THE VANGUARD OF EQUALITY: THE IOWA SUPREME COURT'S JOURNEY TO STAY AHEAD OF THE CURVE ON AN ARC BENDING TOWARDS JUSTICE

*Mark S. Cady**

Dr. Martin Luther King insightfully and eloquently declared that "the arc of the moral universe is long, but it bends towards justice."[1] Our forty-fourth President has added an important understanding to this enduring declaration that the arc "doesn't bend on its own."[2] Both precepts apply equally to the parallel arc of the legal universe. Justice is not a destination. Instead, it follows a long interminable arc bent toward a more complete meaning for justice by the foresight, courage, and will of people, legislatures, and courts, all as contemplated and expected by our nation's Constitution and, more particularly, by those of the states.

As history has shown, the U.S. Supreme Court's consideration of civil rights questions of critical significance has too often yielded calculations that placed people behind the vertex on the parabola of justice.[3] This result is why the several states, including my own state of Iowa, occupy a critical position in the history and future of civil rights.[4] In the nascence of our republic, the framers of the Federal Constitution viewed the states as the primary protectors of fundamental rights, such as equal protection under the law.[5] As we

* Chief Justice, Iowa Supreme Court. J.D., Drake University Law School, 1978. The author expresses deep gratitude for the substantial and valuable assistance of his law clerks, Renner Walker and Nawi Ukabiala.

[1] A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR. 199 (Clayborne Carson & Kris Shepard eds., 2001).

[2] *Candidate Obama's Sense of Urgency*, CBS NEWS (Nov. 15, 2009), http://www.cbsnews.com/stories/2007/02/09/60minutes/main2456335.shtml.

[3] *See, e.g.*, Scott v. Sandford, 60 U.S. (19 How.) 393, 453 (1857) (holding that slaves were not citizens, but rather the property of their owners and therefore the Circuit Courts had no jurisdiction over the case).

[4] *See* 1 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA, ASSEMBLED AT IOWA CITY 100 (1857), *available at* http://publications.iowa.gov/7313/1/The_Debates_of_the_Constitutional_Convention_Vol%231.pdf. George Ells, Chairman of the Committee on the Preamble and Bill of Rights, declared that the committee intended for the Iowa Bill of Rights to "enlarge, and not curtail the rights of the people." *Id.*

[5] *See* ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 109–12 (2d ed. 1983).

continue to march into the twenty-first century, this approach must continue.

Many early constitutional battles—the nullification crisis, for example[6]—were fought over the states' asserted sovereignty, which was often a proxy fight for the perseverance of slavery.[7] And, so, the Civil War Amendments federalized important civil rights: prohibiting slavery;[8] guaranteeing citizenship, equal protection, and due process of law;[9] and protecting the right to vote.[10] Undoubtedly, the Due Process Clause of the Fourteenth Amendment has been pivotal to the protection of civil rights and civil liberties; over the last century, the Supreme Court used it to incorporate most of the Bill of Rights against the states.[11]

But, the Federal Constitution merely sets a "constitutional floor" below which state constitutional interpretations may not sink.[12]

While George Mason and Elbridge Gerry sought a bill of rights early on at the constitutional convention, other delegates resisted the idea, believing such a charter would be superfluous. *Id.* at 109. But, when the contours of the full, expansive powers of the new federal government became more apparent, the notion of adding a bill of rights to ensure the rights of the people would not be infringed by the federal government gained popularity. *Id.* at 110–12. However, states were still viewed as the primary protectors of civil rights. *Id.* at 112; Mark S. Cady, *A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties*, 60 DRAKE L. REV. 1133, 1145 (2012) ("Our Iowa Constitution, like other state constitutions, was designed to be the primary defense for individual rights.").

This conclusion is necessarily inferred from the Supreme Court's opinion in Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833), in which it held that the Bill of Rights did not apply to the states. *See* Paul Finkelman & Stephen E. Gottlieb, *State Constitutions and American Liberties*, *in* TOWARD A USEABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 1, 9 (Paul Finkelman & Stephen E. Gottlieb eds., 1991). Because the Bill of Rights did not initially apply against the states, it stands to reason that state constitutions were originally envisioned as the primary layer of protection. *See id.*

[6] *See* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 24–25 (2004).

