THE NATURAL RIGHTS CLAUSE OF THE IOWA CONSTITUTION: WHEN THE LAW SITS TOO TIGHT

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> *The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.*[1]

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1. GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977). "When the law tries to do too much, it is likely to fail to do anything well." BURTON M. LEISER, LIBERTY, JUSTICE, AND MORALS: CONTEMPORARY VALUE CONFLICTS 30 (3d ed. 1986). "All around us there is a growing malaise that is intimately related to the unprecedented expansion in the ends of the law during the present century. Our statute books are cluttered with laws that represent society's good intentions." Bernard Schwartz, *The Ends of Law*, *in* AMERICAN LAW: THE THIRD CENTURY 277, 283 (Bernard Schwartz ed., 1976); *see* H.L.A. HART, LAW, LIBERTY, AND MORALITY 14-16 (1962); *Quote of the Day*, DES MOINES REG., Apr. 19, 1991, at A2 (according to one state representative, the Iowa Code needs another volume: it "would publish all irrelevant material"). Nevertheless,

The federalist pendulum remains in motion: the United States Supreme Court continues to give Iowa and its forty-nine sisters greater leeway in their legislative handling of various socioeconomic problems.[2] That

> The battle for preserving liberties is not usually fought against evil people. It is usually fought against those who are intent upon doing good—as they see it. . . . Justice Brandeis [once observed]: "Experience should teach us to be most on guard to protect liberty when the government's purposes are beneficent. Men born into freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well meaning, but without understanding." I heartily second that.
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> This country is full of well meaning men and women intent upon helping us. They are going to prevent us, if they can, from driving cars in national parks, or make us wear motorcycle helmets when we drive our motorcycles, or limit or prohibit our access to tobacco or alcohol—for our own good, of course.
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> . . .
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> They intend to do what they sincerely believe is right. They are so convinced they are right that if you disagree with them, you are wrong. Then it is just a short step to the philosophy of the end justifies the means.

Robert W. Packwood, *Perspective of Politics*, *in* AMERICAN LAW: THE THIRD CENTURY, *supra*, at 303, 303-04. George Orwell believed such a philosophy could exist in a world of advanced technology:

> There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to.

GEORGE ORWELL, *From "Nineteen Eighty-Four," in* THE ORWELL READER 397 (1956); *see* HAROLD J. LASKI, LIBERTY IN THE MODERN STATE 126-27 (1972) ("Every state [has] fussy and pedantic moralists who seek to use its machinery to insist that their habits shall become the official standard of conduct; . . . [t]hey are the kind of people who drove Byron and Shelley into exile, and they remain unable to see upon whom that exile reflects."); BERNARD SCHWARTZ, SOME MAKERS OF AMERICAN LAW 143 (1985) ("[T]he ever-increasing governmental ability to violate individual rights . . . has been the dubious gift of modern science."); William O. Douglas, *The Bill of Rights is Not Enough, in* THE GREAT RIGHTS 115, 148 (Edmond Cahn ed., 1963) (central problem of this era is "the scientific revolution and all the wonders and damage it brings" to society's members); Arthur Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1091, 1176-77 (1969) (individuals have little ability to protect their information from governmental and "private snoopers" who use sophisticated electronic surveillance).

In November 1991 the cover story of a popular national magazine dealt with the impact of computers and other "high-tech gadgets" upon a person's privacy. *See* Richard Lacayo, *Nowhere To Hide*, TIME, Nov. 11, 1991, at 34-40. According to the magazine, 76% of Americans were "very or somewhat concerned" about the amount of computerized information that business and the government collected and stored about them. *Id.*

2. David G. Savage, *States Win at the Supreme Court*, 17 ST. LEGISLATURES 19, 19-21 (Sept. 1991); *see, e.g.*, Barnes v. Glen Theatre, 111 S. Ct. 2456 (1991) (upholding Indiana indecency statute prohibiting a person from appearing nude in a public place); Debra L. Willen, *Now States Act as Champions for Religion*, 14 NAT'L L.J., Mar. 2, 1992, at 15. *See generally* Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before* Griswold v. Connecticut, 75 IOWA L. REV. 915, 915-16 (1990) (attention is now focusing on the states in the

view of republican government may bring the Iowa Constitution into the foreground of challenges to such legislation in the courts.[3] In leafing through the fifteen pages of the Iowa Constitution, judges and lawyers will fortunately find a relatively compact governmental charter that totals less than twelve thousand words.[4] In leafing through court decisions and scholarly works analyzing those words, however, they will unfortunately find little in the way of substance.[5]

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area of reproductive rights); Harry F. Tepker, Jr., *Abortion, Privacy, and State Constitutional Law: A Speculation if (or when)* Roe v. Wade *is Overturned,* EMERGING ISSUES IN ST. CONST. L. 173 (1989); Ellen Goodman, *Medical Rights Depend on Geography,* DES MOINES REG., Mar. 12, 1991, at A8; Michael A. Giudicessi, *How Iowa's Bill of Rights Compares to U.S.,* DES MOINES REG., Nov. 3, 1991, at C2; *Supreme Court Puts No Cap on Damage Awards,* DES MOINES REG., Mar. 5, 1991, at A3.

3. *See generally* Ken Gormley, *Ten Adventures in State Constitutional Law,* 1 EMERGING ISSUES IN ST. CONST. L. 29, 53 (1988) (discussing conflicting individual rights in the area of abortion); Robert N.C. Nix, *Federalism in the 21st Century–Individual Liberties in Search of a Guardian, in* FEDERALISM: THE SHIFTING BALANCE 65, 71 (Janice C. Griffith ed., 1989) (speculating that Supreme Court will look to state courts on right-to-die issues); Paul Katzeff, *States Go to Work After* Cruzan, NAT'L L.J., Sept. 24, 1990, at 16 (right-to-die issues are principally battled in state legislatures and courts); *Legislatures Expect Flood of Anti-Abortion Bills,* DES MOINES REG., Jan. 10, 1991, at A2.

State constitutional law "has remained and indications are that it will assume an increasingly more visible role in American law in the years ahead." Ronald K.L. Collins, *Reliance on State Constitutions: Some Random Thoughts, in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 1, 6 (Bradley McGraw ed., 1985). *But see* Hans A. Linde, *Does the "New Federalism" Have a Future?* 4 EMERGING ISSUES IN ST. CONST. L. 251, 261 (1991) (the future of state constitutional law "remains doubtful").

4. BENJAMIN F. SHAMBAUGH, THE CONSTITUTIONS OF IOWA 270 (1934); *see* Richard H. Leach, *Introduction* to CYNTHIA E. BROWNE, STATE CONSTITUTIONAL CONVENTIONS xxvii (1973). William Penn Clarke, a 39 year old lawyer from Johnson County and delegate to the 1857 constitutional convention, helped ensure a concise constitution when he chided the other delegates at one point: "If we go in to all these details, we will make a Constitution as large as an ordinary law book, and create the most fruitful source of litigation that can be imagined." 1 THE DEBATES OF THE CONSTITUTIONAL CONVENTION; OF THE STATE OF IOWA 121 (W. Blair Lord rep.) (Davenport, Lusé, Lane & Co. 1857) [hereinafter THE DEBATES].

5. Few articles deal with Iowa's constitutional law. *See, e.g.,* THE CONSTITUTIONS OF THE STATES: A STATE BY STATE GUIDE AND BIBLIOGRAPHY 137-38 (Bernard Reams, Jr. & Stuart Yoak eds., 1988); Michael A. Giudicessi, *Independent State Grounds for Freedom of Speech and of the Press: Article I Section 7 of the Iowa Constitution,* 38 DRAKE L. REV. 9 (1988-1989); Frank E. Horack, *The Banking Clauses in the Constitution of Iowa,* 13 IOWA L. REV. 293 (1928); Bruce Kempkes, *Rediscovering the Iowa Constitution: The Role of the Courts Under the Silver Bullet,* 37 DRAKE L. REV. 33 (1987-1988); Julie F. Pottorf, *Political Stew: Item Veto Issues Bubbling to the Top in State Court Jurisdictions,* 1 EMERGING ISSUES IN ST. CONST. L. 121 (1988); Don Muyskens, Note, *Item Veto Amendment to the Iowa Constitution,* 18 DRAKE L. REV. 245 (1969); *see also* State v. James, 393 N.W.2d 465, 470-77 (Iowa 1986) (Lavorato, J., dissenting), *appeal dismissed,* 481 U.S. 1009 (1987); Marcia Cranberg, Note, *The Right of the Press and Public to Attend Criminal Trial Proceedings in Iowa,* 66 IOWA L. REV. 153, 167 (1980) (noting state constitutional provisions).

In at least one state, failure of a litigant to brief fully state constitutional issues can equate with waiver on appeal. *See* State v. Lafferty, 749 P.2d 1239 (Utah 1988).

Of all the articles in the Iowa Constitution, the most important is the first,[6] which sets forth the bill of rights.[7] Like the bill amended to the federal constitution, it reminds all governmental officials "that power is a heady thing and that there are limits beyond which it is not safe to go."[8] The Iowa Constitution's bill of rights generally declares that the people hold all political power and that they instituted state government for their "protection, security, and benefit."[9] It then specifically secures, among other things, freedom of religion,[10] freedom of speech,[11] freedom from unreasonable searches

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6. George W. Ells, the chairman of the committee drafting Iowa's bill of rights, argued at the 1857 constitutional convention that the bill of rights

> will probably be read more by the people than any other [article] . . . and therefore it should receive the consideration of this Convention to a greater degree than any other subject which may be discussed here. . . . I hold that the Bill of Rights is of more importance than all the other clauses in the Constitution put together, because it is the foundation and written security upon which the people rest their rights.

1 THE DEBATES, *supra* note 4, at 102-03. "It stands there in the beginning like a sentinel guarding the gates of a city; and it is a warning to all who come there that unless they give the sign-manuel, they cannot enter." 1 *id.* at 168-69.

> [State constitutional bills of rights] enumerate more rights in more detail than the U.S. Bill of Rights. What has been overlooked is why. Most immediately, their place at the beginning of the constitution is intended to announce that the protection of rights is the first task of government, indeed, its *raison d'etre*.

Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 PUBLIUS 11, 15 (Winter 1982); *see* James C. Harrington, *Privacy and the Texas Constitution*, 13 VT. L. REV. 155, 160 (1988) (the importance of the Texas Bill of Rights is indicated by its location in article one); Lester J. Mazor, *Notes on a Bill of Rights in a State Constitution*, 1966 UTAH L. REV. 326, 326 (the fundamentals of the bill of rights "are taken for granted in the political and legal theory of every American state").

"The preservation of individual freedom is the first obligation of every government to its citizens. . . . For without individual freedom no society is worth having." Whitney R. Harris, *Freedom and the Businessman*, 37 IOWA L. REV. 196, 196 (1952).

Although no set pattern existed for arranging the various constitutional articles, Iowa was one of a majority of states placing its bill of rights first in its constitution. JAMES DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS 122-25 (1915).

7. Technically, the article is a declaration of rights and not a bill, which denotes legislative input.

8. Douglas, *supra* note 1, at 115, 121; *see* Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring). *See generally* 1 THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 89, 93-94 (8th ed. 1927); THOMAS MARKS & JOHN COOPER, STATE CONSTITUTIONAL LAW 2-4 (1988).

Sometimes less important "rights" find their way into a state constitution. In 1907, for example, the Oklahoma Constitution authorized free passes for the traveling secretaries of the Young Men's Christian Association. DEALEY, *supra* note 6, at 136.

9. IOWA CONST. art. 1, § 2.

10. *Id.* § 3.

11. *Id.* § 7.

and seizures,[12] the right to due process of law,[13] and the right to a speedy and public trial.[14]

These guarantees appear similar if not identical in language to those set forth in the federal constitution's bill of rights.[15] Significantly, the Iowa Constitution's bill of rights contains clauses not found in its federal counterpart,[16] and the most important of these additions finds expression in the first section to article one and thus the very first words appearing in its body: "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."[17]

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12. *Id.* § 8.
13. *Id.* § 9.
14. *Id.* § 10.
15. *See* U.S. CONST. amends. I, IV-VI, XIV.
16. *See generally* Alderman v. United States, 394 U.S. 165, 175 (1969) (states may provide citizens individual liberties more expansive than those within guarantees of the federal constitution). The drafters of the proposed state constitutions in 1844, 1846, and 1857, however, clearly modeled their bills of rights upon the first ten amendments to the federal constitution. 63 IOWA OFFICIAL REG. 266 (1989-1990).
17. IOWA CONST. art. I, § 1. As one commentator has stated about another state's constitution, "One cannot help but to be curious about a constitutional provision of such broad language . . . ." John D. Dyche, *Section 2 of the Kentucky Constitution–Where Did it Come From and What Does it Mean?*, 18 N. KY. L. REV. 503, 503 (1991).

On November 3, 1992, Iowa voters rejected a proposed "equal rights amendment" to IOWA CONST. art. I, § 1. Jonathan Roos, *Defeat is Replay of 1980 for ERA*, DES MOINES REG., Nov. 4, 1992, at A1. The proposed 1992 amendment would have added words, indicated by italics below, to provide:

> All men *and women* 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. *Neither the state nor any of its political subdivisions shall, on the basis of gender, deny or restrict the equality of rights under the law.*

See generally Melinda Voss, *ERA on the Ballot*, DES MOINES REG., Oct. 26, 1992, at T1; Jonathan Roos, *Abortion Issue Plays Role in Equal Rights Amendment's Future*, DES MOINES REG., Nov. 24, 1991, at B4.

The question arises why this particular clause—which has received relatively little construction or interpretation in the distant past and absolutely none in recent years—needed amending in some way. *See infra* notes 191-201 and accompanying text. Setting aside any symbolic value gained through the proposed 1992 amendment, what specific gain would have resulted in changing a clause having virtually no known parameters? *See infra* notes 199-210 and accompanying text. Indeed, it appears the proposed 1992 amendment could only have achieved symbolic value, for, as this Article asserts, the original clause had the widest parameters imaginable to protect every person's individual rights from unwarranted governmental interference.

Although the word "men" in the original clause arguably could be construed to exclude women, thereby justifying the first two words of the proposed 1992 amendment, no decision in recent memory from the Supreme Court of Iowa appears to lend support for such a narrow construction. Nor does common sense. To say, for example, a woman has no right of "enjoying and

This Article focuses upon the "natural rights clause"[18] of the Iowa Constitution and its limitation on the ability of the General Assembly, pursuant to its "police powers,"[19] to enact legislation affecting civil liberties[20] and

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defending life and liberty" must amount to a rather startling statement even for strict textualists. Construing "men" to mean only males, moreover, seems particularly inconsistent with IOWA CONST. art. I, § 6, which requires the uniform operation of the laws, and generally inconsistent with the largely gender-neutral language used throughout the bill of rights. *See, e.g.*, IOWA CONST. art. I, §§ 2, 3, 7, 8, 10, 11, 12, 16-20, 22, 23, 25. Further, such a narrow construction sits at odds with the language of more recent state constitutional clauses. *E.g.*, IOWA CONST. amends. 15, 30. It undoubtedly would offend guarantees in the federal constitution. *See, e.g.*, U.S. CONST. amends. V, XIV; Craig v. Boren, 429 U.S. 190, 202-04 (1976) (rejecting a gender-based distinction in a state's legal drinking age); Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (affirming gender as a suspect classification under the Fourteenth Amendment's Equal Protection Clause); Reed v. Reed, 404 U.S. 71, 73 (1971) (rejecting a state statutory preference for appointing males to administer estates). A narrow construction thus would have no legal effect by virtue of the Supremacy Clause, U.S. CONST. art. VI. In short, any argument that the original clause did not or does not encompass women, although perhaps appealing to those persons enamored with Victorian dictionaries and sensibilities, certainly lacks any sound legal basis.

18. Article one, section one embodies principles of natural law. State v. Osborne, 154 N.W. 294 (Iowa 1915) (the "first section of our Bill of Rights assures to every man protection in his natural right to buy, sell and exchange"); *cf.* BENJAMIN F. WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW 97-99 (1931) (natural law is set forth in the Declaration of Independence and the 1776 Virginia Bill of Rights, both of which use language similar to IOWA CONST. art. 1, § 1).

One could label article one, section one as an "inalienable rights clause," which emphasizes that neither the General Assembly by legislation *nor the people by constitutional amendment* could affect those rights. *See* State *ex rel.* Burlington & Mo. Riv. R.R. v. City of Wapello, 13 Iowa 388, 411-12 (1862) (rejecting argument that "outside of the rights enumerated in the Constitution lies a vast field of power not reserved, prohibited, or given away, over which the Legislature has full and uncontrolled sway"); Marasso v. Van Pelt, 81 So. 529, 534-35 (Fla. 1919) (Browne, C.J., dissenting) (a constitutional amendment cannot "take away from a citizen his inalienable rights of life, liberty, and pursuit of happiness, even if it should specifically purport to do so, because these rights are inherent and existed before the adoption of the constitution"); 1 COOLEY, *supra* note 8, at 95 ("[W]e must not commit the mistake of supposing that, because individual rights are guarded and protected by [state constitutional clauses], they must also be considered as owing their origin to them. [While such clauses] measure the powers of the rulers, . . . they do not measure the rights of the governed."); THOMAS NORTON, LOSING LIBERTY JUDICIALLY 6 (1928) (inalienable rights mean those "which men are incapable of parting [with] if they were to try to do so, which they cannot alienate as against their posterity, rights which no government can touch"); *see also* IOWA CONST. art. 1, § 25 (this "savings clause" states that the enumeration of rights in the Iowa Constitution "shall not be construed to impair or deny others, retained by the people"); McGuire v. Chicago, B. & Q. R.R., 108 N.W. 902 (Iowa 1906), *aff'd*, 219 U.S. 549 (1911); ANDREW C. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 98 (1936); Gene R. Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 WIS. L. REV. 1305, 1333. In other words, certain fundamental rights, whether specified in the constitution or not, simply could not be altered by constitutional amendment; rights that are "inalienable" cannot be divested from one generation by a preceding one. Under such a theory of inalienability, some recent proposals to amend the constitution might, even if politically successful, be considered "unconstitutional" by the courts. *See generally Branstad Backs Flag-Burning Ban to Support Troops*, DES MOINES REG., Jan. 31, 1991, at A1.

19. It appears quite clear, however, the Iowa Constitution does not (and never did) grant the General Assembly any "police power." "There simply is no such thing. . . . A state constitu-

ostensibly improving the health, safety, and welfare of adult Iowans.[21] The Article (I) tracks the clause to its origin and underlying themes,[22] (II) re-

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tion distributes power, it does not create it." Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 147 (1970). "To call a law a 'police power' regulation if its objective concerns public health or safety or morals or welfare does not mean that it may be enacted *because* it has such an objective, but only that laws passed for such objectives are so described." *Id.* at 148. "[Unlike the analysis of federal laws], [n]o comparable need to interpret and define the legislative power arises in a challenge to a state statute. There is no grant of power to interpret. *'Police power' is not a constitutional term. There can be no such thing as a state law 'exceeding the police power.'*" *Id.* at 149. "[The phrase is] the reddest red herring in all constitutional law." *Id.* at 151; *see* DEALEY, *supra* note 6, at 214; *see also* BERNARD SCHWARTZ, AMERICAN CONSTITUTIONAL LAW 51-52 (1979). Thus, a state legislature can enact any law not forbidden by federal or state constitutional guarantees. In 1851, Chief Justice Lemuel Shaw (1781-1861) of Massachusetts apparently was the first American judge to speak of legislative "police power." SCHWARTZ, *supra* note 1, at 65 n.108. Shaw's phrase has crept into the decisions of Iowa's courts. *See, e.g.*, Steinberg-Baum & Co. v. Countryman, 77 N.W.2d 15, 18-20 (Iowa 1956); State v. Otterholt, 15 N.W.2d 529, 531 (Iowa 1944); Benschoter v. Hakes, 8 N.W.2d 481, 485-86 (Iowa 1943); City of Osceola v. Blair, 2 N.W.2d 83, 84 (Iowa 1942); State v. Bartels, 181 N.W. 508, 512 (Iowa 1921), *rev'd*, 262 U.S. 404 (1923); State v. Hines, 478 N.W.2d 888, 890 (Iowa Ct. App. 1991).

20. Civil liberties define the interface of governmental power and individual freedom. They do so by carving out a sphere of autonomy around each individual. This sphere has been defined in part spatially, as by recognizing the sanctity of the home against unreasonable searches; in part with procedural safeguards, to limit arbitrary actions of government; and to a great extent in terms of protected activities, like worship, expression, . . . travel, child rearing and family planning. In protecting the sphere against various invasions with different degrees of vigilance, we have approached what Justice Brandeis termed "the most comprehensive of rights," "the right, as against the government . . . to be let alone."

David L. Bazelon, *Civil Liberties Protecting Old Values in the New Century*, *in* AMERICAN LAW: THE THIRD CENTURY, *supra* note 1, at 69.

21. This Article does not address issues arising out of legislation affecting an individual's economic or property rights, a broad area in which courts have traditionally accorded legislatures wide latitude for experimenting to promote the public welfare. It also does not address the impact of any legislation curtailing the rights of those persons who have not attained majority age or suffer from mental disease or defect. Last, it does not discuss usage of the natural rights clause to generate positive rights from government (in such matters as, for example, education, health, nutrition, and shelter) or to protect an individual from private actions or inactions. *Compare* Melvin v. Reid, 297 P. 91, 93 (Cal. Dist. Ct. App. 1931) (natural rights clause provides a right "to live free from unwarranted attack by others upon one's liberty, property, and reputation" and allows an action for money damages upon its violation by a private individual) *with* Schreiner v. McKenzie Tank Lines, 432 So. 2d 567, 569-70 (Fla. 1983) (natural rights clause requires state action and therefore cannot apply to purely private action); Grzyb v. Evans, 700 S.W.2d 399, 402 (Ky. 1985) (indicating that the right of "enjoying and defending life and liberty" implicates state and not private action). *Cf.* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing a cause of action for damages against federal officials violating a person's Fourth Amendment rights). *See generally* Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118-72 (1970); Gormley, *supra* note 3, at 51; Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893-901 (1989); Bernard Schwartz, *The Ends of Law*, *in* AMERICAN LAW: THE THIRD CENTURY, *supra* note 1, at 277; Betty A. Smith, Comment, *Independent Interpretation: California's*

counts the years between Iowa's settlement and ratification of its two constitutions;[23] (III) examines the reasons for inclusion of the clause in those constitutions;[24] (IV) discusses how such clauses in state constitutions have

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Declaration of Rights or Declaration of Independence?, 21 SANTA CLARA L. REV. 199, 206, 235 (1981).

22. "Some of [the] provisions [in the Iowa Constitution] can be clearly known, only if we follow their courses through centuries." Andrew C. McLaughlin, *A Written Constitution in its Historical Aspects*, *in* PROCEEDINGS OF THE FIFTIETH ANNIVERSARY OF THE CONSTITUTION OF IOWA 39, 41-42 (Benjamin F. Shambaugh ed., 1907). "[T]he first causes of things lie hid, and it is a business of some difficulty to search after and find them out." GEORGE DAWSON, OF THE ORIGIN OF LAWS i (London, Richard Chiswell 1694).

23. [T]he real makers of the Constitutions of Iowa were not the men who first in 1844, then in 1846, and then again in 1857 assembled in the Old Stone Capitol on the banks of the Iowa River. The true "Fathers" were the people who, in those early times from 1830 to 1860, took possession of the fields and forests and founded a new Commonwealth.

. . . .

. . . It is in the social mind back of [a constitutional] convention, back of the government, and back of the law that the ideals of human right and justice are conceived, born, and evolved. A Constitution is a social product. It is the embodiment of popular ideals.

SHAMBAUGH, *supra* note 4, at 16. "It is dangerous, of course, to attempt to read the minds of past generations and generalize about what 'society' thought." Lawrence M. Friedman, *Notes Toward a History of American Justice*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER 13, 19 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978).

24. To understand the Constitution of the United States it is necessary that one know the world which produced it. That world has given place to a new one, but it is the old that contains the lesson. It should therefore be valuable to take a look at the past and find the reasons why the Constitution of the United States contemplates that Government should let Man alone.

NORTON, *supra* note 18, at 5.

[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions transplanted from English soil. The significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and their line of growth.

Gompers v. United States, 233 U.S. 604, 610 (1914).

"Recorded battles over specific constitutional clauses . . . can both elucidate and compel an interpretation. . . . Often you cannot argue intelligently about specific clauses without knowing that history." Hans Linde, *E Pluribus—Constitutional Theory in State Courts*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 3, at 286; *accord* Gormley, *supra* note 3, at 37; *see* District Township v. City of Dubuque, 7 Iowa 262, 277, 279, 284 (C. Cole 1858) (referring to debates for construing constitutional clause).

Still, "it does not follow that larger principles are confined to what the generation that adopted them was ready to live by." Linde, *supra*, at 286; *see* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 422-43 (1934); Ronald K.L. Collins, *Litigating State Constitutional Issues: The Government's Case*, 1 EMERGING ISSUES IN ST. CONST. L. 201, 201-05 (1988); Henry S. Commager, *Historical Background of the Fourteenth Amendment*, *in* THE FOURTEENTH AMENDMENT 14, 16 (Bernard Schwartz ed., 1970) ("recourse to [constitutional] debate[s] is allowed less authoritative credentials" than legislative debate, because the constitution was intended to endure for ages); John M. Devlin, *State Constitutional Autonomy Rights in an Age of Federal Retrenchment*, 3 EMERGING ISSUES IN ST. CONST. L. 195, 227 nn.119-20 (1990); Eric B.

affected specific legislation involving personal liberty and happiness; and (V) concludes that the clause stands as a potentially powerful, albeit unused, tool for constitutional challenges against legislation enacted by the General Assembly that impinges upon individual choice.

