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# “IN THE NAME OF HEAVEN, DON’T FORCE MEN TO HEAR PRAYERS”: RELIGIOUS LIBERTY AND THE CONSTITUTIONS OF IOWA

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## ABSTRACT

*As to matters of religious liberty, the Iowa constitutions of 1844, 1846, and 1857 were the products of the liberal religious spirit of the pioneers. The drafters of the 1844 constitution—submitted as part of the first, unsuccessful attempt at statehood—advanced the values of voluntarism and democracy. They rejected compulsory public prayer, discrimination based on religious belief, and compulsory participation in and support of religious activities. That liberal spirit continued to inform the constitutions of 1846 and 1857, even though the political landscape of the state changed dramatically in the decade following statehood. On matters of religious liberty, Iowa continues to benefit from the good work of the citizens who drafted our constitutions.*

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## I. PROLOGUE: THE RADIANT SUMMER OF 1838

The story of religious liberty under Iowa’s constitutions has many threads. One began on a warm summer evening in Boston in the year 1838.<sup>1</sup>

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1. 8 CHARLES FRANCIS ADAMS, DIARY OF CHARLES FRANCIS ADAMS 78–79 (Aida Donald & David Donald eds., 1986), <http://www.masshist.org/publications/>

On July 15 of that year, Ralph Waldo Emerson addressed the seven graduating students of the Harvard Divinity School.<sup>2</sup> Having been invited by the students, Emerson delivered what became known as his Divinity School Address, in which he framed a Transcendentalist critique of the Unitarian theology then predominant at Harvard.<sup>3</sup> The talk generated great controversy—some thought his remarks blasphemous—but his introduction was inoffensive.<sup>4</sup> Emerson started his remarks to the divinity students by describing the glorious Boston summer of 1838:

In this refulgent summer, it has been a luxury to draw the breath of life. The grass grows, the buds burst, the meadow is spotted with fire and gold in the tint of flowers. The air is full of birds, and sweet with the breath of the pine, the balm-of-Gilead, and the new hay. Night brings no gloom to the heart with its welcome shade. Through the transparent darkness the stars pour their almost spiritual rays.<sup>5</sup>

As Emerson spoke of beauty to the students in Cambridge that warm July evening, five miles away in South Boston, white-haired, 64-year-old Abner Kneeland languished in the Old House of Correction.<sup>6</sup> After a legal battle that stretched over five years, he had been imprisoned for blasphemy, the last American to be so persecuted.<sup>7</sup> A month after Emerson's talk, Kneeland was released from prison.<sup>8</sup> Having served his full sentence, he was free to enjoy what was left of Emerson's radiant summer.<sup>9</sup>

That Abner Kneeland found himself in prison for blasphemy that Boston summer was perhaps inevitable. His religious journey had been shrouded in conflict and controversy.<sup>10</sup> Kneeland was a 27-year-old

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apde2/view?mode=p&id=DCA08p15#DCA08p15.

2. Ralph Waldo Emerson, Divinity School Address (July 15, 1838), <http://transcendentalism-legacy.tamu.edu/authors/emerson/essays/dsa.html>.

3. *Id.*

4. *Id.* (discussing negative responses to the address).

5. *Id.* Refulgence is defined as "a radiant or resplendent quality or state." *Refulgent*, RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 2001).

6. Mary R. Whitcomb, *Abner Kneeland: His Relations to Early Iowa History*, in 6 ANNALS OF IOWA 340, 346 (1904).

7. *Id.* at 355 (describing Mr. Kneeland as "a fine looking, venerable, white headed man"); HENRY SABIN & EDWIN L. SABIN, *THE MAKING OF IOWA* 217 (1900) (describing Mr. Kneeland as "a fine appearing man").

8. Whitcomb, *supra* note 6, at 346.

9. *See id.*

10. Stephan Papa & Peter Hughes, *Abner Kneeland*, DICTIONARY UNITARIAN &

carpenter in 1801 when he joined the Baptist church in Putney, Vermont, and began to preach.<sup>11</sup> Apparently, Kneeland evidenced a penchant for controversy even as a young Baptist preacher.<sup>12</sup> Within three years he left the Baptist church amid accusations of heresy and became an ordained Universalist minister.<sup>13</sup> Kneeland was a Universalist preacher in New Hampshire until 1811, when he moved to a church in Charlestown, Massachusetts.<sup>14</sup>

Three years after moving to Charlestown, assailed by religious doubt, Kneeland resigned the ministry and went into the dry-goods business.<sup>15</sup> But he felt called to religious service and returned to the ministry two years later, going first to Whitestown, New York, and then in 1818 to Philadelphia.<sup>16</sup> A description of Kneeland's activities in Philadelphia gives an indication of the nature of the individual and the ferment of his character:

During the Philadelphia years Kneeland was almost superhumanly busy. He published sermons and tracts, edited denominational and secular newspapers, compiled a hymnal, made a translation of the New Testament, and developed a new system of spelling. . . . In addition to these ecclesiastical and scholarly pursuits, Kneeland found time to help his wife with a new store and to serve as a government inspector of imported hats.<sup>17</sup>

In 1825, Kneeland moved to New York City to lead the First Universalist Society, and the tempo of his divisive nature accelerated.<sup>18</sup> Within two years of arriving in New York, his theological views split the congregation, and he and his supporters left to form the Second Universalist

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UNIVERSALIST BIOGRAPHY (Jan. 22, 2001), <http://uudb.org/articles/abnerkneeland.html>.

11. *Id.*

12. Whitcomb, *supra* note 6, at 341 (“For a brief time he preached for the Baptist denomination, but he soon wavered in the faith, and there was talk of dealing with him for heresy.”).

13. *Id.*

14. In Langdon, New Hampshire, where Kneeland began as a Universalist minister, he reportedly preached at both the Universalist church and the Congregational church, both of which were supported by public taxation. *Id.* at 341.

15. *Id.* (“Religious doubt again assailed him and he engaged for a time in the merchandise business in Salem, Mass.”).

16. *Id.*

17. Papa & Hughes, *supra* note 10.

18. *Id.*

Society.<sup>19</sup> Within two years of founding the Second Universalist Society, Kneeland brought controversy to that group.<sup>20</sup> In 1829, he signed a statement of voluntary suspension from the fellowship: “He grew more outspoken in his religious doubts, which finally obtained the mastery. The Universalists refused longer to recognize him as a preacher, and in May, 1829, after nearly twenty-five years of ministerial labor he suspended himself from the church, giving a clear and dignified statement of his position.”<sup>21</sup> In 1830, “on the basis of his renunciation of Christianity, Abner Kneeland was considered automatically disfellowshipped by the New England Universalist General Convention.”<sup>22</sup>

Kneeland parted with the Universalists, for “in spite of all his efforts to prevent it, the whole fabric of Christian evidence was completely demolished in his mind, without leaving even a wreck behind.”<sup>23</sup> Years later, at the time of his death, an editorial in the newspaper he founded in Boston, the *Investigator*, described Kneeland’s religious evolution:

He rejected theory after theory until he finally rested on the faith of a universal God—a one God—all things God—if a God there were, but of this being we could know nothing, and from him we had nothing, independent of this economy of things, to hope or fear.<sup>24</sup>

By 1831, Kneeland was in Boston leading the First Society of Free Enquirers and editing the *Investigator*.<sup>25</sup> He was a popular speaker. At a time when Boston had only roughly 60,000 residents, it was reported that twice weekly—on Sundays and Wednesdays—Kneeland addressed gatherings of over 2,000 men and women.<sup>26</sup>

During Christmas week of 1833, Kneeland published three articles in the *Investigator* that grounded his indictment for blasphemy.<sup>27</sup> The first

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19. *Id.*

20. *Id.*

21. Whitcomb, *supra* note 6, at 343.

22. Papa & Hughes, *supra* note 10.

23. Whitcomb, *supra* note 6, at 343.

24. *Id.* at 358.

25. *Id.* at 343.

26. Papa & Hughes, *supra* note 10; *POP Culture: 1830*, U.S. CENSUS BUREAU, [https://www.census.gov/history/www/through\\_the\\_decades/fast\\_facts/1830\\_fast\\_facts.html](https://www.census.gov/history/www/through_the_decades/fast_facts/1830_fast_facts.html) (last visited Mar. 12, 2018).

27. 2 WILLIAM ELLERY CHANNING, MEMOIR OF WILLIAM ELLERY CHANNING: WITH EXTRACTS FROM HIS CORRESPONDENCE AND MANUSCRIPTS 243 (1850).

article was, in the words of Unitarian theologian William Ellery Channing, (one of his *defenders*), “[a] scurrilous extract from Voltaire, ridiculing the miraculous generation of Jesus.”<sup>28</sup> The second was “[a]n article declaring the practice of addressing prayers to God to be absurd.”<sup>29</sup> But it was the third article upon which Kneeland was imprisoned.<sup>30</sup> In that piece he traced four foundational differences he had with the Universalist church.<sup>31</sup> The first difference was the Universalist belief in God: “Universalists believe in a God which I do not; but believe that their God, with all his moral attributes, (aside from nature itself) is nothing more than a chimera of their own imagination.”<sup>32</sup> The second difference discussed in the *Investigator* article was the Universalist belief in Christ:

Universalists believe in Christ, which I do not; but believe that the whole story concerning him is as much a fable and fiction as that of the god Prometheus, the tragedy of whose death is said to have been acted on the stage in the theater in Athens five hundred years before the Christian era.<sup>33</sup>

The third difference was the Universalist belief in miracles: “Universalists believe in miracles, which I do not; but believe that every pretension to them can be accounted for on natural principles, or else is to be attributed to mere trick and imposture.”<sup>34</sup> The final difference outlined in the *Investigator* article was the Universalist belief in resurrection and eternal life:

Universalists believe in the resurrection of the dead, in immortality and eternal life, which I do not; but believe that all life is mortal, that death is an extinction of life to the individual who possesses it, and that no individual life is, ever was, or ever will be eternal.<sup>35</sup>

On one level, Abner Kneeland was tried, convicted, and sentenced to prison for blasphemy on the basis of the *Investigator* article, in which he set

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28. *Id.*

29. *Id.* The two articles were characterized by 168 of Kneeland’s supporters as “one of a highly irreverent, and the other of a grossly indecent character.” *Id.* at 244.

30. Whitcomb, *supra* note 6, at 346.

31. *Id.*

32. *Id.* Other sources list the passage with lowercase gods. CHANNING, *supra* note 27, at 242–43.

33. Whitcomb, *supra* note 6, at 346.

34. *Id.*

35. *Id.*

forth his differences in belief from the Universalists.<sup>36</sup> In that sense, Kneeland was imprisoned for the simple expression of his beliefs on matters religious. As the prosecutor acknowledged upon appeal, “The denial of God, whether in decent language or otherwise, is prohibited.”<sup>37</sup> The trial judge confirmed that Kneeland’s statement of his beliefs was at issue: “I instructed the jury that the wilful denial of the existence of any God, except the material universe itself, would be a violation of the statute.”<sup>38</sup>

However, there was a political aspect to the persecution of Kneeland, as well as the clear religious aspect.<sup>39</sup> He had long been involved in Democratic politics<sup>40</sup> and advanced political and social ideas antithetical to the Whig establishment:

The prosecution portrayed his blasphemy as part of a pattern with his social thought. They were, in effect, trying him not just for his theology, but for his politics. For Kneeland had not only denounced the conservative influence of religion on society, but he had called for equal rights for women and equality of races. He had suggested women keep their own name and bank accounts. He had spoken out in favor of birth control, divorce, and interracial marriage.<sup>41</sup>

Thus, the Commonwealth prosecutor argued to the jury that a failure to convict Kneeland for blasphemy would see “marriages . . . dissolved, prostitution made easy and safe, moral and religious restraints removed, property invaded, and the foundations of society broken up, and property made common.”<sup>42</sup>

The blasphemy case against Kneeland took five years and multiple

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36. CHANNING, *supra* note 27, at 243. Channing argues that on appeal, Kneeland accepted an offer from the prosecutor to exclude the counts based on the Voltaire article and the article on prayer, and to limit the prosecution to the article tracing Kneeland’s differences with the Universalists. *Id.* But, Channing asserts, “As Mr. Kneeland had no counsel, and was little skilled in legal proceedings, the first and second articles were not struck out of the indictment.” *Id.*

37. *Id.* at 243–44 (quoting 20 OCTAVIUS PICKERING, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 211 (1864)).

38. *Id.* at 244.

39. Papa & Hughes, *supra* note 10.

40. Whitcomb, *supra* note 6, at 341 (noting Kneeland served in the New Hampshire House of Representatives in 1810 and 1811).

41. Papa & Hughes, *supra* note 10.

42. *Id.*

trials to complete.<sup>43</sup> The prosecution was highly controversial.<sup>44</sup> After the conviction, Emerson, Channing, abolitionist William Lloyd Garrison, and 165 other leading citizens of the Commonwealth endorsed a pardon petition to Commonwealth Governor Edward Everett,<sup>45</sup> himself a former Unitarian minister.<sup>46</sup> They asked Governor Everett to pardon Kneeland, using four arguments that sound quite modern.<sup>47</sup> First, they argued that the free expression of ideas was necessary for social progress: “Because the freedom of speech and the press is the chief instrument of the progress of truth and of social improvements, and is never to be restrained by legislation, except when it invades the rights of others, or instigates to specific crimes . . . .”<sup>48</sup> They further argued that to suppress speech would be to distort that process:

Because the influence of hurtful doctrines is often propagated by the sympathy which legal severities awaken towards their supporters;

. . . we are unwilling that a man, whose unhappy course has drawn on him general disapprobation, should, by a sentence of the law, be exalted into a martyr, or become identified with the sacred cause of freedom[.]<sup>49</sup>

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43. The record of the blasphemy trials is confused. Whitcomb, *supra* note 6, at 346:

He was tried before the municipal court of Boston, in January 1834, convicted and sentenced to three months’ imprisonment in the common jail. He appealed to the supreme court of Massachusetts, and in May, 1834, was tried before Judge Samuel Putnam; the jury disagreeing, the case was again tried, before Judge Samuel Wilde, Nov., 1835; a new trial was moved, the case was continued, and finally in 1838, Kneeland was sentenced to sixty days’ imprisonment.

44. *Id.* at 347 (stating that the prosecution “raised a storm of protest”).

45. *Id.*; Papa & Hughes, *supra* note 10.

46. Governor Everett is an interesting figure. After losing his 1839 reelection when his opponent was declared to have a single-vote majority of the ballots cast, Everett served as Minister to Great Britain, President of Harvard University, and Secretary of State. A MEMORIAL OF EDWARD EVERETT FROM THE CITY OF BOSTON 14–16, 118 (James McKellar Bugbee ed. 1875). He ran for Vice President in 1860 with John Bell of Tennessee on the Constitutional Union Party, but is perhaps best known as the featured speaker on the occasion when President Lincoln delivered the Gettysburg Address. Ted Widmer, *The Other Gettysburg Address*, N.Y. TIMES (Nov. 19, 2013), <http://opinionator.blogs.nytimes.com/2013/11/19/the-other-gettysburg-address/>.

47. CHANNING, *supra* note 27, at 244–46.

48. *Id.* at 245.

49. *Id.* at 246.

Second, the citizens seeking a pardon for Kneeland argued that truth did not need the protection of the state “[b]ecause truths essential to the existence of society must be so palpable as to need no protection from the magistrate”<sup>50</sup> and was dishonored by the attempt “[b]ecause religion needs no support from penal law, and is grossly dishonoured by interpositions for its defence, which imply that it cannot be trusted to its own strength and to the weapons of reason and persuasion in the hands of its friends[.]”<sup>51</sup>

Third, the petitioners made the practical argument that once the state started suppressing speech, there would be no speech that someone would not want suppressed “[b]ecause, if opinion is to be subjected to penalties, it is impossible to determine where punishment shall stop; there being few or no opinions in which an adverse party may not see threatenings of ruin to the state;”<sup>52</sup> and because history provided examples of the worst types of suppression “[b]ecause the assumption by government of a right to prescribe or repress opinions has been the ground of the grossest deprivations of religion, and of the most grinding despotisms[.]”<sup>53</sup>

Finally, the citizens argued that suppression of speech by the state was antithetical to the liberal spirit of the age:

Because the punishment proposed to be inflicted is believed to be at variance with the spirit of our institutions and our age, and with the soundest expositions of those civil and religious rights which are at once founded in our nature, and guaranteed by the constitutions of the United States and this Commonwealth;

. . . .

[and] [b]ecause we regard with filial jealousy the honour of this Commonwealth, and are unwilling that it should be exposed to reproach, as clinging obstinately to illiberal principles, which the most enlightened minds have exploded.<sup>54</sup>

The petition, which William Ellery Channing hailed as “an assertion by Christians of the equal rights of atheists to freedom of thought and speech,”<sup>55</sup>

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50. *Id.* at 245.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 245–46.