[7] Lamentably, the federal government was in many ways as culpable as individual states in perpetuating slavery. The Constitution protected slavery in several sections, denying Congress the power to prohibit the importation of slaves until 1808, U.S. CONST. art. I, § 9, cl. 1, requiring the return of fugitive slaves, U.S. CONST. art. 4, § 2, cl. 3, and, most confoundedly, defining slaves as less than fully human beings. *See* U.S. CONST. art. I, § 2, cl. 3.

[8] U.S. CONST. amend. XIII.

[9] U.S. CONST. amend. XIV, § 1.

[10] U.S. CONST. amend. XV, § 1.

[11] *See* Gideon v. Wainwright, 372 U.S. 335, 341 (1963) ("[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment."); *see also* Danforth v. Minnesota, 552 U.S. 264, 272 (2008) ("The serial incorporation of the Amendments in the Bill of Rights during the 1950's and 1960's imposed more constitutional obligations on the States . . . .").

[12] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its

The states never surrendered the power to play an independent role in guaranteeing a greater measure of equality and liberty for their citizens.[13] From a constitutional standpoint, it is a well-settled precept that states enjoy considerable freedom to depart from federal interpretations of analogous—even identically worded—federal constitutional provisions.[14] Our own opinions have not only extolled the virtues of relying on independent state constitutional grounds, but have consistently utilized this vehicle on our journey for equal justice.[15]

Mere observation of a state court's freedom to interpret its constitution independently is meaningless if unaccompanied by action. Such constitutional tokenism not only renders a venerated authority feckless, it shirks a responsibility of the utmost gravity—a responsibility that should be jealously guarded and employed with reverent, faithful allegiance to the principles of equality and liberty. This responsibility is a key source of Iowa's proud civil rights heritage and vigorous approach to ensuring that all of our citizens

citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). *See also* Traylor v. State, 596 So. 2d 957, 961–63 (Fla. 1992) ("Under our federalist system of government, states may place more rigorous restraints on government intrusion than the federal charger imposes; they may not, however, place more restrictions on the fundamental rights of their citizens than the federal Constitution permits.").

[13] *See* McClure v. Owen, 26 Iowa 243, 249 (1868) (explaining the requirement that federal courts honor constructions of the Iowa Constitution established by the Supreme Court of Iowa).

[14] State v. Ochoa, 792 N.W.2d 260, 264 n.1 (Iowa 2010) ("The power to independently interpret state constitutional provisions extends to those provisions identical to the federal model." (citations omitted)). *See also* State v. Baldon, 829 N.W.2d 785, 791 (Iowa 2013) (citing *Traylor*, 596 So. 2d at 961–63) ("[T]he Supreme court's jurisprudence regarding the freedom from unreasonable searches and seizures under the Fourth Amendment—or any other fundamental, civil, or human right for that matter—makes for an admirable floor, but it is certainly not a ceiling.").

[15] *See, e.g.*, Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 354 (Iowa 2013) (holding that Iowa Code section 144.13(2) (2011) violated the equality guarantees contained in Article I, sections 1 and 6 of the Iowa Constitution by limiting the marital presumption of parentage on Iowa birth certificates to heterosexual couples); *Baldon*, 829 N.W.2d at 802–03 (holding that parolee's agreement to mandatory terms of parole agreement, which required consent to warrantless, suspicionless searches, did not function as a waiver of the parolee's right to be free from unreasonable searches and seizures under Article I, section 8 of the Iowa Constitution); *Ochoa*, 792 N.W.2d at 291 (holding that Article I, section 8 of the Iowa Constitution prohibited a warrantless search of a parolee based on parole status alone); Varnum v. Brien, 763 N.W.2d 862, 896–906 (Iowa 2009) (finding sexual orientation to be a quasi-suspect classification and applying intermediate scrutiny to strike down statute limiting marriages to a union between a man and a woman); State v. Cline, 617 N.W.2d 277, 292–93 (Iowa 2000) (holding that the exclusionary rule is a constitutional remedy under Article I, section 8 of the Iowa Constitution and rejecting the good faith exception articulated in United States v. Leon, 468 U.S. 897, 923 (1984)), *abrogated on other grounds by* State v. Turner, 630 N.W.2d 601, 606 n.2 (Iowa 2001).

enjoy equal protection under the law.[16] No court is inerrant. Our court, like all others, has published pages that future generations would revise with disdain. However, by persistently seeking to demonstrate the circumspection and courageousness necessary to protect the civil liberties of all Iowans, our court has consistently placed Iowans well ahead of the curve on an arc bending towards justice.