I. JOHN LOCKE, NATURAL LAW AND COLONIAL AMERICA

> *[Speculation about natural law could be found in writings dating to the Middle Ages;] it becomes significant for the law at and after the Reformation and becomes dominant in juristic thought in the seventeenth century.*[25]

In 1698, the educated men and women of the Enlightenment[26] could find on the shelves of their London booksellers a newly published book on political theory by the sixty-six-year-old son of a country lawyer. Inside the covers of *Two Treatises of Civil Government*[27] they would find that John Locke had borrowed threads from the works of other philosophers and woven them into a tapestry of natural rights and limited government.[28] Locke argued:

Schnurer, *It Is a Constitution We Are Expanding: An Essay on Constitutional Past, Present, and Future*, 1 EMERGING ISSUES IN ST. CONST. L. 135, 149 (1988).

25. ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 13 (1938). Why did this happen in the seventeenth century?

> Dissolution of relationally organized society, discovery of the new world, creating individual opportunities and setting free individual enterprise to exploit the resources of nature, the boundless faith in reason which had come with the Renaissance, and the breakdown of authoritative interpretation at the Reformation, contributed to overthrow the universal, [stable] law taught by medieval universities. Morals were set free from authority. . . . [Men] believed they had found [an unchallengeable starting point] in reason. Reason . . . expressed in natural law replaced authority.

Id. at 15.

26. *See generally* ROBERT C. WHITTEMORE, MAKERS OF THE AMERICAN MIND 49 (1964).

> The long night of Faith was over; the new day of Reason had arrived; a decent respect for the rights of man and the opinions of mankind now replaced reliance on religious authority. In England the new watchword was "commonsense", and in the writings of Locke, Berkeley and Hume it was polished to a high gloss.

Id. "The eighteenth century invented not only law or jurisprudence but also history, economics, and sociology—that is, the whole range of what came to be called the social sciences." GILMORE, *supra* note 1, at 3. It produced confidence, enthusiasm, and a "belief in the inevitability of progress," which carried through into the nineteenth century. *Id.* at 4.

27. JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT (Peter Lasslet ed., 1970) (2d ed. 1698).

28. MCLAUGHLIN, *supra* note 18, at 92-93. Arising from the experience of slavery in Greece, freedom as "a supreme value [emerged] over the course of the sixth and fifth centuries B.C., at the very dawn of Western civilization." ORLANDO PATTERSON, FREEDOM xii (1991). From there it made "a spectacular leap" to England centuries later. *Id.* The idea of natural law

> Natural law prohibited individuals from harming others in their lives, liberties, and properties;[29]
>
> Individuals united with others to form a society only for the mutual preservation of these three things;[30]
>
> In uniting with others the individual person, possessed of all rights, surrendered to society only those rights needed to enforce the command of natural law;[31]
>
> Society's laws must be "directed to no other end, but the Peace, Safety, and publick good of the People";[32] and
>
> Any law directed toward other ends breached the social contract.[33]

Although Locke proposed his theory of natural rights and limited government to justify England's Glorious Revolution, which witnessed Protestants William and Mary trading sides of the English Channel in 1688 with Roman Catholic James II, the theory took on far greater significance decades later in the New World.[34] At that time the American colonists needed just such a justification for their revolutionary actions that sought to place

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arose in England at least by 1100, with the Charter of Liberties of Henry II. NORTON, *supra* note 18, at 24, 30-31.

Locke often referred to the writings of Richard Hooker, a sixteenth-century English theologian who had studied the works of St. Thomas Aquinas and Aristotle. *See, e.g.*, LOCKE, *supra* note 27, at 167, 176; PETER STANLIS, EDMUND BURKE AND THE NATURAL LAW 20 (1958). *See generally* FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY 11-21, 162-67 (1960). His reference to a "social contract" may have arisen out of the seventeenth-century philosophy that viewed the covenant between God and the tribes of Israel as proof of the contractual nature of government. *See* HERBERT FRIEDENWALD, THE DECLARATION OF INDEPENDENCE 185 (1974).

29. LOCKE, *supra* note 27, at 368.

30. *Id.*

31. *Id.* at 370-71.

32. *Id.* at 371.

33. *Id.* at 382; *see* FRIEDENWALD, *supra* note 28, at 187-93; MCLAUGHLIN, *supra* note 18, at 94-96. *See generally* Leon Duguit, *The Law and the State*, 31 HARV. L. REV. 1, 10-13 (1917) (discussing the relationship between the individual and the state).

One hundred years after Locke's book another Englishman echoed his thoughts: "The principle ends of all civil government, and of human society, were the security of [men's] lives, liberties and properties, mutual assistance and help unto each other, and provision for their common benefit and advantage . . . ." JOHN L. SOMERS, THE SECURITY OF ENGLISHMEN'S LIVES 7 (London, J. Almon 1771).

34. "Europe seemed incapable of becoming the home of free States. It was from America that the plain idea[] that men ought to mind their own business . . . burst forth . . . ." LORD ACTON, HISTORY OF FREEDOM AND OTHER ESSAYS 55 (1907).

the hands of George III and Parliament back in their own pockets.[35] Believing that the Glorious Revolution served as precedent for the musket shots at Lexington,[36] the colonists in 1776 placed Thomas Jefferson of Virginia in charge of expressing that belief by a writing addressed to Mother England.[37] Jefferson seemed well-suited to this task, having studied William Blackstone and English law at, ironically, the College of William and Mary.[38]

Meanwhile, twenty-eight other Virginians, including James Madison and Patrick Henry, prepared to draft the first state constitution in America.[39] They placed "a gentleman planter who dabbled in politics," George Mason, in charge of writing the Virginia Declaration of Rights.[40] Tutored by his guardian in legal studies, Mason knew about natural law through the works of Locke and Algernon Sidney,[41] the English aristocrat and classicist whose advocacy for limited government prompted the notorious Lord Chief Justice Jeffreys to send him to the gallows in 1683 for treason.[42]

Mason omitted all reference to English common law, colonial charters, and statutes in his declaration, which he penned in the Raleigh Tavern.[43] As adopted by the other twenty-seven members of the constitutional convention, Mason's first declared right provided

> [t]hat all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[44]

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35. HAYEK, *supra* note 28, at 170; ARTHUR E. SUTHERLAND, CONSTITUTIONALISM IN AMERICA: ORIGIN AND EVOLUTION OF ITS FUNDAMENTAL IDEAS 100 (1965); *see* MCLAUGHLIN, *supra* note 18, at 104.

36. Daniel Sisson, *The Idea of Revolution in the Declaration of Independence and the Constitution*, *in* CONSTITUTIONAL GOVERNMENT IN AMERICA 405 (1977) (Ronald K.L. Collins ed., 1977).

37. SOURCES OF OUR LIBERTIES 316-17 (Richard L. Perry ed., 1959).

38. NORTON, *supra* note 18, at 27.

39. SOURCES OF OUR LIBERTIES, *supra* note 37, at 302.

40. SCHWARTZ, *supra* note 1, at 5; A.E. Dick Howard, *"For the Common Benefit": Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*, 54 VA. L. REV. 816, 822 (1968).

41. 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 58, 60 (1974); SCHWARTZ, *supra* note 1, at 7; Howard, *supra* note 40, at 823-25, 862. *See generally* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 118, 156-57 (1980).

42. "But without prejudice to the society into which I enter, I may and do retain to myself the liberty of doing what I please in all things relating peculiarly to myself, or in which I am to seek my own convenience." ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 548 (Thomas G. West ed., Liberty Classics 1990) (1698).

43. SCHWARTZ, *supra* note 1, at 7; SOURCES OF OUR LIBERTIES, *supra* note 37, at 304.

44. SOURCES OF OUR LIBERTIES, *supra* note 37, at 311. *See generally* ROBERT B. DISHMAN, STATE CONSTITUTIONS: THE SHAPE OF THE DOCUMENT 10 (1968); 1 HOWARD, *supra* note 41, at 58; FREDERIC J. STIMSON, FEDERAL AND STATE CONSTITUTIONS OF THE

About one month after the convention finished writing the constitution for the residents of Virginia,[45] Jefferson, who apparently read an initial draft of Mason's declaration,[46] finished writing the Declaration of Independence for the Second Continental Congress and the three million American colonists. Having familiarized himself with the works of Aristotle, Cicero, Locke, and Sidney,[47] Jefferson eloquently and succinctly phrased them in formally severing America's ties with England and creating the most celebrated of our nation's documents.[48] The self-evident truths in his second paragraph heralded to the world the natural law[49] "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . ."[50]

UNITED STATES 75-77 (1908); BENJAMIN FLETCHER WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW 116-17 (1931). The Pennsylvania Constitution similarly provided on August 16, 1776:

> That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

SOURCES OF OUR LIBERTIES, *supra* note 37, at 329.

45. Robert F. Williams, *Equality and State Constitutional Law*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 3, at 71, 74-75.

46. R. Carter Pittman, *Equality Versus Liberty: The Eternal Conflict*, 46 A.B.A. J. 873, 874-75 (Aug. 1960); *see* Donald S. Lutz, *The Declaration of Independence as Part of an American National Compact*, 19 PUBLIUS 41, 54-55 (Winter 1989).

47. CARL BECKER, THE DECLARATION OF INDEPENDENCE 25-26 (1964); *accord* DANIEL J. BOORSTIN, THE LOST WORLD OF THOMAS JEFFERSON (1948); FRIEDENWALD, *supra* note 28, at 185-86, 188, 193, 197, 201, 205-06. *See generally* Lutz, *supra* note 46, at 44-45; SIDNEY, *supra* note 42, at xv, xxi; SUTHERLAND, *supra* note 35, at 100, 143. Disagreeing with Becker's traditionally accepted view that Jefferson's inspiration for the wording of the Declaration lay with the writings of Aristotle, Cicero, Locke, and Sidney, another commentator posits that the writings by a trio of Scots—Frances Hutcheson, David Hume, and Thomas Reid—inspired him instead. *See* GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE (1978).

48. FRIEDENWALD, *supra* note 28, at 152; Earl Warren, *Fourteenth Amendment: Retrospect and Prospect*, *in* THE FOURTEENTH AMENDMENT, *supra* note 24, at 212, 214. "The classic statement of American liberty—the Magna Carta of the United States, as it were—is the Declaration of Independence." James M. McPherson, *Lincoln and Liberty*, *in* ESSAYS IN THE HISTORY OF LIBERTY 59, 61 (1988).

49. POUND, *supra* note 25, at 15-20; State v. Langley, 84 P.2d 767, 770 (Wyo. 1938); *see* MCLAUGHLIN, *supra* note 18, at 101-02; WILLIAM O. DOUGLAS, AN ALMANAC OF LIBERTY 2-5 (1954).

50. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); SOURCES OF OUR LIBERTIES, *supra* note 37, at 319. *See generally* H.L.A. Hart, *Perspective of Philosophy*, *in* AMERICAN LAW: THE THIRD CENTURY, *supra* note 1, at 417, 421-23 (examining Jeremy Bentham's criticisms of the Declaration's language on inalienable rights).

"That men are entitled to a free choice in the conduct of their lives and affairs, became the hallmark of American life; and these convictions left their mark on American law." THE GOLDEN AGE OF AMERICAN LAW 428 (Charles M. Haar ed., 1965). Yet "this ideology was often warped

Mason's and Jefferson's declarations provided models for those colonists in other soon-to-be states who desired written clauses securing natural rights.[51] After General Conwallis's surrender at Yorktown in 1781 and the colonists' ratification of the new United States Constitution eight years later,[52] however, the founding fathers in 1791[53] took a different tack in preparing the new nation's bill of rights.[54] Unlike the declarations written by Mason and Jefferson (owners of 118 and 149 slaves, respectively),[55] the national charter made no mention of equality or natural rights,[56] and the drafters specifically rejected James Madison's proposed prefix, which would have provided "[t]hat Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty,

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when it came to action. Frequent resort was made to the regulation of individual actions, even though under the guise of removing impediments to the 'natural' course of development." *Id.*

51. HAYEK, *supra* note 28, at 182; 1 HOWARD, *supra* note 41, at 69; SOURCES OF OUR LIBERTIES, *supra* note 45, at xx, 309; WRIGHT, *supra* note 18, at 180, 183, 185; Arvel Ponton, III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 95 (1988); Williams, *supra* note 45, at 75; *see, e.g.*, FLA. CONST. art. 1, § 2 (1968); ILL. CONST. art. 1, § 1 (1970); IND. CONST. art. 1, § 1 (1851); KY. CONST. bill of rights, § 1 (1891); ME. CONST. art. 1, § 1 (1820); MASS. CONST. art. 1, § 1 (1820); MO. CONST. art. 1, § 2 (1945); NEB. CONST. art. 1, § 1 (1988); N.H. CONST. pt. 1, art. 2 (1784). Similar clauses were found in the majority of state constitutions. *See* 1 HOWARD, *supra* note 41, at 68 & n.66, 69.

In fact, the Declaration of Independence necessitated the establishment of state governments. MCLAUGHLIN, *supra* note 18, at 106. Along with the Virginia Declaration of Rights, it also provided guidance in 1787 for the laws governing the Old Northwest Territory, which included the then-unknown State of Iowa. DEALEY, *supra* note 6, at 9.

52. *See generally* JEFFREY B. MORRIS, FEDERAL JUSTICE IN THE SECOND CIRCUIT xi (1987).

53. In this year an Irish publisher printed a book on natural law that explained:

> We give the name of liberty to that force or power of the soul, whereby it modifies and regulates its operations as it pleases, so as to be able to suspend, continue, or alter its deliberations and actions; in a word, so as to be capable to determine and act with choice, according as it thinks proper.

JEAN J. BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 11 (Arno Press 1972) (5th ed. 1807).

54. "All the Founding Fathers felt sure of was the need for something in writing. They never doubted whenever a new nation emerged from the Egypt of repression or colonialism it should next find its own version of Mount Sinai and formally inscribe the tablets of its fundamental law." Edmond Cahn, *A New Kind of Society*, *in* THE GREAT RIGHTS, *supra* note 1, at 4. Commanding language was used, because the drafters understood a bill of rights "would not always prevail over the passion of the people, the arrogance of officials, or the insensibility of both . . ." *Id.*

55. ADAMS, *supra* note 41, at 164.

56. At the same time, the framers structured the new government "to vindicate the principles of the American Revolution as set forth in the Declaration of Independence." William Bradford Reynolds, *Another View: Our Magnificent Constitution*, 40 VAND. L. REV. 1343, 1346 (1987).

with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety."[57]

II. IOWA—THE PIONEER YEARS

> *Our [Iowa] men are bigger, and longer, and higher, and thicker, and faster, and drink more whiskey, and chew more tobacco, spit further, and stick their heels higher, and do anything else more and better and oftener than men in all other countries combined. Our ladies are prettier, dress finer, spend more money, break more hearts, wear bigger hoops and shorter dresses, and kick up the deuce generally to a greater extent, than all other ladies. . . . Our children squall louder, grow faster, and get too big for their trowsers [sic] quicker than all other children.*[58]

Fifty years after Madison's proposal went down to defeat, Dr. Isaac Galland, who lived in what is now Lee County in southeast Iowa, also wrote about life, liberty, property, happiness, and safety:

> 'Can a poor man get a comfortable living [in Iowa]?' 'Can he do better there than to remain in the old settlements on rented lands?' 'Is it probable that a poor man with a large family, could in a few years obtain lands for all his children?' . . . These inquiries are continually being answered in the affirmative, by the improved circumstances of hundreds who are locating themselves in Iowa Territory.[59]

With these alluring words the gold miner, counterfeiter, personal secretary to the Mormon prophet Joseph Smith, and founder of the first school on Iowa soil began *Galland's Iowa Emigrant*.[60] Published in 1840, the pamphlet ex-

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57. SOURCES OF OUR LIBERTIES, *supra* note 37, at 422, 424. That such a clause did not find its way into the federal constitution may mean little, as Mr. Owen of Posey pointed out while helping to frame Indiana's constitution:

> Is not that one Declaration, traced by the pen of the immortal Jefferson, all-sufficient? Must we and every other State repeat it [in their state constitutions] before we are entitled to its guaranties? Did they re-write it in the Constitution of the United States, when that instrument was framed? And because they did not, will [anyone] argue, that, as citizens of the Union, these rights are not guarantied to us all? That, surely, is not a logical inference.

1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 958 (H. Fowler rep.) (Indianapolis, A. H. Brown 1850).

58. Robert Edson Lee, *Politics and Society in Sioux City, 1859*, 54 IOWA J. HIST. & POL. 117, 130 (1956).

59. ISAAC GALLAND, GALLAND'S IOWA EMIGRANT ix-x (Chillicothe, Wm. C. Jones 1840).

60. *Id.*

tolled the virtues of the Indians, upbraided the federal government for its conduct toward them, and noted "the character of the people of Iowa has nothing peculiar in it but what has been derived from other and older sections of the civilized world."[61]

A. *Governmental Structures*

Just twenty-five years before publication of Locke's *Two Treatises on Civil Government*,[62] adventurers from the other and older sections of the civilized world began arriving in the land now known as Iowa. On June 17, 1673, the canoes of Louis Jolliet and Jacques Marquette floated down the Wisconsin River and into the Mississippi River, thereby extending the sphere of influence for New France westward into land occupied some 30,000 years before by a people known as the Mound Builders.[63] The French explorations into territory later named Louisiana in honor of King Louis XIV opened the door for fur trapping and for trading with several Indian tribes, including "the Sleepy Ones" of the plains, the Iowa.[64]

The French and their Spanish friends officially stayed in Louisiana for around one hundred years and left shortly after Mason, Jefferson, and like-minded revoluntionaries wrenched away from England its American possessions on the Atlantic seaboard.[65] The new United States of America quickly began expanding westward to and beyond the Mississippi.[66] In 1804, one year after President Jefferson increased the Indiana Territory by paying fifteen million dollars to Napoleon for 825,000 square miles of Louisiana, Captain Meriwether Lewis and Lieutenant William Clark traveled through the Land of the Mound Builders.[67] In 1805, Zebulon Pike explored the same area, then organized under the Louisiana Territory.[68] In 1808, the United States Army began building the area's first settlement on the west bank of the Mississippi at Fort Madison.[69]

The Land of the Mound Builders, included within the Missouri Territory from 1812 to 1821, remained a largely uncivilized frontier throughout the 1820s, '30s, and '40s.[70] Although the federal government originally

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61. *Id.* at xi-xiv, 4.
62. LOCKE, *supra* note 27.
63. LELAND SAGE, A HISTORY OF IOWA 19-20, 27-28 (1974).
64. *Id.* at 23, 36, 56; 10 WORLD BOOK ENCYCLOPEDIA 315 (1965).
65. *See* SAGE, *supra* note 63, at 27-34; 10 WORLD BOOK ENCYCLOPEDIA 311 (1965).
66. *See* SAGE, *supra* note 63, at 36-52.
67. *Id.* at 36.
68. *Id.* at 37-38.
69. *Id.* at 41-42.
70. *Id.* at 46; *see* SHAMBAUGH, *supra* note 4, at 51. When Missouri became admitted as a state in 1821, its northern border was hardly known to local authorities, let alone Congress. 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 413 (William F. Swindler ed., 1974).

penciled it in on its maps as an Indian reservation, that idea became discarded and treaties negotiated as more and more settlers arrived and encroached onto Indian possessions.[71] Then, in 1832, the settlers' insatiable thirst for land led to war between the Long Knives of the Great White Chief and the alliance of Sauk and Fox led by Chief Black Hawk.[72] Costing the lives of seventy soldiers and settlers over fifteen weeks on land east of the Mississippi, the Black Hawk War eventually resulted in the federal government's purchase by treaty of settlement land west of the Mississippi.[73] Thus, after the summer of 1833, hundreds and soon thousands of largely southern emigrants crossed the Great River and took up residence on inexpensive land discovered suitable for mining and superior for farming:[74] "They came from Maine and Massachusetts, from New York and Pennsylvania, from Virginia and the Carolinas, from Georgia, Kentucky, and Tennessee, and from the newer States of Ohio and Indiana. It is said whole neighborhoods came over from Illinois."[75] Settlements soon arose in Bellevue, Burlington, Dubuque, Fort Madison, Keokuk, and Muscatine, and a little later in Davenport, Fairfield, Keosauqua, and Mount Pleasant.[76]

Major William Williams of the United States Army wrote in his memoirs about the 150 persons residing in Webster County in 1853: "They formed a republic of their own. Law and justice was administered in their own way . . . . Every man read the Code of Iowa and expounded the law to suit himself. Several North Carolinians and Indianans came in. Soon law suits and trouble commenced." Maury White, *A Wrestling Match that Shaped Iowa History*, DES MOINES REG., Feb. 17, 1991, at D9.

71. SAGE, *supra* note 63, at 46-48.

72. *Id.* at 48; MORTON M. ROSENBERG, IOWA ON THE EVE OF THE CIVIL WAR 8 (1972).

73. SAGE, *supra* note 63, at 48, 50.

74. 1 GEORGE F. PARKER, IOWA PIONEER FOUNDATIONS 76-77 (1940); SAGE, *supra* note 63, at 52, 97, 100; 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 413-14.

"[S]uch people [emigrating west] were not held in high esteem [by their old neighbors.] They were generally looked upon as running away from their duties and responsibilities." 1 PARKER, *supra*, at 83. The prospect of such castigation by former neighbors certainly did nothing to stem the flow of settlers, and after the Black Hawk War the area's population "grew literally by leaps and bounds." SHAMBAUGH, *supra* note 4, at 17.

Government land cost $1.25 per acre, or less than two days-worth of labor by a common man. 1 BENJAMIN F. GUE, HISTORY OF IOWA 223 (1903).

75. SHAMBAUGH, *supra* note 4, at 17; *accord* GALLAND, *supra* note 59, at 4.

76. SAGE, *supra* note 63, at 52.

The first white settlement apparently arose in 1830 when a company of lead miners crossed the Mississippi near present-day Dubuque. James Alton James, *Constitution and Admission of Iowa into the Union, in* STUDIES IN HISTORICAL AND POLITICAL SCIENCE 9 (Herbert Adams ed., 1900).

The first pioneers, who generally settled illegally on unsurveyed and unplatted land in groups of two to four families, created their own "squatter constitutions" to protect themselves and their properties from the government, the newcomer, and the land speculator; such by-laws and resolutions fostered concepts of justice, equality, and democracy within the communities. SHAMBAUGH, *supra* note 4, at 18, 27-28, 47; 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 415. When the area west of the Mississippi became aligned with the Wisconsin Territory in 1836, Wisconsin Territorial Law supplanted these various squat-

Still redrawing its organizational maps, the federal government realigned these settlements and surrounding areas, unorganized since 1821, into Michigan Territory in 1834 and, after Michigan achieved statehood, into Wisconsin Territory in 1836.[77] Immigration into the territory continued from the south and, to an increasing degree, from the Middle Atlantic and New England states.[78]

In 1837, the first thunderclaps about the need to create an Iowa Territory for its 25,000 residents rumbled across the Ohio Valley and through the Cumberland Gap to Washington, D.C.[79] Congress heard them, and on June 12, 1838, President Martin van Buren signed into law the act dividing Iowa from the Wisconsin Territory.[80] When General George Atkinson declined the honor of becoming Iowa's first territorial governor,[81] Robert Lucas—an Ohio Democrat, War of 1812 veteran, and temperance man[82]—stepped forward to take the oath of office in Burlington.[83] The man later referred to as "Lord Pomposity" by the Whigs[84] appointed Chief Justice Charles Mason to codify Iowa's territorial laws,[85] which were patterned in large part upon those governing the old Wisconsin Territory.[86]

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ter constitutions, and when Iowa became a territory in its own right, Iowa Territorial Law supplanted Wisconsin Territorial Law in turn. Both territorial charters traced back in large part to the Northwest Ordinance of 1787, the "Magna Carta of the West." SHAMBAUGH, *supra* note 4, at 75.

The Iowa Territorial Law provided one sentence securing the rights of the people: "The inhabitants of the . . . Territory shall be entitled to all the rights, privileges and immunities heretofore granted and secured to the Territory of Wisconsin and its inhabitants." *Id.* at 80-81. Similar to the Northwest Ordinance, the Wisconsin Territorial Law provided, among other things, that no man "shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land." *Id.* at 81-82.

77. SAGE, *supra* note 63, at 52-53, 57; 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 413; EARL F. WISDOM, THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF IOWA 118 (1930).

78. *See* SAGE, *supra* note 63, at 57.

79. *Id.* at 59; 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 414.

80. SAGE, *supra* note 63, at 60; 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 415.

81. SAGE, *supra* note 63, at 60.

82. *See* 1 MESSAGES AND PROCLAMATIONS OF THE GOVERNORS OF IOWA 74, 83-84 (Benjamin F. Shambaugh ed., 1903).

83. SAGE, *supra* note 63, at 61.

84. SHAMBAUGH, *supra* note 4, at 111-12.

85. SAGE, *supra* note 63, at 61.

86. *Id.* at 60; *see* Emlin McClain, *The Iowa Codes*, 1 IOWA L. BULL. 3 (1915); Russell M. Ross, *The Development of the Iowa Constitution of 1857*, 55 IOWA J. HIST. & POL. 97, 100 (1957).

B. *Life on the Prairie*

While the names attached to the territory changed during these early years of settlement, the facts of life there, for the most part, did not.[87] The first group of settlers preferred the woodlands over the prairies for their homes, for there they would be close to wood, game, fruits, and nuts.[88] Near springs and along streams they built their log cabins, finishing them with leather hinges on the doors and oiled paper for the windows, and often leaving them with dirt floors.[89] At a time when Europe's Industrial Revolution began reeling in the states of the Atlantic seaboard,[90] Iowa pioneers roughed out spartan tables, stools, and chairs; slept in straw-filled beds or on floors; cooked corn meal mush in heavy iron pots; gathered wild honey and maple syrup; rendered powerful soap from ash, lye, and animal fat; stitched together their own clothes; drank from streams; and harvested barley, corn, hay, potatoes, rye, and wheat.[91]

These folks, not well-to-do,[92] lived rather long distances from one another: in 1837, one Aristarchus Cone walked from Davenport to Bloomington (now Muscatine) and never saw another person.[93]

Without any canals, railroads, telegraphs, daily mail, or newspapers, and with few stage lines, the territory experienced little communication.[94] In sparsely populated areas the old educated the young, while more populous areas could support a schoolhouse, a few books, and a three-month term of reading, 'riting, and 'rithmetic.[95]

Besides dealing with hostile Indians and horse thieves, the first settlers endured swarms of flies and mosquitoes, hordes of gophers, and infestations

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87. *See generally* 1 PARKER, *supra* note 74, at 72-77; ROSENBERG, *supra* note 72, at 6-7; Charles W. Cruikshank, *The Making of a Pioneer*, 45 IOWA J. HIST. & POL. 290 (1947); Reuben Gold Thwaites, *The Romance of Mississippi Valley History, in* PROCEEDINGS OF THE FIFTIETH ANNIVERSARY OF THE CONSTITUTION OF IOWA, *supra* note 22, at 113, 125-40.