55. *Id.* at 246.

was summarily rejected by Governor Everett.<sup>56</sup> Abner Kneeland served his full 60-day sentence in the Old House of Correction in South Boston that glorious summer of 1838.<sup>57</sup>

Unitarian minister Theodore Parker, a friend of both Kneeland and Emerson, wrote at the time, linking Emerson's Divinity School Address and Kneeland's imprisonment:

Abner was jugged for sixty days; but he will come out as beer from a bottle, all foaming, and will make others foam—the charm of all is that Abner got Emerson's address to the students, and read it to his followers, as better infidelity than he could write himself.<sup>58</sup>

After his release from prison, Kneeland resolved to leave Massachusetts for a place in which he would be free to hold and advocate his individual views on matters of religion.<sup>59</sup> And so, in the spring of 1839, he relocated far away, to Van Buren County in the southeastern corner of the Iowa Territory, where he founded a community named Salubria.<sup>60</sup>

Thus, Abner Kneeland came to sit on the banks of the Des Moines River and wonder whether his fellow Iowans would fulfill his hopes for religious liberty.<sup>61</sup> The answer would come five years later, when the constitutional convention of 1844 assembled in Iowa City to write the constitution required for Iowa to become a state.<sup>62</sup> Until then, Abner

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56. *Id.* According to Channing, although unsuccessful in getting Abner Kneeland a pardon, the petition was beneficial:

[T]he petition was rejected by the Governor and Council. But, nevertheless, it exerted a wide and permanent influence. It was an assertion by Christians of the equal rights of atheists to freedom of thought and speech. It did a good work in educating the public mind. And there will never, in all probability, be another prosecution for atheism in Massachusetts.

*Id.* Channing correctly predicted Abner Kneeland would be the last person imprisoned for blasphemy in the Commonwealth and the nation.

57. Papa & Hughes, *supra* note 10.

58. Whitcomb, *supra* note 6, at 348 (quoting 1 FRANKLIN B. SANBORN & WILLIAM T. HARRIS, A. BRONSON ALCOTT: HIS LIFE AND PHILOSOPHY 281 (1893)).

59. *Id.* at 349.

60. *Id.* at 349–50, 353.

61. *See id.* at 353.

62. Russell M. Ross, *The Development of the Iowa Constitution of 1857*, 55 IOWA J. HIST. 97, 101–02 (1957).

Kneeland, “the hoary-headed apostle of Satan,” would simply have to wait.<sup>63</sup>

## II. THE CONSTITUTIONAL PROCESS BEGINS

“. . . a country of beginnings, of projects, of designs, and expectations.”  
Ralph Waldo Emerson<sup>64</sup>

The territorial capitol building in Iowa City was unfinished in late September 1844.<sup>65</sup> Under construction in fits and starts since the cornerstone was laid on July 4, 1840, it would not be completed for another decade.<sup>66</sup> However, that September, hurried preparations were underway.<sup>67</sup> The southern room on the second floor had been plastered, and furniture was being gathered.<sup>68</sup> It was reported that a carpet would have to be dispensed with, “as there are no available funds with which to purchase one, and credit cannot be procured.”<sup>69</sup> The preparations were for the convention to draw up the constitution required for Iowa to enter the Union.<sup>70</sup>

Like its capitol building, Iowa was very much a work in progress that fall. Officially open for settlement only since 1834, the Iowa Territory had been carved out of the Wisconsin Territory on July 4, 1838—just 11 days

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63. LEONARD W. LEVY, *BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE* 414 (1993) (quoting Unitarian theologian Samuel Gridley Howe).

64. Ralph Waldo Emerson, *A Lecture Ready Before the Mercantile Library Association: The Young American* (Feb. 7, 1844) [hereinafter Emerson, *A Lecture*], <https://archive.vcu.edu/english/engweb/transcendentalism/authors/emerson/essays/youngam.html>.

65. MARGARET N. KEYES, *OLD CAPITOL: PORTRAIT OF AN IOWA LANDMARK* 13–14 (1988).

66. *Id.* at 9–16.

67. BENJAMIN F. SHAMBAUGH, *FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846, ALONG WITH PRESS COMMENTS AND OTHER MATERIALS ON THE CONSTITUTIONS OF 1844 AND 1846*, at 207 (1900) [hereinafter SHAMBAUGH, *FRAGMENTS*].

68. *Id.*

69. *Id.* Support for the convention was apparently tenuous:

The law authorising a Convention makes it the duty of the Secretary to prepare a room, &c., for the use of the Convention; but nothing has been done by that officer. The Agent visited him at Burlington, upon that subject, but could procure no aid, beyond the furnishing of a small quantity of stationery.

*Id.*

70. 4 DOCUMENTARY MATERIAL RELATING TO THE HISTORY OF IOWA 130 (Benjamin Franklin Shambaugh ed., 1896).

before Emerson's Divinity School Address—in contemplation of statehood.<sup>71</sup> The population was growing rapidly and with it, support for statehood.<sup>72</sup> On October 7, 1844, the elected members of the convention—a group of 74 farmers, lawyers, physicians and tradespeople—gathered at the capitol.<sup>73</sup> Farmers predominated,<sup>74</sup> and Democrats greatly outnumbered Whigs.<sup>75</sup> All had been born somewhere else; the average member had been in Iowa fewer than six years.<sup>76</sup>

The convention deliberated on the full range of questions raised by the creation of a new state government. Several of the most controversial issues were the role of banks, the election of judges, and the status and treatment of blacks.<sup>77</sup>

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71. 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, 1134 (2012).

72. The 1840 census fixed the Territory's population at 43,112. *Resident Population and Apportionment of the U.S. House of Representatives*, U.S. CENSUS BUREAU, <http://www.census.gov/dmd/www/resapport/states/iowa.pdf> (last visited Feb. 7, 2018). Iowa's population would grow to 192,214 in 1850 and 674,913 in 1860. *Id.* By 1843 the opposition to statehood had been overcome. BENJAMIN F. SHAMBAUGH, *THE CONSTITUTIONS OF IOWA* 114–17 (1934) [hereinafter SHAMBAUGH, *THE CONSTITUTIONS*]. Organized on July 4, 1838, the Iowa Territory encompassed all of what later became the state of Iowa and, in addition, roughly the western two-thirds of what became the state of Minnesota, the eastern one-half of what became the state of South Dakota, and the eastern two-thirds of what became the state of North Dakota. See Edward M. Mansfield & Conner L. Wasson, *Exploring the Original Meaning of Article I, Section 6 of the Iowa Constitution*, 66 *DRAKE L. REV.* 147, 151 n.21 (2018).

73. See SHAMBAUGH, *THE CONSTITUTIONS*, *supra* note 72, at 149 (noting the 1844 convention adjourned on November 1, after 26 days in session).

74. *Id.* at 123 (“[T]here were forty-six farmers, nine lawyers, five physicians, three merchants, two mechanics, two miners, two millwrights, one printer, one miller, and one civil engineer.”).

75. Of the 73 delegates elected to the 1844 convention, the Democrats held a substantial majority and fewer than one-third were Whigs. *Id.* at 118 (“[T]he Democrats had won a great victory.”). Of the 72 delegates participating in the 1844 convention, 51 were Democrats and 21 were Whigs. *Id.* at 122–23.

76. See SHAMBAUGH, *FRAGMENTS*, *supra* note 67, at 408–10. One member, Whig lawyer Ralph P. Lowe, had lived in Iowa for 16 years. *Id.* at 409. Two had lived in Iowa for 14 years. *Id.* No other member had lived in Iowa for even 10 years. See *id.* at 408–10. Three members, Democrat lawyer John C. Hall, Democrat farmer William Morden, and Whig mechanic Elijah Sells, had lived in Iowa only three years. *Id.* at 409–10. The average member had lived in Iowa fewer than six years. See *id.* at 408–10.

77. SHAMBAUGH, *FRAGMENTS*, *supra* note 67, at 52 (stating that the minority of the Judiciary Committee wanted judges to be elected by the people); SHAMBAUGH, *THE*

Among the most important questions considered by the 1844 convention were three issues of religious freedom: whether to open convention sessions with a prayer, whether to prohibit nonbelievers from testifying in Iowa courts, and whether to adopt a guarantee against individual compulsion in matters of religion.<sup>78</sup> On these three issues of religious freedom, the members of the convention made notably progressive choices. As to one, they constitutionalized a bar to a particular form of religious bigotry for the first time in our national history.<sup>79</sup>

The accomplishments of the 1844 convention members cannot be separated from the times in which they met. By any measure, they gathered in a time of tremendous energy and progress. While the decade of the 1840s is not perhaps familiar to many Americans, in 1844 the nation was very much at a midpoint of our path to modernity.<sup>80</sup> The national sense of energy and progress was nicely captured that year by Ralph Waldo Emerson in his lecture, *The Young American*, where he proclaimed the United States “the country of the Future[,]” and described the nation as “a country of beginnings, of projects, of designs, and expectations.”<sup>81</sup>

The Revolution was long past and the nation had changed

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CONSTITUTIONS, *supra* note 72, at 140–49.

78. SHAMBAUGH, *THE CONSTITUTIONS*, *supra* note 72, at 125–30.

79. *Id.* at 129–30.

80. YONATAN EYAL, *THE YOUNG AMERICA MOVEMENT AND THE TRANSFORMATION OF THE DEMOCRATIC PARTY, 1828–1861*, at 116 (2007) (“Thinking metaphorically about the history of the United States, New Democrats conceived of themselves as the middle link between infancy and ripeness. Nations proceeded through life cycles just as human beings did, and now it was time for America to grow up.”).

81. Emerson, *A Lecture*, *supra* note 64. He concluded his remarks:

Our houses and towns are like mosses and lichens, so slight and new; but youth is a fault of which we shall daily mend. This land, too, is as old as the Flood, and wants no ornament or privilege which nature could bestow. Here stars, here woods, here hills, here animals, here men abound, and the vast tendencies concur of a new order. If only the men are employed in conspiring with the designs of the Spirit who led us hither, and is leading us still, we shall quickly enough advance out of all hearing of other’s censures, out of all regrets of our own, into a new and more excellent social state than history has recorded.

*Id.*

dramatically.<sup>82</sup> By 1844 the national population increased almost five-fold,<sup>83</sup> the number of states had doubled,<sup>84</sup> the population was shifting away from the original 13 states,<sup>85</sup> and the United States was becoming more diverse.<sup>86</sup>

Politically, the nation was in the middle of the Second Party System, a period of competition between the Whigs and Democrats.<sup>87</sup> The President

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82. See DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 243 (2007) [hereinafter HOWE, *TRANSFORMATION*] (detailing how the passing of the icons of our revolutionary past may also have contributed to the sense of energy and progress). Thomas Jefferson and John Adams died on July 4, 1826, the 50th anniversary of the Declaration of Independence. *Id.* The last surviving signer of the Declaration, Charles Carroll of Maryland, died in 1832. *Id.* The last surviving signer of the Constitution, President James Madison, died in 1836. *Id.* Indeed, not only Revolutionary icons were passing. President Jackson himself would survive the Iowa convention by only eight months. *See id.*

83. See *Population, Housing Units, Area Measurements, and Density: 1790 to 1990*, U.S. CENSUS BUREAU, <https://www.census.gov/population/www/censusdata/files/table-2.pdf> (last visited Mar. 13, 2018). The national population in the 1790 census was 3,929,214. Table 2. *Id.* The 1840 census population was 17,069,453; 1850 was 23,191,876. *Id.* Using a straight-line projection, the 1844 population could be estimated at 19,518,422. *See id.* This would indicate the population had grown between 1790 and 1844 by a factor of 4.96.

84. In 1844 there were 26 states; the original 13 had been joined by Vermont, Kentucky, Tennessee, Ohio, Louisiana, Indiana, Mississippi, Alabama, Maine, Missouri, Arkansas, and Michigan. *See An Act for the Apportionment of Representatives Among the Several States According to the Sixth Census*, ch. 48, 5 Stat. 491 (1842).

85. While the census of 1840 found a majority of the nation's population in the original 13 states, the census of 1850 found only a slight majority in the original 13, and the census of 1860 was the first in which the combined population of the original 13 states was eclipsed. *Population, Housing Units, Area Measurements, and Density: 1790 to 1990*, *supra* note 83. The 1840 census found 9,579,881 people in the original 13 states out of a total population of 17,063,353, or 56 percent. *Id.* By the census of 1850, the percentage had dropped to just 52 percent, 11,967,342 people in the original 13 states out of a national population of 23,191,876. *Id.* The lines had crossed by the 1860 census: only 46 percent of the nation's people lived in the original 13 states; 14,423,402 out of a total population of 31,443,321. *Id.* These percentages do not change materially if one excludes slaves and calculates based only on free individuals. HOWE, *TRANSFORMATION*, *supra* note 82, at 140. From 1800 to 1820 the number of people living beyond the Appalachians rose from a third of a million to over two million, "a population movement of stunning magnitude." *Id.*

86. DICKSON D. BRUCE JR., *EARNESTLY CONTENDING: RELIGIOUS FREEDOM AND PLURALISM IN ANTEBELLUM AMERICA* 26 (2013) ("[T]he Catholic population stood at about 300,000 in 1830. By 1840, . . . it had reached 600,000. And it continued to grow, reaching almost 1.2 million by the end of that decade.").

87. *Democracy and the Second Party System*, HIST. RESOURCES MOTT COMMUNITY

in the fall of 1844 was John Tyler.<sup>88</sup> Elected Vice President as a Whig in 1840, Tyler became President shortly after the inauguration upon the death of President William Henry Harrison.<sup>89</sup> By the time of the 1844 Iowa convention, President Tyler so estranged himself from Congressional Whigs that he had been expelled from the party.<sup>90</sup> Within days of the Iowa constitutional convention, Democrat James Knox Polk defeated Whig Henry Clay in the 1844 presidential election, largely on the question of the annexation of Texas.<sup>91</sup> Within five months of the Iowa convention, Congress approved Texas statehood.<sup>92</sup> Texas became a state at the end of 1845,<sup>93</sup> and war with Mexico followed in 1846.<sup>94</sup> While the election of President Polk marked a return to Jacksonian democracy, Polk's dark-horse nomination in place of former President Martin Van Buren, largely on the basis of the issue of Texas annexation, signaled the ascendancy of the Young America faction of the Democratic party and with it a modernization of Democratic policies.<sup>95</sup>

By any reasonable evaluation, 1844 was a year ripe with possibilities for the future.<sup>96</sup> The nation had largely recovered from the Panic of 1837 and

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C. (Mar. 30, 2014), <https://history.mcc.edu/wordpress/history/2014/03/30/democracy-andrew-jackson-and-the-second-party-system/>.

88. *John Tyler*, HISTORY, <http://www.history.com/topics/us-presidents/john-tyler> (last visited Feb. 7, 2018).

89. *William Henry Harrison*, HISTORY, <http://www.history.com/topics/us-presidents/william-henry-harrison> (last visited Feb. 7, 2018).

90. *A Controversial President Who Established Presidential Succession*, CONST. DAILY (Mar. 29, 2017), <http://constitutioncenter.org/blog/john-tyler-americas-most-unusual-president>.

91. SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 574–76 (2005).

92. *Id.* at 576; *see also The Debates at the Constitutional Convention of the State of Iowa*, ST. LIBR. IOWA, [www.statelibraryofiowa.org/services/collections/law-library/iaconst](http://www.statelibraryofiowa.org/services/collections/law-library/iaconst) (last visited Feb. 7, 2018) (discussing Iowa's three constitutional conventions, which were held in Iowa City).

93. *A Historic Reunion*, in 3 ANNALS OF IOWA 32, 40 (1897).

94. *Id.* at 42.

95. WILENTZ, *supra* note 91, at 571–72.

96. Of course many of the events of 1844 were not positive. Only three months prior to the Iowa convention, and only about 100 miles distant, a mob murdered Joseph Smith, leader of the Church of Jesus Christ of Latter Day Saints, while he was in the custody of the civil authorities. BRUCE, *supra* note 86, at 25 (illustrating that religious bigotry was also a part of our national makeup); HOWE, TRANSFORMATION, *supra* note 82, at 725–26.

the resulting depression of 1839.<sup>97</sup> 1844 was the year Samuel F.B. Morse sent the first electrical telegram, an event Henry Adams later described as the point when “the old universe was thrown into the ash-heap and a new one created.”<sup>98</sup> It was the year in which Karl Marx and Friedrich Engels met,<sup>99</sup> and in which Alexandre Dumas published *The Count of Monte Cristo*<sup>100</sup> and *The Three Musketeers*,<sup>101</sup> Marx published *On the Jewish Question*,<sup>102</sup> and John Stuart Mill published *Essays on Some Unsettled Questions of Political Economy*.<sup>103</sup>

The strong national sense of energy and progress set the stage for the

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97. EYAL, *supra* note 80, at 66 (“When the economy picked up again after 1843 . . . .”); HOWE, TRANSFORMATION, *supra* note 82, at 564 (“[P]rosperity began to return around 1842 . . . .”); WILENTZ, *supra* note 91, at 456 (“After a fifteen-month recovery [from the Panic of 1837] beginning in 1838, the economy crashed again, causing a national depression that lasted three more years.”).

98. HOWE, TRANSFORMATION, *supra* note 82, at 854 (quoting HENRY ADAMS, THE EDUCATION OF HENRY ADAMS 5 (1918)). The telegram, sent between Washington D.C. and Baltimore, read, “What hath God wrought.” It is perhaps difficult for contemporary readers to appreciate the sense in which the advent of the telegraph changed the world in 1844:

In later years, people looked back upon Morse’s demonstration of 1844 as a pivotal moment in the shaping of their world. John Quincy Adams’s grandson Henry, in his retrospective biography published in 1918, identified the first telegraphic message between Baltimore and Washington as the time when “the old universe was thrown into the ash-heap and a new one created.

HOWE, TRANSFORMATION, *supra* note 82, at 1, 691, 854; *see* EYAL, *supra* note 80, at 166 (“Samuel Morse’s telegraph had become the exciting new technology of the 1840s . . . .”). For such a significant advance in technology, contemporary observers reconciled it with religion. HOWE, TRANSFORMATION, *supra* note 82, at 3 (“Morse’s synthesis of science and religion represented the predominant American attitude of the time; only a few eccentrics believed there was any conflict between scientific and religious truth.”).