On July 4, 1839, some seven years prior to achieving statehood, Iowa began its legal history with a decision that would stand as a groundbreaking testament to equality, liberty, and uniformity of law—civil rights principles that would become the bedrock upon which our jurisprudence would stand.[17] *In re Ralph*, the first published opinion of the Supreme Court of Iowa, presented the case of a black man from Missouri who had been permitted to come to Iowa to work in order to purchase his freedom.[18] When the man came up short, the Missouri slave owner sent bounty hunters to collect him and sued in Iowa court for his return.[19] Chief Justice Charles Mason, writing for the then three-member panel, rejected the claim of the Missouri slave owner. The court concluded that the

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[16] Article I, section 6, of the Iowa Constitution provides:

> All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges and immunities, which, upon the same terms shall not equally belong to all citizens.

IOWA CONST. art. I, § 6. Thus, our equal protection clause is textually distinguishable from the federal guarantee, which provides that "[n]o [s]tate shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The first lexicological distinction is immediately apparent. While the Federal Equal Protection Clause is textually concerned with action unjustifiably denying rights to minorities, Article I, section 6 is textually focused on conduct unjustifiably granting rights that do not apply to all equally. *Compare* U.S. CONST. amend. XIV, § 1, *with* IOWA CONST. art. I, § 6. Both types of discrimination treat groups differently in affording a certain right or privilege. Some commentators have opined that similarly worded state constitutional equality provisions—dubbed "Jacksonian equality provisions"—were never conceived to ensure equal protection to vulnerable minorities but rather to ensure that privileged elites are not afforded special treatment. *See* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1206–08 (1985). However, 174 years of equality jurisprudence in Iowa conclusively demonstrates that our equality guarantee effectively achieves both of these ends. Thus, these two concepts are simply two sides of the same coin.

The second lexicological distinction rests in the Article I, section 6 requirement that all laws should have a "uniform operation." IOWA CONST. art. I, § 6. In this regard, Article I, section 6 is more concerned with the actual uniformity of laws in their operation and less concerned with the motive or intent behind state action and the attendant, often treacherous inquiry into legislative purposes.

[17] *In re* Ralph, 1 Morris 1, 1 (1839). *See* IOWA DEP'T OF ADMIN. SERVS., COMPREHENSIVE FISCAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED June 30, 2009 (2009) (describing that the decision came down on July 4, 1839 on the backside of the cover page).

[18] *In re Ralph*, 1 Morris at 2.

[19] *Id*.

law "extend[s] equal protection to men of all colors and conditions,"[20] and therefore, "no man in this territory can be reduced to slavery."[21] Thus, twenty-six years before the ratification of the Thirteenth Amendment abolishing slavery[22] and eighteen years before the Supreme Court reached the opposite result in the iniquitous Dred Scott decision,[23] the Iowa Supreme Court gave real meaning to the abiding principle "all men are created equal."[24]

Less than twenty years later, the Iowa Supreme Court reaffirmed an abounding dedication to the precept of equality under the law by ruling that Susan B. Clark, a twelve-year-old school girl, could not be denied admission to public school because she was black.[25] Relying on the broad constitutional principle of "equal rights to all, upon which our government is founded," the Iowa Supreme Court once again set the standard well above the appallingly low federal constitutional floor[26] that would not be elevated by the U.S. Supreme Court until nearly a century later in *Brown v. Board of Education*.[27]

In 1869, Justice Francis Springer helped demonstrate that the Iowa Supreme Court possessed a commitment to gender equality as well by admitting Arabella Mansfield to the bar, making her the first woman licensed to practice law in the nation.[28] After becoming the first woman in the nation to pass a bar exam, Mansfield successfully persuaded Springer to interpret the gender-restrictive language in the Iowa bar admissions statute in a gender-neutral

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[20] *Id*. at 7.