88. WILLIAM D. HOULETTE, IOWA: THE PIONEER HERITAGE 69 (1970); 1 PARKER, *supra* note 74, at 226-28.

89. HOULETTE, *supra* note 88, at 69, 71.

90. WOODROW WILSON, EPOCHS OF AMERICAN HISTORY; DIVISION AND REUNION 102 (Albert Bushnell Hart ed., 1909).

Industrialization did not necessarily equate with progress, and town life in England during the 1800s changed little in some respects: "There were no cesspools and sewage disposal was very primitive. People threw garbage into the streets as they had always done." JAMES BURKE, THE DAY THE UNIVERSE CHANGED 192 (1985).

91. INEZ MCALISTER FABER, OUT HERE ON SOAP CREEK 7 (1982); HOULETTE, *supra* note 88, at 72-77. Kerosene lamps were not commonly used in rural areas until after the Civil War. *Id.* at 199.

92. 1 GUE, *supra* note 74, at 385-97.

93. HOULETTE, *supra* note 88, at 97.

94. 1 GUE, *supra* note 74, at 197, 223. Not until 1844, the year of Iowa's first constitutional convention, did Samuel Morse invent the telegraph. BERNARD GRUN, THE TIMETABLES OF HISTORY 413 (1982); Ross, *supra* note 86, at 101.

95. FABER, *supra* note 91, at 5; HOULETTE, *supra* note 88, at 103-05.

of cutworms, and chinch bugs.[96] Grasshopper flights could be "so dense as to hide the sun,"[97] and blizzards, hailstorms, floods, and droughts took their toll equally on the harvests and the people.[98]

Even in the more populated areas, opportunities for distraction from the hard life of the pioneer approached nil in the earliest years.[99] Opportunities, of course, did arise over time. In 1836, publication of the *Du Buque Visitor* began; this newspaper cost three dollars a year and carried such columns as "The Evangelical Advocate" and poems such as "The Excellency of Women."[100] For spiritual matters there were churches, and for the excitement-starved there were public executions; indeed, on the morning of June 20, 1834, one thousand spectators in Dubuque viewed the hanging of Patrick O'Connor, who had murdered his mining partner, George O'Keaf.[101]

C. *Political and Personal Philosophies*

The pioneers largely kept to themselves and did not ask questions about each other.[102] They brought to Iowa the idea that individuals possessed the right to govern their own lives, an idea that became "strengthened by the character of the settlement in which . . . it was men as men and not as masses that counted in the making of new communities."[103]

Averaging thirty years of age,[104] the pioneer farmer[105] prided himself on his practicality[106] and on paying his own way:[107] he had but "his own hands, the raw lands, and neighbors more or less remote [who] united with him . . ."[108] Little money or gold circulated, no banks existed, and no help from any Department of Economic Development flowed to him out of the government.[109] He and his fellow pioneers universally feared the idea of central

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96. FABER, *supra* note 91, at 6-7; 1 GUE, *supra* note 74, at 289, 313, 331-38; HOULETTE, *supra* note 88, at 71; HUBERT M. MOELLER, THIRTY STORIES OF IOWA 46 (1966).

97. MOELLER, *supra* note 96, at 46.

98. HOULETTE, *supra* note 88, at 79; ROSENBERG, *supra* note 72, at 9-10.

99. SAGE, *supra* note 63, at 101.

100. MOELLER, *supra* note 96, at 50-51.

101. *Id.* at 12-13.

102. 1 PARKER, *supra* note 74, at 74.

103. 1 *id.* at 154; *see* JAMIL S. ZAINALDIN, LAW IN ANTEBELLUM SOCIETY 1 (1983).

104. 1 PARKER, *supra* note 74, at 239.

105. By far, most of the people in Iowa raised livestock or cultivated the soil. 1 *id.* at 237-38, 339; ROSENBERG, *supra* note 72, at 3-4, 6.

106. JAMES W. HURST, LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY 115 (1960).

107. 1 PARKER, *supra* note 74, at 169.

108. 1 *id.* at 198; *see* 1 GUE, *supra* note 74, at 221. "Pioneer society could only be developed as a series of units, where the individual, whatever his occupation or abilities, did his part." 1 PARKER, *supra* note 74, at 167.

109. 1 GUE, *supra* note 74, at 223; 1 PARKER, *supra* note 74, at 169, 198.

authority.[110] They rejected the arguments of Alexander Hamilton and embraced those of Thomas Jefferson.[111] More important, unlike the religiously bent colonists of earlier generations, they came upon the frontier at a time when a concept of liberty had effectively displaced the pages of the family Bible as the guiding light for their conduct.[112]

Liberty for such a people primarily meant freedom of competition, freedom of acquiring and using property for creative change, and freedom from arbitrary governmental regulations upon property.[113] This narrow definition

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110. 1 PARKER, *supra* note 74, at 155. "[A]ll ideas, policies, and actions were based upon individualism." 1 *id.* at 154. "That law is best which governs least; that law is also best which provides most. The first is a truth which belongs to the nineteenth century; the second to the twentieth. American law's task is to reconcile those two truths." SCHWARTZ, *supra* note 1, at 166.

111. To an extent not always fully recognized, the whole of the West—no less than the new South—was formed and in its early days governed in its most minute ramifications under the doctrines of Thomas Jefferson. In the making and conduct of the new commonwealths and communities, . . . his ideas were the dominant forces. Practically no others were known.

1 PARKER, *supra* note 74, at 153. America was "a nation founded in revolution, birthed by rebels and dissidents"; for Jefferson, who believed that uniformity of opinion "was no more desirable than uniformity of 'face and stature,'" dissent "was not only a right but also a necessity." Barbara Ehrenreich, *Real Patriots Speak Their Minds*, TIME, July 8, 1991, at 66. "Nearly all Federalist and Anti-Federalists viewed themselves as good Whigs—as men who were devoted to the idea of limited government and individual liberty." David E. Narrett, *A Zeal for Liberty: The Anti-Federalist Case against the Constitution in New York, in* ESSAYS ON LIBERTY AND FEDERALISM 48, 49 (David E. Narrett et al. eds., 1988).

112. 1 PARKER, *supra* note 74, at 444.

[A] significant change in the intellectual history of America took place in the middle of the nineteenth century. For after 1850 the role of religion as a unifying force among American intellectuals was considerably diminished, and the sense that American civilization offered endless possibilities for individual growth and progress was sharply qualified.

G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 168 (1978); *accord* BURKE, *supra* note 90, at 306.

"The pioneers were religious, but not ecclesiastical. They lived in the open and looked upon the relations of man to nature with an open mind. . . . [T]heir thoughts were more on 'getting along' in this world. . . ." SHAMBAUGH, *supra* note 4, at 22.

[M]any colonists, particularly in Massachusetts, believed that government in America, like some existing Moslem regimes, ought to have certain specified religious ends in view: the salvation of men's souls, the maintenance of the church, and the preservation of godliness through laws penalizing heresy or absence from church services, or the doing of certain acts on the Sabbath.

Douglas, *supra* note 1, at 147.

113. James Willard Hurst, *The Release of Energy, in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER, *supra* note 23, at 109, 113-18; Michael Kammer, *Personal Liberty and American Constitutionalism, in* ESSAYS ON LIBERTY AND FEDERALISM, *supra* note 111, at 105, 105-07; John Phillip Reid, *Liberty and the Original Understanding, in* ESSAYS IN THE HISTORY OF LIBERTY, *supra* note 48, at 1, 2-6; SCHWARTZ, *supra* note 1, at 152-57. *See generally* Proprietors of the Charles River Bridge v. The Proprietors of the C. Warren Bridge and others, 36 U.S. (11 Pet.) 420, 547-48, 552-53 (1837); 1 BERNARD SCHWARTZ, THE CONSTITUTION OF THE UNITED STATES 8 (1977).

apparently sprang out of the general desire to get ahead—to exploit the vast economic opportunities of an untamed continent.[114] Personal liberty simply was not a pressing issue.[115] Why not? According to one historian, Americans in the first half of the nineteenth century "were a people going places in a hurry"[116] and were placing

> all the energy and attention [they] could into economic interests. . . . From time to time the zealous minority interested in [such issues as slavery, drink, and women's rights] could whip up a general, emotional reaction to them. But in most affairs one senses that men turned to noneconomic issues grudgingly or as a form of diversion and excitement or in spurts of bad conscience over neglected problems.[117]

"Freedom to compete, unhindered by government, was becoming the new ideal." ZAINALDIN, *supra* note 103, at 33. "The ends of antebellum common law were not unlike those of antebellum legislation. Judges created new rules of law that enlarged the sphere of private action and gave effect to the maximum assertion of individual will." *Id.* at 52; *see id.* at 58.

114. HURST, *supra* note 106, at 113; *see* Mildred Throne, *Diary of a Law Student*, 55 IOWA J. HIST. & POL. 167, 172-73, 184-85 (1957).

"In the two decades before the Civil War, the ideologies of laissez-faire and rugged individualism had finally established a prominent beachhead in American property doctrine." MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860, 107-08 (1977). During this period,

> much of the *formal* criminal law was carried over from colonial days, [when the people viewed society as the victim of every crime and felt the need to punish every sinner to preserve the moral order]. The statute books kept the old moral laws [regarding fornication, adultery, incest, blasphemy, sodomy, and bigamy.] . . . [But c]riminal justice [had] turned its attention to crimes against property: to crimes such as burglary and theft.

Lawrence M. Friedman, *Notes Toward a History of American Justice*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER, *supra* note 23, at 13, 16. "The secular, instrumental men of the nineteenth century were less interested in the moral code as such, so long as infractions wore a low profile." *Id.* at 16. "[A]pparently nowhere did the law take seriously the job of enforcing the sexual code." *Id.* at 17. So too with other naughty things: during the reign of Queen Victoria (1837-1901), people "on both sides of the Atlantic published and read dirty books, cavorted with prostitutes, engaged in buggery and every form of vice. They drank and gambled to excess. But they seemed to take care not to sin in such a way as to threaten the moral norms publically [sic]." *Id.* at 18.

115. Collins, *supra* note 24, at 201, 204. "[L]iberty in the eighteenth century was thought of as restraining arbitrary government rather than as liberating the individual." Reid, *supra* note 113, at 16.

116. Hurst, *supra* note 113, at 113.

117. JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM 29 (1956).

> The nineteenth century produced some important issues for individual civil liberties, but showed no impressive record for grappling with them. . . . There is little that happens after 1800 . . . to suggest the presence of a really substantial public opinion interested in and prepared to pay the costs of supporting individual civil liberties. It would distort the view of our nineteenth-century life to say that it embodied any substantial, defined hostility to individual political freedoms; the accepted and revered political generalities all exalted individual liberty. But the century was so market focused as to be politically naive. Its prevailing attitude tended to range from indifference to

Yet it remains that if an individual's thoughts, actions, or words were at issue, "the self-reliant frontiersman felt that fools should be allowed . . . to act freely and be held for the consequence of their folly."[118]

D. *Demographics*

In the decade before the Civil War, the North and South chose to engage in a path of turbulent relations that paved the way for the consequences of their folly.[119] During these years the face of Iowa, which achieved statehood in 1846 with its Missouri compromise partner, slaveholding Florida, changed a few degrees rather rapidly.[120]

In 1850, the bulk of Iowa's population still clustered around the southeast portion of the state and along the Mississippi; the rest of the state, for the most part, remained largely unsettled.[121] Yet within a few more years the

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> impatience with matters that distracted attention from . . . an increase of capital and consumable wealth.

Id. at 31-32; *see* Hurst, *supra* note 113, at 112-16, 118, 119-20; *see also* ROSENBERG, *supra* note 72, at 33, 117. *See generally* SCHWARTZ, *supra* note 1, at 150-52. Regarding private property, "a high value was put on men's right to be let alone—to be 'private'. . . ." Hurst, *supra* note 113, at 112.

118. POUND, *supra* note 25, at 155.

The law at this time emphasized "the social desirability of free individual action and decision." SCHWARTZ, *supra* note 1, at 62-63; *see* DANIEL ELAZAR, CITIES OF THE PRAIRIE 157 (1970). Its makers "believed that life's meaning would be found through the creative will of individuals, that individuals were responsible to God for what they made of themselves." HURST, *supra* note 106, at 54. "The evolution of Judeo-Christian ideas led men to value the individual person and to see the life of men and their societies not as a closed cycle but as unique growth toward ever enlarging meaning." *Id.* at 107. With individual responsibility lying at Heaven's gate, little need arose for human intervention in the form of government.

No reason exists to doubt that these notions of individual responsibility and good government were widespread across Iowa. Governor Samuel J. Kirkwood, in office during and after the Civil War, once remarked, "We are rearing the typical American, the Western Yankee, . . . the man of broad and liberal views, the man of tolerance of opinion . . . ." SHAMBAUGH, *supra* note 4, at 24. Life in Iowa and tolerance apparently marched hand-in-hand: "[A]bove all the frontier was a great leveler. The conditions of life there were such as to make men plain, common, unpretentious—genuine. The frontier fostered the sympathetic attitude." *Id.* at 25.

Still, it was a rough-and-tumble frontier. "[P]articularly after the first quarter of the century, there was a great deal of crime, brawling, drunkeness, gambling, and general hell-raising, just as one would expect from normal human flesh." Friedman, *supra* note 114, at 18. "[W]hen the chips were down and the situation serious enough, men inside and outside the system were willing to take the law into their own hands, [and to hell with 'rights.']" *Id.* at 19. In other words, the consequences of a person's folly could involve punishment according to unwritten laws or codes of conduct: thus, as one Sioux City newspaper reported in 1859, "The editor of the Omaha *Nebraskan* was 'cowhided' on the street by the wife of a maligned gentleman; opinion was that the editor deserved it." Lee, *supra* note 58, at 120.

119. SAGE, *supra* note 63, at 140.

120. *See generally* SAGE, *supra* note 63, at 91-92.

121. *See generally id.* at 92-94.

pioneers, who had begun homesteading the boggy yet fire-prone prairie, were able to tame the wildest aspects of their frontier.[122] In overcoming disease as well as natural calamity,[123] they created a neat and ordered patchwork of towns and farms in their energetic and vibrant state.[124] Their newly built dirt or wood-plank roads provided the routes for prairie schooners and produced new communities in Chariton, Council Bluffs, Decorah, Fort Des Moines, Fort Dodge, Iowa City, Osage, and Sioux City.[125] Their railroads, the building of which had become a passion,[126] hauled in more goods and more people: in 1854, the Rock Island Railroad reached the eastern border of Iowa; in 1855, the Northwestern Railroad; and in 1856, the Burlington.[127] Although Iowa remained a way station on the route to California's gold mines, which captured the fancy of dreamers after the 1848 strike at Sutter's Mill, its farming and mining opportunities provided sufficient lure for many others to stay. Its population of 191,000 in 1850, for example, jumped to 326,000 by 1854.[128]

This large increase in Iowa's population also increased its diversity.[129] While the earliest settlers had taken boats up the Mississippi River and betrayed a definite Southern affinity,[130] more and more Yankees and foreign-born had begun to travel overland to take up residence with them and form, in some respects, a cosmopolitan society in Iowa.[131] Love thy neighbor did not occur at first sight. The southern and northern groups viewed each other with suspicion, and many of the native-born cast an especially long and hard eye at the foreign-born and their different religions, habits, customs, lan-

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122. HOULETTE, *supra* note 88, at 79; 1 PARKER, *supra* note 74, at 240.

In 1857, Fort Dodge was still a frontier outpost, and Fort Des Moines and Kanesville (now Council Bluffs) were sparsely populated. SAGE, *supra* note 63, at 111. Little population meant no railroad lines would be coming into such areas from the east. *Id.* A line reached Iowa City one year before the third constitutional convention. *Id.* at 112.

123. FABER, *supra* note 91, at 4. "During the intense heat of mid-July [in 1850], a newspaper in Burlington reported that an average of six to eight persons was falling victim to the dreadful scourge [of cholera] daily . . . ." ROSENBERG, *supra* note 72, at 9.

124. Lee, *supra* note 58, at 117.

125. SAGE, *supra* note 63, at 69. Plank roads first appeared in Iowa in the 1850s. HOULETTE, *supra* note 88, at 97-100. Overland travel could be slow-going, perhaps two miles an hour in the mud. *Id.* at 98.

126. ROSENBERG, *supra* note 72, at 231.

127. At nine o'clock on Saturday morning, August 25, 1855, the first passenger train in Iowa left the station in Davenport for the one in Walcott. HOULETTE, *supra* note 88, at 152. "Some five hundred people were on board, including seventy-five ladies and a brass band." *Id.* It took about one hour to complete the twelve mile trip. *Id.*

128. ROSENBERG, *supra* note 72, at 19, 24.

129. *Id.* at 23.

130. *Id.* at 12, 14-15, 86-87; *see* HOULETTE, *supra* note 88, at 95-96. Although crowded on board, the ships were relatively cheap for passengers on the deck: $35 bought a ticket from Philadelphia to Dubuque. *Id.* at 97.

131. *See* HOULETTE, *supra* note 88, at 109-13. Considerable numbers of Bohemians, Danes, Dutch, Germans, English, Irish, Norwegians, Scots, Swedes, and Welsh flowed into the state after 1846. *Id.* *See generally* ELAZAR, *supra* note 118, at 150-205; ROSENBERG, *supra* note 72, at 231-34; SAGE, *supra* note 63, at 93-94.

guages, and dress.[132] Stereotypes bandied about, linking the Irish with a fondness for whiskey and the Germans with one for beer, and Mormons and Quakers, no matter their country of birth, suffered a good deal of ridicule as well.[133]

III. JOHN STUART MILL, THE RIGHT TO BE A FOOL, AND IOWA'S CONSTITUTIONAL CONVENTIONS

> *Our [Iowa] politicians can spout louder and lie harder, make gas faster, dodge quicker, turn oftener, make more noise, and do less work, than anybody else's politicians.*[134]

One Quaker electing to remain in New York at this time was the first important American novelist, James Fenimore Cooper. He wrote about rugged men named Natty Bumppo, Deerslayer, Leather Stocking, and Hawkeye[135] as the nation's population, expanding to and beyond the Mississippi, struggled to create systems of law for its increasingly mobile, multifaceted society. But those systems, as one of Cooper's independent frontiersmen remarked, could be stifling at times: "I have come, old man, into these districts, because I found the law sitting too tight upon me . . . ."[136]

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132. ROSENBERG, *supra* note 72, at 23-24, 29-30. Suspicion of the foreign-born found expression in the Know-Nothing political party. *Id.* at 30.

133. *Id.*; SAGE, *supra* note 63, at 129; KENNETH M. STAMPP, AMERICA IN 1857: A NATION ON THE BRINK 37, 199-200 (1990).

No reason exists to accept "the arrogant claim that Iowans believed in religious tolerance . . . ." in the 1840s. SAGE, *supra* note 63, at 73. Perhaps the Quakers antagonized the substantial element in Iowa society that would not view the Negro as its equal, because they "were profoundly convinced of the equality of every human being before God as well as the sanctity of liberty and individual freedom in the State." LEOLA BERGMANN, THE NEGRO IN IOWA 7 (1969). It has been said with their arrival "the atmosphere of the southern uplands on the Iowa hills and prairies was tempered by a new spirit." *Id.*

134. Lee, *supra* note 58, at 117, 120 (quoting THE SIOUX CITY EAGLE, Aug. 27, 1859).

135. "Hawkeye" became the nickname for those living in the Iowa Territory in 1838, according to Richard, Lord Acton. His research traces its coinage to David Rorer, "a legendary trial lawyer famous for killing Iowa's first district attorney in self-defense" and who "was all too aware that unless the inhabitants of the new territory were given an attractive nickname, others would soon dub them something nasty." Richard, Lord Acton, *We Could be Yelling, 'Go, Hairy Nation,'* DES MOINES REG., Dec. 31, 1990, at A12. Apparently aware that Illinoisans were known as "the Suckers," that Missourians were known as "the Pukes," and that Iowa was becoming known as "the Hairy Nation," Rorer settled on the name of Cooper's hero from his best-selling *The Last of the Mohicans. Id.*

136. JAMES FENIMORE COOPER, THE PRAIRIE 63 (Dodd, Mead & Co. 1954). "The people who moved restlessly westward must have been in large part those who were impatient with the constraints of a settled society." GILMORE, *supra* note 1, at 22. James Clarke, the third governor of the Iowa Territory, remarked in his first annual message to the legislature in 1845 that

> [T]he evils of overlegislation are so generally acknowledged, that any attempt by me to impress the important truth upon your minds, would justly be looked upon as supererogation[sic]. At the same time that we concede the

A. ON LIBERTY (1859)

During the years before the Civil War when Iowa, Indiana, Minnesota, New Jersey, and Wisconsin drafted their constitutions,[137] natural rights and limited government, which soon found expression through John Stuart Mill, were already familiar phrases in America's political jargon.[138] Mill's *On Liberty*[139] was first published in England contemporaneously with Charles Darwin's bombshell, *The Origin of Species*, in 1859. Before Mill's readers turned too many pages, they came upon the core of his Lockean thoughts:

> The object of this Essay is to assert one very simple principle . . . . That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the *only* purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.[140]

> evil, however, we have not avoided running into it; for perhaps no community ever suffered more severely from the cause in question, than have the people of Iowa. . . . [T]he point to be avoided is, legislation for legislation's sake. I trust and believe that the Legislature . . . will limit its action to such subjects only as are of pressing importance . . . .

Governor James Clarke, *First Annual Message (Dec. 3, 1845)*, *in* 1 MESSAGES AND PROCLAMATIONS OF THE GOVERNORS OF IOWA, *supra* note 82, at 326-27.

137. *See* DEALEY, *supra* note 6, at 118 & n.2. *See generally* SIMON STERNE, CONSTITUTIONAL HISTORY AND POLITICAL DEVELOPMENT OF THE UNITED STATES 250-74 (New York, J.J. Little & Co. 1882); Ross, *supra* note 86, at 97, 98-114; Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS 57, 63 (Winter 1982).

During this period of Jacksonian Democracy, when the prevailing (and popular) political theory led to the decentralization of governmental power, the states took responsibility for regulating manufacturing, banking, insurance, transportation, public education, bankruptcy, corporations, and inspection of goods and services. ZAINALDIN, *supra* note 103, at 31, 33, 34, 48, 49. Decisions from the Supreme Court dovetailed with this theory, tipping the balance in favor of a federalism that left expansive powers to state government. *Id.* This state of affairs highlighted the importance of a state constitution's bill of rights.

138. "[T]he lawyers and judges and teachers of the formative era [of American law, roughly from Independence to the Civil War,] found their creating and organizing idea in the theory of natural law." POUND, *supra* note 25, at 12. *See generally* R. Lawrence Hackey, *Jacksonian Democracy and the Wisconsin Constitution*, 62 MARQ. L. REV. 485, 485-88 (1979).

> It is no longer the fashion to invoke natural rights and the social compact, but the men who shaped our constitutional law in its formative stages did so fervently. In creating a government and empowering it to act, they were careful to surrender only part of their natural liberty; their view of the social contract was Lockean, not Hobbesian.

DISHMAN, *supra* note 44, at 18.

139. JOHN STUART MILL, ON LIBERTY, *reprinted in* ON LIBERTY AND OTHER WRITINGS (Stefan Collini ed., 1989) (1859).

140. *Id.* at 13 (emphasis added); *see* DAWSON, *supra* note 22, at 201 ("[e]very individual of the Body Politick may have Right done him by the Laws thereof, except when his Right shall in-

Mill explained that a civilized society actually benefited from diversity[141] and that it therefore should not legally interfere with someone merely seeking to be different:

> His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he does otherwise. . . . *The only part of the conduct of any one, for which he is amenable to society, is that which merely concerns others. In the part which concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.*[142]

Mill concluded that an individual's right to do as he pleases must not be transgressed by the laws of society "even though [others should think his] conduct foolish, perverse, or wrong."[143]

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terfere with the Good of the whole . . . ."). *But see* JAMES F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY (R.J. White ed., 1967) (1873) (criticizing Mill's thesis).

On Liberty was "chiefly intended as a protest against the coercive moralism of Victorian society." Stefan Collini, *Introduction* to ON LIBERTY AND OTHER WRITINGS, *supra* note 139, at xi.

141. MILL, *supra* note 139, at 13, 62-67, 115. "Human beings are not like sheep . . . ." *Id.* at 67; *see* NORTON, *supra* note 18, at 1 (everything achieved by the American "has been owing largely to the fact that Government has let him alone"). Ironically, Mill looked to the culture of a far eastern country, which in the last 40 years has taken especially great pains to produce conformity at all levels of society, to illustrate his point:

> [W]e flatter ourselves that we are the most progressive people who ever lived. It is individuality that we war against: we should think we had done wonders if we had made ourselves all alike . . . . We have a warning example in China—a nation of much talent, and . . . wisdom . . . . [Yet] they have become stationary—have remained so for thousands of years . . . . They have succeeded beyond all hope in what English philanthropists are so industriously working at—in making a people all alike . . . .

MILL, *supra* note 139, at 71-72. "Better a dog in peace than a man in anarchy." The Madison & I. R.R. v. Whiteneck, 8 Ind. 217, 232 (1856) (quoting Chinese proverb). "The more tolerant of the unorthodox we are, the more respectful of minorities we become, the greater the chance of realizing the rich dividends of a Free Society." Douglas, *supra* note 1, at 157. "Everyone who has studied the order of nature knows that without variety there can be no progress." 2 HERBERT SPENCER, THE PRINCIPLES OF ETHICS 275 (1978). "[It is absurd for people to] impose on the future their ideal citizen." *Id.* at 276. Society naturally adjusts over time: in 1897, "such amounts of self-restraint have been acquired that most men carry on their lives without much impeding one another." *Id.* at 278.