99. *The Life and Work of Karl Marx: Outstanding Dates*, MARXISTS INTERNET ARCHIVE, <https://www.marxists.org/archive/marx/bio/marx/lifeandwork.htm> (last visited Mar. 14, 2018).

100. Alexandre Dumas, *The Count of Monte Cristo in*, JOURNAL DES DÉBATS POLITIQUES ET LITTÉRAIRES (Aug. 28, 1844), <http://gallica.bnf.fr/ark:/12148/bpt6k446668c.item>.

101. David Rush, *The Three Musketeers*, ENCYCLOPAEDIA BRITANNICA (Feb. 5, 2018), <https://www.britannica.com/topic/The-Three-Musketeers>.

102. *On the Jewish Question*, WORKS KARL MARX 1844, <https://www.marxists.org/archive/marx/works/1844/jewish-question/> (last visited Mar. 14, 2018).

103. *Essays on Some Unsettled Questions of Political Economy*, LIBR. ECON. & LIBERTY, <http://www.econlib.org/library/Mill/mlUQP.html> (last visited Mar. 14, 2018).

Iowa constitutional convention. Within that national sense, the related concepts of voluntarism and democracy that marked the nation's political and religious identity were central as the members considered important issues of religious liberty: whether to open convention sessions with a prayer, whether to prohibit nonbelievers from testifying in Iowa courts, and whether to adopt a guarantee against individual compulsion in matters of religion. It is to those related concepts of voluntarism and democracy that we now turn.

### III. VOLUNTARISM AND DEMOCRACY

*“ . . . to . . . leave to each individual the most perfect liberty to seek his own highest good.”*

John C. Calhoun<sup>104</sup>

Although speaking specifically of politics, John C. Calhoun nicely captured the predominant thinking in 1844 on the role of government with respect to religion: To facilitate individual progress. “Here then is the great office of the State, to give or protect freedom of action, to remove every impediment, especially those arising out of the social condition itself, from the path of progress, and leave to each individual the most perfect liberty to seek his own highest good.”<sup>105</sup>

By the time the members gathered at the capitol in Iowa City to draft a first state constitution, religion in the United States had evolved from an institutional to an individual orientation. One aspect of the evolution was a fundamental shift in the relationship of the states and the churches. By 1844 the disestablishment of U.S. churches had long been accomplished and the establishment issue was dead.<sup>106</sup> Where the Church of England was the established church before the Revolution, it was disestablished after as a result of the patriot victory.<sup>107</sup> In the four colonies where the Congregational

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104. *Life and Speeches of John C. Calhoun*, 9 S.Q. REV. 204, 207 (1846).

105. *Id.*; BRUCE, *supra* note 86, at 40.

106. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 480 (Eduardo Nolla ed., 2012) (“I found that all of these men differed among themselves only on the details; but all attributed the peaceful dominion that religion exercises in their country principally to the complete separation of Church and State. I am not afraid to assert that, during my visit in America, I did not meet a single man, priest or laymen, who did not agree on this point.”).

107. HOWE, *TRANSFORMATION*, *supra* note 82, at 164–65; WILENTZ, *supra* note 91, at 17 (“[A]fter 1776, yeomen farmers swamped the Virginia Assembly with petitions that called for reforms ranging from the easing of debt payments to (in Baptist districts) disestablishing the official Anglican Church.”).

church had been the established church prior to the Revolution, that relationship survived for a time.<sup>108</sup> But by 1818 three of the four had disestablished. Only Massachusetts remained, albeit in a modified form, until it finally disestablished in 1833.<sup>109</sup>

Disestablishment did not harm religion in the United States; it set the stage for the explosive growth of religious activity that became the Second Great Awakening. One of the leaders of the Second Great Awakening made the connection: “Looking back . . . Lyman Beecher . . . would even call the Connecticut Standing Order’s destruction in 1818, paradoxically, *‘the best thing that ever happened,’* because it forced the more complacent congregations to evangelize.”<sup>110</sup>

Disestablishment uncovered the weakness of the previously established denominations and allowed for the rise of denominational competitors.<sup>111</sup> It prepared the way for a fundamental transformation of U.S. religious life, as religious experiences swept the nation during the first part of the nineteenth century:

[T]he so-called Second Great Awakening— . . . which would last into the 1840s—was a diverse movement, generated by impulses too unruly and doctrines too contradictory to be contained by any one organization. It was a movement that, at its outermost edges, saw farmers and factory workers talk directly with Christ Jesus, angels appear in remote villages bearing wholly new dispensations and commandments from the Lord, and women of all ages and backgrounds commune with the spirits of the

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108. HOWE, TRANSFORMATION, *supra* note 82, at 164–65.

109. Vermont disestablished in 1807, New Hampshire in 1817, Connecticut in 1818, and Massachusetts in 1833. A REVIEW OF THE PROSECUTION AGAINST ABNER KNEELAND FOR BLASPHEMY 19 (1835) (tracing history of disestablishment in Massachusetts); HOWE, TRANSFORMATION, *supra* note 82, at 164–65 (noting the years that each state experienced disestablishment); WILENTZ, *supra* note 91, at 188 (noting that after 1815, “[T]he [Massachusetts] reformers made their greatest gains in proposing expanded religious liberties, recommending an end to the existing religious test for officeholders and equalization in the distribution of local tax monies to Unitarians and Congregationalists.”).

110. WILENTZ, *supra* note 91, at 269–70.

111. NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY 59 (1989) (“What is striking about the period after the Revolution in America is not disestablishment per se but the impotence of Congregational, Presbyterian, and Episcopalian churches in the face of dissent. At the turn of the century, their own houses lay in such disarray that movements such as Methodists, Baptists, and Christians were given free rein to experiment.”).

dead. Closer to its core, the Awakening saw rival denominations (especially Methodists and Baptists) denounce each others' beliefs and practices nearly as much as they denounced sin and Satan.<sup>112</sup>

There was a quantitative aspect of the Second Great Awakening as a vast array of participatory religious movements got more and more Americans into church.<sup>113</sup> The number of people affiliated with churches increased dramatically,<sup>114</sup> as did the number of ministers.<sup>115</sup>

But even more important than the number of participants was the qualitative change that disestablishment and the Second Great Awakening brought to U.S. religion.<sup>116</sup> In a relatively short period of time, religion ceased to be a narrow, rigid, hierarchical construct common people were compelled to accept, epitomized by the established church.<sup>117</sup> Instead, religious faith became a matter of individual conviction, epitomized by the evangelical revival.<sup>118</sup>

What changed was the popular belief that individuals were competent to make their own voluntary decisions on matters of religion, and the resulting democratization of religion:

The relation between God and the soul is original for every man. His

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112. WILENTZ, *supra* note 91, at 266.

113. *Id.* at 266–67.

114. *Id.* (“[T]he sheer scale of religious conversions was astounding, in every part of the nation. Although the figures are sketchy, it appears that as few as one in ten Americans were active church members in the unsettled aftermath of the American Revolution. The evangelizing that ensued proceeded, at first, in fits and starts, but gathered tremendous momentum after 1825. By the 1840s, the preponderance of Americans—as many as eight in ten—were churched . . . . What was, in 1787, a nation of nominal Christians—its public culture shaped more by Enlightenment rationalism than Protestant piety—had turned, by the mid-1840s, into the most devoted evangelical Protestant nation on earth.”).

115. HATCH, *supra* note 111, at 4 (“Amidst this population boom [between 1776 and 1845], American Christianity became a mass enterprise. The eighteen hundred Christian ministers serving in 1775 swelled to nearly forty thousand by 1845. The number of preachers per capita more than tripled; . . . . The sheer number of new preachers in the young republic was not a predictable outgrowth of religious conditions in the British colonies. Rather, their sudden growth indicated a profound religious upsurge and resulted in a vastly altered religious landscape.”).

116. JAMES TURNER, *WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA* 74, 75 (1985); WILENTZ, *supra* note 91, at 267.

117. *See* TURNER, *supra* note 116, at 76; WILENTZ, *supra* note 91, at 268.

118. *See* TURNER, *supra* note 116, at 75; WILENTZ, *supra* note 91, at 269.

religion must be his own. No two men think of God alike. No man or men can tell me what I must think of him. If I am pure of heart, I see him, and know him;—& creeds are but fictions that have nothing to do with the truth.<sup>119</sup>

The Baptists describe this as “soul competency,” defined as “the accountability of each person before God.”<sup>120</sup> Their position statement continues: “Your family cannot save you. Neither can your church. It comes down to you and God. Authorities can’t force belief or unbelief. They shouldn’t try.”<sup>121</sup>

This willingness to give primacy to what Locke termed “the dictates of their own consciences” on matters of religion found theoretical acceptance during the Revolution and popular reliance during the Second Great Awakening.<sup>122</sup>

The result was to reinforce, in the religious and secular realms alike, individualistic emphases in ideals of faith and commitment, pointing toward a view of religion in which authority could not dictate truth but rather each individual had to find it based on free inquiry, thought, and discussion. Adherence to it had to be a matter of assent, rather than compulsion.<sup>123</sup>

Replacing establishment, the voluntary system provided the environment in which the Second Great Awakening could flourish:

A central tenet in Jeffersonian and Madisonian thinking, here was a view that stressed the sincerity of commitment private judgment created. . . .

In part because of this view of commitment, there was also extensive acknowledgment that what was quickly labeled the “voluntary system” . . . provided a better foundation for faith than did some form of establishment. . . . Founded on freedom, not compelled by external authority, the acceptance of voluntarism’s necessity to a flourishing

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119. TURNER, *supra* note 116, at 133 (quoting Charles Eliot Norton, “editor of the nation’s most respected magazine, the *North American Review*,” as he “spelled out his basic principle of belief for a Midwestern minister” in 1865).

120. *Position Statements*, S. BAPTIST CONVENTION, <http://www.sbc.net/aboutus/positionstatements.asp> (last visited Feb. 8, 2018).

121. *Id.*

122. BRUCE, *supra* note 86, at 13.

123. *Id.*

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religious environment became itself an article of faith during the [antebellum] era . . . .<sup>124</sup>

And flourish it did: from disestablishment through the first part of the nineteenth century, the U.S. religious landscape atomized into an environment in which “from a religious perspective, religious variation really did appear to be limitless.”<sup>125</sup> Or, as Stephen Douglas remarked: “Uniformity . . . is the parent of despotism the world over, not only in politics, but in religion.”<sup>126</sup>

This belief in individual competency, not compelled adherence, defines the first proposition important to understanding the decisions of the Iowa constitutional convention of 1844 on matters of religious freedom: voluntarism. The Second Great Awakening was based on the voluntary decisions of individuals: “The decision for Christ that the revivalists demanded had to be made voluntarily and responsibly.”<sup>127</sup> Participation in religious organizations and exercises needed to be equally voluntary.<sup>128</sup> The necessary corollary of voluntarism is the proposition that governmental compulsion ought have no role in matters of religion or, as the Southern Baptist Convention so eloquently stated it more than a century later, the “aversion to any effort to use the . . . powers of government to lay the weight of a feather upon the conscience of any man in the realm of religion by privilege or penalty.”<sup>129</sup>

The centrality of voluntarism and the absence of governmental compulsion was nicely illustrated in a tract published in Boston during Abner Kneeland’s blasphemy trial:

A religion that cannot withstand the force of argument, the shafts of ridicule, and the thunder of invective—a religion that requires for its

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124. *Id.* at 17.

125. *Id.* at 20; *see also* DE TOCQUEVILLE, *supra* note 106, at 472–73 (“There is an innumerable multitude of sects in the United States. All differ in the worship that must be given to the Creator, but all agree on the duties of men toward one another.”).

126. JEAN H. BAKER, *AFFAIRS OF PARTY: THE POLITICAL CULTURE OF NORTHERN DEMOCRATS IN THE MID-NINETEENTH CENTURY* 186 (1983).

127. HOWE, *TRANSFORMATION*, *supra* note 82, at 188.

128. *Id.* at 849 (citing “the awakened vigor of democratically organized Protestant churches and other voluntary associations” as one of the three “most important forces that had made American democracy meaningful during the years since 1815”).

129. *See Resolution on Religious Liberty: Chicago, Illinois - 1957*, S. BAPTIST CONVENTION, <http://www.sbc.net/resolutions/934/resolution-on-religious-liberty> (last visited Mar. 14, 2018).

support, the axe, the rack and the faggot, has but weak claims to divinity, and is hardly worth protecting at such cost. A religion founded upon coercion in this world, and upon menace in the next, is surely but poorly calculated to soften the heart, to chasten the feelings, or to increase, in the aggregate, the sum of human felicity.<sup>130</sup>

Voluntarism, which relies upon individual competency, required a reworking of authority within the churches.<sup>131</sup> This “passionate rejection of the past”<sup>132</sup> accompanied the democratization of religion:

The democratization of Christianity . . . has less to do with the specifics of polity and governance and more with the incarnation of the church into popular culture. In at least three respects the popular religious movements of the early republic articulated a profoundly democratic spirit. First, they denied the age-old distinction that set the clergy apart as a separate order of men, and they refused to defer to learned theologians and traditional orthodoxies. . . .

Second, these movements empowered ordinary people by taking their deepest spiritual impulses at face value rather than subjecting them to the scrutiny of orthodox doctrine and the frowns of respectable clergymen. . . .

. . . [Third,] [r]eligious outsiders, flushed with confidence about their prospects, had little sense of their limitations.<sup>133</sup>

This democratization of religion greatly diminished the role of ministers and hierarchical church authorities,<sup>134</sup> and elevated individuals.<sup>135</sup>

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130. A REVIEW OF THE PROSECUTION AGAINST ABNER KNEELAND FOR BLASPHEMY, *supra* note 109, at 10.

131. *See* HATCH, *supra* note 111, at 71.

132. *Id.* at 14 (“In an age when most ordinary Americans expected almost nothing from government institutions and almost everything from religious ones, popular religious ideologies were perhaps the most important bellwethers of shifting worldviews. The passion for equality during these years equaled the passionate rejection of the past.”).

133. *Id.* at 9–10.

134. *Id.* at 11 (“[T]he fundamental impetus of these movements was to make Christianity a liberating force; people were given the right to think and act for themselves rather than depending upon the mediations of an educated elite.”), 17–22 (stating that from 1775 to about 1815, the traditional leaders of U.S. Christianity were challenged by a new, egalitarian, uneducated group of ministers).

135. *Id.* at 58 (“All of these movements challenged common people to take religious

In religious, but not political, terms, the second Great Awakening empowered new groups of people:

The most important social consequences of the Awakening in America derived from its trust in the capacities of ordinary people. In the early American republic, the most significant challenge to the traditional assumption that the worth of human beings depended on their race, class, and gender came from the scriptural teachings that all are equal in the sight of God and all are one in Christ. Different revivals appealed to different constituencies, but taken together, the Second Great Awakening was remarkable for embracing . . . "all sorts and conditions of men." Including women, the poor, and African Americans among the exhorters and exhorted, the revivals expanded the number of people experiencing an autonomous sense of self. They taught self-respect and demanded that individuals function as moral agents. In this way the Awakening empowered multitudes.<sup>136</sup>

The transition from Puritan predestination to individual human agency refocused some religious Americans on good works in the temporal world.<sup>137</sup> Clearly, the effect of the Second Great Awakening was much broader than in terms of matters narrowly religious.<sup>138</sup>

[W]hen one looks for evidence of religious awakening in this period, one finds it everywhere: not only in the astonishing variety of religious sects, both imported and native, but also in literature, politics, educational institutions, popular culture, social reforms, dietary reforms, utopian experiments, child-rearing practices, and relationships between the sexes. In terms of duration, numbers of people involved, or any other measure, the Second Great Awakening dwarfed the First. Because of its diversity, perhaps it should be called a multitude of contemporaneous

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destiny into their own hands, to think for themselves, to oppose centralized authority and the elevation of the clergy as a separate order of men.").

136. HOWE, *TRANSFORMATION*, *supra* note 82, at 187–88.

137. EYAL, *supra* note 80, at 33 ("This 'Second Great Awakening' reignited embers of devotion from the hamlets of upstate New York to the grasslands of Kentucky. Unlike its predecessor and namesake, this second groundswell of evangelical religion emphasized individual human agency . . . . Instead of the predestination that had taught Puritans the irrelevance to salvation of good works in the temporal world, the theology of the Second Awakening suggested that individual effort toward a perfect social order was achievable and significant. Revivalists encouraged listeners to take personal responsibility for making the United States a more charitable and Christian country.").

138. HOWE, *TRANSFORMATION*, *supra* note 82, at 186.

“awakenings.”

While the number of religious options multiplied, so did the number of congregations and individual believers.<sup>139</sup>

The rise of voluntarism and democracy meant that Americans of 1844 were very different than their counterparts of prior generations. As one pamphleteer wrote at the time of Abner Kneeland’s trial:

We do not believe the public will at all acquiesce in a continuance of this prosecution; the public of this day are not the public of Cotton Mather’s, and the Salem witchcraft, time; they are not the public of 1782, that passed the blasphemy law; they are not the public of forty, nor of twenty, years back. They are a new race of young people, ardent, generous, liberal, moral people; and though we would not say that a majority of them are indifferent to the truths of the christian religion, or unbelievers in its dogmas, we do state it as our decided opinion, that a vast majority are disposed to have perfect freedom of thought and of discussion. They care not if the devout send out their missionaries to propagate a mendicant religion by mendicant efforts. So long as these contributions are the voluntary payments of the donors, they will not complain. But when coercion and the power of the law, are called in support or to spread opinions, then will be seen the rising up of the liberal spirit of the age. This is the prevalent, existing feeling . . . .<sup>140</sup>

As to politics, in 1844 the Democrats and Whigs were competitive and represented different conceptions of the United States.<sup>141</sup> When Horace Greeley listed the seven reasons he was a Whig, the first was cast in terms of liberty: “The Democrats overemphasized liberty at the expense of order; their celebration of popular sovereignty was demagogic.”<sup>142</sup> Whiggish conservatism gave voice to those who had reservations about the Democratic emphasis on liberty.<sup>143</sup>

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139. *Id.*

140. A REVIEW OF THE PROSECUTION AGAINST ABNER KNEELAND FOR BLASPHEMY, *supra* note 109, at 31.

141. DANIEL WALKER HOWE, THE POLITICAL CULTURE OF THE AMERICAN WHIGS 187 (1979) [hereinafter HOWE, THE POLITICAL CULTURE].