[21] *Id*. at 6.

[22] *"The 13th Amendment is Ratified"*, THIS DAY IN HISTORY, http://www.history.com/this-day-in-history/13th-amendment-ratified (last visited Aug. 4, 2013) (noting that the Thirteenth Amendment was ratified in 1865).

[23] Scott v. Sandford, 60 U.S. (19 How.) 393, 454 (1857).

[24] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[25] Clark v. Bd. of Dirs., 24 Iowa 266, 277 (Iowa 1868).

[26] *Id.* at 269. The Iowa Supreme Court interpreted the meaning of a statute that provided for the education of the youth of the state in the context of a constitutional provision that provided for the education of "*all the youths of the State* through a system of common schools." *Id.* at 274 (quoting Iowa Const. amend IX, § 12 (1857)). The court rejected an argument that common schools did not preclude separate-but-equal schools under the statute by declaring that the separate-but-equal approach would violate the broader constitutional principle that all youth were also "equal before the law." *Clark*, 24 Iowa at 277. Consequently, the court held that school boards could not discriminate in making the assignment of students to multiple schools within a community based on "nationality, religion, color, clothing or the like." *Id.*

[27] Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

[28] RICHARD, LORD ACTON & PATRICIA NASSIF ACTON, TO GO FREE: A TREASURY OF IOWA'S LEGAL HERITAGE 132 (2d prtg. 1996); KAREN BERGER MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT 11 (1986); 2 NOTABLE AMERICAN WOMEN 1607–1950: A BIOGRAPHICAL DICTIONARY 492 (Edward T. James et al. eds., 1971).

fashion.[29] This impressive first stood in stark contrast to the position taken in other states and by the U.S. Supreme Court, which some four years later concluded that an Illinois woman had no right to practice law.[30]

In the 1873 case, *Coger v. North Western Union Packet Co.*,[31] the Iowa Supreme Court dealt another blow to the abhorrent institution of segregation and the "separate but equal" rationale upon which it was speciously based.[32] *Coger*, decided five years after the ratification of the Fourteenth Amendment,[33] presented the opportunity to continue the tradition of staying in the vanguard of civil rights established in *Clark* by embracing our responsibility to independently interpret the Iowa Constitution. This opportunity came by way of Emma Coger, a black, female school teacher who brought suit after she was denied dining accommodations on a steamboat in Keokuk.[34]

With some difficulty, Coger purchased a ticket with admittance to the first-class dining section of the steamboat that was limited to white patrons only.[35] When the captain of the steamer asked her to leave the dining room, she resisted arduously and was forcibly removed.[36] Subsequently, she brought suit against the steamboat company for assault and battery.[37] The Iowa Supreme Court affirmed a jury verdict for Coger.[38] The court concluded that the principle of equality contained in Article I, section 6 of the Iowa Constitution could not tolerate such a denial of access to a public accommodation on the basis of race.[39]

> These rights and privileges rest upon the equality of all before the law, the very foundation principle of our government. If the negro must submit to different treatment, to accommodations inferior to those given to the

[29] MORELLO, *supra* note 28, at 12.

[30] Bradwell v. State, 83 U.S. (16 Wall.) 130, 140, 142 (1872).

[31] Coger v. Nw. Union Packet Co., 37 Iowa 145 (Iowa 1873).

[32] *Id.* at 160.

[33] *"The Fourteenth Amendment Ratified"*, PBS, http://www.pbs.org/wnet/jimcrow/stories_events_14th.html (last visited Aug. 4, 2013) (indicating that the Fourteenth Amendment was ratified in 1868).

[34] *Coger*, 37 Iowa at 147–48.

[35] *Id.* (noting that she first attempted to buy a ticket for the state room, but was refused because she was African American and eventually asking another man to purchase the ticket for her, which he did).