142. MILL, *supra* note 139, at 13 (emphasis added).

143. *Id.* at 15.

Seventy-five years before the publication of *On Liberty*, Jefferson wrote that "the legitimate powers of government extend to such acts only as are injurious to others'." Nichol, *supra*

Mill acknowledged that the principle only applied to those persons "in the maturity of their faculties"[144] and cautioned that it would not permit someone to "make himself a nuisance to other people."[145] Although Mill also acknowledged "it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them,"[146] he argued the law should never impinge upon personal liberty unless those governmental authorities proposing restrictions on its exercise could show "a definite damage, or a definite risk of damage, either to [another] individual or to the public . . . ."[147]

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note 18, at 1325 (quoting Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* THE PORTABLE JEFFERSON 430 (Merrill D. Peterson ed., 1975)). One of Jefferson's paramount beliefs was that "the proper ends of government did not include the attainment of the good society." *Id.* at 1326.

Herbert Spencer, Mill's contemporary, joined in his philosophy. "Every man has the freedom to do all that he wills, provided he infringes not the equal freedom of any other man." HERBERT SPENCER, SOCIAL STATICS: TOGETHER WITH MAN VERSUS THE STATE 55 (D. Appleton & Co. 1910) (1892). Spencer adopted Charles Darwin's social theories and, in fact, coined the phrase "the survival of the fittest." In the United States, "founded under a constitution that expressly discouraged government interference, [his] Social Darwinism took hold like wildfire. There, as Darwin seemed to demand, the government had one duty—to preserve the individual's freedom to act in his own interest." BURKE, *supra* note 90, at 268-69. Unlike Mill, Spencer seemed to provoke his critics into personal attacks: Thomas Carlyle labeled him "[t]he most unending ass in Christendom." FRANK MUIR, AN IRREVERENT AND THOROUGHLY INCOMPLETE SOCIAL HISTORY OF ALMOST EVERYTHING 157 (1976).

Another of Mill's contemporaries was the most vocal Democrat helping to frame Iowa's 1857 constitution, Jonathan C. Hall; at the constitutional convention, in words similar to Mill's, he argued:

> I understand democracy to be that principle which does justice to all, protects all, and allows the largest liberty consistent with the public safety. It is that which puts no shackles or trammels upon the man in his individual or associated capacity, that is not absolutely necessary for the public good.

1 THE DEBATES, *supra* note 4, at 155-56.

Such thinking probably would have swayed Abraham Lincoln, who, in an 1859 debate with Senator Douglas, defined liberty to mean "'each individual is naturally entitled to do as he pleases with himself and the fruit of his labor, so far as it in no wise interferes with any other man's rights.'" Nichol, *supra* note 18, at 1332 (quoting Letter from Abraham Lincoln to H.L. Pierce (Apr. 6, 1859), *in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 489 (R. Balser ed., 1946)); *see* GEORGE H. SMITH, THE LAW OF PRIVATE RIGHT 70 (New York, Humboldt Publishing Co. 1890).

144. MILL, *supra* note 139, at 13.

145. *Id.* at 56.

146. *Id.* at 80. Mill acknowledged that "nearly all our actions might be said in some loose sense to *affect* others, but he [discriminated] as a legitimate basis for [societal] interference only those which *harm* them." *Id.* at xvi. Obviously, it may be a line "exceedingly hard to draw . . . ." *Id.* "[D]etermining what is 'injury' is no simple task . . . ." Nichol, *supra* note 18, at 1340. "No one, as it goes, is an island." *Id.*

147. MILL, *supra* note 139, at 82; *see* McLaughlin, *supra* note 22, at 39, 70.

B. *The Convention of 1844*

The substance of what Mill was telling the world in 1859 could be heard in Iowa City in the two decades before the Civil War, when three constitutional conventions proposed the structure for state government in Iowa and outlined restrictions on its operation.[148]

Thirteen years before a railroad reached Kanesville (now Council Bluffs) on the Missouri River,[149] residents of the Iowa Territory began their march to statehood in 1844 with the first constitutional convention.[150] The largest political party, the Democrats, hoped to frame a constitution in accordance with "the true principles of Jeffersonian Democracy and Economy."[151] Yet some delegates proposed to begin each morning of the twenty-six-day session in the territorial capital with a prayer, and this proposal did not sit well with Dr. Gideon Bailey of Van Buren County. As one newspaper reported his remarks, "People love liberty, and [are] daily becoming more and more sensitive upon this subject of individual rights and privileges. . . . We are a progressing people, and were, he was happy to believe, becoming more enlightened upon the matter of individual rights daily."[152]

President Shepherd Leffler of Des Moines County and the seventy-two other delegates to the 1844 convention, however, did not concern themselves

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148. *See generally* HOULETTE, *supra* note 88, at 59-64; SAGE, *supra* note 63, at 82-87, 89-91; James, *supra* note 76, at 13-51; Emlin McClain, *The Constitutional Convention and the Issues Before It, in* PROCEEDINGS OF THE FIFTIETH ANNIVERSARY OF THE CONSTITUTION OF IOWA, *supra* note 22, at 155, 165.

> Resorting to natural law, though justified by Westerners because of their special circumstances, was by no means confined to them. It pervaded the law of this era.
>
> Since it meant all things to all men, natural law became a wonderful means of adapting, innovating, or stabilizing legal institutions. Its brooding omnipresence was not unlike the literary symbol that dominated the period: Moby Dick. You knew it is near, you feel its importance, but at any given moment it is difficult to pierce its meaning and trace its exact effects.

THE GOLDEN AGE OF AMERICAN LAW 427 (Charles M. Haar ed., 1965).

149. SAGE, *supra* note 63, at 112.

150. Statehood was not universally sought. Land squatters who had not yet proven and paid for their claims strongly resisted it, and their voices helped defeat election calls for it in 1840 and 1842. 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 424.

151. SHAMBAUGH, *supra* note 4, at 123-24; *see* FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846 37, 174 (Benjamin F. Shambaugh ed., 1900) [hereinafter FRAGMENTS]. Presumably, those delegates adhering to Jefferson's view of democracy were "jealous of too much government . . ., who desired above all things to maintain the political liberty of the individual, and his freedom in his home affairs." STIMSON, *supra* note 44, at 68-69.

152. FRAGMENTS, *supra* note 151, at 178-79. Compelling attendance for morning prayer, one delegate was reported to have said, "violated one of the inalienable rights of men." James, *supra* note 76, at 18 n.28.

to any great degree with matters of individual rights.[153] If anything captured their fullest attention that October, it was the issue whether Iowa should permit currency-issuing banks to operate within its then undefined borders.[154] Indeed, little dispute actually existed at the convention about the article drafted by the Committee on the Bill of Rights,[155] and what dispute arose naturally involved the Negro.[156] While most of the delegates opposed slavery and advocated a certain measure of civil liberty for the Negro,[157] these relatively young men, forty-six of whom farmed,[158] certainly refused to swear allegiance to Jefferson's famous words that "all men are created equal."[159] That principle, it seemed, amounted to nothing more than a mere abstraction.[160] Equality simply might bring the wrong type of person to the new state; Iowans "did not want negroes swarming among them."[161]

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153. *See* FRAGMENTS, *supra* note 151, at 40, 178.

154. James, *supra* note 76, at 22.

155. *See* SHAMBAUGH, *supra* note 4, at 170-73. The Committee on the Bill of Rights consisted of James Grant, an attorney originally from North Carolina; George Hepner, a farmer originally from Kentucky; V. B. Delashmutt, a farmer originally from Virginia; Ed Langworthy, a miner originally from New York; J. C. Hawkins, a farmer originally from Kentucky; Ralph Benedict, a millwright originally from Vermont; and J. C. Blankenship, a farmer originally from Virginia. FRAGMENTS, *supra* note 151, at 9.

156. SHAMBAUGH, *supra* note 4, at 140-43.

157. Apparently the elected officials of the state in those years concurred that whites deserved unequal treatment. On January 6, 1840, the General Assembly passed an act declaring void and illegal all marriages between whites and blacks. *See* LAWS OF IOWA ch. 25, § 13 (1840). Six years later the General Assembly passed an act making common schools "open and free alike to all white persons . . . between the ages of five and twenty-one years." *See id.* ch. 99, § 6 (1846-1847).

158. SHAMBAUGH, *supra* note 4, at 123 (noting the delegates averaged 40 years in age).

159. The delegates "were opposed to the giving of free negroes those civil, social, and educational privileges enjoyed by white men." James, *supra* note 76, at 19. "To put it bluntly, the 'first free state in the Louisiana Purchase' was not very free . . . ." SAGE, *supra* note 63, at 136. Although slavery never officially existed in Iowa, many of its residents "were far from ready to share with the Negro the rights and privileges they expected to enjoy on the new frontier. In fact, they did not want him there at all." BERGMANN, *supra* note 133, at 6-7. Southerners moving to Iowa generally opposed slavery not on moral grounds, but on the ground it "appeared to give wealthier men an unfair economic advantage." *Id.* at 7 n.8, *accord* ROSENBERG, *supra* note 72, at 15.

160. BERGMANN, *supra* note 133, at 12; SHAMBAUGH, *supra* note 4, at 141-42; James, *supra* note 76, at 19; *see* Reid, *supra* note 113, at 1, 10-11. "[T]here is little doubt, if any, that [this rationalization by the delegates about the abstractive quality of the Declaration of Independence] expressed the sentiment that prevailed in the Territory at that time." BERGMANN, *supra* note 133, at 13.

161. SHAMBAUGH, *supra* note 4, at 144. Accordingly, the proposed 1844 constitution did not permit blacks to vote or to hold legislative office or to serve in the militia. BERGMANN, *supra* note 133, at 14. The 1846 constitution contained the same provisions. *Id.*

The 1850 act making it a crime for free Negroes to immigrate to the state "had the full support of Iowans," though it was rarely enforced. ROSENBERG, *supra* note 72, at 15, 16 n.38; *see* SENATE JOURNAL, 3d Gen. Assembly, at 295 (1850); HOUSE JOURNAL, 3d Gen. Assembly, at 88, 159 (1850).

Discussion in the territory on the merits of the proposed constitution, however, did include the protection of individual freedoms for citizens of the right skin color.[162] As one man argued, "Governments are but the agents, and not the masters of the people—they are, or should be, mere instruments for the elevation and advancement of mankind. This is all we claim as the friends of this Constitution."[163] Yet the proposed 1844 constitution, produced by the fifty-one Democrats and twenty-one Whigs[164] who originated mostly from northern states, did not receive public approval. The voters refused to ratify it on two occasions,[165] primarily on the ground the new state's boundaries were too restricted and not on the grounds its 7000 or so words were ill-chosen, insufficient, overbroad, or unfavorable in some other respect to the 75,000 people living in the territory.[166]

C. *The Convention of 1846*

The votes against ratification of the proposed 1844 constitution merely stalled the drive for statehood, and a second constitutional convention took place in the spring of 1846.[167] Though unratified, the 1844 constitution became the model for drafting the 1846 constitution, which retained its structure and most of its provisions.[168] This borrowing produced a substantial savings in time: The delegates, who averaged thirty-seven years in age,[169]

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162. *See* FRAGMENTS, *supra* note 151, at 245, 300-02, 305-06, 312-13.

163. *Id.* at 307. A state constitution's bill of rights carried great significance to its citizens at that time: The United States Supreme Court had held that the first eight amendments to the federal constitution operated solely against federal and not state power. *See* Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).

164. SHAMBAUGH, *supra* note 4, at 118, 122-23.

165. James, *supra* note 76, at 33; 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 432.

166. SHAMBAUGH, *supra* note 4, at 114, 150, 172-73, 177, 183; 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 428-29. Interestingly, Democrat Augustus C. Dodge, the Iowa Delegate to Congress, championed ratification of the proposed constitution, and then, after it fell short by 996 votes, railed against its ratification, which only fell short by 500 or so votes. SHAMBAUGH, *supra* note 4, at 175-83. Dodge later ran for senator on the eve of the Civil War against Republican Samuel J. Kirkwood, and their campaign was neither genteel nor cerebral in substance or form. For example, Kirkwood "ridiculed Dodge for his immaculate appearance and courtly manners and drew attention to his own indifference to such matters." SAGE, *supra* note 63, at 142; *see* 63 IOWA OFFICIAL REG. 265 (1989-1990).

167. *See* SHAMBAUGH, *supra* note 4, at 187. While Iowa concentrated on forming a state constitution, the federal government concentrated on winning its war with Mexico. Four years later, in 1850, the General Assembly remembered that conflict by honoring its battlefields and officers in the names of Iowa's new counties: Buena Vista, Cerro Gordo, Palo Alto, Taylor, Ringgold, Mills, Yell, Worth, Butler, Hardin, and Guthrie. 1 GUE, *supra* note 74, at 226.

168. James, *supra* note 76, at 33, 36 n.67; 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 424; *see* SHAMBAUGH, *supra* note 4, at 191-207.

169. Ross, *supra* note 86, at 101. The delegates were "practical men who drew on their knowledge of previous territorial and state governments, not brilliant innovators toying with the

were able to write the thirteen articles governing Iowa's 100,000 residents in only fifteen days. Led by President Enos Lowe of Des Moines County, the twenty-two Democrats and ten Whigs debated little if nothing about the new bill of rights and left it practically unchanged from the unratified 1844 constitution.[170]

After enduring attacks against its provisions governing banks, state debt, corporations, and judges,[171] the proposed constitution received public approval: on August 3, the voters ratified it by the slim margin of 9492 to 9036.[172] When President James K. Polk's official acknowledgment came from Washington, D.C., on December 28,[173] the delegates had accomplished their primary purpose: placing Iowa as the twenty-ninth state into the map of the Union.[174]

D. *The Convention of 1857*

The new state initially placed Democrat Ansel Briggs into the governor's office.[175] In 1850, it elected another Democrat to that office, Stephen Hempstead, who reminded the General Assembly in his inaugural address that a leading principle of "a republican government . . . [is] 'the least possible restraint upon the mind, person, energy and industry of every man, consistent

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task of concocting a model constitution." SAGE, *supra* note 63, at 91. Eight delegates had attended the 1844 constitutional convention. *Id.* at 89.

170. SHAMBAUGH, *supra* note 4, at 194-95; Ross, *supra* note 86, at 101. The quirky clause prohibiting duelers from ever becoming office-holders was added. SHAMBAUGH, *supra* note 4, at 194-95; *see* IOWA CONST. art. 1, § 5. The 1846 constitution "essentially embodied all the Jacksonian principles valued by the Democratic party." ROSENBERG, *supra* note 72, at 57-58.

171. SHAMBAUGH, *supra* note 4, at 206-07.

172. 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 449. Upon ratification, the constitution went to the Congress, which endorsed it on December 28, 1846. 3 *id.* at 450.

173. Ross, *supra* note 86, at 101.

174. 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 451.

William Gwin took the new constitution with him to California, where, in 1849, it may have greatly influenced the Golden State's constitutional convention. Lawrence M. Newman, Note, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L.J. 481 n.54, 490, 495, 501, 507 (1974).

175. *See* 1 MESSAGES AND PROCLAMATIONS OF THE GOVERNORS OF IOWA, *supra* note 82, at 367. Governor Briggs thought highly of the work by the delegates. In 1846, he remarked, "Our Constitution is one which does honor to the character and intelligence of our infant State." 1 *id.* He also thought that the bill of rights in the state constitution hemmed in, to a great degree, the powers of the General Assembly; in 1848, he remarked, "It can be gathered from the Constitution, that the people of this State are determined to retain as much power in their own hands, as they can consistently with a proper and judicious Administration of the affairs of the Government." 1 *id.*

with the rights of his fellow men.'"[176] He explained, "[T]he laws necessary for the purposes of such government are sufficiently complicated and burthensome without adding to them those designed to regulate the conduct of persons upon mere questions of morality, when such objects can only be reached by the force of public opinion, and that alone."[177]

Although the leading principles of republican government in 1850 may have required a healthy respect for individual rights, they certainly did not include a prohibition against banking, a prominent feature of the 1846 constitution.[178] That prohibition proved to be ill-advised: it allowed worthless currency to flood into Iowa from other states and destroy credit.[179] The ever-increasing population of Iowa, moreover, had become enamored with the new Republican Party[180] and less with the old Whig and Democratic ones, whose members had been responsible for drafting the 1846 constitution and its unpopular banking clause.[181] Dissatisfaction with that constitution never died;

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176. 1 *id.* at 426-27. During this address, Governor Hempstead also observed that the state constitution was "eminently calculated to secure to us the enjoyment of life, liberty, equality, and the pursuit of happiness." 1 *id.* at 425.

In his second biennial message in 1854, Governor Hempstead questioned whether religion should play a factor in politics. 1 *id.* at 460. In words that sound strikingly similar to those of Locke and Mill, he noted that the state constitution guards "against the proscription or intolerance, either by legislation or individuals, and to leave to every one the right of judging for himself upon questions which relate to eternity, and over which human governments cannot properly exercise control." 1 *id.*

177. 1 *id.* at 427. As one newspaper editor argued:

> The object of a Constitution we conceive to be, [is] to set the wheels of government in motion and at the same time to secure from the reach of ordinary hasty legislation, certain inalienable rights of the citizen which are of too high a nature to be exposed to the varying opinions of the day.

FRAGMENTS, *supra* note 151, at 390-91.

178. James, *supra* note 76, at 41-42; SAGE, *supra* note 63, at 135.

179. WISDOM, *supra* note 77, at 118; Ross, *supra* note 86, at 102.

> Farmers in newly settled regions where cash was in especially short supply generally favored paper money and the inflation it would bring as a device to obtain capital and hence economic growth they could not otherwise enjoy. Established mercantile groups, who stood to be paid in inflated paper for what they bought with hard cash, opposed the circulation of paper currency although they might support creation of a bank from which they would profit.

WILLIAM E. NELSON & ROBERT C. PALMER, CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 39 (1987).

180. SAGE, *supra* note 63, at 124, 130-34; David Sparks, *The Birth of the Republican Party in Iowa, 1854-1856*, 63 IOWA J. HIST. & POL. 1 (1956). In their first organized campaign, the Republicans stunned the Democrats on August 4, 1856, when they swept the election "with ridiculous ease," including a two-to-one majority in each branch of the General Assembly. ROSENBERG, *supra* note 72, at 141.

181. HOULETTE, *supra* note 88, at 128; *see* ROSENBERG, *supra* note 72, at 222-25, 238. As one delegate to the 1857 constitutional convention remarked, "[T]he question of banking in this State was one of the controlling, if not the controlling reason for calling this Convention . . . ." 1 THE DEBATES, *supra* note 4, at 19.

proposals of a third constitutional convention circulated in the General Assembly as early as 1847.[182]

In August 1856, a majority of voters agreed with the narrow proposal of "revising and amending" the 1846 constitution.[183] A majority of the thirty-six delegates, who averaged forty years in age, were Republicans.[184] Most of them had little or no experience in either territorial or state government,[185] and nothing suggests an especially brilliant group of men assembled in Iowa City on January 19, 1857, to write the new constitution. They seemed beholden to their parties, their politics, and their home districts, all of which had a tendency to get in the way; for example, parochialists spent a fair amount of time griping about the inhospitality of the host city before the convention got down to the important business of constitution-making.[186]

The first designated committee was the one responsible for tinkering with the bill of rights;[187] its chairman was a Republican from Scott County,

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182. SHAMBAUGH, *supra* note 4, at 215; 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 451; *see* ROSENBERG, *supra* note 72, at 147. In addition to planning for a new constitution, the General Assembly soon acted to codify all the new laws of the state. 1 GUE, *supra* note 74, at 264-65. It arranged for the publication of the Iowa Code, prefaced by the words of the Declaration of Independence, in 1851. 1 *id.*

183. SHAMBAUGH, *supra* note 4, at 217; 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 451. The revisions and amendments, among other things, provided for the creation of the lieutenant governor's office; the election of supreme court justices, the attorney general, and district attorneys; a limitation on state indebtedness; the creation of the permanent school fund; and the creation of the constitutional amendment process. James, *supra* note 76, at 49-50 n.101; Ross, *supra* note 86, at 102-08.

The convention's president, Francis Springer, later indicated that the delegates had placed their own ideas into the wording of the 1857 constitution: twenty-five years after the convention he said the constitution had not been "a mere transcript or compilation made up of constitutional law, borrowed from other constitutions." Van der Zee, *The Constitutional Convention of 1857*, 12 IOWA HIST. REC. 481, 490 (1896). *But see* Collins, *supra* note 24, at 205 (noting that the framers of most state constitutions generally borrowed from the constitutions of other states).

184. Ross, *supra* note 86, at 102. Twenty-one delegates were Republicans, fifteen were Democrats. SAGE, *supra* note 63, at 134. The members of the new Republican Party, while committed to the democratic method, were cautious of majority rule. ZAINALDIN, *supra* note 103, at 12-13.

185. SAGE, *supra* note 63, at 134-35; Erik M. Eriksson, *The Framers of the Constitution of 1857*, 22 IOWA J. HIST. & POL. 52, 54-55 (1924). *But see* WISDOM, *supra* note 77, at 119 (noting that the delegates were "[e]xperienced in affairs of state"). *See generally Contemporary Editorial Opinion of the 1857 Constitution*, 55 IOWA J. HIST. & POL. 115, 121 (1957); Van der Zee, *supra* note 183, at 481-84. Three of the delegates dominated the proceedings: Rufus L.B. Clarke, a Mount Pleasant attorney; William Penn Clarke, an Iowa City attorney with ties to John Brown's anti-slavery circle; and Jonathan C. Hall, a railroad promoter and future justice of the Supreme Court of Iowa. SAGE, *supra* note 63, at 134-45; *see* ROSENBERG, *supra* note 72, at 139-40. "Others offered little except unsung hack work on the committees. The external evidence shows that a very few men did most of the originating work and the others merely voted yes or no." *Id.* at 135.

186. 1 THE DEBATES, *supra* note 4, at 12-19; SHAMBAUGH, *supra* note 4, at 218-19.

The delegates may have had good reason to complain about their lodging: some slept "three in a bed and two in a bunk." McClain, *supra* note 148, at 155, 170.

187. SHAMBAUGH, *supra* note 4, at 228.

George Ells, a forty-eight year old lawyer and farmer originally from Connecticut.[188] His five-member committee included two Republicans originally from New York and two Democrats originally from Ohio.[189] Their draft bill of rights became one of the hottest topics of debate during the thirty-nine-day session,[190] and again, the underlying issue concerned the rights of Negroes,[191] even though at the time a mere two hundred seventy-one of them lived among the half-million residents of Iowa.[192]

Starting with the 1846 constitution and arming itself with other constitutions and assorted law books,[193] the committee proposed an expanded bill of

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188. *See* Eriksson, *supra* note 185, at 65.

189. The Democrats on the committee were Timothy Day, a 53-year-old farmer who mostly limited himself to voting, and Aylett R. Cotton, a 30-year-old lawyer who took practically no part in the proceedings. The Republicans on the committee were S.G. Winchester, a 26-year-old bookseller and druggist, and John T. Clark, a 40-year-old lawyer. *See* Eriksson, *supra* note 185, at 65-68, 77. All of the committee members voted in favor of the constitution's passage at the end of the convention. *See id.* at 78-79.

190. SHAMBAUGH, *supra* note 4, at 236; James, *supra* note 76, at 44; Eriksson, *supra* note 185, at 69. "[P]ratically every public question was viewed in the light of" the issue of slavery. *Contemporary Editorial Opinion of the 1857 Constitution*, *supra* note 185, at 115.

191. Eriksson, *supra* note 185, at 69-70. This fact should not be surprising: in 1857, the foremost issue in national affairs involved the rights of the Negro. BERGMANN, *supra* note 133, at 11. The delegates as a whole were willing to concede that the undesirable Negro "was a human being, but unwilling to agree that he should enjoy any privileges as a member of the body politic. There was a general disclaimer of any inclination to induce accession of Negroes to the population of the State." McClain, *supra* note 148, at 176. Even Rufus L.B. Clarke, a liberal Whig and lawyer from Henry County, protested at one point that "there is probably no man who has a greater repugnance naturally to [the Negro] race than I have." 1 THE DEBATES, *supra* note 4, at 181.

Like the delegates to the 1844 and 1846 constitutional conventions, the delegates as a whole in 1857 harbored great fear that a progressive constitution concerning the rights of Negroes would bring them in droves to Iowa. *E.g.*, 1 THE DEBATES, *supra* note 4, at 130, 131, 133, 173. Of course, there were some men like Ells, who stood before the convention and proclaimed, "I go for the principle, that every man should stand upon his moral worth, I do not care what his complexion or creed is." 1 *id.* at 175; *accord id.* at 192 (remarks by committee member John T. Clark of Allamakee County).

192. 2 MESSAGES AND PROCLAMATIONS OF THE GOVERNORS OF IOWA, *supra* note 82, at 24; SAGE, *supra* note 63, at 136. Jonathan C. Hall, a convention delegate originally from New York and future justice of the Supreme Court of Iowa, viewed the Negro question in a less-than-serious attitude at one point: in speaking of another delegate, Hall said that he "is from Kentucky, and smells a nigger instinctively." 1 THE DEBATES, *supra* note 4, at 131. Sadly, the convention reporter noted that the comment by Hall, who opposed slavery for Negroes, occasioned laughter from other delegates. 1 *id.*; *see* 1 *id.* at 135.