142. *Id.*

143. BRUCE, *supra* note 86, at 125 (“Certainly, there were caveats, and these paralleled the reservations about a highly autonomous conception of freedom that were most cogently expressed in the Whiggish conservatism that remained visible through the era.”).

Nationally, the parties had different constituencies. The Whigs appealed to citizens who were Yankee Protestants and descendants of British immigrants.<sup>144</sup> The Democrats appealed to Catholics and descendants of Dutch and German stock.<sup>145</sup> Reflecting Greeley's liberty-and-order dichotomy, the Democrats were broadly anti-institutional: "The Whigs' commitment to institutions helped them synthesize order with freedom and change. Democrats of this era often perceived institutions as being opposed to liberty; freedom was to be secured through breaking down institutions that were repressive, such as established churches."<sup>146</sup>

The national cleavages were replicated in Iowa, where "[t]he parties' constituents were a polyglot bunch."<sup>147</sup> Democratic strength was based in part on ethnic and religious factors:

In ethnoreligious terms, the Democrats fared better among European immigrants than the Whigs: Catholic Irish and Germans were particularly devoted to the Jacksonian cause, partly because the Democrats appeared to be less ethnocentric than the Whigs, and partly because the Whig party was perceived as a vehicle for bigoted evangelical Protestantism.<sup>148</sup>

Patterns of migration also played a role:

Many of the upcountry southerners who migrated to Iowa in the late 1830s and 1840s were also Democrats, principally because they had opposed the dominance of large Whig slaveholders in states such as Tennessee and Virginia. Many of these people were Baptists and Methodists, and were naturally suspicious of the more Yankeeified denominations that were at the forefront of moral reform in the antebellum period, principally Congregationalists and Presbyterians.<sup>149</sup>

In Iowa, as in the nation, Whiggery appealed to a more upper-class constituency:

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144. HOWE, *THE POLITICAL CULTURE*, *supra* note 141, at 17.

145. *Id.* ("Besides their alternative economic programs, the parties also possessed different ethnic constituencies. The Whigs were predominantly the party of Yankee Protestants and British-American immigrants. The Democrats were stronger among folk of Dutch and German descent and among Catholics.").

146. *Id.* at 181.

147. Robert Cook, *The Political Culture of Antebellum Iowa: An Overview*, in *IOWA HISTORY READER* 86, 97 (Marvin Bergman, ed., 1996).

148. *Id.*

149. *Id.*

In Iowa, hard-pressed Whigs drew a good deal of support from members of [Congregational and Presbyterian] churches, as well as from areas of Quaker settlement . . . New Englanders and British immigrants appear to have favored the Whig party, too, not only because of its moral concerns but also due to its generally Anglophile ethos.<sup>150</sup>

The widely held view, true in some measure, is that the antebellum Democratic party was racist and expansionist.<sup>151</sup> It was, after all, the party of President Andrew Jackson and the Trail of Tears; Chief Justice Roger B. Taney and *Dred Scott*; and John L. O’Sullivan and Manifest Destiny.<sup>152</sup> But the reality in 1844 was more complicated. As the Iowa constitutional convention of 1844 convened, a more progressive voice was coming to the Democratic Party.<sup>153</sup> The Young America movement within the Democratic Party was “the younger, western wing of the organization[,]”<sup>154</sup> which included individuals such as Stephen A. Douglas,<sup>155</sup> who wanted to move beyond the positions of Jacksonian Democracy:

Beginning in the mid 1840s, a group of young Democratic politicians, reformers, and editors gradually reoriented some of the fundamental principles of the Democratic Party, and hence of the Jeffersonian-Jacksonian tradition that held sway since the revolution of 1800. They made a defensive, agrarian, small-government party into a forward-looking, market-oriented, internationally conscious organization ready to fight the economic battles of the new age of steam and railroads. This New Democracy dissented from the classic viewpoints attributed to Jefferson, Jackson, and the officeholders surrounding them. It ushered in a more progressive, open-minded, and reformist ideology by the late 1840s and early 1850s.<sup>156</sup>

In politics, as in religion, Iowa replicated the national picture.<sup>157</sup> Iowa Democrats, like their national counterparts, fought governmental control:

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150. *Id.*

151. EYAL, *supra* note 80, at 12.

152. *Id.* at 11, 28–30.

153. *Id.* at 12 (portraying “antebellum [Young America] Democrats as progressive and forward-looking”), 67 (“The first deployment of this New Democracy would occur with Polk’s election in 1844.”).

154. *Id.* at 62.

155. HOWE, TRANSFORMATION, *supra* note 82, at 829.

156. EYAL, *supra* note 80, at 19.

157. *See* Cook, *supra* note 147, at 94.

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Iowa Democrats . . . fought against governmental intervention in all walks of life, not just the economic sphere. In particular, they opposed efforts by evangelical Protestants to use governmental power to reform antebellum America's turbulent society in their own image. Campaigns to prohibit liquor sales, abolish slavery, and maintain the sanctity of the sabbath were anathema to many Democrats because they smacked of interference in the lives of a free people.<sup>158</sup>

Iowa Democrats were distinguishable from their Whig counterparts in their views regarding matters of cultural pluralism and immigration:

Religious divisions exacerbated racial and ethnic differences between the two parties in Iowa. Many evangelical Whigs advocated the use of government to create a truly Protestant republic—by preventing liquor sales, for example . . . . They were therefore inclined to oppose the rising political influence of Irish Catholics, for the latter were renowned for their drinking . . . . Democrats, on the other hand, endorsed cultural pluralism as a vital component of republican ideology and rejected Whig criticisms of foreign immigrants.<sup>159</sup>

Iowa Democrats, like their national counterparts, were committed to policies of “negative government and free market economics.”<sup>160</sup> Electoral success, in 1844, followed.

Voluntarism and democracy were the guiding principles as the Iowa constitutional convention of 1844 addressed the first of three issues of religious freedom: whether to start each day with an official prayer.

#### IV. STARTING EACH DAY WITH OFFICIAL PRAYER

The first religious liberty issue addressed by the 1844 members was whether to open each session with an official prayer. The question served as a proxy for the larger issue of the relationship between government and religion, and the underlying principles of voluntarism and democracy.

The question of whether to start each session with an official prayer was not joined immediately when the 1844 convention began.<sup>161</sup> The first

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158. *Id.*

159. *Id.* at 96.

160. *Id.* at 93.

161. See SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 125.

session opened with a prayer,<sup>162</sup> but apparently not the second<sup>163</sup> or the third.<sup>164</sup> Thereupon, Elijah Sells proposed “that the Convention be opened every morning by prayer to Almighty God.”<sup>165</sup>

The proposal for official prayer met with substantial opposition, which seems to have surprised the proponents: “Mr. Sells did not expect the resolution to meet with opposition . . . .”<sup>166</sup> Former Governor Robert Lucas “regretted that there should be contention on this subject, and could not believe that any disbelieved in a superintending Providence.”<sup>167</sup>

Lacking a transcript of the proceedings, it is hard to sense the tenor of the debate over the Sells proposal. Celebrated nineteenth-century University of Iowa historian, Professor Benjamin Shambaugh, cites the debate as evidence of the Iowa pioneers’ “liberal attitude and . . . fearless courage in expressing views on so delicate a subject.”<sup>168</sup> Consistent with Professor Shambaugh’s characterization, one is struck on reading the available records at how squarely the issue was joined.

Initially, convention members on both sides of the issue apparently

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162. The 1844 convention was convened on Monday, October 7, at 2:00 in the afternoon. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 7. General Ralph Phillips Lowe was called to the chair, and James W. Woods was appointed Secretary pro tempore. *Id.* As the next order of business, “Rev. Mr. Sneath, by request of the Convention, opened it with prayer.” *Id.* The 1846 convention also opened with a prayer. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 190. It was convened on May 4 at the Old Stone Capitol in Iowa City. *Id.* During the opening session, “The Reverend Mr. Smith invoked a blessing from Deity upon the future labors of the Convention.” *Id.*

163. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 8 (missing any mention of opening the Tuesday, October 8 session with prayer).

164. *Id.* at 9 (missing any mention of opening the Wednesday, October 9 session with prayer).

165. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 125; *see also* SHAMBAUGH, FRAGMENTS, *supra* note 67, at 10 (stating Mr. Sells opined “that the Convention be opened by prayer every morning”). Elijah Sells was a Whig, 30 years of age, and a mechanic from Muscatine County. *Id.* at 410. Originally from Ohio, he had been in Iowa for three years at the time of the 1844 convention. *Id.*

166. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 14.

167. *Id.* Former Territorial Governor Robert Lucas was a Democrat, 63 years of age, and a farmer from Johnson County. *Id.* at 409. Originally from Virginia, he had been in Iowa for six years at the time of the 1844 convention. *Id.* He served as the first territorial governor of Iowa from 1838 to 1841, having previously served as governor of Ohio from 1832 to 1836. Lawrence Kestenbaum, *Index to Politicians*, POLITICALGRAVEYARD.COM, <http://politicalgraveyard.com/bio/lucas.html#886.92.39> (last visited Feb. 8, 2018).

168. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 124–25.

attempted to either avoid a confrontation or fashion a compromise. An opponent of official prayer, John C. Hall, moved to amend the Sells motion to provide that the prayer commence at least one half hour before the assembling of the convention.<sup>169</sup> William Chapman opposed the Hall compromise because he “thought that such a provision would be an insult to the Clergy and to ‘those who believed in the superintendence of Almighty God.’”<sup>170</sup> Lyman Evans, a proponent of official prayer, favored “providing a room for those who did not wish to hear prayers.”<sup>171</sup>

There are several indications the members expected a vote in favor of official prayer. Andrew Hooten, an opponent of official prayer, suggested a vote on the merits, asking that “those who were in favor . . . not press it at the expense of the feeling of others.”<sup>172</sup> Official prayer opponent John Thompson said,

[W]hen he looked at the system on which the Christian religion was propagated, and saw the excitement that existed in the Convention, he felt satisfied, that although those in favor of opening the Convention with prayer, might be a majority, they ought not to urge the point; and

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169. *Id.* at 125; SHAMBAUGH, FRAGMENTS, *supra* note 67, at 12. John C. Hall was a Democrat, 36 years of age, and a lawyer from Henry County. *Id.* at 409. Originally from New York, he had been in Iowa for three years at the time of the 1844 convention. *Id.*

170. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 125; *Id.* at 11–12 (adding “and desired his aid to be invoked in behalf of the Convention”). William W. Chapman was 36 years of age and a lawyer from Wapello County. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 408. Originally from Virginia, he had been in Iowa for eight years at the time of the 1844 convention. *Id.* There is some uncertainty as to his party affiliation—the Iowa Standard listing has him as a Whig; the Parvin listing has him as a Democrat. *Id.* at 21, 408. William Chapman had been a delegate to Congress from the Iowa Territory (1838–1840) and was later a member of the Oregon territorial House of Representatives. Kestenbaum, *supra* note 167.

171. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 128; *see also* SHAMBAUGH, FRAGMENTS, *supra* note 67, at 17. Lyman Evans was a Democrat, 53 years of age, and a farmer from Clinton County. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 409. Originally from New York, he had been in Iowa for four years at the time of the 1844 convention. *Id.*

172. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 14. Andrew Hooten was a Democrat, 57 years of age, and a farmer from Des Moines County. *Id.* at 409. Originally from New Jersey, he had been in Iowa for five years at the time of the 1844 convention. *Id.* Hooten also made a somewhat oblique point involving one of the founding fathers: “Mr. Hooten reminded [former Governor Robert] Lucas of the story told of Franklin, who, when a boy, asked his father why he did not say grace over the whole barrel of pork at once.” SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 126.

he hoped that the measure would be withdrawn.<sup>173</sup>

There being no consensus for compromise, the issue was joined.<sup>174</sup> How the issue of official daily prayer was framed is telling.<sup>175</sup> To start, it is clear what the convention's official prayer debate was not: it was not a debate on the establishment of a state religion.<sup>176</sup> By 1844, disestablishment was fully accomplished and the question of establishment was dead.<sup>177</sup> That the question of daily prayer was not seen as an establishment issue is also reflected in the language of the debates.<sup>178</sup> In the reports of the convention debate on the matter of official prayer, the word "establish" appears only twice, both in ways which clearly indicate the speaker saw the question of official prayer as distinguishable from the question of establishment.<sup>179</sup>

If not framed in terms of establishment, how did the members of the 1844 convention approach the question? Given the national environment in which they met, it is unsurprising that they approached it as a matter of voluntarism:<sup>180</sup> Should individuals be compelled to participate in and support religious exercises?

That the members framed the issue as one of compulsion and not establishment is clearly indicated by the language they used in the debates. They discarded the language of establishment for the words of

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173. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 16. John Thompson was a Democrat, 59 years of age, and a farmer from Lee County. Originally from Virginia, he had been in Iowa for six years at the time of the 1844 convention. *Id.* at 410; *see also Iowa: 1844 Constitutional Convention*, POLITICALGRAVEYARD.COM, <http://politicalgraveyard.com/geo/IA/ofc/cncn1.html> (last visited Mar. 14, 2018).

174. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 20.

175. *See id.* at 12–20.

176. *See id.*

177. *See id.* at 20.

178. *Id.* at 12–20.

179. *Id.* at 15 (“Mr. Kirkpatrick said if the Convention had a right to pass the resolution, they had a right to establish a religion. It had no right to bring the members on their knees every morning.”), 17–18 (“Mr. Hepner said he would like to see the Convention be consistent. The committee that reported a Bill of Rights, had provided that no law should be enacted to establish a religion. None had opposed that, nor did he presume any body would oppose it. There was a rule of the Convention which required all the members to be in attendance when it was in session. Suppose some of the members attend somewhere else on religious service in the morning, the Sergeant-at-arms might be sent for them, and they be compelled to attend here. That would be an interference with the free exercise of religion.”).

180. *See* TURNER, *supra* note 116, at 133.

voluntarism—voluntary, force, and compulsion—which appear repeatedly in the debate over daily prayer.<sup>181</sup>

There were essentially two arguments against having a daily official prayer, both of which related to compulsion.<sup>182</sup> The first was based on opposition to the state compelling participation in religious exercises; the second on opposition to the state compelling support of religious exercises.<sup>183</sup>

The first major argument against daily official prayer was based on compelled participation in religious exercises.<sup>184</sup> By 1844, 17 of the 26 states had constitutional provisions prohibiting government compulsion in the exercise of religion, beyond a free exercise clause parallel to the federal Constitution.<sup>185</sup> Aligning with the majority, the constitution drafted by the

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181. The comments repeatedly include the words “voluntary,” *id.* at 130–31, “force” or “enforce,” SHAMBAUGH, *THE CONSTITUTIONS*, *supra* note 72, at 125, 129, and “compel” or “compulsion,” *id.* at 128; SHAMBAUGH, *FRAGMENTS*, *supra* note 67, at 14, 15, 19.

182. *See* SHAMBAUGH, *FRAGMENTS*, *supra* note 67, at 12–20.

183. *See id.* at 12–20.

184. *See id.*

185. ALA. CONST. art. I, § 3 (1819) (“No person within this state shall . . . be compelled to attend any place of worship . . .”); ARK. CONST. art. 2, § 3 (1836) (“[N]o man can of right be compelled to attend . . . any place of worship . . . against his consent.”); DEL. CONST. art. I, § 1 (1831) (“[N]o man shall, or ought to be compelled to attend any religious worship . . . against his own free will and consent . . .”); GA. CONST. art. IV, § 10 (1798) (“No person within this State shall . . . be compelled to attend any place of worship contrary to his own faith and judgment . . .”); ILL. CONST. art. VIII, § 3 (1818) (“[W]e declare . . . that no man can of right be compelled to attend . . . any place of worship . . . against his consent . . .”); IND. CONST. art. I, § 3 (1816) (“That no man shall be compelled to attend . . . any place of Worship . . . against his consent . . .”); KY. CONST. art. X, § 3 (1799) (“[T]hat no man shall be compelled to attend . . . any place of worship . . . against his consent . . .”); MD. CONST. art. XXXIII (1776) (“[N]or ought any person to be compelled to frequent . . . any particular place of worship . . .”); MICH. CONST. art. I, § 4 (1835) (“[N]o person can of right be compelled to attend . . . against his will, any place of religious worship . . .”); MO. CONST. art. XIII, § 4 (1820) (“[T]hat no man can be compelled to . . . attend any place of worship . . .”); N.J. CONST. art. I, § 3 (1844) (“No person . . . under any pretence whatever be compelled to attend any place of worship contrary to his own faith and judgment . . .”); OHIO CONST. art. VIII, § 3 (1802) (“[T]hat no man shall be compelled to attend . . . any place of worship . . . against his consent . . .”); PA. CONST. art. IX, § 3 (1838) (“[N]o man can, of right, be compelled to attend . . . any place of worship . . . against his consent . . .”); TENN. CONST. art. I, § 3 (1835) (“[T]hat no man can, of right, be compelled to attend . . . any place of worship . . . against his consent . . .”); TEX. CONST. art. I, § 4 (1845) (“[N]o man shall be compelled to attend . . . any place of worship . . . against his consent . . .”); VT. CONST. chap. I, art. 3 (1793) (“[T]hat no man ought to, or of right can be compelled to attend any religious

Iowa convention would contain such a provision: “The legislature shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship . . . .”<sup>186</sup>

The compelled exercise argument was straightforward. Gideon S. Bailey,<sup>187</sup> a Van Buren County physician, spoke to compulsion:

Absent members might be brought in and compelled to hear what they were opposed to. This was contrary to the inalienable rights of man. If members did not feel disposed to come, it took away their happiness, contrary to the Declaration of Independence and the principle laid down by Thomas Jefferson, the Apostle of Liberty. If individuals wish prayer, there were meetings in town almost every night; let them go there and not take up the time of the Convention.<sup>188</sup>

A Des Moines County farmer, George Hepner,<sup>189</sup> called for consistency “because he thought that it was inconsistent with the principle of religious freedom as set forth in the Bill of Rights.”<sup>190</sup> His opposition was framed in terms of compulsion and free exercise:

Mr. Hepner said he would like to see the Convention be consistent. The committee that reported a Bill of Rights, had provided that no law should be enacted to establish a religion. None had opposed that, nor did he presume any body would oppose it. There was a rule of the Convention which required all the members to be in attendance when it was in session. Suppose some of the members attend somewhere else on religious service in the morning, the Sergeant-at-arms might be sent for them, and they be compelled to attend here. That would be an

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worship . . . contrary to the dictates of conscience . . . .”); VA. CONST. art. III, § 11 (1830) (“No man shall be compelled to frequent . . . any religious worship, place or ministry whatsoever . . .”).