[36] *Id.* at 148–49.

[37] *Id.* at 146.

[38] *Id.* at 160.

[39] *Id.* at 153. *See also id.* at 154–55.

> white man, when transported by public carriers, he is deprived of the benefits of this very principle of equality.[40]

The *Coger* ruling would stand as a blueprint setting forth the robust machination of the uniformity principle our court and others would rely on in constructing a legal order based upon "absolute equality of all" persons before the law.[41] Notably, in the *Coger* ruling the court did not decline to enforce our constitutional equal protection guarantees against a private actor in the public accommodation context as the U.S. Supreme Court would ten years later in the *Civil Rights Cases*.[42]

Over twenty years after the *Coger* ruling, the U.S. Supreme Court demonstrated in *Plessy v. Ferguson*[43] its unwillingness to interpret the equal protection guarantee contained in the Fourteenth Amendment in such a manner as to harmonize our federal legal order and our national Constitution.[44] The two would stay woefully out of tune for another sixty years—a discordance that shamelessly orchestrated the social and legal disjunction of the Jim Crow era that brought to bear upon our legal order a debilitating degree of cognitive dissonance. Not until 1954, over eighty years after the *Coger* ruling, would the U.S. Supreme Court begin to resolve this disharmony.[45]

The area of women's suffrage, regrettably, is one arena in which our Iowa Supreme Court faltered in its role as a pioneer for civil rights. At the dawn of the twentieth century, as the women's suffrage movement began to gain momentum, U.S. Supreme Court precedent declining to extend constitutional protections to women demonstrated the need for state judiciaries to lead the way in this critical arena.[46] It appeared that the Iowa Supreme Court would once again distinguish itself by positioning itself as a groundbreaking leader on the question of women's right to vote. As the *Daily Iowa State Register* proclaimed in an 1870 newspaper article recognizing Arabella Mansfield's revolutionary achievement,

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[40] *Id.* at 153.

[41] *See* Varnum v. Brien, 763 N.W.2d 862, 877 (Iowa 2009) (quoting *Coger*, 37 Iowa at 153).

[42] *See* The Civil Rights Cases, 109 U.S. 3, 17–18, 23–24 (1883) (interpreting the Equal Protection Clause of the Fourteenth Amendment as authorizing Congress to pass legislation to control only state but not private conduct).

[43] Plessy v. Ferguson, 163 U.S. 537 (1896).

[44] *See id.* at 544 (interpreting the federal Equal Protection Clause to permit "separate but equal" provisions with race-based segregation).

[45] *See* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

[46] *See, e.g.*, Minor v. Happersett, 88 U.S. (21 Wall.) 162, 171–72, 173 (1874) (holding that the Privileges or Immunities Clause contained in the Fourteenth Amendment applied to women but it did not grant the right to vote).

"[t]he people of Iowa will not be long in declaring that an intelligent woman has as much right to the ballot as an ignorant man."[47]

This notion was encouraged by our court's 1908 ruling in *Coggeshall v. City of Des Moines*.[48] In 1894, Iowa suffragists, yet to achieve universal suffrage for women, proceeded to employ a gradated solution and convinced the legislature to permit women to vote in "any city, incorporated town, or school district for the purpose of issuing any bonds for municipal or school purposes, or for the purpose of borrowing money, or for the purpose of increasing the tax levy."[49] City officials, hasty to subvert the success of the suffragist's subversion, phrased one question on the ballot in a 1907 special election as follows: "Shall the city of Des Moines erect a city hall at a cost, not exceeding $350,000?"[50] Believing that by omitting any reference to taxes or bonds the wording of the question effectively excluded women from the polls, city officials turned away activist women who attempted to cast ballots.[51]

A number of female activists brought suit challenging their exclusion from the polls.[52] On appeal, the Iowa Supreme Court held that women had been illegally excluded from the ballot and that the appropriate remedy for such an exclusion of "an entire class of voters" was to declare the election invalid.[53] However, in reaching this conclusion, the court declined to interpret Article II, section 1 of the Iowa Constitution in a gender-neutral fashion.[54] The court interpreted the word "election" as used in Article II, section 1 as being applicable only to elections for public officers and not elections regarding public policy issues such as levying taxes or issuing bonds.[55] In reaching a result otherwise favorable to the suffragists,

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[47] ACTON & ACTON, *supra* note 28, at 132 (quoting DAILY IOWA STATE REG. (Des Moines), Mar. 5, 1870).