193. 63 IOWA OFFICIAL REG. 265-66 (1989-1990); 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 407; McClain, *supra* note 148, at 172; Eriksson, *supra* note 185, at 76-77; Ross, *supra* note 86, at 114; *see* 1 THE DEBATES, *supra* note 4, at 88-89, 90, 98, 103, 113, 153. Constitutional amendments and judicial decisions from Illinois, Ohio, and Wisconsin were frequently referred to by the delegates. 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 467. *See generally* DEALEY, *supra* note 6, at 51-52. Also referred to were the constitutional conventions of Indiana, New York, and Ohio. 1 THE DEBATES, *supra* note 4, at 44, 105, 169, 190, 199, 213. George Gillaspy, a delegate from Wapello County, apparently did not favor too much reliance on legal

rights for the persons the new constitution would unquestionably protect.[194] Ells stood before the convention at various times and remarked about his committee's proposals in language reminiscent of Locke:

> The [members of my committee] . . . were singularly unanimous in their conclusions; they were all desirous of maintaining the Bill of Rights in the present constitution, by the addition only of such provisions as would enlarge, and not curtail the rights of the people. They did not doubt that the people . . . heretofore exercised all the rights which freemen may enjoy under any charter of liberty, *but they did desire 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.*
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> . . . .
>
> In common with a large majority of the people of this State, I desire to see our constitution contain every guarantee for freedom that words can express.
>
> . . . .
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> [My committee wishes] to make the Bill of Rights as full and perfect as possible . . . . *[T]he object we have in view is to protect every man in the enjoyment of the largest liberty consistent with his duties to civil government.*[195]

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authority in framing the constitution: He informed the convention that his constituents, "do not expect this Constitution to be made wholly by lawyers." 1 *id.* at 91.

194. SHAMBAUGH, *supra* note 4, at 270-71; WISDOM, *supra* note 77, at 119.

The convention parried away petitions seeking to grant the legislature power to ensure "observance of the Christian Sabbath" and to prohibit the manufacturing of and trafficking in liquor; however, it rejected a proposed right of citizens to bear arms. *See* 1 THE DEBATES, *supra* note 4, at 47, 115, 126, 139.

"The expanded bill of rights reflected the mounting sectional issues of the day. Section 4 and 6 were intended to establish equality of legal capacity in all residents, including blacks." 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 467.

At least to Ells, the chairman of the committee on the bill of rights, little doubt existed as to the necessity of a written bill:

> [T]he history of the world teaches us the absolute necessity of guarding well the rights of the people; for power is always receding from the many to the few. . . . The annals of the world also furnish many instances in which the freest and most enlightened governments that have ever existed upon earth, have been gradually undermined, and actually destroyed, in consequence of the people's rights not being guarded by written constitutions.
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> . . . .
>
> But allow me to say . . . that I do not consider that we are conferring power upon the people by the Bill of Rights. I hold that every right contained in this bill exists in the people, and we are but simply embodying these ideas in a tangible form . . . .

1 THE DEBATES, *supra* note 4, at 100-01, 102.

195. 1 THE DEBATES, *supra* note 4, at 100, 102 (emphasis added); *see* State v. Dunham, 6 Iowa (C. Cole) 245, 253 (1858) (personal liberty is "essential to the prosperity and advancement of every free government"). Ells's apparent concern about overly broad legislative power was shared, it seems, by the convention as a whole. Its lengthening of the legislative article reflected the nineteenth century conviction "that the lawmaking process should be rigidly circumscribed."

The committee's proposed revision of the bill of rights included the insertion of the word "equal" in lieu of "independent" in the natural rights clause, which since 1846 had provided: "All men are, by nature, free and independent, and have certain unalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."[196] During the convention a short debate ensued about which word "declared the great[er] truth," with committee member John T. Clark of Allamakee County arguing that "independent" included "equal," "that you cannot make it more definite and broad than it is now," and that the original version "comprehends every thing that we can claim by the laws of nature and Nature's God."[197] The convention ultimately accepted the committee's version of the natural rights clause,[198] which had been premised upon the words written eighty-one years earlier by Mason and Jefferson.[199]

The laws of nature and Nature's God often entered into the debates.[200] Delegates would speak of such rights in reverential terms or quote the new clause on natural rights or the Declaration of Independence.[201] Others would emphasize the need for the new constitution to protect zealously the rights of minorities.[202] Rufus L.B. Clarke of Henry County, a forty year old lawyer

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3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 467. In other words, the national mood generally did not favor great legislative power: "Legislatures were no longer honored bodies but were repressed [in the new state constitutions] by limitations on their powers . . . ." DEALEY, *supra* note 6, at 54; *accord* STAMPP, *supra* note 133, at 25-30; Kempkes, *supra* note 5, at 41-44.

196. IOWA CONST. of 1846, art. I, § 1.

197. 1 THE DEBATES, *supra* note 4, at 104. *But see* Duncan v. City of Des Moines, 268 N.W. 547, 551 (Iowa 1936) (IOWA CONST. art. I, § 1 "is essentially the same as" IOWA CONST. of 1846, art. I, § 1). *Cf.* Herman v. State, 8 Ind. 545, 566 (1855) (natural rights clause in the Indiana Constitution designed to protect minorities).

198. 1 THE DEBATES, *supra* note 4, at 104.

199. Pittman, *supra* note 46, at 875; *cf.* Cason v. Baskin, 20 So. 2d 243, 250 (Fla. 1944) (natural rights clause "is a positive guarantee" of "certain basic individual rights" that follows "quite closely the thought contained" in the Declaration of Independence); Madison & I. R.R. v. Whiteneck, 8 Ind. 217, 223-26 (1856) (natural rights clause originated with enlightenment ideas against despotism, which were set forth in the Declaration of Independence); Monrad G. Paulsen, *"Natural Rights"—A Constitutional Doctrine in Indiana*, 25 IND. L.J. 123, 123 (1950) (natural rights clause is "a statement of Jeffersonian political theory").

200. *E.g.*, 1 THE DEBATES, *supra* note 4, at 100-01, 139, 173, 191-93, 196-97, 199, 307, 310, 326, 332, 337, 338. Of the 1066 pages of recorded debate, 142 were devoted to the bill of rights. Eriksson, *supra* note 185, at 69.

Jeremy Bentham's thesis that law alone created rights "never seems to have gained any foothold in United States jurisprudence." Brian Walsh, *200 Years of American Constitutionalism—A Foreign Perspective*, 48 OHIO ST. L.J. 757, 759 (1987).

201. 1 THE DEBATES, *supra* note 4, at 173, 196.

202. 1 *id.* at 139, 191.

originally from Connecticut and the convention's most influential liberal,[203] observed at one point:

> Is it not better to endeavor to protect the poor and the feeble in our constitution, than the wealthy, and the powerful and the mighty? They can take care of themselves. But we are trying to throw a shield over the feeble and the weak, and to keep the oppressors from treading them down with their iron heels.[204]

The arguments underlying the expansion of individual rights apparently carried the day, for the delegates voted to approve the proposed revisions of the 1846 bill of rights by twenty-six to six.[205] Before adjournment on March 5, President Francis Springer[206] addressed the convention and proudly remarked that the delegates had produced "some new and important guards for the security of popular rights."[207]

By a vote of 40,311 to 36,681, the voters ratified the new constitution on Monday, August 3, 1857.[208] By a margin of six to one, they rejected a hotly

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203. *See* Eriksson, *supra* note 185, at 82-83.

204. 1 THE DEBATES, *supra* note 4, at 133. J.H. Emerson of Dubuque, a 49-year-old real estate dealer originally from Virginia, eloquently argued,

> I do not believe this is a purely Democratic form of government, and . . . I do not believe in that pure Democracy, or rather the Iron will of the majority enact their laws at the ballot box. If that were our form of Government it would be unnecessary for us to be here to-day making a Constitution. We came here simply to protect the rights of the weaker, the minority if you please.

1 THE DEBATES, *supra* note 4, at 112.

Then, like now, "[s]tate governments did not dictate policies from on high. Rather, they channeled the energies of the people. They remained, throughout the [antebellum] era, extremely responsive to local political forces. . . . [T]hey favored those persons, groups, or interests who were best able to mobilize support for the laws they favored." ZAINALDIN, *supra* note 103, at 50.

205. 2 THE DEBATES, *supra* note 4, at 1008; Eriksson, *supra* note 185, at 69. All six votes against its passage came from Democrats: delegates Emerson, Gillaspy, Palmer, Patterson, Peters, and Solomon. 2 THE DEBATES, *supra* note 4, at 1008.

206. Ironically, President Springer railed against a constitutional convention and statehood in 1842: "'Are we slaves? Is our liberty restricted? . . . Is the rod of oppression held over us by [the federal territorial government]? Has that [g]overnment manifested its care toward us by sending persons to "spy out our liberties . . .?'" SHAMBAUGH, *supra* note 4, at 109.

207. 2 THE DEBATES, *supra* note 4, at 1066; *see* 1 GUE, *supra* note 74, at 284-85; Eriksson, *supra* note 185, at 88.

At least one group apparently has acknowledged that the delegates in 1857 produced a particularly fine bill of rights: in 1921, the National Municipal League used it for the first Model State Constitution. *See* Ross, *supra* note 86, at 103. *See generally* Van der Zee, *Proposed Constitutional Amendments in Iowa 1857-1909*, 8 IOWA J. HIST. & POL. 171, 174-84 (1910).

208. 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 70, at 467. The margin of ratification indicated "a very puny endorsement" of a constitution defended and attacked primarily along partisan lines. SAGE, *supra* note 63, at 137.

contested proposal to strike the adjective "white" from various constitutional provisions, including the one defining the right of suffrage.[209]

IV. IOWA CONSTITUTION ARTICLE I, SECTION 1

> *Facts were simpler because men's interests did not yet interweave to the extent that they did later when urban living and a highly specialized economy complicated patterns of living. In the early nineteenth century men still saw their relationships largely on a one-to-one basis . . .; they had little sense of individual helplessness in the face of great impersonal social currents; they felt little awareness that the public might have concern with matters wholly "private" in origin.*[210]

Lawyers and judges examining the 1857 constitution and seeking to find the scope, import, and purpose of its clauses and amendments should be prepared to enter a veritable and largely uncharted Sargasso Sea.[211]

A. *General Purpose*

The first question concerning the natural rights clause is, given the absence of any commanding word or phrase, whether it provides a substantive ground for relief against state action, whether it merely serves as an interpretive guide for other (and now better known) clauses, or whether it carries any constitutional weight at all.[212]

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209. *See* ROSENBERG, *supra* note 72, at 151.

> Some Democratic newspapers were almost apoplectic in their reaction to the new constitution and to the codicil which submitted to the voters the question of striking out the word "white" from the new constitution. Vociferated the Du Buque *North-West*, "What man who has one drop of Anglo-Saxon blood in his veins, and who has the spirit of a free born American, would consent to have his little sons and daughters, bound by the Constitution and laws of his State to become the associates, schoolmates and equals in every other respect, as is designed, of the thick-lipped and wooly headed negro."

BERGMANN, *supra* note 133, at 21. The vote was 49,387 against and 8489 for striking the word "white" from the constitution. SAGE, *supra* note 63, at 136; *see* IOWA CONST. art. II, § 1 (amended 1868). As a result, Negroes held second-class citizenship when it came to education, office-holding, property rights, schooling, and jury duty. SAGE, *supra* note 63, at 136.

210. JAMES W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 339 (1950).

211. *See* Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 3, at 247. *See generally* Newman, *supra* note 174 (setting forth sources for interpreting state constitutions).

212. With regard to natural rights clauses, their

Courts have traditionally presumed that the drafters of a constitution intended to give substantive meaning to every provision,[213] and in the case of the Iowa Constitution's natural rights clause, nothing exists to rebut this presumption.[214] To the contrary, the drafters' placement of it at the very head of the constitution and discussion about its underlying themes throughout their debates strongly support the presumption of substantive meaning.[215]

> principles of liberty and democracy are now so thoroughly ingrained in our legal systems as hardly to need explicit statement in a constitution, yet they will doubtless be long retained as assurances against possible legislative tyranny and as mementos of former struggles. . . . Evidently such provisions . . . are well worth preserving in our fundamental law. On the other hand one may question whether it is worth while to retain references to the exploded theory of social compact.

DEALEY, *supra* note 6, at 125; *see* STIMSON, *supra* note 44, at 45 (the more abstract provisions of American constitutional documents "have so far hardly resulted in more than the sounding phrases in which they are couched"); Paulsen, *supra* note 199, at 123 (regarding the natural rights clause in the Indiana Constitution, "no one [should] suppose that these sentiments are merely pious expressions of hope"); Robert Twomley, *The Indiana Bill of Rights*, 20 IND. L.J. 211, 221 (1945) (Indiana Constitution's natural rights clause sets forth "a general statement of a persuasive principle which should act as a guide post for the various functions of government"); Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1206 (1985) (natural rights clause in the Texas Constitution seems only "to declare political truths").

213. Martin B. Margulies, *A Lawyer's View of the Connecticut Constitution*, 15 CONN. L. REV. 107, 109 (1982).

> It is . . . axiomatic that every statement in a state constitution must be interpreted in light of the entire document, that all fundamental principles are of equal dignity, and that none may be so construed as to nullify, substantially impair or avoid giving effect to any other portion of the document.

Utter, *supra* note 211, at 250. *See generally* 1 COOLEY, *supra* note 8, at 124-29.

214. "[I]t is a Constitution that is being interpreted and as a Constitution it would serve little of its purpose if all that it promised, like the elegantly phrased Constitutions of some totalitarian or dictatorial Nations, was an ideal to be worshipped when not needed and debased when crucial." Flushing Nat'l Bank v. Municipal Assistance Corp., 358 N.E.2d 848, 854 (N.Y. 1976).

215. "Appearing . . . at the very threshold of the Iowa Bill of Rights, that constitutional safeguard is thereby emphasized, and shown to be paramount." Hoover v. Iowa St. Highway Comm'n, 222 N.W. 438, 439 (Iowa 1928); *cf.* State *ex rel.* Davis v. City of Stuart, 120 So. 335, 337 (Fla. 1929) (Florida's constitution gives primacy of position to its declaration of rights, the first of which is a natural rights clause).

"The practical potential of these statements of principle [set forth in natural rights clauses] was not lost on their authors and other contemporaries. We know of opposition to the . . . clause in the convention that drafted the Virginia bill of rights." ADAMS, *supra* note 41, at 157-58.

> [The drafters of the Indiana Constitution designed its natural rights clause] as a fundamental provision, binding up the supreme power. It was necessarily general. They could not look down the stream of time and see all the cases wherein it would be proper for a state government to exert legislative power, specifying them and excluding all others, thus protecting the rights reserved; nor could they anticipate all the various attempts that might be made to invade these rights, and expressly prohibit them.

Madison & I. R.R. v. Whiteneck, 8 Ind. 217, 227-28 (1856).

The Supreme Court of Iowa, moreover, has never treated the natural rights clause as anything less than a full-fledged constitutional provision. For example, when a challenge against the laws heavily regulating the business transactions of transient merchants arose in 1915, the court observed,

> The constitutional right to life and liberty and to acquire, possess, and enjoy property [in article one, section one] is not a mere glittering generality without substance or meaning. It includes the right to pursue a useful and harmless business without the imposition of oppressive burdens by the lawmaking power . . . .[216]

More recently, the supreme court has held that the natural rights clause provides prison escapees with the defense of necessity[217] and has indicated that it permits witnesses to limit their cross-examination if it jeopardizes their or their families safety.[218]

B. *Language, Original Intent, and the* Sic Utere *Doctrine*

Although little doubt exists that the natural rights clause carries substantive meaning,[219] the Supreme Court of Iowa has done virtually nothing in charting its ebbs and flows; in no case has the supreme court examined either its text or the reasons for its inclusion in the constitution.[220]

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216. State v. Osborne, 154 N.W. 294, 300 (Iowa 1915).

217. State v. Reese, 272 N.W.2d 863, 866 (Iowa 1978); *see* State v. Ward, 152 N.W. 501, 502 (Iowa 1915) (a property owner may, under the natural rights clause, raise the defense of necessity against wild animals injuring the property).

218. Gibb v. Hansen, 286 N.W.2d 180, 188 (Iowa 1979).

219. The story in Virginia concerning its natural rights clause appears to be different:

> [It] has often been discussed in the decisions of the Virginia Supreme Court of Appeals, but its language, strictly speaking, is more exhortatory than enforceable. Nevertheless, the Commission is strongly of the view that such declarations . . . are an important part of the Bill of Rights, and . . . the Commission does *not* recommend restricting the Bill of Rights to language which is judicially enforceable.

THE CONSTITUTION OF VIRGINIA: REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 87-88 (1969). The Supreme Court of Kentucky in contrast, apparently agrees with the position taken by the Supreme Court of Iowa that the natural rights clause carries substantive meaning. *See* Commonwealth v. Wasson, 842 S.W.2d 487, 491 (Ky. 1992) ("sodomy statute" violates natural rights clause of the Kentucky Constitution).

220. Gibb v. Hansen, 286 N.W.2d at 185-86; Hawkins v. Preisser, 264 N.W.2d 726, 729 (Iowa 1978); Diamond Auto Sales v. Erbe, 105 N.W.2d 650, 651 (Iowa 1960); Steinberg-Baum & Co. v. Countryman, 77 N.W.2d 15, 19 (Iowa 1956); Jacobs v. City of Chariton, 65 N.W.2d 561, 569 (Iowa 1954); May's Drug Stores v. State Tax Comm'n, 45 N.W.2d 245, 250 (Iowa 1950); State v. Otterholt, 15 N.W.2d 529, 531 (Iowa 1944); Benschoter v. Hakes, 8 N.W.2d 481, 487 (Iowa 1943); Clark v. Herring, 260 N.W. 436, 438-39 (Iowa 1935); *In re* Emerson's Estate, 183 N.W. 327, 329 (Iowa 1921); State v. Bartels, 181 N.W. 508, 513-14 (Iowa 1921), *rev'd*, 262 U.S. 1104 (1923); State v. Ward, 152 N.W. 501, 502 (Iowa 1915). *But see* Commonwealth v. Wasson, 842 S.W.2d 487, 491 (Ky. 1992) (noting the background and purpose of the natural rights clause in the Kentucky Constitution).

The Supreme Court of Iowa has summarily stated that the protections in the clause equate with the protections of due process and equal protection in the Fourteenth Amendment to the federal constitution.[221] While perhaps convenient for deciding cases also involving challenges under the Fourteenth Amendment,[222] this arithmetic should immediately raise a few eyebrows.[223]

Courts recounting constitutional history, however, may still stumble. As one state supreme court justice has pointed out, lawyers "who take seriously recent U.S. Supreme Court historical scholarship as applied to the Constitution also probably believe in the Tooth Fairy and the Easter Bunny." RICHARD NEELY, HOW COURTS GOVERN AMERICA 18 (1981).

At least one delegate to the 1857 convention in Iowa City, Harvey Skiff, believed that history would not help those in the future: "[The words one hears in this constitutional convention] are all made for 'the dear people' at large in the State. I do not believe these speeches will ever be read, or if they are read, it will at any rate be a 'waste of time.'" SHAMBAUGH, *supra* note 4, at 243-44.

221. Harden v. State, 434 N.W.2d 881, 885-86 (Iowa), *cert. denied*, 493 U.S. 869 (1989); Federal Land Bank v. Arnold, 426 N.W.2d 153, 156 (Iowa 1988); Vilas v. Iowa State Board of Assessment & Review, 273 N.W. 338, 342 (Iowa) (IOWA CONST. art. 1, §§ 1 and 6 "contain practically the same guarantees found in the 'due process' clause and 'equal protection of the law' clause of the Fourteenth Amendment"), *appeal dismissed*, 302 U.S. 637 (1937); McGuire v. Chicago, & Q. R.R., 108 N.W. 902, 905 (Iowa 1906) (IOWA CONST. art. 1, §§ 1 and 6 are "substantially similar" to federal constitutional guarantees of due process and equal protection), *aff'd*, 219 U.S. 549 (1911); *accord* James C. Kirby, Jr., *Expansive Judicial Review of Economic Regulation Under State Constitutions*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 3, at 94, 132 n.4 (IOWA CONST. art. 1, § 1 is "parallel" to the federal constitutional guarantee of equal protection); *see* Hawkins v. Preisser, 264 N.W.2d 726, 730 (Iowa 1978) (Harris, J., dissenting) (IOWA CONST. art. 1, §§ 1 and 6 combine to provide equal protection of the laws); *cf.* Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985) (natural rights clause "seeks to protect against injustice and against the unequal treatment of those who should be treated alike," and "[t]o this extent [it] safeguards values like those encompassed by the principles of due process and equal protection" in the Fourteenth Amendment); Henry v. Bauder, 518 P.2d 362, 365 (Kan. 1974) (natural rights clause equated with the Due Process Clause of the Fourteenth Amendment). *But cf.* Duncan v. City of Des Moines, 268 N.W. 547, 551 (Iowa 1936) (IOWA CONST. art. 1, § 9 "conveys the same idea" as the federal constitutional guarantee of due process).

At least on one other occasion, the court employed no analysis in concluding that the natural rights clause, in conjunction with IOWA CONST. art. 1, § 9, required invalidation of a statute mandating cosmetology-school students to perform gratuitous work while obtaining practical experience. *See* State *ex rel.* Mitchell v. Thompson's Sch. of Beauty Culture, 285 N.W. 133 (Iowa 1939). Such a requirement, the court summarily stated, amounted to an arbitrary interference with private business and the right to contract, and imposed unnecessary restraints upon a lawful occupation. *Id.* at 135.

222. The Fourteenth Amendment provides, in pertinent part, that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

223. "It often seems as though state courts are unaware that their state constitutions differ from the Fourteenth Amendment." Williams, *supra* note 45, at 82. "[S]tate constitutional provisions having equality implications often derive from different historical circumstances than those which gave rise to the Fourteenth Amendment, are aimed at different evils, and commonly are framed in different terms." A.E. Dick Howard, *Introduction: A Frequent Recurrence to Fundamental Principles*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 3, at

First, the natural rights clause preceded passage of the Fourteenth Amendment by eleven years; second, the drafters of the Iowa Constitution took pains in 1857 to provide specifically for due process a mere five clauses after the natural rights clause;[224] and third, the supreme court has consistently construed the state constitutional clause requiring the uniform application of laws to provide equal protection of the laws.[225] Just as important, equating the state clause with the federal one completely ignores the significant differences between them textually.[226]

The natural rights clause sets forth language substantially broader than the language set forth in any federal constitutional clause. It specifies that all men, "by nature," are "free and equal"[227] and have "*certain inalienable rights*," which, at a minimum,[228] include "*enjoying and defending life and lib-*

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xviii. *See* Utter, *supra* note 211, at 242 (state constitutions "often protect individual rights that are nowhere explicitly recognized" in the federal constitution).

Stare decisis need not, however, terminate the modern-day quest to discover the meaning of the Iowa Constitution's natural rights clause. As a justice from Ohio once reasoned:

> I care not what some court decisions may hold about it, no infamy is too infamous that some decisions of some court somewhere cannot be found to support it; even witchcraft and slavery were defended by some very plausible opinions. But the language of the Constitution is not the language of a court, and must not be considered from the angle of the professional mind, from the viewpoint of legalism, or the squint of a technical judge.

Local Tel. Co. v. Cranberry Mut. Tel. Co., 133 N.E. 527, 531 (Ohio 1921) (Wanamaker, J., dissenting).

224. *But cf.* James C. Harrington, *Privacy and the Texas Constitution*, 13 VT. L. REV. 155, 159 (1988) (Texas Constitution sets forth two independent sections on due process).

225. *See, e.g.*, City of Waterloo v. Selden, 251 N.W.2d 506, 509 (Iowa 1977); Lunday v. Vogelmann, 213 N.W.2d 904, 907 (Iowa 1973), *overruled on other grounds by* Miller v. Boone County Hosp., 394 N.W.2d 776 (Iowa 1986); Graham v. Worthington, 146 N.W.2d 626, 638 (Iowa 1966).

Although the Supreme Court of Iowa remains the final arbiter of the Iowa Constitution, its decisions equating IOWA CONST. art I, § 6—requiring uniform application of the law—with the Fourteenth Amendment's Equal Protection Clause appear to have no legal support. *See* Kempkes, *supra* note 5, at 38 n.28.

226. "Constitutional text is important not for what a court must decide but for what it cannot plausibly decide." Linde, *supra* note 24, at 294. *See generally* Laurence Tribe, *On Reading the Constitution*, 1988 UTAH L. REV. 747, 751-59.

227. "Not only do we [not] know what Jefferson meant when he wrote [in the Declaration of Independence] that all men are created equal . . ., but it is most improbable that Jefferson himself had any very clear idea what the phrase meant." Commager, *supra* note 24, at 15; *cf.* Coger v. Northwest. Union Packet Co., 37 Iowa 145, 154-55 (1873) (equality in the natural rights clause is expressed "in language most comprehensive, and incapable of misconstruction"). *See generally* Williams, *supra* note 45, at 72-82.

228. *See* Commonwealth v. Wasson, 842 S.W.2d 487, 502-03 (Ky. 1992) (Combs, J., concurring).

Iowa Constitution article one, section 25 provides: "The enumeration of rights shall not be construed to impair or deny others, retained by the people." This clause plainly implies that the people reserved other rights the General Assembly could not impair. *See* 1 COOLEY, *supra* note 8, at 173. Like the Ninth Amendment to the federal constitution, it provides a rule of interpretation. *See generally* Tribe, *supra* 226, at 789.

erty," "acquiring, possessing and protecting property," and "*pursuing and obtaining safety and happiness.*"[229] These assuring words, which should be liberally construed,[230] do not have

> a single, definite, unqualified meaning. Their meaning is subject to certain qualifications. . . . [T]he phrase "inalienable rights" . . . does not have the same meaning when applied to property as applied to life and liberty. . . . In the one case the right is a natural claim, in the other a just claim resting upon principles of law. In the one case the right attaches as soon as one comes into existence; in the other it attaches when sanctioned, authorized, supported by law.[231]

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229. IOWA CONST. art. 1, § 1 (emphasis added). "[The natural rights clause in the Wisconsin Constitution serves] as the substructure upon which our whole constitutional system is bottomed. It breathes the all-pervading purpose of the whole body of fundamental law. Around and upon it are clustered all other things as subsidiary in a complete structure." State *ex rel.* McGrael v. Phelps, 128 N.W. 1041, 1046 (Wis. 1910); *see* State v. Redmon, 114 N.W. 137, 138 (Wis. 1907) (natural rights clause in Wisconsin Constitution "was intended to cover a broad field").