186. IOWA CONST. art. II, § 3 (1844).

187. Gideon S. Bailey was a Democrat, 34 years of age, and a physician from Van Buren County. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 408. Originally from Kentucky, he had been in Iowa for seven years at the time of the 1844 convention. *Id.*; *see also Iowa: 1844 Constitutional Convention, supra* note 173.

188. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 15.

189. George Hepner was a Democrat, 38 years of age, and a farmer from Des Moines County. *Id.* at 409. Originally from Kentucky, he had been in Iowa for seven years at the time of the 1844 convention. *Id.*; *see also Iowa: 1844 Constitutional Convention, supra* note 173.

190. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 128.

interference with the free exercise of religion.<sup>191</sup>

Joseph S. Kirkpatrick,<sup>192</sup> a Whig farmer from Jackson County, spoke at some length and tied the question directly to the matter of voluntarism.<sup>193</sup> Kirkpatrick started by speaking of the members' natural rights, noting:

[T]he members of this Convention had come here from every part of the Territory, and had brought with them their natural rights. We had equally a right to the atmosphere we breathe, and to the sun's rays that fall upon us. In a word, we had a right to life, liberty, and the pursuit of happiness; a right to worship God in our own way . . . .<sup>194</sup>

He then identified another right "arising from the nature of the social compact," which he termed "the adventitious right."<sup>195</sup> This right, of which the rules governing the convention were an example, "is used to govern the social compact in all business which shall come before them, and in actions or transactions between man and man."<sup>196</sup> But the social right can only be "exercised in its legitimate sphere" and "can never be used to enforce a moral precept, when the action is performed in reference to the Great Supreme."<sup>197</sup> Kirkpatrick continues: "The action performed in obedience to a moral precept, in order to be valid, must, in the nature of the case, be voluntary, otherwise it is not virtuous. Prayer is a moral precept."<sup>198</sup>

Kirkpatrick argued that to use the social right to enforce prayer would be both to render the prayer invalid because of compulsion and to violate the participants' natural rights.<sup>199</sup> For the convention to adopt official prayer,

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191. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 17–18.

192. Joseph S. Kirkpatrick was a Whig, 38 years of age, and a farmer from Jackson County. *Id.* at 409. Originally from Illinois, he had been in Iowa for four years at the time of the 1844 convention. *Id.*

193. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 125–126; SHAMBAUGH, FRAGMENTS, *supra* note 67, at 12–13, 13 n.1 (reproducing, apparently in full, Kirkpatrick's remarks as they appeared "in *The Iowa Standard* of Oct. 31, 1844, first page").

194. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 12.

195. *Id.* Merriam-Webster defines adventitious as "coming from another source and not inherent or innate." *Adventitious*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2011).

196. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 12–13.

197. *Id.*

198. *Id.* at 13.

199. *Id.* ("Now we cannot enforce a moral precept by this adventitious right, from the fact, that to do so, would be first, to render the action not valid, because it is brought

according to Kirkpatrick, would first be illegitimate:

And shall we make this moral duty one of the rules of this Convention? If by the action of this compact, we can enforce this moral obligation, then we have a right, upon the same principle, to enforce other religious duties, and to make every member of this Convention go upon his knees five times a day; but there would be no volition on the part of individuals; consequently they would be no more pious by it.<sup>200</sup>

And to do so would be to open the way to further erosions of freedom:

Now, sir, this Convention, (as a figure by way of illustration,) if we have a right to enforce moral duties here, we have a right by the authority of our social compact, as a State, to enforce the observance of religious duties, and to make every man in the State fall upon his knees fifty times a day; and if we violate this general principle, we may retrograde, step by step, until we get back to the policy and customs of our forefathers, on the eastern side of the Atlantic, where tyrants wield despotic sway, and liberty never had a name.<sup>201</sup>

Richard Quinton,<sup>202</sup> a Keokuk County farmer, concluded for those in opposition to official prayer, addressing the issue of compulsion in religious exercise:

He believed that the Bible furnished a rule for faith and practice, but did not believe praying would change the purposes of Deity, nor the views of members of the Convention. In the name of Heaven, don't force men to hear prayers. He believed in religion, but did not want to force members to hear what they did not believe in.<sup>203</sup>

Only one proponent of official prayer sought to address the compelled exercise argument directly.<sup>204</sup> Future Iowa Governor and Iowa Supreme

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about by the adventitious coercion of proceedings; and secondly, because by enforcing this moral duty, we violate or infringe our natural rights. These rights are inalienable, and we have not yielded them to the social compact.”).

200. *Id.*

201. *Id.*

202. Richard Quinton was 38 years of age and a farmer from Keokuk County. *Id.* at 410. Originally from Kentucky, he had been in Iowa for five years at the time of the 1844 convention. *Id.* There is some uncertainty as to his party affiliation—the Iowa Standard listing has him as a Democrat; the Parvin listing has him as a Whig. *Id.* at 21, 410.

203. *Id.* at 18–19.

204. *Id.* at 19.

Court Justice Ralph Phillips Lowe<sup>205</sup> challenged the argument that members might be compelled to attend the convention when official prayers were given: “Members were required to be present at hours when the Convention was doing business. The Convention was not opened to do business until after the prayer. The prayer itself opened the Convention. There was no proper organization till afterwards, and members could not be compelled to attend till afterwards.”<sup>206</sup> Lowe deemed the compulsion argument “frivolous” and characterized one objection as “trifling,” apparently using a straw person establishment argument when he asserted that he “could not believe that those who talked about blending Church and State, were serious in what they said.”<sup>207</sup>

The second major argument against official prayer was based on compelled support of religious exercises. The convention met in a situation where 16 of the 26 states had constitutional provisions prohibiting government compulsion for the support of religious activities.<sup>208</sup> Again aligning with the majority, the constitution written by the Iowa convention would contain the provision: “[N]or shall any person be compelled to . . . pay tithes, taxes, or other rates, for building or repairing places of worship, or for the maintenance of any minister or ministry.”<sup>209</sup>

The debate was apparently as to the propriety, not the magnitude, of payment. For example, it is reported that William W. Chapman favored the resolution, observing that “the ministers would gladly attend and render the service without compensation.”<sup>210</sup> In response to Chapman, Francis Gehon<sup>211</sup> took exception, as “it would not be economical, for the Convention

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205. Ralph Phillips Lowe was 36 years of age and a lawyer from Muscatine County. *Id.* at 409. Originally from Ohio, he had been in Iowa for 16 years at the time of the 1844 convention. *Id.* Lowe was later an Iowa district court judge (1852–1857), a governor of Iowa (1858–1860), and a justice of the Iowa Supreme Court (1860–1867). Kestenbaum, *supra* note 167.

206. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 19. Lowe did not address the question of staff members who might, because of their duties, be forced to be present during the official prayers. *Id.* at 19–20.

207. *Id.* at 19–20.

208. *See infra* notes 499–509 and accompanying text.

209. IOWA CONST. art. II, § 3 (1844).

210. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 125; *see also* SHAMBAUGH, FRAGMENTS, *supra* note 67, at 11–12.

211. Francis Gehon was a Democrat, 47 years of age, and a miller from Dubuque County. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 409. Originally from Tennessee, he had been in Iowa for eight years at the time of the 1844 convention. *Id.*; *see also*

sat at an expense of \$200 to \$300 per day, and time was money.”<sup>212</sup> One assumes that Gehon’s point was that the expenditure of \$200 to \$300 per day was an expenditure of public funds that would—if the daily official prayer passed—be tantamount to compelling taxpayers to support a ministry.<sup>213</sup> George Hepner seems to have made the same point as to public support:

Mr. H[epner] also spoke of the probability that the services would, in the end, have to be paid for, and cited the instances of rent having to be paid for the use of the Temporary State House, and the \$5,000 loan from the Dubuque Bank, in support of that opinion.<sup>214</sup>

But not all the comments went to propriety at the expense of magnitude. Using the same daily cost figure, Gideon Bailey observed that he had voted for the prayer the initial day, but suggested that to pray every day was too expensive: “When the motion was made to open the Convention with prayer the first day, he had no objection. But to do it every day would cost \$200 or \$300. Why not be economical in this as well as in other things.”<sup>215</sup> And a proponent of official prayer, Stephen B. Shelledy,<sup>216</sup> can be seen as

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Kestenbaum, *supra* note 167.

212. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 125; SHAMBAUGH, FRAGMENTS, *supra* note 67, at 12.

213. See SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 125; SHAMBAUGH, FRAGMENTS, *supra* note 67, at 12.

214. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 18.

215. *Id.* at 15.

216. Stephen B. Shelledy was a Whig, 43 years of age, and a farmer from Mahaska County. *Id.* at 410. Originally from Kentucky, he had been in Iowa for four years at the time of the 1844 convention. *Id.*; see also Kestenbaum, *supra* note 166. Shelledy was also a member of the Iowa constitutional convention of 1846. *Id.* He was later Speaker of the Iowa House of Representatives (1858–59). *Id.* There is some variation as to the spelling of his name. The weight of the evidence supports “Shelledy,” which is used herein. Shambaugh listed him as “Stephen B. Shelleday,” as did the contemporaneous account of the Iowa City newspaper reproduced by Shambaugh. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 128, 129, 353, 354; SHAMBAUGH, FRAGMENTS, *supra* note 67, at 407 (citing III IOWA CAPITAL REPORTER 41 (1844)). However, other contemporaneous sources, including public documents, list him as “Stephen B. Shelledy.” THE HISTORY OF JASPER COUNTY, IOWA 646–47 (1878) (containing the biography of Stephen B. Shelledy, born in Fleming County, Kentucky, in 1801, moved to Mahaska County in 1843, moved to Jasper County, represented Jasper County in the legislature, one term as Speaker, died 1870); JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE SEVENTH GENERAL ASSEMBLY OF THE STATE OF IOWA 5 (1858) (recounting the election of “Stephen B. Shelledy” as Speaker of the Iowa House of Representatives); SHAMBAUGH, FRAGMENTS, *supra* note 67, at 410, 413 (appearing on Parvin lists of 1844 and 1846 convention delegates).

seeking to avoid the support argument by trying to narrow the discussion to the direct charge from the minister, not the expenditure of public funds to create the venue for prayer: “He could not conceive that gentlemen were serious when they opposed the having of prayers upon the ground of expense[,]” because “[e]xcept in case of Congress, he believed no charge was made.”<sup>217</sup>

Those in favor of official prayer attempted to turn the debate into one on the merits of religion and prayer. Ralph Phillips Lowe delivered an endorsement of the positive effects of prayer, claiming that “[t]he exercise of prayer would have an effect to calm excitement, and contribute to moderation” and “would tend to give dignity and character to the Convention.”<sup>218</sup> Former Governor Robert Lucas spoke in support of the Sells resolution, suggesting that “if ever an assemblage needed the aid of Almighty Power, it was one to organize a system of Government[,]” and that “‘it was due to the religious community, and to our own character’ to have prayer.”<sup>219</sup> Jonathan Fletcher,<sup>220</sup> who apparently made the motion for the prayer the first day, spoke in favor of the resolution for daily prayer:

He believed it was becoming in the patriot to appeal to the Almighty for aid and guidance. He was not a professor, and probably would not be acknowledged as an evangelical Christian, but he acknowledged the God of his fathers, and was willing to supplicate His blessing. He hoped the resolution would pass.<sup>221</sup>

The opponents of official prayer questioned the motives of the proponents. John Hall declared himself “opposed to any attempt on the part of the Convention to palm themselves off to be better than they really were, and above all other things, to assume a garb of religion for the purpose of giving themselves character.”<sup>222</sup> He indicated he “doubted the efficacy of prayers invoked at political meetings,” and said, “As for himself, ‘he would

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217. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 18.

218. *Id.* at 19–20.

219. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 126; *see also* SHAMBAUGH, FRAGMENTS, *supra* note 67, at 14.

220. Jonathan E. Fletcher was a Democrat, 38 years of age, and a farmer from Muscatine County. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 409. Originally from Vermont, he had been in Iowa for six years at the time of the 1844 convention. *Id.*; *see also* Kestenbaum, *supra* note 167.

221. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 16; *see also* SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 128.

222. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 126–27.

pray as did the man in New Orleans, that God would “lay low and keep dark,” and let us do the business of the Convention.”<sup>223</sup> Hall concluded by stating, “There were places where the Almighty could not be approached in a proper spirit—and this was one.”<sup>224</sup> Another source credits Hall with the suggestion: “Let those who prayed, enter into their closets.”<sup>225</sup>

Along with the value of prayer, the proponents of official prayer conjured up a variety of horrible consequences if the convention abjured official prayer. The resolution’s sponsor, Elijah Sells, “was shocked, and would ‘regret to have it said of Iowa that she had so far travelled out of Christendom as to deny the duty of prayer.’”<sup>226</sup> Governor Lucas concluded that to not have the prayer would “give us a bad name abroad.”<sup>227</sup> Jonathan Fletcher “regretted the opposition that he saw, and he was unwilling that it should go forth to the world that Iowa refused to acknowledge a God.”<sup>228</sup> “Mr. Shelledy said he did not feel as if he would represent correctly the moral and religious feelings of his constituents, if he remained silent.”<sup>229</sup>

John Hall took up issues regarding the implication that those in opposition to daily prayer denied God, the weight of precedent, and the suggestion that prayer be included as a demonstration to the outside world.<sup>230</sup>

The drift of the arguments of those who favored the resolution was to accuse those who opposed it of denying the existence of a God. Opposition was no evidence of disbelief. He believed, with the

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223. *Id.* at 127.

224. *Id.*

225. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 14.

226. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 126; *see also* SHAMBAUGH, FRAGMENTS, *supra* note 67, at 14 (“Mr. Sells did not expect the resolution to meet with opposition, and should regret to have it said of Iowa that she had so far travelled out of Christendom as to deny the duty of prayer.”).

227. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 126; *see also* SHAMBAUGH, FRAGMENTS, *supra* note 67, at 14 (indicating Lucas “referred to precedents of similar practice in other assemblages”).

228. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 128; SHAMBAUGH, FRAGMENTS, *supra* note 67, at 16.

229. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 18; *see also* SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 128–29 (“Mr. Shelleday wished to represent the moral and religious feelings of his constituents by supporting the resolution.”). Official prayer opponent Richard Quinton observed that his constituents were as moral as those of Shelledy. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 18.

230. *Id.* at 16–17.

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gentleman of Muscatine, in the God of his fathers. But he thought there were places where the Almighty could not be approached in a proper spirit—and this was one. Precedent was invoked, but he did not believe in following it here. Effect abroad was what was desired—not good here. They did not tell us we were sinners, and call upon us to repent. If any gentlemen needed religious instruction, he would vote to give it to them. It was wrong and hypocritical to send such a thing abroad for effect. . . . He objected to prayers not out of disrespect to religion, but because he thought them inappropriate. It would be going a step too far, and would be a mockery.<sup>231</sup>

Both sides attempted to contextualize the issue of official prayer into the sweep of history. Ralph Phillips Lowe placed the official prayer question in the context of Christian triumphalism and predicted that in the future only properly religious men would hold office: “[R]eligion had taken a deep hold in this country, and the time would soon come when men of proper moral and religious sentiments would alone hold the offices of this country.”<sup>232</sup> On the other side, Gideon Bailey cast the issue in terms of humanity’s progress:

Precedent exerted too much influence—operated upon the Convention that formed the Constitution of the United States. If we were to follow it always, we should hang for witchcraft, and punish for religious opinions. People were becoming more liberal in sentiment. No man could say that he ever opposed another on account of religion; he respected men who were sincerely religious; but he wanted to have his own opinions.<sup>233</sup>

After a lengthy debate and some procedural maneuvering, the

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231. *Id.*

232. *Id.* at 19.