[48] Coggeshall v. City of Des Moines, 117 N.W. 309 (Iowa 1908).

[49] Patricia A. Cain & Linda K. Kerber, *Subversive Moments: Challenging the Traditions of Constitutional History*, 13 TEX. J. WOMEN & L. 91, 99 (2003) (quoting Act of Apr. 13, 1894, ch. 39, 1894 Iowa Acts 47).

[50] Cain & Kerber, *supra* note 49, at 99 (quoting *Coggeshall*, 117 N.W. at 309).

[51] Cain & Kerber, *supra* note 49, at 99.

[52] *Id.*

[53] *Coggeshall*, 117 N.W. at 314.

[54] At the time of the case, Article II, section 1 of the Iowa Constitution provided, "[e]very male citizen of the United States of the age of 21 years, who shall have been a resident of this state six months next preceding the election, and of the county in which he claims his vote, sixty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law." *Coggeshall*, 117 N.W. at 311 (quoting IOWA CONST. art II, § 1 (1857) (amended 1868)). This section to the Iowa Constitution, however, was amended in 1970 in order to become more gender-neutral. *See* IOWA CONST. art II, § 1.

[55] *Coggeshall*, 117 N.W. at 312–13.

the court decided that Article II, section 1 was limited to males, and thus women could not become qualified electors absent constitutional amendment.[56]

It was this reasoning that our court relied on in *In re Carragher*,[57] a case that resulted in a missed opportunity to progress towards a legal regime guaranteeing equal treatment for women in our State.[58] In *Carragher*, the court upheld a statue limiting licenses to sell liquor to males, reasoning that the statute only permitted "qualified electors" to obtain liquor licenses and women were not "qualified electors" under our constitution.[59]

Thus, in the wake of the *Carragher* decision, *Coggeshall*, a case that seemed to signify genuine progress for the fledgling women's rights movement proved an evanescent victory for women seeking universal suffrage in our state. Nonetheless, in 1921, the Iowa Supreme Court played a distinctive role in furthering the cause of equality for women by becoming one of the early states to rely on the Nineteenth Amendment[60] in concluding that women were also eligible to serve on juries.[61] Though we concluded that suffrage and jury duty were unrelated, we applied our jury eligibility statute, which made "[a]ll qualified electors of the state" eligible for jury service.[62] We reasoned that, the Nineteenth Amendment made women "eligible electors," and the jury eligibility statute in turn made them eligible for jury service.[63]

Like all courts, the path treaded by our high court in seeking the ends of justice has never been infallible. At times we have faltered. But, justice is a journey, not a destination. A survey of the legal landscape upon which the journey is undertaken will always reveal obstacles. We can, at times, be blinded by the past and fail to see beyond the bend in the curve. Yet, the goal of ensuring the equal treatment of every Iowan is one that our court will never abandon, as long as our constitution never abandons our belief in equality. And, with a legal history demonstrating such vigor and accomplishment in navigating this journey for justice, why would we cede the helm, the great responsibility with which we are

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[56] *Id.* at 311–12.

[57] *In re* Carragher, 128 N.W. 352 (Iowa 1910).

[58] *Id.* at 353.

[59] *Id.* (citing *Coggeshall*, 117 N.W. 309).

[60] U.S. CONST. amend. XIX (constitutionalizing women's suffrage).

[61] *See* Jennifer K. Brown, Note, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2191 n.85 (1993) (citing cases allowing women to serve on juries).

[62] State v. Walker, 185 N.W. 619, 623, 625 (Iowa 1921) (citation omitted).

[63] *Id.* at 626.

charged, to any authority—surely not to arrive at some point behind the curve on the arc of justice. In retrospect, it can be seen that our mistakes have come when we have failed to stay ahead of the curve.