William Penn Clarke of Johnson County knew that language was important in drafting the bill of rights. As he pointed out during the debates, "[A] wrong word here in any one section . . . may cause confusion in the legislation of the State for years to come." 1 THE DEBATES, *supra* note 4, at 215. Ells, the chairman for the committee on the bill of rights, took pride in his committee's and the convention's work: "When [Iowans read this bill of rights], I wish them to see how cautious and careful were the men sent [to this convention] to make a Constitution, in putting in plain English what they conceive to be the true, primary and original rights of the people." *Id.* at 144.

230. Stam v. State, 267 S.E.2d 335, 339 (N.C. Ct. App. 1980) ("[I]t is basic that constitutional guarantees should be liberally construed," but they "are not to be construed as absolute or without limitation."), *aff'd in part, rev'd in part*, 275 S.E.2d 439 (N.C. 1981); NORTON, *supra* note 18, at 48, 69, 84-85; *see* Byars v. United States, 273 U.S. 28, 32 (1927) (constitutional provisions "for the security of person and property are to be liberally construed"). *See generally* CARL L. BECKER, NEW LIBERTIES FOR OLD 4 (1941) ("[L]iberty means nothing until it is given a specific content, and with a little massage it will take any content you like.").

231. Marasso v. Van Pelt, 81 So. 529, 532 (Fla. 1919) (Ellis, J., concurring). Judge Ellis also observed:

> "Inalienable," for instance, does not mean that which cannot be deprived of without [a person's] consent. . . . The word is defined . . . as meaning that which one cannot give away or part with even with his own consent, and yet one's life or his liberty is taken from him by the authority of the state for an infraction of a rule or a regulation of society. Thus while one may not sell his life or liberty to another, he may forfeit it to the state.

Id. (Ellis, J., concurring); *see* Slaughterhouse Cases, 111 U.S. 746, 757 (1884) (Field, J., concurring) (inalienable rights include "the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity, or develop their faculties, so as to give them their highest enjoyment"); BLACK'S LAW DICTIONARY 759 (6th ed. 1990); *see also* State *ex rel.* Burlington & Mo. Riv. R.R. v. County of Wapello, 13 Iowa 388, 412 (1862) (the savings clause in the state constitution "contains a positive negation of the presumption that [the rights in article one] exclude[] the existence" of other unenumerated rights).

> Rights, both in England and in America, . . . were qualifiable. Every man was qualified by entry into society; no right was absolute in the modern sense,

Though the natural rights clause may not have a single, definite, unqualified meaning, one matter should remain clear: Its drafters chose to use language more detailed and more encompassing than the grand endowment of rights set forth earlier in the Declaration of Independence and later in the Fourteenth Amendment.[232]

Beyond text lies the matter of "original intent." If that doctrine has any place in state constitutional law,[233] harking back to the tenor of the 1857 con-

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> that is, unqualifiable. Nevertheless, many rights were inalienable. Qualification and alienation were two markedly different matters. Alienation of rights was tantamount to tyranny; qualification of rights was merely the realization of the rights of others in society.

NELSON & PALMER, *supra* note 179, at 66. *See generally* Madison & I. R.R. v. Whiteneck, 8 Ind. 217, 223 (1856) (noting imprecision of words in Indiana Constitution's natural rights clause).

232. *See supra* text accompanying note 42.

233. Traditionally, the construction of a constitutional clause required a court to keep an eye fixed upon the intent of its drafters or those who ratified it. *E.g.*, THOMAS C. MARKS & JOHN F. COOPER, STATE CONSTITUTIONAL LAW 8 (1988); 1 COOLEY, *supra* note 8, at 124-27. That view has been subject to criticism:

> It should . . . be recognized that each generation must necessarily have its own scale of values. In nineteenth-century America, concerned as it was with the economic conquest of a continent, property rights occupied the dominant place. A century later, in a world in which individuality was dwarfed by concentrations of power, concern with the maintenance of personal rights had become more important.

SCHWARTZ, *supra* note 1, at 140.

> The need to broaden the constitutional protection of personal rights received . . . emphasis from the growth and misuse of governmental power in the twentieth-century world. Totalitarian systems showed dramatically what it meant for the individual to live in a society in which Leviathan had become a reality. The "Blessings of Liberty," which the U.S. Constitution's framers took such pains to safeguard, were placed in even sharper relief in a world that had seen so clearly the consequences of their denial.

Id. at 142-43. *See generally* Grady v. Corbin, 495 U.S. 508, 517 n.8 (1990); Burnham v. Superior Court, 495 U.S. 604, 619 (1990); Scott v. Sandford, 60 U.S. (19 How.) 393, 426 (1856) (the constitution "must be construed now as it was understood at the time of its adoption"); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 388 (1821) (the constitution was "framed for ages to come"); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406-07, 415 (1819); Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 72 (1872) (in construing the Civil War amendments, "it is necessary to look to the purpose which . . . was the pervading spirit of them all, the evil which they were designed to remedy"); NELSON & PALMER, *supra* note 179, at 1-2; LAWRENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION (1991); Commager, *supra* note 24, at 17 (theories of original intent "have been relegated to the realm of legal antiquinarianism, but their ghosts still haunt the corridors of court rooms and law schools"); W.F. Dodd, *The Problem of State Constitutional Construction*, 20 COLUM. L. REV. 639 (1920); Reid, *supra* note 113, at 2;.

"No satisfactory historical treatment will yield a constitution adequately suited to our times. The Framers were not gods, and we are neither morally nor intellectually inferior to them." NELSON & PALMER, *supra* note 179, at 139.

"The debate over 'original intent' . . . has united historians in collective disbelief over the historical naivety of the legal community . . . ." Peter S. Onuf, *Introduction: Historians and the Founding*, *in* ESSAYS ON LIBERTY AND FEDERALISM, *supra* note 111, at 5.

stitutional debates in Iowa City tends to suggest that the natural rights clause would invalidate legislation adversely affecting personal liberty and happiness unless their exercise in some way harms or presents an actual and substantial risk of harm to another person.[234] That principle, which Mill would popularize two years later, apparently originated with an old common-law precept: *sic utere tuo alienum non laedas*—use your own property in such a manner as not to injure another.[235] As applied to "enjoying" liberty or

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234. *See* State *ex rel.* Zillmer v. Kreutzberg, 90 N.W. 1098, 1101, 1104 (Wis. 1902) (a person's liberty, which under the natural rights clause "begins where another's terminates," means "an opportunity to act, consistent with the rights of others"; police-power enactments must be based upon injuries to others).

In concluding that a statute prohibiting the manufacture or sale of alcoholic beverages by private individuals violated the Indiana Constitution's natural rights clause, one mid-nineteenth century justice reasoned:

> The legislature cannot declare any practice it may deem injurious to the public a nuisance and punish it accordingly. . . .
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> . . . .
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> . . . [T]he right of liberty and pursuing happiness . . . embraces the right, in each *compos mentis* individual, of selecting what he will eat or drink . . . , and . . . the legislature cannot take that right away by direct enactment. . . . If the people are subjected to be controlled by the legislature in the matter of their beverages, so they are as to their articles of dress, and in their hours of sleeping and waking.
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> . . . .
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> . . . [Although it may be argued that] a man shall not use at all for enjoyment what his neighbor may abuse, . . . [that] doctrine . . . would, if enforced by law in general practice, annihilate society, make eunuchs of all men, or drive them into the cells of monks, and bring the human race to an end, or continue it under the direction of licensed county agents. . . .
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> . . . .
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> [U]nder our system of government, founded in the confidence in man's capacity to direct his own conduct, designed to allow to each individual the largest liberty consistent with the welfare of the whole, and to subject the private affairs of the citizen to the least possible governmental interference, some excesses will occur, and must be tolerated . . . .

Herman v. State, 8 Ind. 545, 554, 558, 563, 563-64 (1855). *See generally* Whitney R. Harris, *Freedom and the Businessman*, 37 IOWA L. REV. 196, 196 (1952) (of all natural aspirations of man, "none is more vital than this—that he shall be free").

235. "[T]he ancient law recognized [the maxim] that a person had a legal right 'to be let alone,' so long as he was not interfering with the rights of other individuals or of the public." Bednarik v. Bednarik, 16 A.2d 80, 90 (N.J. 1940), *overruled by* Cartese v. Cartese, 76 A.2d 717 (N.J. 1950); *see* Jonathan A. Weiss & Stephen B. Wizner, *Pot, Prayer, Politics and Privacy: The Right to Cut Your Own Throat in Your Own Way*, 54 IOWA L. REV. 709, 727 (1969). Blackstone, whom Jefferson had studied, summarized the essence of English tort and property law with this maxim, and the one that "the owner of the soil owns to the sky." ZAINALDIN, *supra* note 103, at 58. Blackstone reasoned in the first chapter of his first book,

> Let a man, therefore, be ever so abandoned in his principles, or [vicious] in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself, (as drunkeness, or the like), they then become by the bad example

"pursuing and obtaining" happiness, it involves the notion individuals may freely swing their arms whenever and however they please so long as they stop short of their neighbors' noses.[236]

Through the years, various courts and commentators have discussed this notion underlying the *sic utere* doctrine in attempting to define the limits

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> they set, of pernicious effects to society; and, therefore, it is then the business of human laws to correct them.

II BLACKSTONE'S COMMENTARIES 123 (St. George Tucker ed., Rothman Reprints & Augustus M. Kelly 1969) (1803). Thus, in early English common law,

> The notion of compelling a freeman to do something or to abstain from doing something was foreign to Anglo-Saxon ideas of liberty. Like the doctrine of free will carried to its extreme, a freeman was lord of his own acts; only liable for the consequences of the same, to the person injured; later only to the Crown if a criminal act, and to the individual injured if a private wrong.

STIMSON, *supra* note 44, at 24.

Such ideas may have been first written when Justinian I, ruler of the eastern half of the Roman empire from 527 to 565, commanded 10 of the wisest men in his realm to codify the Roman laws. In the part directed to lawyers and law students, they wrote, "The precepts of the laws are these: to live honestly, to injure no one, and to give every man his due." THE INSTITUTES OF JUSTINIAN 3 (J.B. Moyle trans., 5th ed. 1913).

236. *See* David C. Bazelon, *Civil Liberties Protecting Old Values in the Century*, *in* AMERICAN LAW: THE THIRD CENTURY, *supra* note 1, at 69; *see also* Kent v. Dulles, 357 U.S. 116, 126 (1958) (quoting Edwards v. California, 314 U.S. 160, 197 (1941)) ("'[O]utside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases'"). *See generally* 3 FREDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY 111 (1979) (a model constitution would restrain an individual "only in such conduct as may encroach upon the protected domain of others" and leave him "wholly unrestricted in all actions which affected only his personal domain or that of other consenting responsible persons"); Sir Zelman Cowen, *The Right to Swing My Arm*, *in* INDIVIDUAL LIBERTY AND THE LAW 1-25 (1977).

> I believe the attitude of most people toward freedom comes first from the gut. They are taught and instinctively accept that, in America, people can say what they think, regardless of who likes it; that so long as they don't hurt anyone, what they do in the privacy of their own home is their business.

Nicholas Simeonidis, *The Last Word on Freedom*, 13 NAT'L L.J., Feb. 18, 1991, at 14; *accord* Miami Home Milk Producers Ass'n v. Milk Control Bd., 169 So. 541, 545 (Fla. 1936) (liberty never "has been understood to mean the absolute and unqualified right to do anything that the individual wants to do, regardless of the rights of his neighbor or of the general public"; the framers of the state constitution never intended "that this sacred word should be confounded" with the word "license"); Reynolds v. Milk Comm'n, 179 S.E. 507, 517 (Va. 1935) ("liberty," particularly in view of the "*sic utere* doctrine," means "to do such acts as [the person] may judge best for his interest, not inconsistent with the equal rights of others"); Harris, *supra* note 234, at 197 (no person "is free in the United States to manufacture atomic bombs"); *cf.* 1 THE DEBATES, *supra* note 4, at 153-54 (quoting delegate James F. Wilson: A man "has a right to life, liberty and the pursuit of happiness," and may use "physical force, so [long as] he does not interfere with the rights of others"); 1 *id.* at 313 (quoting delegate Jonathan C. Hall: Government "is the best which is regulated by those principles best calculated to preserve the rights of all, and infringe upon the rights of none, except so far as the legitimate objects of government may require"); 1 *id.* at 338 (quoting delegate William Penn Clarke: "[E]very man [has] a right to use his property as he may consider best, subject only to this exception, that he shall not use it to the injury or prejudice of his neighbors").

of constitutionally guaranteed liberty and happiness.[237] The Supreme Court of Iowa expressly acknowledged the doctrine in 1906, albeit in a case not involving the natural rights clause:

> The spirit which pervades the police power is closely related to that which is embodied in the common-law maxim, "Sic utere tuo alienum non laedas." The liberty of the individual may always be restrained where its unregulated exercise becomes a source of danger or injury to the society of which that individual is a member. "As soon as any part of a person's conduct affects prejudicially the interest of others, society has jurisdiction over it."[238]

C. *Judicial Analysis: The Fourteenth Amendment*

After 1906, the words "sic utere" never reappeared in the pages of Iowa law. In the handful of decisions involving the natural rights clause, moreover, the Supreme Court of Iowa focused not upon text, historical background, intent, or other clues pointing to constitutional meaning, but upon increasingly familiar themes from the theater of federal constitutional law.[239]

In determining whether a particular statute offended the natural rights clause, the Supreme Court of Iowa—which had equated the clause's protections with those of the Fourteenth Amendment[240]—naturally came to rely upon Fourteenth Amendment analysis.[241] Critically important to its conclusion, accordingly, was the weighing of the statute's collective benefits against its restraints on personal liberty—a weighing that required the labeling of individual rights as "fundamental," state interests as "compelling," relationships between legislative means and ends as "rational," and legislative alternatives as "more restrictive."[242] As a result, the supreme court created a body

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237. *See infra* notes 263-69.

238. McGuire v. Chicago, B. & Q. R.R., 108 N.W. 902, 907 (Iowa 1906) (quoting JOHN STUART MILL, ON LIBERTY ch. 4), *aff'd*, 219 U.S. 549 (1911). In *In re* Ruth, 32 Iowa 250, 251-52 (1871), Thomas R. Ruth of Page County, who conceded he did not "possess the [required high] standard of morals," argued the General Assembly did not have the power to insist he obtain a license from a county judge before selling liquor to citizens of "good moral character." His lack-of-equality argument under IOWA CONST. art. 1, §§ 1 and 6 brought forth this response from the supreme court, which elected against using the words "*sic utere*":

> [T]he equality secured to the citizen [under these sections] cannot be exercised to the danger of the lives and property of others; neither can property be acquired, enjoyed and disposed of to the peril of the lives, health, happiness and property of others. The constitution does not interfere with the police power of the State to protect the people in their lives, health and property.

Id. at 252.

239. *See supra* note 220.

240. *See supra* text accompanying note 221.

241. *See supra* text accompanying note 222.

242. *See supra* note 221. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 991-1004 (1978); Jill H. Andersen, *Equal Protection During the 1984*

of law that actually favors challenges grounded upon the natural rights clause. Two arguments support this conclusion.

First, it seems beyond doubt the natural rights clause secures *fundamental* rights of life, liberty, property, safety, and happiness;[243] it protects those preferred personal freedoms that include expression, association, assembly, spirituality, and privacy.[244] Those protected freedoms have been, at times, collectively characterized as "the right to be let alone,"[245] "the right

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Term: Revitalized Rational Basis Examination in the Economic Sphere, 36 DRAKE L. REV. 25, 42 (1986-1987).

243. State *ex rel.* Burlington & Mo. Riv. R.R. v. County of Wapello, 13 Iowa 388, 412 (1862); Lunday v. Vogelmann, 213 N.W.2d 904, 908 (Iowa 1973) (Reynoldson, J., dissenting) (natural rights clause provides a fundamental right of reasonable access to courts), *overruled on other grounds by* Miller v. Boone County Hosp., 394 N.W.2d 776 (Iowa 1986); *see* State v. Rathbone, 100 P.2d 86, 91 (Mont. 1940) (natural rights clause secures fundamental rights); Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985) (same).

Fundamental rights under the federal constitution are those "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Berton Maryland, 395 U.S. 784 (1969). The implication of a fundamental right triggers heightened judicial scrutiny of the legislative means and ends. State action burdening the exercise of a fundamental right requires the state to establish a compelling necessity for it. Roe v. Wade, 410 U.S. 113, 115-56 (1973); United States v. Carolene Prods. Co. 304 U.S. 144, 152-53 n.4 (1938); *see* SMITH, *supra* note 143, at 83 ("[I]t is important to remember that the presumption is in favor of the right, and that, to assign any limit to it, such limit must be affirmatively established."). *But see* Gibb v. Hansen, 286 N.W.2d 180, 186 (Iowa 1979) (when an accused argued the natural rights clause allowed him to refuse giving testimony that he claimed would jeopardize his and his family's safety, the court applied the rational-basis test, which would be employed for analyzing nonfundamental rights "tinged with public concern"); Benschoter v. Hakes, 8 N.W.2d 481, 485 (Iowa 1943) (no problem arises under natural rights clause if a statute amounts to "a reasonable exercise of the police power," which turns on "whether or not the collective benefit outweighs the specific restraint"); Tri-State Hotel Co. v. Londerholm, 408 P.2d 877, 888 (Kan. 1965) (natural rights clause only triggers rational-basis test for nonfundamental rights). *Cf.* Madison & I. R.R. v. Whiteneck, 8 Ind. 217, 227, 229 (1856) (natural rights clause sets forth fundamental principles). *See generally* Stewart G. Pollack, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 722 (1983) (for the rest of this century "the most significant fact may be the extent to which courts look to state constitutions as separate declarations of fundamental rights").

244. Greenberg v. Kimmelman, 494 A.2d 294, 304 (N.J. 1985) (a right of privacy is implicit within natural rights clause). *See generally* State v. Hartog, 440 N.W.2d 852, 854-55 (Iowa), *cert. denied*, 493 U.S. 1055 (1989) ("[W]hile rights of privacy have been found in the shadows of specific [federal] constitutional provisions, there will be considerable reluctance to recognize new rights of privacy that stray from" child rearing and education, family relationships, procreation, marriage, contraception, and abortion.); WHITE, *supra* note 112, at 308-81 (1978) (recounting Supreme Court cases involving constitutional protections of personal tastes, preferences, and expressions); A.E. Dick Howard, *State Constitutions and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 923-34 (1976).

245. Breese v. Smith, 501 P.2d 159, 168-70 (Alaska 1972) (liberty, in natural rights clause, has at its core "the notion of total personal immunity from governmental control: 'the right to be let alone'"); State v. Cotton, 516 P.2d 709, 714 (Haw. 1973) (Abe, J., dissenting) (natural rights clause guarantees that one "has the right to be let alone"); *see* Yoder v. Smith, 112 N.W.2d 862, 863-64 (Iowa 1962) (recognizing a right to be let alone for purposes of a tort action); Bremmer v. Journal-Tribune Publishing Co., 76 N.W.2d 762, 764 (Iowa 1956) (the common-law

to privacy,"[246] "the right to personal autonomy,"[247] "the right to choose one's own lifestyle,"[248] "the right to personal taste," "the right of an individual to

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right to be let alone includes the right "to live a life of seclusion, to be free from unwarranted publicity"); *see also* Public Util. Comm'n v. Pollak, 343 U.S. 451, 467-69 (1952) (Douglas, J., dissenting) (liberty means more than freedom from unlawful governmental restraint; it includes the right to be let alone, which encompasses the right to choose among competing entertainments, propaganda, and political philosophies); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

> [I]n very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. . . . Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone . . . .
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> This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition . . . .

Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 193, 195 (1890); *see* THOMAS M. COOLEY, LAW OF TORTS 29 (1888).

246. "It is now well settled that the right of privacy having its origin in natural law, is immutable and absolute, and transcends the power of any authority to change or abolish it. It is one of the 'natural and unalienable rights' recognized [by our state constitution.]" McGovern v. Van Riper, 43 A.2d 514, 519 (N.J. Ch. 1945), *aff'd in part*, 45 A.2d 842 (N.J. 1946); *see* Barber v. Time, Inc., 159 S.W.2d 291, 294 (Mo. 1942) (an action for money damages based upon invasions of privacy "is, or at least grows out of," natural rights clause). *See generally* 1 SCHWARTZ, *supra* note 113, at 173 (the right of privacy "is peculiarly a product of the urbanized industrial society, . . . closely connected with the development of modern technologies that permit privacy to be invaded to an extent that would have been inconceivable not too long ago").

In Poe v. Ullman, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting), Justice Douglas suggested that a right of privacy "emanates from the totality of the [federal] constitutional scheme under which we live." His suggestion later won approval from a majority of the Court's members. *See* Paul v. Davis, 424 U.S. 693, 712 (1976); Roe v. Wade, 410 U.S. 113, 152 (1973); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees of the Bill of Rights have penumbras, formed by emanations from those guarantees that . . . give them life and substance"; various guarantees "create zones of privacy."). *But see* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (recognizing that a right to privacy arises out of the right to personal liberty rather than from penumbras of other rights); Olmstead v. United States, 277 U.S. 438, 474, 478 (1928) (Brandeis, J., dissenting) (linking a right to privacy with right to personal liberty), *overruled by* Katz v. United States, 389 U.S. 347 (1967). *See generally* Louis Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526, 527 (1941) (the law slowly began to recognize that the right to life in a complex society "includes the right to enjoy life"); Mark John Kappelhoft, Note, Bowers v. Hardwick: *Is There a Right to Privacy?*, 37 AM. U. L. REV. 487, 512 (1988).

Apparently, only a few appellate cases involving privacy have arisen in Iowa. *See* Winegard v. Larsen, 260 N.W.2d 816, 818-19 (Iowa 1977) (tort action may arise for invasion of the right to privacy for oral statements); *see also* Chidester v. Needles, 353 N.W.2d 849, 853 (Iowa 1984) (compulsory disclosure of medical records argued to violate the federal constitutional right of privacy); MRM, Inc. v. City of Davenport, 290 N.W.2d 338, 347 (Iowa 1980) (upholding ordinance prohibiting commercialized sexual activity against federal right-of-privacy challenge). *See generally* Gerald B. Cope, Jr., Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U. L. REV. 631 (1977).

seek his or her own answers,"[249] or "the right to self-ownership."[250] Meaning "something more than physical freedom and a happy home,"[251] these freedoms implicate, among other things,[252] the right of a person to decide:

whether to bear a child;[253]

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247. State v. Kantner, 493 P.2d 306, 313 (Haw.) (Levinson, J., dissenting), *cert. denied*, 409 U.S. 948 (1972); *see* Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (mentioning the "right of the citizen to be free in the enjoyment of all his faculties"); Nichol, *supra* note 18, at 1309 (the federal constitution provides one with the right of self-governance, or personal autonomy in moral decision-making, "to formulate, shape, and act upon the core aspects of one's sense of identity, character, and personality").

248. If the individual is not to be overwhelmed by Leviathan . . . , he must be permitted to retain the essential attributes of individuality . . . free from invasion by governmental power. Above all, in a society in which science places in the hands of those possessing governmental power ever-improved means of intruding upon the heretofore private lives of individuals, it is essential that there remain an area of apartness in which the individual may live as Walt Whitman's "simple separate person" . . . [and thus enjoy] "a liberty of choice as to his manner of life . . . ."

1 SCHWARTZ, *supra* note 113, at 174.

249. Wendell J. Brown, *What Liberty Is*, 47 A.B.A. J. 290, 292 (Mar. 1961).

250. SMITH, *supra* note 143, at 81-82.

251. Reynolds v. Milk Comm'n, 179 S.E. 507, 517 (Va. 1935). "Inviolability of the physical person is universally put first among the demands made by the individual." 1 SCHWARTZ, *supra* note 113, at 11. "Of no less importance than integrity of the physical person is what may be called the inviolability of the spiritual person." 1 *id.* at 171.

252. *See generally* John M. Devlin, *State Constitutional Autonomy Rights in an Age of Federal Retrenchment*, 3 EMERGING ISSUES IN ST. CONST. L. 195, 199-200 (1990) (attempting to define the word "privacy"). Such rights could also include the freedom of expression. *Cf.* West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943) (freedom asserted by Jehovah Witnesses refusing to salute the American flag pursuant to school regulation "does not bring them into collision with rights asserted by any other individual"); Comment, *Flag Desecration as Constitutionally Protected Symbolic Speech*, 56 IOWA L. REV. 614 (1971) (flag-desecration statutes are constitutional only if limited to actions creating a clear and immediate threat of public disorder).

253. Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779, 789-98 (Cal. 1981); People v. Belous, 458 P.2d 194, 206 (Cal. 1969), *cert. denied*, 397 U.S. 915 (1970); Right to Choose v. Byrne, 450 A.2d 925, 932-34 (N.J. 1982); *cf.* Stam v. State, 267 S.E.2d 335, 340-41 (N.C. Ct. App. 1980) (natural rights clause does not encompass the rights of a fetus), *aff'd in part, rev'd in part*, 275 S.E.2d 439 (N.C. 1981). *See generally* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (under the federal constitution, a woman has a right to abort, before fetal viability, without undue state interference; and a state may restrict abortions, after fetal viability, except when a woman's health is endangered; a state has a legitimate interest throughout pregnancy in protecting the woman's health and the potential life of the fetus); State v. Abodeely, 179 N.W.2d 347, 354 (Iowa 1970) (upholding abortion statute against equal protection and vagueness attacks), *appeal dismissed and cert. denied*, 402 U.S. 936 (1971); Michael R. Braudes, *State Constitutional Regulation of Abortion*, 19 U. BALT. L. REV. 497 (1990); John Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could* Roe v. Wade *be Alive and Well in the Bayou State?*, 51 LA. L. REV. 685 (1991); Cecil C. Means, Jr., *Symposium on the Legal Rights of Women*, 17 N.Y.L.F. 335 (1971); Kimberly A. Chaput, Note, *Abortion Rights Under State Constitutions: Fighting the Abortion War in State Courts*, 70 OR. L. REV. 593 (1991); Note, *The Unborn Child and Constitutional Conception of Life*, 56 IOWA L. REV. 994 (1971); Note, *The*

what to eat and what to drink, including alcohol;[254]
whether to engage privately in sexual relations with consenting male and female adults;[255]

Right to Equal Access to Abortions, 56 IOWA L. REV. 1015 (1971); Bruce W. Foudree, Case Note, 20 DRAKE L. REV. 666, 668 (1971).