233. *Id.* at 15. Lyman Evans, a 53-year-old Democratic farmer from Clinton County, responded that he thought the example of the convention which drafted the federal Constitution was a good one: “He did not believe so much in ‘progression’ as to exclude prayer, and had no fears of its leading to monarchy.” *Id.* at 17. Evans was originally from New York, and he had been in Iowa for four years at the time of the 1844 convention. *Id.* at 409; *see also* Kestenbaum, *supra* note 167.

convention prepared to vote.<sup>234</sup> Elisha Cutler<sup>235</sup> asked for a recorded vote, allowing that “he had not lived a great while, but long enough not to be afraid of meeting such a question openly.”<sup>236</sup> On Friday, October 11, 1844, the convention decided the matter on a procedural vote: “The Convention resumed the consideration of the resolution of Mr. Sells, providing for daily prayer; and refused to postpone the subject to Monday. . . . Mr. Galbraith moved the indefinite postponement of the resolution. Carried; yeas 44, nays 26 . . . .”<sup>237</sup> The vote was not strictly by party lines, although the Democrats were predominantly opposed to official prayer while the Whigs were predominantly in favor.<sup>238</sup>

The recorded vote of 44 to 26 to indefinitely postpone consideration of the Sells resolution for an official daily prayer was the convention’s final

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234. Sells’s motion was tabled the day it was made, Wednesday, October 9, 1844. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 10. The matter was taken up for debate on Thursday, October 10, 1844. *Id.* at 11–20. At the conclusion of the debate, a motion was made by an opponent of official prayer (Durham) to postpone further consideration of Sells’s motion until Monday, October 14, 1844, “but the resolution was cut off by a motion . . . that the Convention adjourn; which prevailed.” *Id.* at 20. The next day, Friday, October 11, 1844, Sells’s resolution was taken up. *Id.* at 20–21. No further debate is indicated in the available record. *Id.* at 21. A motion, evidently a test motion, was made for the indefinite postponement of the resolution. *Id.* That was the manner in which Sells’s resolution came up for a vote. *See id.*

235. Elisha Cutler Jr. was a Democrat, 28 years of age, and a mechanic from Van Buren County. Originally from Massachusetts, he had been in Iowa for six years at the time of the 1844 convention. *Id.* at 408; *see also* Kestenbaum, *supra* note 167. Elisha Cutler Jr. later served as Iowa Secretary of State (1846–1848). *Id.*

236. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 128; *see also* SHAMBAUGH, FRAGMENTS, *supra* note 67, at 16.

237. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 21. William H. Galbraith was a Democrat, 27 years of age, and a lawyer from Wapello County. *Id.* at 409. Originally from Pennsylvania, he had been in Iowa for five years at the time of the 1844 convention. *Id.*

238. It is somewhat unclear whether the vote to indefinitely postpone consideration of the Sells resolution was a party-line division because the contemporaneous records of party affiliation are inconsistent. *Compare id.* at 21–22 (listing party affiliation compiled by the Iowa Standard on motion to indefinitely postpone the Sells resolution (the “Iowa Standard listing”)), *with id.* at 408–10 (listing data compiled by Theodore S. Parvin (the “Parvin listing”). Using the Iowa Standard listing, the majority included only one Whig, Joseph S. Kirkpatrick of Jackson County, while the minority included eight Democrats. *Id.* at 21. Using the Parvin listing, the majority included four Whigs, John Davidson of Van Buren County, Richard Quinton of Keokuk County, and John Taylor of Jones County, in addition to Kirkpatrick, while the minority included ten Democrats. *Id.* at 408, 410.

word on the subject; the issue of official prayer does not recur in the records of the convention.<sup>239</sup>

The members of the 1844 convention rejected official prayer by a substantial margin.<sup>240</sup> Their refusal to compel participation in and support of official prayer was wholly consistent with the commitments to voluntarism and democracy that characterized their age.<sup>241</sup>

The 1844 convention was ultimately unsuccessful, in that statehood was not achieved.<sup>242</sup> The reason had nothing to do with issues of religious liberty.<sup>243</sup> Iowa was to be admitted to statehood at the same time as Florida to maintain the balance between free and slave states.<sup>244</sup> The matter of the boundaries of the new state of Iowa became entangled with the question of how many states would be admitted out of the northern territory, and thus how many free-state senators would represent the region.<sup>245</sup> The Iowa constitution of 1844 included the “Lucas boundaries,” but the House of Representatives voted to substitute the “Nicollet boundaries.”<sup>246</sup> The Nicollet boundaries, which describe the familiar shape of Iowa, differ from the Lucas boundaries in that the latter excluded the small part of Iowa northwest of a line from Sioux City to Spirit Lake and included the portion of Minnesota southeast of a line from Spirit Lake to Mankato and thence to St. Paul.<sup>247</sup>

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239. *Id.* at 21–22.

240. *Id.* (noting the recorded vote was 44 to 26).

241. *See supra* Part I (using the beliefs and works of Abner Kneeland as an example of his age).

242. BENJAMIN F. SHAMBAUGH, HISTORY OF THE CONSTITUTIONS OF IOWA 283 (1902) [hereinafter SHAMBAUGH, HISTORY].

243. *Id.* at 284 (noting the defeat had to do with Whig misrepresentation of the boundaries).

244. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 160–61.

245. *Id.* at 161.

246. *Id.* at 164–65.

247. *Boundaries of Iowa Proposed by the Iowa Constitutional Convention of 1844*, MNOPEdia, <http://www.mnopedia.org/multimedia/boundaries-iowa-proposed-iowa-constitutional-convention-1844> (last visited Feb. 12, 2018). Congress would not agree to the proposed northern boundary, and that is the point upon which statehood failed in 1844. Cook, *supra* note 147, at 99 (“Iowans rejected the constitution of 1844 because they wanted larger borders for their state and (in some cases) a continuation of low territorial property taxes.”); SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 154 (“It was on the question of boundaries that the Constitution of 1844 was wrecked.”); Steven C. Cross, *The Drafting of Iowa’s Constitution*, ST. LIBR. IOWA, <http://publications.iowa.gov/135/1/history/7-6.html> (last visited Mar. 14, 2018) (“The key

Congress substituted the Nicollet boundaries in early March of 1845, just as ratification of the constitution of 1844 was about to be voted upon by the citizens of the Iowa Territory.<sup>248</sup> It is said that “[t]he news that Congress had . . . rejected the boundaries prescribed by the Iowa Convention reached the Territory just in time to determine the fate of the Constitution of 1844.”<sup>249</sup> The constitution of 1844 fell short of ratification by fewer than a thousand votes.<sup>250</sup>

The month after the failed ratification vote, the territorial legislature voted to resubmit the constitution of 1844 for ratification.<sup>251</sup> Governor John Chambers, a Whig, vetoed the legislation, but the legislature overrode his veto.<sup>252</sup> In August of 1845 the voters again failed to ratify the constitution of 1844.<sup>253</sup>

By December of 1845, the Iowa Territory had a new Democratic governor, James Clarke, and the next month the territorial legislature passed a bill calling for the election of delegates to another constitutional convention.<sup>254</sup>

The second Iowa constitutional convention met in Iowa City at the start of May 1846.<sup>255</sup> Again, Democrats greatly outnumbered Whigs—22 Democrats to only 10 Whigs.<sup>256</sup> Also as in 1844, farmers were the largest occupational group and lawyers the second largest.<sup>257</sup>

After convention was convened, “The Reverend Mr. Smith invoked a blessing from Deity upon the future labors of the Convention.”<sup>258</sup> After that,

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dispute in 1844 was the size of the prospective state itself. . . . [I]t was rejected because of the boundary question.”).

248. SHAMBAUGH, *THE CONSTITUTIONS*, *supra* note 72, at 173.

249. *Id.*

250. *Id.* at 177 (noting ratification of the 1844 constitution failed by 996 votes).

251. *Id.* at 178.

252. *Id.* at 179–81.

253. *Id.* at 184.

254. *Id.* at 186–87.

255. *Id.* at 190.

256. *Id.* at 189.

257. The convention included “thirteen farmers, seven lawyers, four merchants, four physicians, one mechanic, one plasterer, one smelter, and one trader.” *Id.* at 189–90; *see also* Cook, *supra* note 147, at 94 (explaining the 1846 constitution was “a largely Jacksonian creation”).

258. SHAMBAUGH, *THE CONSTITUTIONS*, *supra* note 72, at 190.

the 1846 convention adopted the 1844 rules.<sup>259</sup> Thus, the prayer given the first day was the only prayer in conjunction with the 1846 convention.<sup>260</sup> In consequence, the Iowa constitutions of 1844 and 1846 were written without the benefit of official daily prayer.<sup>261</sup>

The Iowa constitution of 1846 conceded the question of boundaries by adopting the Nicollet boundaries favored by Congress.<sup>262</sup> Iowa entered the Union on December 28, 1846, as the 29th state.<sup>263</sup>

By the mid-1850s, the political landscape of Iowa was changing, and there was support for convening another constitutional convention to modify the constitution of 1846.<sup>264</sup> In January of 1855, the state legislature passed, and the governor approved, a provision calling for a vote of the citizens in conjunction with the general election of 1856 to determine if a constitutional convention would be convened.<sup>265</sup> The vote in August of 1856 supported a convention, and in November of 1856, 36 members were elected to assemble in Iowa City on January 19, 1857.<sup>266</sup>

By 1857, the political composition of Iowa had shifted from the Democratic domination evidenced in the constitutional conventions of 1844 and 1846.<sup>267</sup> The Democrats had been eclipsed by the new Republican Party, and in consequence, the attitude toward official prayer changed.<sup>268</sup>

Like the constitutional conventions of 1844 and 1846, the 1857 convention opened the first day with a prayer.<sup>269</sup> The second day of the 1857

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259. *Id.*

260. *Id.*

261. *Id.* at 129. (“At this point [during the opening session of the constitutional convention of 1846, on May 4, 1846 at the Old Stone Capitol at Iowa City] ‘The Reverend Mr. Smith invoked a blessing from Deity upon the future labors of the Convention.’ This was the only prayer offered during the entire session.”).

262. *Id.* at 164–65.

263. *Iowa*, HISTORY, <http://www.history.com/topics/us-states/iowa/> (last visited Feb. 13, 2018).

264. See SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 216–17 (indicating “a Convention to revise the Constitution of 1846 had indeed become imperative” and was approved in 1855).

265. *Id.* at 217.

266. *Id.*

267. See SHAMBAUGH, FRAGMENTS, *supra* note 67, at 408–10, 414–15.

268. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 218 (indicating 21 of the 36 newly elected delegates were Republicans).

269. There was a motion to appoint a clergyman to present a prayer, but there is no

convention saw another motion authorizing a prayer for that one day.<sup>270</sup> On the third day, a motion was made authorizing official daily prayer, which passed with neither debate nor a recorded vote.<sup>271</sup> Both the process and the outcome were very different in 1857 than they had been in 1844; the outcome was different than that in 1846.

The current treatment of official prayer in Iowa follows the example of the 1857 convention, not those of 1844 and 1846. For example, contemporary practice in Iowa is to start each legislative session with a prayer or meditation.<sup>272</sup> Individuals are invited to speak by members of the legislature.<sup>273</sup> In recent years, the speakers have reflected the diversity of the state. In addition to the Catholic and Protestant Christian traditions, speakers have represented Judaism, Islam, and Buddhism.<sup>274</sup>

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record of a vote on the motion. Apparently it passed. “Mr. SPRINGER moved, that Mr. Clarke, of Johnson, be appointed to invite a clergyman to open the Convention with prayer, who introduced Rev. Mr. Young. Prayer by Rev. Mr. YOUNG.” 1 W. BLAIR LORD, *THE DEBATES OF THE CONSTITUTIONAL CONVENTION; OF THE STATE OF IOWA, ASSEMBLED AT IOWA CITY 5* (1857).

270. *Id.* at 6 (“On motion of Mr. CLARKE, of Johnson, the Rev. Mr. Kynett was invited to open the Convention with prayer; which he did accordingly.”). For reasons not explained, “The PRESIDENT laid before the Convention the correspondence between himself and the Rev. Alpheus Kynett, of this city, in reference to the daily opening of the Convention by prayer, which was read and laid upon the table.” *Id.* at 24.

271. According to the delegate who made the motion on the third day, it was cast as a general authority to save time:

Mr. PATTERSON offered the following resolution:

*Resolved*, That the President of this Convention be, and is hereby authorized and requested to invite a minister of the Gospel to open the sessions of this Convention each morning with prayer.

Mr. PATTERSON stated that he offered that resolution to obviate the necessity of a special motion every morning for that purpose.

The resolution was adopted.

*Id.* at 22.

272. *Prayer Practices*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/documents/legismgt/ILP/02Tab5Pt7.pdf> (last visited Mar. 15, 2018).

273. *Id.*

274. Jeff Guo, *What Happened When a Wiccan Witch Blessed Iowa Legislators*, WASH. POST (Apr. 10, 2015), [https://www.washingtonpost.com/blogs/govbeat/wp/2015/04/10/what-happened-when-a-wiccan-witch-blessed-iowa-legislators/?utm\\_term=.c6a88916a847](https://www.washingtonpost.com/blogs/govbeat/wp/2015/04/10/what-happened-when-a-wiccan-witch-blessed-iowa-legislators/?utm_term=.c6a88916a847).

The system was tested, and many would conclude found wanting, on April 9, 2015, when Deborah Maynard of Cedar Rapids was asked by her Representative, Democrat Liz Bennett, to give the blessing.<sup>275</sup> Maynard is a Wiccan priestess, leader of the Covenant of Unitarian Universalist Pagans in Cedar Rapids.<sup>276</sup> The prayer called upon the members of the legislature to remember who they are to represent, to work for the people of Iowa, to be thoughtful, to recognize the inherent worth and dignity of each person, and to act with justice, equity, and compassion:

We call this morning to God, Goddess, Universe, that which is greater than ourselves to be here with us today.

By the earth that is in our bones and centers us: May all here remember our roots and those whom we are here to represent.

By the fire that gives us light and passion: May all here remain passionate about the work that must be done for the people of Iowa.

By the air that gives us breath and logic: May all here find thoughtful solutions to the problems that are presented.

By the water that flows through our blood and stirs our emotions: May all here draw on that emotional intelligence which helps us to see the inherent worth and dignity of every person.

We call this morning to spirit, which is ever present, to help us respect the interdependent web of all existence of which we are a part. Be with this legislative body and guide them to seek justice, equity, and compassion in the work that is before them today.

Blessed Be, Ah ho, and Amen.<sup>277</sup>

It was reported that more than half of the legislators were absent; some reportedly boycotting her prayer.<sup>278</sup> A group of Christians prayed at the

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275. *Id.*; see also William Petroski & Brianne Pfannenstiel, *Iowa House Starts Day with Wiccan Invocation*, DES MOINES REG. (Apr. 9, 2015), <https://www.desmoinesregister.com/story/news/politics/2015/09/09/iowa-wiccan-house-chamber/25512827/>.

276. Petroski & Pfannenstiel, *supra* note 275.

277. Guo, *supra* note 274.

278. *Id.*

capitol in response to Priestess Maynard's remarks.<sup>279</sup> The minister who organized the counterprayer said "he doesn't dispute Maynard's constitutional right to pray as she wishes, but he would rather have legislators hearing lessons from the God of the Bible."<sup>280</sup> One minister, surely without knowing the history of the 1844 and 1846 conventions and the Iowan tradition that they represent, spoke with some irony: "We feel that this is completely out of sync with the traditions of our state and our nation to seek guidance from the occult[.]" said Pastor Michael Demastus of the Fort Des Moines Church of Christ, "We believe it is just not a good idea[.]"<sup>281</sup> A private citizen attended and prayed in an effort to counteract the Wiccan prayer: "I don't want any demonic influences on the people who are making decisions on our behalf[.]"<sup>282</sup>

Other faith leaders disagreed. The Executive Director of the Interfaith Alliance of Iowa, Connie Ryan Terrell, put the controversy in perspective:

Like it or not, our Legislature has a long-standing tradition of opening their sessions with prayer or a brief meditation[.] . . . The only real stipulation is that it be respectful of other religious beliefs. A person who is a Wiccan has every right to provide that prayer at the request of a legislator. Quite simply, it is disingenuous for some legislators and conservative religious groups to create a public outcry against a minority religion when they often cry wolf about their own religious rights being under assault.<sup>283</sup>

Notable was the reaction of Representative Rob Taylor, a Republican from West Des Moines.<sup>284</sup> Representative Taylor "said he prayed often the past several days about how to respond to the Wiccan prayer."<sup>285</sup> The representative sought guidance: "I thought to myself, 'What would Jesus do?'"<sup>286</sup> Apparently Representative Taylor's Jesus would be in the chamber during the Wiccan prayer and turn his back on the speaker, which is what the representative did.<sup>287</sup>

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279. Petroski & Pfannenstiel, *supra* note 2755.

280. *Id.*

281. *Id.*

282. Guo, *supra* note 274 (quoting Michelle Gute).

283. Petroski & Pfannenstiel, *supra* note 275.

284. *Id.*

285. *Id.*; *see also* Guo, *supra* note 274.