Indeed, in more recent times our court has continued to demonstrate a keenness to stay ahead of the curve on matters of equal protection, notwithstanding political and public relations consequences.[64] This approach stems from a strong understanding of judicial independence and the promises contained in the judicial oath to uphold the constitution and the laws, not the political or sociological ideology of any party, group, or individual. It has also helped that the Iowa Supreme Court has strived to view the constitutional meaning of equality through the lens of what is understood today.[65] This inextinguishable allegiance to the Iowa Constitution will continue to fuel us in our journey on the parabolic path of equal justice. Our court has been a pioneer because we take the time, as we must, to venture into an examination of our constitutional beliefs free from the view of the past, but only to better see if our past understanding has been eclipsed by the truth of today. This pioneer role can be treacherous at times, as it always has been for those who have ventured to discover the truth before the truth is discovered by most. Yet, it is a judicial role that ensures our enduring strength.

Where are we on the arc of justice as a nation? Undoubtedly, many surveyors of the legal landscape would conclude that we have not come far enough on our journey. Some would point to an intent requirement that results in lenient scrutiny for laws that have a grossly disproportionate impact on minorities.[66] Others would be

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[64] *See* Bert Brandenburg & Matt Berg, *The New Storm of Money and Politics Around Judicial Retention Elections*, 60 DRAKE L. REV. 703, 709 (2012) (discussing how the same-sex marriage decision in *Varnum v. Brien* incited social conservative campaigners who resultantly raised over one million dollars, mostly from large out-of-state donors, to successfully unseat three Iowa Supreme Court Justices in the subsequent judicial retention election); *see also* Marsha Ternus, State Constitutional Commentary Symposium: *Remarks: Chief Justice Marsha Ternus of Iowa*, 74 ALB. L. REV. 1569, 1573–74 (2011).

[65] *See* Cady, *supra* note 5, at 1147–48.

[66] *See* Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but . . . [s]tanding alone, it does not trigger the rule, that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." (citation omitted)); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) ("[T]he Fourteenth Amendment guarantees equal laws, not equal results."); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (declining to classify the elderly as a suspect class); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (concluding that the poor have not been "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

dissatisfied with a judicial unwillingness to apply heightened scrutiny to laws intended to have an unfavorable impact upon some of the most vulnerable members of our society.[67] While others would criticize an interpretation of the Equal Protection Clause that uses antidiscrimination principles to strike down laws designed to combat the invidious, institutionalized discrimination pervading our society to this day.[68] Still others would criticize judicial decision-making that uses principles of restraint to avoid confronting claims of discrimination.[69] Wherever we fall on the arc of justice as a nation, it is critical to remember that it is indeed an illimitable arc that does not bend towards justice by itself—an arc upon which the Iowa Supreme Court will forever strive to stay ahead of the curve, as courts were contemplated to do.

[67] *See* Romer v. Evans, 517 U.S. 620, 624, 632 (1996) (striking down a Colorado constitutional amendment that forbade recognition of homosexuals as a protected class on equal protection ground but refusing to declare homosexuals a suspect class; evident from the use of a rational basis test applied to non-suspect class equal protection cases); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 436, 442–43, 450 (1985) (striking down a municipal ordinance preventing the construction of a group home for the mentally challenged but declining to classify persons with disabilities as a suspect or quasi-suspect class for equal protection purposes); Dandridge v. Williams, 397 U.S. 471, 473, 485–86 (1970) (reviewing a challenge that claimed Maryland's upper limit on social welfare benefits constituted discrimination against impoverished members of society under a rational basis standard).

[68] *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 255, 270 (2003) (applying strict scrutiny to strike down the University of Michigan's affirmative action plan); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 205–06, 227, 238–39 (1995) (applying strict scrutiny to federal and state race-based affirmative action program and remanding for determination of whether highway contracts offering financial incentives for hiring minority-owned subcontractors served a compelling government interest).

[69] *See, e.g.*, Jean v. Nelson, 472 U.S. 846, 848–49, 854, 857 (1985) (refusing to proceed to the equal protection claim made by Haitians denied parole following Immigration and Naturalization Service decisions, deciding the case on narrower, nonconstitutional grounds).