254. *Compare* Marasso v. Van Pelt, 81 So. 529, 536 (Fla. 1919) (Browne, C.J., dissenting) (legislation prohibiting the possession of alcoholic beverages violates natural rights clause, because a legislature may not "invade the homes of the people and say what they should, or should not have for their personal use, so long as they did not use it to the detriment of the rights of others"); Commonwealth v. Smith, 173 S.W. 340, 342 (Ky. 1915) (natural rights clause "would be but an empty sound if the Legislature could prohibit the citizen the right of owning or drinking liquor, when in doing so he did not offend the laws of decency by being intoxicated in public"); Commonwealth v. Campbell, 117 S.W. 383, 385-86 (Ky. 1909) (government may not "invade the privacy of a citizen's life . . . to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society") *with* WHITE, *supra* note 112, at 371 ("[U]nlike marriage, divorce, and personal appearance, . . . drugs and alcohol have traditionally been associated with potential harm to others of a magnitude justifying criminal sanctions."); LEISER, *supra* note 1, at 13-14 (getting drunk in private "*is* society's business, and not merely [the drinker's] own, for society would not long survive if large numbers of people got drunk every night in the privacy of their homes"). *See* Eidge v. City of Bessemer, 51 So. 246, 247-48 (Ala. 1909) (city ordinance prohibiting the simple possession of liquor amounted to an unconstitutional infringement of property, because, in part, its possession did not "injure the equal rights of others, or the interests of the community").

After Iowans favored repeal of the Eighteenth Amendment to the federal constitution, Governor Clyde L. Hearing spoke about the false hopes underlying its passage: "We forgot that character must be developed by moral means and we believed that we could develop character by making men stop drinking, and that we could make men stop drinking by the passage of a law." JOURNAL OF THE STATE CONVENTION ON REPEAL OF THE EIGHTEENTH AMENDMENT, at 6 (July 10, 1933).

In more recent times, New Jersey passed legislation in 1992 requiring that restaurants cook eggs at high temperatures—to eliminate the rare possibility of a child or elder customer dying from salmonella bacteria—or risk a fine of up to $100. *Eggs Over Easy? Not in New Jersey*, DES MOINES REG., Jan. 13, 1992, at A2. "I think it's a silly law. . . . You can't tell people how to eat," said Al Lavacca, a customer at the Short Stop Diner in Bloomfield. *Id.* After a number of citizens made known their agreement with Mr. Lavacca's sentiments, the regulations were relaxed. *See NJ Ends Ban on Runny Eggs*, DES MOINES REG., Feb. 12, 1992, at A3 (noting a comedian's joke that "New Jersey required a 10-day waiting period to get a Caesar salad"); Mike Mchann, *A State Law That's Been Cracked*, 15 NAT'L L.J., Jan. 27, 1992, at 55.

255. Commonwealth v. Wasson, 842 S.W.2d 487, 493 (Ky. 1992); Greenberg v. Kimmelman, 494 A.2d 294, 304 (N.J. 1985). *But see* Bowers v. Hardwick, 478 U.S. 186, 189-96 (1986) (Fourteenth Amendment's guarantee of due process does not confer upon homosexuals the right to engage in consensual sodomy at home). *Cf.* State v. Gray, 413 N.W.2d 107, 114 (Minn. 1987) (sex for hire is not a fundamental right); MRM, Inc. v. City of Davenport, 290 N.W.2d 338, 347-48 (Iowa 1980) (right to privacy under the State constitution does not extend to commercialized sex); State v. Price, 237 N.W.2d 813, 818 (Iowa 1976) (after noting that prostitution affects others in its public negotiation and possible role in the spread of disease and crime, the court concluded that it "need not decide whether the State established [a compelling interest] in this case, because we rest our decision of this question upon a holding that prostitution is not constitutionally protected"), *appeal dismissed*, 426 U.S. 916 (1976).

"In seventeenth-century England—a period often described as the Age of Reason—people were hanged for having homosexual relations. People were hanged and pilloried for the same offense through the eighteenth and into the nineteenth centuries." LEISER, *supra* note 1, at 33.

whether to terminate life—whether it be one's own or, under certain circumstances, a loved one's;[256]
how to appear in public;[257]

If Justinian were right, and sodomy caused earthquakes, plagues, and famines, harsh penalties for sodomy would certainly be in order, for it would be a serious crime against society, and it would cause much needless suffering to many innocent persons. But all the available evidence indicates that Justinian was wrong and that if homosexuality is harmful to anyone at all, it is harmful only to those who engage in it.

Id. at 67. *See generally* Tribe, *supra* note 226, at 795 ("[C]onsensual intimacies in the home are presumptively protected as a privilege of U.S. citizens."); Nan Feyler, Comment, *The Use of the State Constitutional Right of Privacy to Defeat State Sodomy Laws*, 14 N.Y.U. REV. L. & SOC. CHANGE 973 (1986).

256. *In re* Quinlan, 355 A.2d 647, 663-64 (N.J.), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976); *see* Stam v. State, 267 S.E.2d 335, 340-41 (N.C. Ct. App. 1980), *aff'd in part, rev'd in part*, 275 S.E.2d 439 (N.C. 1981) (fetus unentitled to protections of natural rights clause). *Compare* State v. Marti, 290 N.W.2d 570, 580-84 (Iowa 1980) (aiding and abetting a suicide is not a defense to homicide in Iowa); Note, *Suicide in Iowa Criminal Law*, 19 IOWA L. REV. 445 (1934) *with* State v. Campbell, 251 N.W. 717, 719 (Iowa 1933) (suicide is not a crime in Iowa). *See generally* LEISER, *supra* note 1, at 129 (the purpose of euthanasia "is the relief of human suffering"); David A.J. Richards, *Constitutional Privacy, the Right to Die and the Meaning of Life: A Moral Analysis*, 22 WM. & MARY L. REV. 327 (1981) (right to die is a fundamental constitutional right); Barbara Callaway, Case Note, 20 ARIZ. ST. L.J. 345 (1988) (a right to die exists in Arizona); Charles Edward Anderson, *Suicide Doctor Wins Dismissal*, 77 A.B.A. J. 22-23 (Feb. 1991); *Love and Let Die*, TIME INT'L, Mar. 19, 1990, at 36-42; Thomas A. Fogarty, *Legislator to Draft Bill Legalizing Aided Suicides*, DES MOINES REG., Nov. 26, 1991, at M4.

257. Breese v. Smith, 501 P.2d 159, 168 (Alaska 1972) (natural rights clause gives public school students "a constitutional right to wear their hair in accordance with personal tastes"); Sandstrom v. State, 336 So. 2d 572, 576 (Fla. 1976) (England, J., dissenting) (contempt-of-court citation against attorney refusing to wear a fabric necktie should not be upheld, because the natural rights clause secures "to every individual the basic right to choose his or her own lifestyle without undue governmental interference"); Murphy v. Pocatello Sch. Dist. No. 25, 480 P.2d 878, 884 (Idaho 1971) (natural rights clause provides "the right to wear one's hair in a manner of his choice" unless a compelling state interest is established); *see* Pence v. Rosenquist, 573 F.2d 395, 398-99 (7th Cir. 1978) ("choice of appearance is an element of liberty;" school-district regulation against mustaches on bus drivers was "so irrational as to be arbitrary" and illegal); Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970) (citations omitted) (right to wear hair in a certain way or at a certain length "is an ingredient of personal freedom" protected by the First or Ninth Amendments of the federal constitution, requiring a compelling governmental interest); Peppies Courtesy Cab Co. v. City of Kenosha, 475 N.W.2d 156, 159 (Wis. 1991) (city ordinance regulating the appearance of taxicab drivers for the goal of "cleaning up the image of the city" offended federal and state constitutional guarantees of due process and liberty); Comment, *Public Schools, Long Hair, and the Constitution*, 55 IOWA L. REV. 707, 710-11 (1970) (haircut regulations in public schools are unconstitutional). *But see* Kreimer v. Bureau of Police, 958 F.2d 1242, 1250-70 (3d Cir. 1992) (city library ordinance requiring expulsion of patrons "whose bodily hygiene is offensive" and a nuisance to other patrons upheld after federal constitutional challenge); State v. Nelson, 178 N.W.2d 434, 439-42 (Iowa 1970) (compelling state interest in society's well-founded and recognized forms of behavior overrides an individual's First Amendment right to appear nude in a public place), *cert. denied*, 401 U.S. 923 (1971). *See generally* Kelly Carter, *D.M. Board to Mull Dress Code at Two "Traditional" Elementaries*, DES MOINES REG., Jan. 22, 1991, at M1.

what printed materials, including pornography, to own and peruse in private;[258]
where, when, and how to travel and with whom to associate;[259] and
whether to use various drugs in private.[260]

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258. "[In view of the natural rights clause,] it is not within the competency of a free government to invade the sanctity of the absolute rights of the citizen any further than the direct protection of society requires. Therefore, the question of what a man will drink, or eat, *or own*, provided the rights of others are not invaded, is one which addresses itself alone to the will of the citizen." Commonwealth v. Smith, 173 S.W. 340, 342 (Ky. Ct. App. 1915) (emphasis added); *cf.* Stanley v. Georgia, 394 U.S. 557, 565 (1969) (state law criminalizing the mere possession of adult pornography violates the First Amendment: "[A] State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."); State v. Kam, 748 P.2d 372, 377-80 (Haw. 1988) (state constitutional right of privacy allows viewing of pornography in a private residence); Jack Thompson, *Music: Lyrical Temptations*, 34 ST. GOV'T NEWS 20 (Mar. 1991) (noting a governmental study suggesting a statistical link between obscenity and rape).

"Unlike the smell of rancid garbage, which cannot be easily avoided, 'when an "obscene" book sits on a shelf, who is there to be offended?'" LEISER, *supra* note 1, at 169. Is the Bible 'obscene' because, for example, it tells of Lot's daughters, their conspiracy to put him in an alcoholic stupor, and their incestuous relations with him? *Id.* at 173.

> When man was first in the jungle he took care of himself. When he entered a societal group, controls were necessarily imposed. But our society—unlike most in the world—presupposes that freedom and liberty are in a frame of reference that makes the individual, not government, the keeper of his tastes, beliefs, and ideas.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973) (Douglas, J., dissenting); *see* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (mere possession of obscene materials is not a crime); Wallace L. Taylor, Note, *The Status of Iowa's Obscenity Laws*, 21 DRAKE L. REV. 314, 330 (1972) (advocating against legislative restraints upon adults wishing to read or see obscene materials). *See generally* Frank Santiago, *Question Threatens Anti-Smut Law*, DES MOINES REG., Jan. 15, 1991, at M2 (noting the legal issue whether, under the Iowa antipornography law, judges must define community standards for juries).

259. *See* State v. Shigematsu, 483 P.2d 997, 1000-01 (Haw. 1971) (freedom of movement and association are fundamental rights); State v. Cotton, 516 P.2d 709, 714-15 (Haw. 1973) (Abe, J., dissenting) (natural rights clause "affords one the privilege of making a fool of himself if he so desires, so long as his action does not bring significant harm to the general public," and therefore state's motorcycle-helmet law must be unconstitutional); State v. Lee, 465 P.2d 573, 579-80 (Haw. 1970) (Abe, J., dissenting); Greenberg v. Kimmelman, 494 A.2d 294, 304-05 (N.J. 1985) (decision to marry and familial association are privacy interests safeguarded by the New Jersey Constitution, but subject to reasonable government regulation); Hagen v. Culinary Workers Alliance Local No. 337, 246 P.2d 778, 788 (Wyo. 1952) (upholding the right not to join a union); *see also* Fenster v. Leary, 229 N.E.2d 426, 428 (N.Y. 1967) (striking down city ordinance on vagrancy that criminalized conduct "which in no way impinges on the rights or interests of others"). *But cf.* City of Panora v. Simmons, 445 N.W.2d 363, 367-70 (Iowa 1989) (society's strong interest in protecting minors from drugs outweighs minors' right to travel within city limits at night). *See generally Helmets, and Insurance, Too*, DES MOINES REG., Mar. 9, 1992, at A12 (noting the high costs incurred for treatment of motorcycle-accident victims and arguing for adoption of a proposed statute requiring either usage of motorcycle helmets or $1 million insurance coverage).

260. State v. Kantner, 493 P.2d 306, 311, 312 n.1 (Haw.) (Abe, J., concurring), *cert. denied*, 409 U.S. 948 (1972); *id.* at 313, 315 (Levinson, J., dissenting). *Compare* Jonathan A. Weiss & Stephen B. Wizner, *Pot, Prayer, Politics and Privacy: The Right to Cut Your Own Throat in Your Own Way*, 54 IOWA L. REV. 709, 728-32 (1969) (drug usage, according to studies, affects

Second, it appears clear that any statute with a valid legislative objective impinging upon these fundamental rights requires the state, not the individual challenging the statute, to prove its constitutionality by showing that some *compelling* interest warranted its passage by the General Assembly.[261] Placing this burden of proof upon the state coincides with the

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only the user and not society); Charles Bullard, *Effect of Pot Challenged in New Study*, DES MOINES REG., Nov. 26, 1991, at M4 (University of Iowa study contradicts the view that marijuana use alters levels of reproductive hormones) *with* LEISER, *supra* note 1, at viii-ix (reversing original position that adults should be permitted to use any drug "however harmful it may be"). *Cf.* State v. Olsen, 315 N.W.2d 1, 7-9 (Iowa 1980) (compelling state interest to control drug usage overrides an individual's right to use marijuana for religious purposes); LASKI, *supra* note 1, at 121 ("clear case" exists for forbidding the sale of heroin or cocaine on the ground the user will be harmed).

261. *See* Breese v. Smith, 501 P.2d 159, 170-71, 172 n.57 (Alaska 1972) (natural rights clause protects fundamental rights, which may be legally impinged if government shows compelling interest through "hard facts"); State v. Kantner, 493 P.2d at 315 (Levinson, J., dissenting) (the fundamental right to be let alone protects private use of marijuana); LEISER, *supra* note 1, at 118 (those seeking to place limits on abortion should bear burden of proof to show "that abortion is in fact unjustified, that it is murder, and that human fetuses are indeed human beings.").

A statutory directive or proscription that "appears on its face to be within a specific prohibition of the constitution" is presumed unconstitutional. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). *See generally* State *ex rel.* Richey v. Smith, 84 P. 851, 854 (Wash. 1906) (Root, J., concurring) (statutes affecting liberty cannot be upheld when less-restrictive alternative exists to achieve the same goals), *overruled by* City of Tacoma v. Fox, 290 P. 1010 (Wash. 1930).

One professor has placed governmental interests in a hierarchy of five levels. WHITE, *supra* note 112, at 372-74. The fifth (or lowest) are interests that merely promote morality. *Id.* at 373. The fourth are interests designed to "protect the individual from self-inflicted harm or self-degrading experiences." *Id.* at 375. The third are interests in curtailing publicly offensive activities. *Id.* at 376. The second are interests that prevent physical violence and disorder. *Id.* at 378. The first are interests in preserving "basic institutions of society," which include sexual fulfillment, reproduction, education, child-rearing, economic support, and emotional security. *Id.* at 379-80.

Allocating the burden of proof to the government often leads to judicial horror lists. For example, in State v. Pilcher, 242 N.W.2d 348, 356-59 (Iowa 1976), the court held that a statute prohibiting carnal copulation in private with an adult person of the opposite sex, not a spouse, violated the fundamental right of privacy under the federal constitution. The dissent argued that labeling the right of privacy as a fundamental right placed a great onus on the State, which, for example,

> would be hard pressed to show a compelling . . . interest in . . . prohibiting use of marijuana in the home . . . . The State could also be forced to come up with a compelling interest in prohibiting keeping a house of ill fame . . ., regulating massage parlors, prohibiting adultery and bigamy . . . . The possibilities are limited only by the fertile imagination of our practicing bar.

Id. at 366 (Reynoldson, J., dissenting) (citations omitted).

This argument can be compared with the comments of another Iowa justice, who observed in 1907:

> It may be true that the conceptions of freedom and independence entertained by the framers of our constitutional system have been too individualistic, and that they are in some ways inapplicable to the state of society necessarily ex-

theories espoused by Locke and Mill and appears to be based upon common sense, because the state sits in a particularly good position to marshal the necessary resources indicating the need for the legislation.[262]

D. Sic Utere *Analysis*

Unlike the Fourteenth Amendment, the *sic utere* doctrine requires no careful weighing of competing interests. Instead, it focuses upon cause and effect for resolving issues implicating the natural rights clause: if the actor can establish that he or she alone undergoes an actual or perceived harm from the exercise of a particular action, the General Assembly may not validly penalize its exercise.[263]

As Mill observed,[264] however, the actor who invokes the *sic utere* doctrine does not invite the state or its political subdivisions to wander off into the realm of metaphysics in defining the person or persons allegedly suffering harm from the actor's conduct. Certainly it could be argued, as an example, that the spouse and children of an alcoholic acutely share in his or her misery and that a legislative prohibition on the consumption of alcoholic beverages therefore cannot offend the natural rights clause, because the alcoholic's decision to drink excessive amounts of hard liquor, wine, or beer indeed causes harm to others. Yet this type of argument, which in the end must lay the blame for all harmful conduct upon Eve's doorstep, should provide little hope for those governmental units seeking to uphold prohibitions against various types of conduct.

Any judge considering the *sic utere* doctrine must be wary of arguments merely emphasizing the remote and indirect consequences of a particular action. Neither history nor logic suggests that a judge, faced with a challenge premised upon the natural rights clause, countenance the sort of imagination often displayed in determining causation in fact[265] or, in Latin, *causa sine qua*

> isting in a country of comparatively dense population, but the burden is on those who insist upon a change in these fundamental conceptions to demonstrate that any reasonable prospect of improvement is not offset by the possible loss of those things which we most highly value, and without which we would be dissatisfied and unhappy.

McClain, *supra* note 148, at 200.

262. "[T]he more complex the civilization, the more troublesome the problem of resolving . . . a conflict . . . [between an individual's right and society's interests] and the less likely when the public safety is involved that the individual's right will be found to be dominant." State *ex rel.* Mavity v. Tyndall, 66 N.E.2d 755, 759 (Ind. 1946), *appeal dismissed*, 333 U.S. 834 (1948).

263. Mill suggested that the governmental unit seeking to uphold a prohibition on the exercise of a particular action bear the burden of showing harm or a definite risk of harm. *See supra* note 127 and accompanying text.

For a discussion about the level of proof needed for successfully challenging the validity of legislation under the Iowa Constitution see Kempkes, *supra* note 5, at 44-51.

264. *See supra* note 127 and accompanying text.

265. Courts in criminal cases must initially decide whether the actor caused harm in fact before deciding whether he or she should legally be held responsible for the act. *See* ROLLIN M.

non.[266] If that were the appropriate line of inquiry, the natural rights clause would have no meaning at all: every action would inevitably "cause" some harm to someone other than the actor.[267]

Similarly, a judge must be wary of arguments about resulting harm that merely involve personal taste: for every public action could be said to cause some "harm," no matter how trivial in degree, no matter how fleeting or remote in time, to someone else. While undoubtedly many persons become annoyed with or offended by the peculiar habits or conduct of their fellow men and women, mere dislike or disagreement regarding a lack of refinement—in, for example, appearance, language, or aroma—cannot rise to the level of harm encompassed by the *sic utere* doctrine. In other words, inhaling someone's cheap perfume does not constitutionally equate with inhaling someone's smoke from a cigarette, cigar, or pipe.[268]

It is thus important to keep in mind this principle: the more the exercise of a particular action leads to harm or a risk of harm fairly classified as "actual" and "substantial," and the more its exercise causes harm fairly classified as "immediate" and "direct," the better the possibility it will be for the

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PERKINS, CRIMINAL LAW 685-93 (2d ed. 1969). Harm in fact is a relatively easy burden for the prosecution: "All antecedents, which contribute to a given result are, as a matter of fact, the causes of that result." *Id.* at 687; *see also infra* note 245.

266. *Sine qua non* literally means "without which not," and commonly becomes expressed as the "but-for test" in causation cases: but-for this one thing, another would not have occurred. BLACK'S LAW DICTIONARY 221 (6th ed. 1990).

267. For example, in Commonwealth v. Wasson, 842 S.W.2d 487, 490 (1992), the state merely argued that the "moral indignation" by the majority of society justified enactment of a statute criminalizing private sexual conduct between two consenting male adults. The state's argument was unsuccessful. *Id.* at 493.

268. *See infra* note 248 and accompanying text.

Physical injuries (or the substantial risk of physical injuries) obviously provide a substantial basis for upholding a statute prohibiting the exercise of an action causing them. Emotional injuries, as in tort cases, present a less stable basis and essentially involve considerations of public policy and the often difficult task of line-drawing. *Compare* Oberreuter v. Orion Indus., 342 N.W.2d 492, 493-94 (Iowa 1984) (refusing to recognize a cause of action for negligent infliction of emotional distress when plaintiff was neither a witness nor a bystander at time injuries were sustained by her husband and son) *with* Barnhill v. Davis, 300 N.W.2d 104, 107-08 (Iowa 1981) (creating a cause of action for negligent infliction of emotional distress if plaintiff actually witnessed a "closely related" victim suffer physical harm nearby). *See generally* Annotation, *Immediacy of Observation of Injury as Affecting Right to Recover Damages for Shock or Mental Anguish from Witnessing Injury to Another*, 5 A.L.R.4th 833 (1981); John S. Herbrand, Annotation, *Relationship Between Victim and Plaintiff-Witness as Affecting Right to Recover Damages in Negligence for Shock or Mental Anguish at Witnessing Victim's Injury or Death*, 94 A.L.R.3d 486 (1979).

Under tort principles, most if not all actions occurring in private that result in an emotional injury to another would appear to be protected under the natural rights clause. *See* Oberreuter v. Orion Indus., 342 N.W.2d at 494 ("horror of witnessing (and probably endlessly reliving) the tragedy" causing physical injury to loved one merits relief). Accordingly, the natural rights clause would invalidate legislation prohibiting adultery, even though a man and woman engaging in private sexual conduct may eventually cause tremendous mental anguish to their respective spouses and children. *See id.*

General Assembly to prohibit its exercise without running afoul of the natural rights clause.[269]

E. *Examples: Tobacco, Vaccines, Seatbelts*

The Supreme Court of Iowa has never needed to formulate such a principle regarding harmful conduct, because it has never equated the meaning of the natural rights clause with the *sic utere* doctrine. If the supreme court eventually decides to do so and leave Fourteenth Amendment analysis for the resolution of Fourteenth Amendment cases, it may be faced with challenges to future legislation regarding such matters as tobacco, vaccines, and seatbelts:

(1). Suppose, for example, the General Assembly passed a statute prohibiting the smoking of tobacco in any public building and imposing a fifty-dollar fine upon violators.[270] Such a statute would withstand a challenge grounded upon the natural rights clause. This conclusion stems from the medical evidence decidedly affirming the logical conclusion that persons who inhale second-hand smoke undergo significantly higher risks of disease than those persons unexposed to second-hand smoke.[271] Thus, in enjoying their liberty or pursuing and obtaining their happiness by lighting a cigarette, cigar, or pipe, smokers in public buildings contribute to the poor health of others. Such circumstances suggest the General Assembly could appropriately restrict the rights of these smokers under the natural rights clause, especially because the exercise of the right may lead to the greatest harm possible—ending prematurely the lives of others.[272]

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269. Similarly, the Fourteenth Amendment analysis employed by the Supreme Court of Iowa focuses upon state interests that are real and not imaginary. *See, e.g.*, Miller v. Boone County Hosp., 394 N.W.2d 776, 779 (Iowa 1986) (fictions underlying the legitimacy of alleged state interests not binding on the court).

270. Such a ban, with an accompanying maximum fine of $500, has been proposed in one California city ordinance. *Ban on Smoking*, DES MOINES REG., Apr. 2, 1991, at A7; *see also Backlash Forces Repeal of Tough Ban on Smoking*, DES MOINES REG., June 29, 1992, at A3 (reporting on opposition to California smoking ban).

271. Sally A. Buck, Note, *Smoking in Public: Nonsmokers' Rights and the Proposed Iowa Clean Indoor Air Act*, 37 DRAKE L. REV. 483, 483-84, 496, 499, 501 (1987-1988); Michael Gartner, *The Strong Case Against Smoking*, DES MOINES REG., Apr. 14, 1991, at C2; *Unreleased Smoking Report is Controversial*, DES MOINES REG., May 30, 1991, at A8 (reporting on the draft report of EPA study linking second-hand smoking to health problems); *Decade-long Study: Infants Harmed by Passive Smoke*, DES MOINES REG., May 29, 1991, at A8 (reporting on a study linking mother's smoking to her children's sickness); *53,000 Deaths Yearly Tied to Passive Smoking*, DES MOINES REG., Jan. 10, 1991, at A4 (reporting on a study linking deaths to passive smoke); *see* McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992) (prison inmate's compelled exposure to cigarette smoke may constitute cruel and unusual punishment).

272. Interestingly, the Iowa Constitutional Convention, on the motion of Lewis Todhunter of Warren County, prohibited all smoking in the chamber during its proceedings. *See* Eriksson, *supra* note 185, at 60 (citing 1 THE DEBATES, *supra* note 4, at 115).