286. Petroski & Pfannenstiel, *supra* note 275. *Accord* Guo, *supra* note 274.

287. Petroski & Pfannenstiel, *supra* note 275.

One can only wonder what John Hall, a delegate from Henry County to the 1844 constitutional convention, would have thought of Representative Taylor's disrespectful behavior toward the Wiccan priestess.<sup>288</sup> During the debate over official prayer, Hall "objected to prayers not out of disrespect to religion, but because he thought them inappropriate. It would be going a step too far, and would be a mockery."<sup>289</sup> He was "opposed to any attempt on the part of the convention to palm themselves off to be better than they really were, and above all other things, to assume a garb of religion for the purpose of giving themselves character."<sup>290</sup> In Representative Taylor's actions one can only assume that John Hall would have found confirmation of his opinion that "[t]here were places where the Almighty could not be approached in a proper spirit—and this was one."<sup>291</sup>

The right to have one's own opinions on matters of religion, the right to have religious exercise and support be voluntary and not compelled—these were the bases upon which the Iowa constitutional conventions of 1844 and 1846 rejected official prayer.<sup>292</sup> The next religious liberty issue addressed by the convention—whether to allow nonbelievers to testify in court—gave the convention an opportunity to advance the core values of voluntarism and democracy in a groundbreaking way.<sup>293</sup>

#### V. RELIGIOUS TESTS FOR WITNESS COMPETENCE

*"Mr. Hempstead wanted to 'do away with this inquiring into a man's religious opinions. He desired to keep it out of the Constitution. It was the fear of the penalties of perjury that restrained men from stating what was not true—not future punishment.'"*<sup>294</sup>

The second religious liberty issue addressed by the members of the 1844 Iowa constitutional convention was the issue of whether nonbelievers should be permitted to testify in the courts of the new state.<sup>295</sup> The issue came before the house when Ralph Phillips Lowe offered an amendment to

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288. See SHAMBAUGH, FRAGMENTS, *supra* note 67, at 406.

289. *Id.* at 17.

290. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 126–27.

291. *Id.* at 127.

292. See *id.* at 129, 190.

293. *Id.* at 129.

294. *Id.* at 130.

295. *Id.*

exclude nonbelievers from testifying.<sup>296</sup> Lowe was not proposing anything new: the exclusion of classes of witnesses based on religious belief was the Anglo-American common law rule.<sup>297</sup> Some progress had been made, but the collapse of discriminatory competency rules as to nonbelievers had not advanced very far by the time of the 1844 convention.<sup>298</sup> No state had adopted a prohibition on religious-based competency challenges as a matter of constitutional law.<sup>299</sup> Only Indiana allowed nonbelievers to testify as a matter of statute.<sup>300</sup>

At least 16 states, either as a matter of constitutional law, statute, or common law, barred nonbeliever testimony.<sup>301</sup> Arkansas had a

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296. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 38–41.

297. Allan W. Vestal, *The Lingering Bigotry of State Constitution Religious Tests*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 55, 70–92 (2015).

298. *Id.* at 74–75.

299. *Id.* at 75 (“With adoption of its constitution of 1846, Iowa became the first state to ban religious tests for witness competency as a matter of constitutional law.” (citing IOWA CONST. art. I, § 4)).

300. An Act Relative to Evidence, ch. 38, 1838 Ind. Rev. Stat. 272, 274, § 16 (stating want of religious faith shall not affect the competency of a witness but shall go only to his credibility). Kentucky had in place a bill of rights provision that would many years later be held to establish atheist competency. *Bush v. Commonwealth*, 80 Ky. 244, 251 (1882), *rev’d*, *Bush v. Kentucky*, 107 U.S. 110 (1883).

301. ARK. CONST. art. XIX, § 1 (1874) (“No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any Court.”); MD. CONST. pmbl., art. 36 (1867) (stating that no “person, otherwise competent, shall be deemed incompetent, as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that, under His dispensation, such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world, or the world to come”); An Act to Secure to Witnesses Freedom of Opinion in Matters of Religion, ch. 58, 1833 Me. Acts 60 (“[N]o person, who believes in the existence of a Supreme Being, shall be adjudged an incompetent or incredible witness, in the Judicial Courts, or in the course of Judicial Proceedings in this State, on account of his opinions on matters of Religion; nor shall such opinions be made the subject of investigation or inquiry.”); *Porter v. Cotney*, 3 Ala. 314, 315 (1842) (“[I]t is not essential to the competency of a witness, that he should believe in a future state of rewards and punishments; but it is enough if he believes in the existence of a God, who will punish falsehood, even in this life.”); *Atwood v. Welton*, 7 Conn. 66, 71 (1828) (positing that a witness who professed to believe in a Supreme Being and that men are punished for their sins in this life, but not in the world to come, was not a competent witness); *Perry v. Stewart*, 2 Del. (2 Harr.) 37, 37 (1835) (“[I]t had frequently been decided that a witness must believe in a God, and a future state of rewards and punishments.”); *Noble v. People*, 1 Ill. (Breese) 54, 56 (1822), *overruled in part by Hroneck v. People*, 24 N.E. 861 (Ill. 1890) (holding a witness is competent where he

constitutional bar to nonbeliever testimony.<sup>302</sup>

It was against this largely exclusionary background that the 1844 Iowa convention took up the proposal that nonbeliever testimony be excluded. The debate was remarkable. Stephen Hempstead,<sup>303</sup> a Dubuque lawyer, opposed “this inquiring into a man’s religious opinions.”<sup>304</sup> Hempstead argued that temporal penalties of perjury and not religious promises of rewards and penalties should be used to secure truthful testimony.<sup>305</sup>

Another speaker in opposition to the exclusion of nonbelievers was Judge James Grant, a Democratic lawyer from Scott County.<sup>306</sup> He

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believed in a God and a future state of existence, although he did not believe in being punished hereafter for crimes done in this life); *State v. Washington*, 22 So. 841, 842–43 (La. 1897) (“The form of religious belief is certainly no ground to exclude the witness, but there must be a belief in the Supreme Being.”); *Smith v. Coffin*, 18 Me. 157, 159 (1841) (excluding witness who believed that anything and everything was God, and that there was no other God in heaven or earth); *Commonwealth v. Smith*, 68 Mass. (1 Gray) 516, 516 (1854) (“[B]elief in the existence of a God is necessary to the competency of a witness . . . .”); *Norton v. Ladd*, 4 N.H. 444, 444 (1828) (finding a witness who did not believe in the existence of a God incompetent to testify); *Den v. Vanclave*, 5 N.J.L. 589, 633–34 (1819) (stating a witness lacked capacity who had no belief in the being, perfections, and providence of God, nor in a future state of rewards and punishment); *Shaw v. Moore*, 49 N.C. (1 Jones) 25, 29 (1856) (noting that a person who believes in God and Divine punishment, even if only in this life, is competent); *Brock v. Milligan*, 10 Ohio 121, 124–25 (1840) (finding an atheist incompetent to testify); *Cubbison v. McCreary*, 2 Watts & Serg. 262, 262 (Pa. 1841) (“The true test of a witness’s competency on the ground of religious principles is, whether he believe[s] in the existence of a God who will punish him if he swear[s] falsely . . . .”); *Farnandis v. Henderson*, 1 CAROLINA L.J. 202, 210 (1831) (S.C. Eq. 1827); *Jones v. Harris*, 32 S.C.L. (1 Rich.) 160, 161 (S.C. 1846) (holding that a person who believes in a Supreme Being and Divine punishment is competent); *McClure v. State*, 3 Tenn. (1 Yerg.) 206, 224 (1829) (“An atheist cannot be a witness.”).

302. ARK. CONST. art. XIX., § 1 (1874) (“No person who denies the being of a God shall . . . be competent to testify as a witness in any court.”).

303. Stephen Hempstead was a Democrat, 32 years of age, and an attorney from Dubuque County. SHAMBAUGH, FRAGMENTS, *supra* note 69, at 409. Originally from Connecticut, he had been in Iowa for eight years at the time of the 1844 convention. *Id.*

304. *Id.* at 39.

305. *Id.* (“It was the fear of the penalties of perjury that restrained men from stating what was not true—not future punishment.”).

306. James Grant was a Democrat, 31 years of age, and a lawyer from Scott County. *Id.* at 409. Originally from North Carolina, he had been in Iowa for six years at the time of the 1844 convention. *Id.*; see also *Iowa: 1844 Constitutional Convention*, *supra* note 173. James Grant had earlier been a member of the Iowa territorial House of Representatives (1842–43), and was later a delegate to the Iowa constitutional convention of 1846, a

proceeded from the importance of freedom of religion as one of the natural rights of man:

Mr. Grant said that to think upon the subject of religion as he chose had been declared one of the natural rights of man. The Pilgrims brought that doctrine over with them. Without that right, society would not be worth much; but men were always disposed to deprive each other of it.<sup>307</sup>

Judge Grant noted the incongruity of allowing nonbelievers to be public officers but not to testify in court: “Atheists might hold any kind of offices, be Executive or Supreme Judge, but must not be witnesses. It was the business of the Convention to correct this glaring inconsistency which existed in other Constitutions.”<sup>308</sup>

Having identified precedents on both sides of the question, Judge Grant “said he hoped this Convention would take high ground upon this subject and silence all these disputes of lawyers and doubts of judges—these inquiries into men’s belief, and exclusions for opinion’s sake.”<sup>309</sup>

Why was the issue of nonbelievers testifying in court important to the members of the 1844 convention? It was not because they or their constituents were themselves nonbelievers. Nonbelief was a topic of popular discussion as the members convened: Richard Hildreth had earlier in the year published his *Theory of Morals*, which was controversial because it suggested the possibility of a system of morals not based on a God.<sup>310</sup> But Hildreth’s analysis caused debate; it did not make the nonbeliever case. The Second Great Awakening, with its emphasis on voluntarism and individual discernment, saw increased interest in non-Christian religious thought.<sup>311</sup>

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member and Speaker of the Iowa House of Representatives (1852–53), and Mayor of Davenport, Iowa (1854). Kestenbaum, *supra* note 167. A judge, he was the founding president of the Iowa State Bar Association. *The Iowa Lawyer Weekly*, IOWA ST. B. ASS’N (May 25, 2016), <http://www.iowabar.org/page/IAWeekly052516/.htm>.

307. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 40.

308. *Id.*

309. *Id.* at 41.

310. BRUCE, *supra* note 86, at 99 (“Hildreth’s *Theory* raised hackles precisely because Hildreth saw no need for God to explain virtue, given its roots in an innate moral sentiment.”). In some sense the *Theory of Morals* was a precursor to Charles Darwin’s *On the Origin of Species*, upon which Darwin was laboring in 1844 but which would not be published until 1859.

311. TURNER, *supra* note 116, at 163 (“[F]rom the 1830s onward, a small but increasing number of voyages away from Christianity led to a variety of non-Christian

But the real outpouring of interest in non-Western religions came 30 years later.<sup>312</sup>

The nineteenth century saw nonbelief become a socially acceptable option in America: “Modern unbelief burst into full blossom in American culture rather suddenly . . . .”<sup>313</sup> But this happened decades after the 1844 convention.<sup>314</sup> Indeed, the term “agnosticism” was not coined for a quarter century after the Iowa convention.<sup>315</sup> In 1844 the revolution of nonbelief was coming, but it was not yet realized: “In 1850, the intellectual ground of belief in God had seemed like bedrock; by 1870, it felt more like gelatin.”<sup>316</sup> Nonbelief became a “self-sustaining phenomenon”<sup>317</sup> by the mid-1880s: “By the 1880s, unbelief had assumed its present status as a fully available option in American culture. . . . [I]t was true that many Americans no longer believed in God.”<sup>318</sup>

Nonbelief had not become socially acceptable in the United States by the time of the 1844 Iowa convention;<sup>319</sup> that was not the reason the members adopted a ban on religious tests for testimony.

If not social acceptability, was the action of the convention a function of a powerful representation of nonbelievers within the membership? There is no evidence that there were any nonbelievers among the convention members, much less a powerful caucus. During the debate on official prayer, former Governor Lucas said he “could not believe that any [of the members] disbelieved in a superintending Providence.”<sup>320</sup> Certainly there were not

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theisms.”); *see also* BRUCE, *supra* note 86, at 63–64.

312. TURNER, *supra* note 116, at 154 (“[T]here was by the 1850s a good deal of awareness of non-Western religions and even some enthusiasm. . . . The real outpouring of writing on comparative religion began just after 1870, but intellectually curious Americans were sensitized to the major non-Christian religions at least a decade earlier.”).

313. *Id.* at 4.

314. *Id.* (noting this occurrence “a few decades after 1850”).

315. *Id.* at 171.

316. *Id.* at 199.

317. *Id.* at 171 (“Within twenty years after the Civil War, agnosticism emerged as a self-sustaining phenomenon. Disbelief in God was, for the first time, plausible enough to grow beyond a rare eccentricity and to stake out a sizable permanent niche in American culture.”).

318. *Id.* at 262.

319. *See generally* SHAMBAUGH, FRAGMENTS, *supra* note 67, at 14.

320. *Id.*

many public atheists in Iowa or in the nation in the mid-1840s.<sup>321</sup> Speaking of an earlier point in our national history, one author states:

It is not so clear that any atheists actually existed. Searching for full-fledged deniers of God before the eighteenth century sometimes resembles hunting the unicorn. . . .

If one unimaginatively takes the word “atheist” to mean someone who denied that any God exists, then the number of atheists before 1690 shrinks almost to the vanishing point.<sup>322</sup>

The number of atheists rose into the nineteenth century, but not by much: “America does not seem to have harbored a single individual before the nineteenth century who disbelieved in God.”<sup>323</sup>

There is no evidence that there were any nonbeliever members of the 1844 convention, and there is absolutely no indication that such nonbelievers had any impact on the adoption of a ban on religious tests for testimony.<sup>324</sup>

It seems that nonbelievers simply constituted the limiting case for the voluntarism and democracy beliefs of the convention members. A commitment to voluntarism and individual competence in matters of religion carried with it the possibility that some individuals would come to nonbelief.<sup>325</sup> A commitment to democracy required that such individuals, even as to those who thought them in error, be accorded equal treatment under the law as a matter of right, not grace.<sup>326</sup> Thus the notion of

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321. Turner defines an atheist as “someone who denied that any God exists.” TURNER, *supra* note 116, at 26. He acknowledges, “Some historians speculate that atheism flourished silently underground,” and speaks of “known unbelievers.” *Id.* at 44. His statements as to the number of atheists at various points in history should be taken as his estimate of atheists who had publicly stated their atheist beliefs. *See id.* at 26. It would perhaps be helpful to adopt a two-part definition, categorizing an atheist as “someone who disbelieves that any God exists,” and a “public atheist” as “an atheist who *publicly* denies that any God exists.” It is an article of faith among atheists that there have always been what might be termed “professing non-believers,” individuals who maintain the forms of outward rite of the dominant religion even while acknowledging—at least to themselves—that they do not believe. Vestal, *supra* note 297, at 94.

322. TURNER, *supra* note 116, at 26.

323. *Id.* at 44 (“If one disregards the expatriate [radical poet Joel] Barlow just before 1800 . . .”).

324. Cook, *supra* note 147, at 92 (“The vast majority of Iowans had no doubt . . . that there was a God—an inscrutable and capricious one, perhaps, but a God nonetheless.”).

325. *See* TURNER, *supra* note 116, at 171.

326. *See id.* at 132.

“toleration” was inapt: “[T]he very idea of toleration is despicable; it supposes that some have a pre-eminence above the rest, to grant indulgence; whereas, all should be equally free, Jews, Turks, Pagans and Christians.”<sup>327</sup> The right of the nonbeliever to make decisions on matters of religion makes toleration inapplicable: “This is the boasted land of toleration . . . . No, gentlemen, that is not the proper word, for who shall presume to tolerate another, when the latter has an undeniable right to enjoy and maintain his own opinion?”<sup>328</sup>

An example of nonbelievers as the limiting case of voluntarism and democracy in matters religious can be found in the 1828 Sabbatarian movement.<sup>329</sup> The Sabbatarians objected to, among other things, the practice of the U.S. Post Office delivering mail seven days of the week.<sup>330</sup> Seeking to uphold the rights of conscience of Christian postmasters to observe their Sabbath and to recognize the day of rest as observed by the vast majority of Americans, they petitioned Congress.<sup>331</sup> Congress refused to eliminate Sunday deliveries, citing in part the rights of all Americans, “Jew or Gentile, pagan or Christian.”<sup>332</sup>

Congress had been in part influenced by a *Report on the Sunday Mails* attributed to Kentucky senator Richard Johnson . . . asserting it to be “the duty of government to afford *all*—to Jew or Gentile, pagan or Christian, the protection and advantage of our benignant institutions on *Sunday* as well as every other day of the week.” To recognize the Christian Sabbath, the report said, would be to convert the government “into an ecclesiastical tribunal.”<sup>333</sup>

After the debate was concluded, the Lowe amendment to exclude nonbelievers from testifying in Iowa courts was put to a vote and overwhelmingly defeated: 10 in favor, 60 opposed.<sup>334</sup> Then the convention took a further step to ensure the ability of nonbelievers to testify in Iowa courts by writing an affirmative guarantee into the constitution of 1844:

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327. BRUCE, *supra* note 86, at 124 (quoting John Leland in 1790).

328. *Id.* at 124–25 (quoting Andrew Dunlap).

329. *Id.* at 121.

330. *Id.*

331. *Id.*

332. *Id.* at 122.

333. *Id.*

334. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 41 (reporting 10 votes in favor of Lowe’s amendment to exclude atheists from testifying and 60 votes in opposition).

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No religious test shall be required as a qualification for any office or public trust; and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties, *or rendered incompetent to give evidence in any court of law or equity*, in consequence of his opinions on the subject of religion.<sup>335</sup>

The reason the members of the 1844 convention adopted a ban on religious tests for testimony was their underlying commitment to voluntarism and democracy. They went where their beliefs took them, despite a lack of social acceptance of nonbelief and despite want of publicly acknowledged nonbelievers among their number.