Now suppose the General Assembly passed another antismoking statute, but this time prohibited and penalized the smoking of tobacco in any place and at any time and under any circumstances.[273] Such a statute would not withstand a challenge grounded upon the natural rights clause: while the medical evidence decidedly affirms the logical conclusion that all who smoke tobacco significantly raise their risks of disease,[274] no one but they can suffer that increased risk if, for example, they went out and lighted-up in the middle of a cornfield in Shelby County. A prohibition on all smoking simply would go too far; it would, contrary to the notion of *sic utere*, encompass those smokers who by all accounts present no danger to others; and if this class of smokers choose to act foolishly and endanger their own lives by inhaling poisonous fumes, the natural rights clause says to the General Assembly that it must turn its collective cheek and let them, as the self-reliant frontiersman would have done in the mid-nineteenth century, bear the consequence of their folly.[275]

(2). Beyond harmful action, such as smoking, lies the realm of harmful inaction, such as the refusal to comply with regulations attempting to promote the public health and welfare. Suppose, for a second example, that science and technology progress to the point where researchers can create a safe and effective vaccine against the virus causing acquired-immune-defi-

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273. *See* Hershberg v. City of Barbourville, 133 S.W. 985, 985-87 (Ky. 1911) (city ordinance prohibiting cigarette smoking anywhere within city limits and imposing fine of $1 to $15 invalidated on ground it amounted to "an unreasonable invasion of the citizen's right of personal liberty" and "his right to control his own personal indulgence" in his home or in any other private premises; however, "a different question would be presented" if the ordinance only penalized smoking in public).

274. *See* Sally Squires, *Study: Smoking Leads to Pot Belly, Diabetes*, DES MOINES REG., June 2, 1991, at E2; *Study Links Smoking Habits to Increased Risk of Impotency*, DES MOINES REG., May 17, 1991, at A9; *Study: Smoking Increases Risk of Some Strokes*, DES MOINES REG., Feb. 25, 1991, at A7; George Will, Editorial, *The Ways Smoking Can Kill You*, DES MOINES REG., Feb. 8, 1991, at A12; *Lung Cancer to Kill More Iowa Women*, DES MOINES REG., Feb. 8, 1991, at M1 (reporting more female deaths from lung cancer than breast cancer for the first time in Iowa); Editorial, *Smoking Takes Deadlier Toll on Americans*, DES MOINES REG., Feb. 1, 1991, at A6; *Studies Link Smoking to Depression*, DES MOINES REG., Jan. 13, 1991, at E10; *see also* Dave Brenton, *Tobacco: Ban It or Leave It Alone*, 34 ST. GOV'T NEWS 22, 22-23 (Mar. 1991) (President of Smokers' Rights Alliance acknowledges smoking amounts to "risky behavior"). "Everybody who smokes or doesn't knows that smoking is bad for you. Everybody. I smoked cigarettes for 15 years of my life and cigars for 20 more. There was never a time during those years when I didn't know I was killing myself." Donald Kaul, *Over the Coffee*, DES MOINES REG., Apr. 19, 1991, at A11.

275. [I]s it government's job to forbid free citizens from engaging in risky behavior, and if so, who will draw the line of acceptable risk? Aren't skydiving, rockclimbing and motorcycling all risky behavior? Will government use its power to restrict them too?

. . . .

. . . If government can take away *our* [choice to smoke tobacco], it can take away *all* choices.

Brenton, *supra* note 274, at 22-23.

ciency syndrome (AIDS) and that the General Assembly thereafter required everyone residing in the state to be vaccinated at no cost or suffer fine, imprisonment, or quarantine. Among other things, the question arises whether a refusal to undergo vaccination can find a constitutional defense in the natural rights clause.[276] A decision by the United States Supreme Court in 1905, *Jacobson v. Massachusetts*,[277] indicates no support for such a finding.[278]

Henning Jacobson lived in Massachusetts on February 27, 1902, when the City of Cambridge, where he resided, adopted a health regulation pursuant to statutory authority:

> Whereas, smallpox has been prevalent to some extent in the city of Cambridge, and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease that all persons not protected by vaccination should be vaccinated; and whereas, in the opinion of the board [of health], the public health and safety required the vaccination of all inhabitants of Cambridge; be it ordered, that all inhabitants of the city who have not been successfully vaccinated since March 1st, 1897, be vaccinated or revaccinated [or suffer a penalty of five dollars].[279]

Jacobson refused to receive a vaccination at no cost, underwent conviction by jury, and brought his case to the Supreme Court.[280]

Jacobson claimed in part that the city ordinance improperly affected the liberty guaranteed him by the Fourteenth Amendment's Due Process Clause.[281] In words appropriate to discussion of a natural rights clause or the *sic utere* doctrine,[282] he argued that "a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such a way as to him seems best . . . ."[283]

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276. "[S]ome progress is being made" toward developing a vaccine for the AIDS virus, "but many difficulties remain." June E. Osborn, *The AIDS Epidemic: Discovery of a New Disease*, *in* AIDS AND THE LAW 17, 25 (Harlan L. Dalton & Scott Burris eds., 1987). "[I]f public-health authorities decided that universal use [of a vaccine] was the best strategy for containment of the epidemic, we would be faced afresh with all the problems and issues that made the swine-flu immunization campaign of 1976 so difficult for the public and health officials alike." *Id.* at 26. *See generally State Officials Turn to Quarantines*, DES MOINES REG., June 17, 1992, at A2 (reporting that two persons with AIDS virus quarantined in Michigan).

277. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

278. "Most of the important public health cases were decided around the turn of the century." Larry Gostin, *Traditional Public Health Strategies*, *in* AIDS AND THE LAW, *supra* note 276, at 47, 49. The courts largely "deferred to public health officials and legislatures as long as public health measures were reasonably necessary and not unreasonably oppressive." *Id.* at 48.

279. Jacobson v. Massachusetts, 197 U.S. at 12-13.

280. *Id.*

281. *Id.* at 14.

282. *See, e.g.*, Hannibal & St. Jos. R.R. v. Husen, 95 U.S. 465, 471 (1877).

283. Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).

The Court, however, properly rejected Jacobson's argument, observing that a person's liberty "does not import an absolute right . . . to be, at all times and in all circumstances, wholly freed from restraint."[284] Such restraints could be imposed for the common good of society:

> Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.
>
> . . . .
>
> [L]iberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.[285]

The Cambridge Board of Health, the Court observed, had reasonably concluded that vaccination presented the best means of stopping the spread of smallpox, and "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[286]

This reasoning applies with equal force to a challenge, premised upon the natural rights clause, against any statutory requirement of vaccination from the AIDS-causing virus. Although AIDS does not immediately threaten the existence of Iowa society,[287] as it may be doing in certain African nations,[288] its victims nevertheless present a real and substantial danger to oth-

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284. *Id.* Years after smallpox became a concern of the Cambridge Board of Health, an influenza epidemic in 1918 killed 20 million people, a number amounting to one percent of the world's population and more than twice the number of soldiers killed in World War I. Christine Gormah, *Invincible AIDS*, TIME, Aug. 3, 1992, at 30, 34.

285. Jacobson v. Massachusetts, 197 U.S. at 26-27.

286. *Id.* at 27. The Court cautioned, however, that other health regulations and other circumstances might produce a different conclusion. *Id.* at 28-29. Indeed, it emphasized that the Cambridge regulations did not establish

> the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death.

Id. at 39.

287. *See* William Petroski, *AIDS Cases Rise Sharply in 1991*, DES MOINES REG., Jan. 3, 1992, at A1 (reporting that AIDS crisis may be taking root in Iowa); *see also* Gormah, *supra* note 284, at 30, 36 (some experts predict that 110 million persons will be infected with the virus causing AIDS by the year 2000); *Worldwide AIDS Epidemic "Heading Out of Control"* DES MOINES REG., June 4, 1992, at A8 (ten-fold increase in AIDS expected by year 2000); *Most Americans Live Longer, But Toll From AIDS Mounts*, DES MOINES REG., Jan. 8, 1992, at A3 (reporting 31% increase in AIDS-related deaths for persons aged 25-44 during 1988-1989).

288. *See* A.R.M. Babu, *Does the West Care if Africa Dies of AIDS?*, DES MOINES REG., Jan. 1, 1992, at A13. Africans are already "grappling with the very survival of their continent" due to the catastrophic impact of AIDS on their societies. *Id.*

ers by transmission through both legal and illegal behavior.[289] A vaccine safely and effectively preventing the transmission of such a deadly disease would mean that no one, pointing to the natural rights clause, could refuse to comply with any statutory requirement for undergoing vaccination on the ground he or she had a right to be a fool.[290]

(3). While arguments on the right to be a fool have rarely come before the Supreme Court of Iowa, a motorist from Carter Lake recently offered one following his conviction for refusing to wear a seatbelt.[291] He argued on appeal that the General Assembly's sole purpose in enacting the statute was "to protect the individual from his own folly and, consequently, such purpose has no relation to the public health, safety, or welfare."[292] He unsuccessfully claimed that the statute violated the federal and state constitutional guarantees to due process.[293] But had he premised his attack upon the natural rights clause would he have prevailed in his appeal?

In responding to the due process challenge, the state relied upon statistics and logic to show that the statute protected the public safety and health in three ways: use of a seatbelt would enhance a driver's ability to maintain control of the vehicle and avoid collisions with other vehicles on the road; it would prevent a front-seat passenger from interfering with a driver's responses in a collision; and it would prevent a driver or a front-seat passenger, as projectiles, from injuring rear-seat passengers in a collision.[294]

In view of these matters, the motorist's failure to rely upon the natural rights clause did not prove fatal to his challenge against the statute. For, in the end, more was at stake in the passage of the statute than just a driver's own well-being: the refusal to buckle-up presented an actual and substantial danger to persons other than the driver.[295]

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289. *See 32 Medical Workers Get AIDS on Job*, DES MOINES REG., Oct. 30, 1992, at A3; *AIDS Threat Grows as Virus Rapidly Spreads*, DES MOINES REG., Feb. 13, 1992, at A1 (World Health Organization predicts AIDs-causing virus "soon will become the main cause of premature death in many Western cities and will leave up to 10 million African children orphaned by the end of the decade"); Mary Challender, *Health Workers' Worry*, DES MOINES REG., Nov. 27, 1991, at M1 (medical personnel face the prospect of contracting AIDs-causing virus from even the most routine medical practices).

290. *Jacobson v. Massachusetts* has been cited by the Supreme Court of Iowa in four decisions, but only one of those decisions touched upon individual rights. *See In re* Karwath, 199 N.W.2d 147, 150 (Iowa 1972) (upholding court order for surgical removal of tonsils and adenoids from children for health reasons over parent's religious objections); Tilghman v. Chicago & N.W. Ry. 115 N.W.2d 165, 174 (Iowa 1962); Wilson v. City of Council Bluffs, 110 N.W.2d 569, 572 (Iowa 1961); Fleming v. Richardson, 24 N.W.2d 280, 310 (Iowa 1946) (Mantz, J., dissenting).

291. State v. Hartog, 440 N.W.2d 852 (Iowa), *cert. denied*, 493 U.S. 1005 (1989).

292. *Id.* at 856.

293. *Id.* at 858.

294. *Id.* at 857-58.

295. *Id.* at 858-59; *cf.* Weiss & Wizner, *supra* note 260, at 727 & nn.86 & 89 (citing cases that recognize danger to public safety exists if motorcyclist refuses to wear a helmet).

F. *The Abortion Issue*

In contrast to tobacco, vaccines, and seatbelts, issues such as the right to abort a viable fetus present no easy solutions for the Iowa judge or lawyer searching for the parameters of the natural rights clause. This acknowledgment largely stems from the conflicting evidence presently surrounding these complicated issues, a fact that inhibits (if not precludes) any finding of harm, or a real and substantial risk of harm, to others in particular or even society as a whole.[296] In such cases, the burden of establishing the unconstitutionality of a statute becomes a difficult hurdle to overcome.[297]

Abortion, unlike private sexual conduct between consenting adults[298] or suicide, presents the thorny problem of defining who, in particular, suffers harm from the exercise of the right: label a viable fetus a "person" and the natural rights clause would be useless in challenging a statutory ban on abortion; label a viable fetus something else and the natural rights clause

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296. At least one court has recognized that although an actor's foolish conduct may do no harm to anyone else, the possibility exists that society as a whole may suffer when it becomes financially liable for the actor's own injuries resulting from that foolishness. *See* Commonwealth v. Wasson, 842 S.W.2d 487, 496-97 (Ky. 1992) (criminal statute proscribing consensual homosexual sodomy violates the state constitution's right of privacy). If "harm" under the *sic utere* doctrine encompasses financial harm to society, however, such claims could (and likely will) be made in every case in which the actor challenges legislation prohibiting the exercise of his or her conduct. Thus, any court electing to consider this type of claim should engage in healthy skepticism and require the state to bear the burden of (1) proving the existence or likelihood of substantial financial liability on the part of society; (2) establishing the absence of any less-restrictive alternatives; and (3) offering a reasonable explanation for the need to prohibit only that particular conduct. For example, if a state establishes that motorcyclists who refuse to obey a helmet requirement often become severely disabled as a result of traffic accidents and that they, as a result, actually comprise a substantial burden upon society's coffers, it must be prepared to explain why required insurance minimums have insufficed (or will insuffice) to protect those coffers and why other activities (such as driving a convertible or ice-skating or riding a bicycle) have not required (or will not require) use of a helmet to guard against the possibility of severe accidental injury.

297. *See supra* notes 127, 240, 242.

298. In Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992), the Kentucky Supreme Court struck down a statute that criminalized oral and anal sex practiced by homosexuals on the ground, inter alai, it violated the state constitution's natural rights clause. *Id.* at 502. This case illustrates the importance of making a good record at trial and writing "a Brandeis brief" on appeal: regarding homosexual practices, the defendant produced seven expert witnesses, and cited extensively to medical and social-science literature and treatises, while the state produced no witnesses and offered no scientific evidence or social data. *See id.* at 489-90. Indeed, the state seemed satisfied to rely upon its conclusory argument that the legislature had a right to criminalize sexual activity it deemed immoral, "without regard to whether the activity is conducted in private between consenting adults and is not, in and of itself, harmful to the participants or others." *Id.* at 490. The court strongly disagreed with the State's argument. It held that immorality in private that "does not operate to the detriment of others is placed beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution." *Id.* at 496.

certainly could be used to challenge such a ban.[299] Thus, as in the federal constitutional context, the validity of legislation implicating the natural rights clause and the *sic utere* doctrine primarily depends upon what a judge knows about the facts and circumstances surrounding the enactment by the General Assembly.

V. CONCLUSION

> *You are what you know. Fifteenth-century Europeans "knew" that the sky was made of closed concentric crystal spheres, rotating around a central earth and carrying the stars and planets. That "knowledge" structured everything they did and thought, because it told them the truth. Then Galileo's telescope changed the truth.*[300]

Like fifteenth-century Europeans, there are Iowans who "know" the truth about virtually everything and wish to sweep aside legislation they "know" precludes them from bearing the consequences of their own actions or inactions.[301] "Prick an American, and he reaches for his constitutional rights."[302] For such persons, who may indeed know the truth, the natural

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299. *See generally* Weitl v. Moes, 311 N.W.2d 259, 270-73, 275-79 (Iowa 1981) (five-justice majority held that a viable fetus is not a "person" for purposes of survival statute), *overruled on other grounds by* Audoubon-Exira Ready Mix v. Illinois Cent. Gulf R.R., 335 N.W.2d 148 (Iowa 1983).

300. BURKE, *supra* note 90, at 9. When persons tend to premise their knowledge of the truth upon religious dogma, even overwhelming scientific evidence to the contrary may do little to budge them from their position in the near future. For example, it took nearly four centuries before the Vatican, whose experts studied Galileo's case for 13 years, formally proclaimed that the Roman Catholic Church had erred in condemning him for his astronomical theory. *See Church was Wrong to Condemn Galileo, Pope Announces*, DES MOINES REG., Nov. 1, 1992, at A3. That proclamation occurred on October 31, 1992, when Pope John Paul II explained that two distinct but compatible realms of our knowledge exist, "one which has its source in revelation and one which reason can discover by its own power." *Id.*

301. An individual's assertion of his constitutional rights may produce its own costs:

> There [has been] a contradiction [in America] between [the freedom] to be oneself while also being part of a common culture, a creative tension that has produced a literature populated by loners, rebels and misfits. Also, come to think of it, a lot of stress and nervous breakdowns. No one said it was easy to be an American, to learn the rules anew each day, every day.

Paul Gray, *Whose America?*, TIME, July 8, 1991, at 12, 17.

302. Anthony Lewis, *Would James Madison Approve?*, DES MOINES REG., Dec. 12, 1991, at C3.

> Today some Americans seem to think that any shortfall in their expectations violates their rights. They feel so remote from political responsibility that they do not even vote. Reaganism taught them to care not for the society but for themselves.

rights clause of the Iowa Constitution provides a potentially powerful tool for striking against legislation affecting life, liberty, property, safety, and happiness.[303] It lays ready for use against the most complicated statutes of our day—those involving abortion, punishment, drug usage, expression, suicide, euthanasia, obscenity, and sexual conduct[304]—if it appears the General Assembly enacted those statutes solely to protect a certain class of individuals from themselves. Such legislative paternalism or moralism offends the *sic utere* doctrine by prohibiting the exercise of actions that can adversely affect no one but the actor.

Nevertheless, for many years the Supreme Court of Iowa has remained silent about the scope of the natural rights clause, and the reason for this silence apparently lies with those lawyers failing to discuss the clause in their constitutional arguments.[305] Ignorance should be no excuse in this third

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> James Madison would surely be troubled by such attitudes. In his view of the American experiment, rights were coupled with duties—the duties of the citizen . . . .

Id.

303. It could be argued the natural rights clause permeates the entire law of Iowa, whether constitutional or statutory or regulatory in origin. *Cf.* Marasso v. Van Pelt, 81 So. 529, 534 (Fla. 1919) (Browne, C.J., dissenting) ("Every other provision [in the state constitution] and every law must be construed [in light of the natural rights clause], and made subservient to it.").

304. *See* John J. Degnan, *Marijuana and Hashish: A Proposal for Decriminalization*, 6 CRIM. J.Q. 94 (1978); Daniel Joseph Langin, Comment, *Bowers v. Hardwick: The Right to Privacy and the Question of Intimate Relations*, 72 IOWA L. REV. 1443 (1987) (homosexual acts between consenting adults are defined as criminal in some states); Jonathan Roos, *House OKs Schooling Provisions*, DES MOINES REG., Mar. 28, 1991, at A2; Kelly Carter, *School Board to Reconsider Dress Code*, DES MOINES REG., Feb. 19, 1991, at M1; *Flag Burning Ban Urged by 26 Legislators*, DES MOINES REG., Feb. 14, 1991, at A2; David Lack, *Does Iowa Need a Flag-burning Law?*, DES MOINES REG., Feb. 11, 1991, at A9; Douglas J. Besharov, *Whose Life is It, Anyway?*, 13 NAT'L L.J., Mar. 3, 1991, at 15 (some state laws equate pregnant mother's drug usage with child abuse); *see also* IOWA CODE ch. 717 (1993) ("injury to animals"); Texas v. Johnson, 491 U.S. 397, 402-20 (1989) (as applied, state statute criminalizing the desecration of venerated objects, such as Old Glory, violates freedom of speech); City of Panora v. Simmons, 445 N.W.2d 363, 367-69 (Iowa 1989) (city curfew ordinance affecting minors only upheld against federal constitutional challenge); Melinda Voss, *Therapists Who Exploit Patients Sexually*, DES MOINES REG., Mar. 5, 1991, at T1 (proposed bill, which precludes a defense based on consent, imposes criminal sanctions in Iowa upon therapists for "sexual exploitation" of clients); Frank Santiago, *Iowans Betting in Office Pools Chance Breaking Gambling Laws*, DES MOINES REG., Mar. 12, 1991, at A1. *See generally* MORALITY AND THE LAW (Richard Wasserstrom ed., 1971).

305. *See, e.g.*, Roth v. Reagen, 422 N.W.2d 464, 466 (Iowa 1988) (noting party's failure to specify which constitution or which constitutional provision underscored pleadings). *See generally* State v. Blanks, 479 N.W.2d 601, 605 (Iowa Ct. App. 1991) ("[T]he judicial branch . . . of this state has for over 150 years led the nation in protecting the individual rights of our citizens"); Ken Gormley & Rhonda G. Hartman, *The Kentucky Bill of Rights: A Bicentennial Celebration*, 80 KY. L.J. 1, 6-7 (1990-1991) (observing that the Kentucky Constitution's natural rights clause, which may have originated with the Magna Carta, is "notable, though seldom employed" in cases).

> The situation in Oregon provides a stark contrast to the one in Iowa: There, state constitutional law is neither new, emerging nor experimental, but solidly established and universally accepted—if not universally loved. Even

century of American law:[306] On at least three hundred occasions between 1971 and 1986, state supreme courts granted greater protection to individuals under state constitutions than under the federal constitution.[307] The message thus seems clear for libertarians[308] itching for a fight outside the arena of the Fourteenth Amendment: lift the natural rights clause from the Iowa Constitution, dust it off, and breathe some life back into it.[309]

> sole practitioners in such exotic and euphonious Oregon outposts as Scapoose, Coos Bay, Tillamook, Drain, Tangent, and Boring have learned to regard questions of constitutional law as, first, questions of state constitutional law.

David Schuman, *Advocacy of State Constitutional Law Cases: A Report from the Provinces*, 2 EMERGING ISSUES IN ST. CONST. L. 275, 275 (1989).

306. Lawyers are not alone when it comes to poor constitutional knowledge:

> We Americans seem to assume that all of us are born with the knowledge of the Bill of Rights and with an insight into its mysteries. Most school boards, however, could not pass an examination on it. Neither could most parent-teacher associations. . . . [M]ost of our . . . teachers would fail.

Douglas, *supra* note 1, at 155; *see also* Fred Strasser, *Poll: Americans are Fuzzy on Rights*, 14 NAT'L L.J., Dec. 23, 1991, at 6 (only 10% of 507 adults surveyed correctly identified the purpose of federal constitution's bill of rights).

307. G. Alan Tarr & Mary Cornelia Porter, *Introduction: State Constitutionalism and State Constitutional Law*, 17 PUBLIUS 1, 7 (1987) ("[T]his rediscovery of state bills of rights could herald a basic change in the state and federal roles in protecting civil liberties.").

"State constitutions have become the pivot of important decisions in a wide range of substantive areas—criminal justice, privacy, libel, church and state, school finance, gender discrimination, abortion funding, terminal illness, and expression on private property, among others." Howard, *supra* note 223, at xvi.

308. I fear that few villages exist without a specimen of the LIBERTINE.

> His errand into this world is to explore every depth of sensuality, and collect upon himself the foulness of every one.
>
> . . . .
>
> Gather around you the venomous snake, the poisonous toad, the fetid vulture, the prowling hyena, and their company would be an honor to you above his . .

Henry Beecher, *Twelve Lectures to Young Men* 83, 85 (1902) (first given in 1844). Such vermin apparently would include the much-beloved Benjamin Franklin, who "attempted familiarities" with a "Mrs. T." and dreamed of establishing "The Society of the Free and Easy." THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN AND SELECTIONS FROM HIS OTHER WRITINGS 51, 107 (Random House, Inc. 1944).

309. If the results of such cases rattle the public, "the fault is of the constitution, not of [the judiciary]." Madison & In. R.R. v. Whiteneck, 8 Ind. 217, 232 (1856).

In Virginia, the state constitution's natural rights clause has been primarily relied upon in property-rights cases, but one commentator has observed "that the courts have begun to place new emphasis on individual rights. In the decades ahead, it would not be surprising if Virginia lawmakers, both in the Legislature and on the courts, found new vigor in the heritage of individual and equal rights embodied in [the natural rights clause]." 1 HOWARD, *supra* note 41, at 68; *see* Williams, *supra* note 45, at 75 n.48.

Many decades earlier, another commentator wrote in the early days of our national life that

> little was thought of those "glittering generalities," . . . which made it a part of our constitutional law that man is possessed of certain inalienable rights . . . and which denied to government the power to do more than to prevent the in-

> *Today, . . . Liberty again returns to the grand old Commonwealth of Iowa. It is hard to tell whether this is the Christmas Eve of a new Liberalism or a new Declaration of Independence of our people.*
>
> *We meet here today to rewrite and rededicate . . . the inexorable scroll of human rights and human liberties. It is the old, old story of the slow, the patient, but the inevitable march of mankind to ultimate freedom. For you may hang men on gibbets and on scaffolds, but you can't hang the truth. . . . You may crucify men upon a thousand hills of Golgotha, but you can't crucify the gospel of eternal right; and all the persecutions, all the bigotries, all the iniquities of red handed inquisition, yes, and all the whited sepulchers of hypocrisy, that have blighted the hopes and holy aspirations of mankind . . . will never . . . place the hosts of wrong upon the everlasting throne of right.*
>
> . . . .
>
> *Where railroads cross highways there are signs which read: "Stop, Look, Listen." It would be well for our people and their representatives in our government to follow that warning now. To stop and take account of our national strengths and our national weakenesses. To look calmly and judicially, and without passion and prejudice, at the momentous changes that have arisen in our body politic, social, political and economic, fanned in this day to a fever heat by a world in turmoil and unrest, that must inevitably affect us and those who will come after us. . . .*
>
> *It is time to call a halt. It is time to get back to the beginning of things, back to the real sources of our strength. Back to the Constitution . . . .*[310]

> fliction of injuries upon others. These general declarations of private rights were not then considered as important in controlling the power of government, because the government manifested no disposition to violate them.

CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 79 (New York, The Knickerbocker Press 1890).

310. JOURNAL OF THE STATE CONVENTION ON REPEAL OF THE EIGHTEENTH AMENDMENT, at 13-14, 15, 16 (July 10, 1933) (remarks of Senator and Convention President Joseph R. Frailey of Lee County). Stated a more succinct way,

> The State is competent to assign duties and draw the line between good and evil only in its immediate sphere. Beyond the limits of things necessary for its well-being, it can only give indirect help to fight the battle of life by promoting the influences which prevail against temptation—religion, education, and the distribution of wealth. . . . The most certain test by which we judge

> whether a country is really free is the amount of security enjoyed by minorities.

NORTON, *supra* note 18, at 31-32 (quoting LORD ACTON, HISTORY OF FREEDOM AND OTHER ESSAYS 3 (1907) (emphasis deleted)).