The 1846 constitution included a virtually identical provision barring religious tests for witness competency.<sup>336</sup> With adoption of the 1846 constitution, Iowa became the first state in the Union to constitutionally protect the right of all citizens to testify without regard to religious belief.<sup>337</sup> New York quickly followed Iowa's example.<sup>338</sup> Three months after Iowa voters adopted their constitution of 1846, the voters of New York adopted their constitution of 1846, which includes a prohibition of any religious-belief-based competency test: "[N]o person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief . . . ."<sup>339</sup>

Iowa and New York provided a model for other states to allow testimony without regard to religious belief as a matter of constitutional law. In all, 22 states have had constitutional prohibitions on religious tests for

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335. IOWA CONST. art. II, § 4 (1844) (emphasis added).

336. IOWA CONST. art. I, § 4 (1846) ("No religious test shall be required as a qualification for any office or public trust, and no person shall be deprived of any of his rights, privileges or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion.").

337. Vestal, *supra* note 297, at 75.

338. See N.Y. CONST. art. I, § 3 (1846).

339. *Id.* The Iowa and New York efforts were contemporaneous. The Iowa convention met for 15 days in May of 1846; the Iowa constitution of 1846 was adopted by popular vote on August 3, 1846. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 191, 210. The New York convention met from June 1 to October 9, 1846; the New York constitution of 1846 was adopted by popular vote in November. *Timeline*, N.Y. ST. LIBR., <http://www.nysl.nysed.gov/collections/nysconstitution/timeline.htm> (last visited Mar. 15, 2018).

testifying.<sup>340</sup> They are, in chronological order: Iowa (1846),<sup>341</sup> New York (1846),<sup>342</sup> Wisconsin (1848),<sup>343</sup> California (1849),<sup>344</sup> Indiana (1851),<sup>345</sup> Ohio (1851),<sup>346</sup> Minnesota (1857),<sup>347</sup> Kansas (1859),<sup>348</sup> Oregon (1859),<sup>349</sup> Nevada

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340. Vestal, *supra* note 297, at 75–76. Two additional states, Virginia and West Virginia, have constitutional provisions that are somewhat ambiguous. VA. CONST. art I, § 16 (1971) (“[T]he General Assembly shall not prescribe any religious test whatever . . .”), and W. VA. CONST. art. III, § 11 (1872) (“No religious or political test oath shall be required as a pre-requisite or qualification to vote, serve as a juror, sue, plead, appeal, or pursue any profession or employment.”).

341. IOWA CONST. art. I, § 4 (1857) (“[N]o person shall be . . . rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion . . .”); IOWA CONST. art. I, § 4 (1846) (“[N]o person shall be . . . rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion.”).

342. N.Y. CONST. art. I, § 3 (1894) (“[N]o person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief . . .”); N.Y. CONST. art. I, § 3 (1846) (“[N]o person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief . . .”).

343. WIS. CONST. art. I, § 19 (1848) (“No religious tests shall ever be required as a qualification for any office of public trust under the State, and no person shall be rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion.”).

344. CAL. CONST. art. I, § 4 (1880) (“[N]o person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief . . .”); CAL. CONST. art. I, § 4 (1849) (“[N]o person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief . . .”).

345. IND. CONST. art. I, § 7 (1851) (“No person shall be rendered incompetent as a witness, in consequence of his opinions on matters of religion.”).

346. OHIO CONST. art. I, § 7 (1851) (“No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations.”).

347. MINN. CONST. art. I, § 17 (1857) (“No religious test . . . shall ever be required as a qualification of any voter at any election in this State; nor shall any person be rendered incompetent to give evidence in any court of law or equity in consequence of his opinion upon the subject of religion.”).

348. KAN. CONST. pmb., § 7 (1859) (“[N]or shall any person be incompetent to testify on account of religious belief.”).

349. OR. CONST. art. I, § 6 (1859) (“No person shall be rendered incompetent as a witness, or juror in consequence of his opinions on matters of religion; nor be questioned in any Court of Justice touching his religious belief to affect the weight of his testimony.”).

(1864),<sup>350</sup> Missouri (1865),<sup>351</sup> Florida (1868),<sup>352</sup> Nebraska (1875),<sup>353</sup> Texas (1876),<sup>354</sup> North Dakota (1889),<sup>355</sup> Washington (1889),<sup>356</sup> Wyoming (1889),<sup>357</sup> Utah (1895),<sup>358</sup> Michigan (1908),<sup>359</sup> and Arizona (1912).<sup>360</sup> All but Florida

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350. NEV. CONST. art. I, § 4 (1864) (“[N]o person shall be rendered incompetent to be a witness on account of his opinions on matters of his religious belief . . .”).

351. MO. CONST. art. I, § 5 (1945) (“[N]o person shall, on account of his or her religious persuasion or belief . . . be disqualified from testifying or serving as a juror . . .”); MO. CONST. art. II, § 5 (1875) (“[N]o person can, on account of his religious opinions . . . be disqualified from testifying, or from serving as a juror . . .”); MO. CONST. art. I, § 9 (1865) (“[T]hat no person can, on account of his religious opinions, . . . be disqualified from testifying, or from serving as a juror . . .”).

352. FLA. CONST. pmb., § 5 (1885) (“[N]o person shall be rendered incompetent as a witness on account of his religious opinions . . .”); FLA. CONST. pmb., § 4 (1868) (“[N]o person shall be rendered incompetent as a witness on account of his religious opinions . . .”).

353. NEB. CONST. art. I, § 4 (1875) (“No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations.”).

354. TEX. CONST. art. I, § 5 (1876) (“No person shall be disqualified to give evidence in any of the Courts of this State on account of his religious opinions, or for the want of any religious belief, but all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury.”).

355. N.D. CONST. art. I, § 4 (1889) (“[N]o person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief . . .”).

356. WASH. CONST. art. I, § 11 (1889) (“[N]or shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.”).

357. WYO. CONST. art. I, § 18 (1889) (“The free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered incompetent to hold any office of trust or profit, or to serve as a witness or juror, because of his opinion on any matter of religious belief whatever; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.”).

358. UTAH CONST. art. I, § 4 (1895) (“[N]o religious test shall be required as a qualification for any office of public trust or for any vote at any election, nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof.”).

359. MICH. CONST. art. I, § 18 (1963) (“No person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief.”); MICH. CONST. art. II, § 17 (1908) (“No person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief.”).

360. ARIZ. CONST. art. II, § 12 (1912) (“[N]or shall any person be incompetent as a

retain their constitutional provisions today. In contrast, only two states, Arkansas<sup>361</sup> and Maryland,<sup>362</sup> have had constitutional prohibitions on atheist testimony. Both states retain their discriminatory provisions today.<sup>363</sup>

The political composition of Iowa changed dramatically in the decade following the 1846 convention.<sup>364</sup> The Whigs and their Republican successors opposed the 1846 constitution for a number of reasons but perhaps primarily for its prohibition of banks.<sup>365</sup> By the middle of the next

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witness or juror in consequence of his opinion on matters of religion, nor be questioned touching his religious belief in any court of justice to affect the weight of his testimony.”).

361. ARK. CONST. art. XIX, § 1 (1874) (“No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any Court.”); ARK. CONST. art. VIII, § 3 (1864) (“No person who denies the being of a God shall hold any office in the civil departments of this state nor be allowed his oath in any court.”); ARK. CONST. art. VII, § 3 (1836) (“No person who denies the being of a God, shall hold any office in the civil department of this state nor be allowed his oath in any court.”).

362. MD. CONST. pmbl., art. 36 (1867) (“[N]or shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief, provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world, or the world to come.”); MD. CONST. pmbl., art. 36 (1864) (“[N]or shall any person be deemed incompetent as a witness or juror, who believes in the existence of God, and that under his dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world or the world to come.”); MD. CONST. pmbl., art. 33 (1851) (“[N]or shall any person be deemed incompetent as a witness or juror, who believes in the existence of a God, and that under his dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world or the world to come.”).

363. ARK. CONST. art. XIX, § 1 (1874); MD. CONST. pmbl., art. 36 (1867).

364. Ross, *supra* note 62, at 101–02.

365. IOWA CONST. art. 8, § 1 (1846):

No corporate body shall hereafter be created, renewed or extended, with the privilege of making, issuing, or putting in circulation, any bill, check, ticket, certificate, promissory note, or other paper, or the paper of any bank, to circulate as money. The general assembly of this state shall prohibit, by law, any person or persons, association, company or corporation, from exercising the privileges of banking, or creating paper to circulate as money.

The second section of article VIII speaks of “corporations with banking privileges, the creation of which is prohibited.” *Id.* Noted University of Iowa political scientist Russell Ross credited the treatment of banks as the primary reason for a constitutional convention in the mid-1850s. Ross, *supra* note 62, at 102 (“The agitation for revision [of the 1846 constitution] stemmed primarily from the acknowledged need for authorizing the establishment of banks. As a direct result of the nonexistence of banks within the

decade, the consensus on banks had shifted. In 1854 Iowans elected their first Whig governor, James Grimes, who favored a new constitution which would allow banking.<sup>366</sup> In August of 1856, a coalition of Whigs and pro-bank Democrats prevailed in a referendum to call for a new constitution.<sup>367</sup> Three months later, delegates to the 1857 constitutional convention were elected, and the new Republican Party—solidly in favor of banking—took 21 of the 35 seats.<sup>368</sup>

Notwithstanding the sweeping change in Iowa's political composition, the 1857 convention did not approach the bill of rights as a *tabula rasa*.<sup>369</sup> Rather, both the Committee on Preamble and Bill of Rights and the convention started with the existing text and considered changes.<sup>370</sup> The chair of the committee, Republican bookseller George W. Ells of Scott County, noted the unanimity of the committee in this approach:

The Committee who had in charge the Preamble and Bill of Rights 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 of Iowa had 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 place there in order that Iowa not only might be the first State in the Union, unquestionably as she is in many respects, but that she might also have the best and most clearly defined Bill of Rights.<sup>371</sup>

Thus, the 1857 convention started from the existing language of article I, section 4 of the 1846 constitution:

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state, Iowa was flooded with depreciated paper currency from other states.”).

366. RICHARD LORD ACTON & PATRICIA NASSIF ACTON, *TO GO FREE: A TREASURY OF IOWA'S LEGAL HERITAGE* 85 (1995).

367. Democrat George Gillaspay of Marion County stated that his constituents desired only two changes from the constitution of 1846: elimination of the prohibition on banks and the election of the Iowa Supreme Court. *Id.* at 195–96.

368. Ross, *supra* note 62, at 102.

369. *Id.* at 108–09.

370. *Id.* at 102 (“While the new constitution was more complete, it was primarily a revision of the 1846 document, and both were patterned after the first proposed organic law of 1844.”).

371. LORD, *supra* note 269, at 100.

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No religious test shall be required as a qualification for any office or public trust, and no person shall be deprived of any of his rights, privileges or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion.<sup>372</sup>

The debate over section 4 of the bill of rights became one of the lengthiest and most heated of the convention, not because the existing provisions were controversial, but rather because it entangled the bar on religious tests with one of the most contentious issues of the 1857 convention: the status of African Americans under the new constitution.<sup>373</sup>

The race-based conflict involving section 4 did not emerge right away. On January 30, the 10th day of the convention, consideration moved to the report of the Committee on Preamble and Bill of Rights.<sup>374</sup> After an unsuccessful attempt by Democratic lawyer Amos Harris of Appanoose County to postpone consideration, the convention resolved itself into a committee of the whole to consider the preamble and bill of rights as they appeared in the 1846 constitution.<sup>375</sup> The committee proposed its amendments, none of which related to section 4.<sup>376</sup>

Once the committee presentation was concluded, Republican lawyer W. Penn Clarke of Johnson County moved that the bill of rights be taken up section by section, which was agreed to.<sup>377</sup> With minimal discussion, the body made a nonsubstantive change to the preamble and declined to make a change to section 1 that had racial implications.<sup>378</sup> The committee of the whole then considered the committee's amendment to section 2, to add the following language to the existing text: "And no privileges or immunities

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372. IOWA CONST. art. I, § 4 (1846).

373. ACTON & ACTON, *supra* note 366, at 88 ("Another matter that consumed the delegates was the rights of black Iowans.").

374. LORD, *supra* note 269, at 97.

375. *Id.* at 97–100.

376. *Id.* (noting the committee proposed amendments to section 2 (political power inherent in the people), section 9 (trial by jury), section 10 (criminal due process), section 11 (criminal due process), and section 18 (takings)).

377. *Id.* at 103.

378. *Id.* (changing "We, the people of the Territory of Iowa" to "We, the people of the State of Iowa"); *id.* at 103–04 (declining the motion of David Bunker of Washington County to change "All men are, by nature, free and independent" in section 1 to read "All men are, by nature, free and equal").

shall ever be granted, that may not be altered, revoked, or repealed, by the General Assembly.”<sup>379</sup> Thus the committee of the whole encountered one of the *bêtes noires* of nineteenth century politics, the rights and privileges of corporations.<sup>380</sup> After a lengthy debate, the committee of the whole agreed to an amendment of the provision that was identical, but for one comma, to the language originally proposed by the committee.<sup>381</sup>

The race-based conflict over section 4 was joined on Monday, February 2, when the report of the committee of the whole came before the convention.<sup>382</sup> Progressive Republican lawyer Rufus L.B. Clarke of Henry County immediately moved to add “nor in consequence of his belonging to any particular sect, class or party of men” to the existing language.<sup>383</sup> And thereupon the convention descended into protracted, bitter conflict over the status of black residents in Iowa.<sup>384</sup>

To the time of the convention, Iowa’s treatment of black residents had been disgraceful. In 1851 the legislature passed “[a]n act to prohibit the immigration of free negroes into this State[,]” which provided “no free negro or mulatto, shall be permitted to settle in this State.”<sup>385</sup> That statute was the basis for the 1863 case of *Archie P. Webb v. I.W. Griffith*.<sup>386</sup> Archie Webb was a free black man who moved to Polk County after the effective date of

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379. *Id.* at 104.

380. *Id.*

381. *Id.* at 104–15 (reflecting that the debate on this point consumed 11 pages of the published debates, after which the committee of the whole adopted a substitute amendment by John H. Peters of Delaware County, adding the following to the existing text of section 2: “And no privileges or immunities shall ever be granted, that may not be altered, revoked or repealed, by the General Assembly.”).

382. *Id.* at 172. The committee of the whole briefly considered section 4 on Saturday, January 31, when Amos Harris of Appanoose County offered an amendment to add language reading: “And no preference shall be given to any religious society, nor shall any interference with the rights of conscience be permitted; but nothing herein contained shall be construed to dispense with oaths or affirmations.” *Id.* at 118. The Harris amendment was not debated, no vote was recorded, and it was not agreed to. *Id.* at 118, 172.

383. *Id.* at 172; *see also* ACTON & ACTON, *supra* note 366, at 88 (“Rufus Clarke tried passionately to obtain equal rights.”). It has been said that he was one of the Republicans “most prominent in debate.” *A Historic Reunion, supra* note 93, *passim* (remarks of Judge George G. Wright).

384. *See, e.g.*, LORD, *supra* note 269, at 172.

385. Nathan E. Coffin, *The Case of Archie P. Webb, a Free Negro, in 11 ANNALS OF IOWA* 200, 201 (1913) (citing Act of Feb. 5, 1851, ch. 72, 1851 Iowa Acts 600).

386. *See id.* at 202.

the statute.<sup>387</sup> Webb, “while employed as a laborer . . . and quietly earning his livelihood, was notified by a gang of persecutors to leave the State.”<sup>388</sup> He refused to be sent from the state and was arrested, fined, and jailed by a justice of the peace until he paid the fine and agreed to leave Iowa.<sup>389</sup> Judge John Henry Gray of the Polk County District Court issued a writ of habeas corpus, and Sheriff I.W. Griffith produced Webb before the court.<sup>390</sup>

After determining that black residents of Iowa were citizens for purposes of the U.S. Constitution,<sup>391</sup> Judge Gray then discussed what it meant for blacks to be citizens:

If therefore they be citizens of the United States, they are entitled to all the rights guaranteed to, and the privileges conferred upon, citizens of the same description in this State. What rights are guaranteed to such citizens in this State by the Constitution thereof? What privileges are withheld from them by our Constitution and laws? . . . The rights guaranteed to such citizens in this State by the Constitution under which this law as enacted are, those of “enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.” And these rights are guaranteed to such citizens in this State who resided here at the adoption of the Old Constitution.<sup>392</sup>

Judge Gray found, “[T]he Legislature had no right to pass a law denying them the right to live in the State when the Constitution guarantees this right to all such citizens in this State at its adoption[,]”<sup>393</sup> and declared the statute invalid:

If . . . they have the right to reside in the State and possess property here, how can they enjoy these rights in Iowa when the law, if *valid*, says that they shall not enter the State, directs its officers to arrest and fine them, and forces upon them the entertainment and hospitality of our jails?<sup>394</sup>

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387. *Id.* at 205.

388. *Id.* at 201.

389. *Id.* at 204.

390. *Id.* at 202–03.

391. *Id.* at 206–07 (jurisdiction), 207 (finding Webb a citizen for purposes of the U.S. Constitution).

392. *Id.* at 210.

393. *Id.* at 210–11.

394. *Id.* at 211. Judge Gray also found the statute was impermissible under the 1857 constitution. *Id.* at 212.

But at the time of the 1857 convention, the *Webb* vindication of the status of blacks as citizens was still six years in the future. The immediate issue raised by Rufus Clarke's proposed amendment to section 4 of the bill of rights was the testimonial competency of African Americans, a very current question in Iowa in 1857.<sup>395</sup> Just over a year before the convention, in December of 1855, the Iowa Supreme Court decided *Motts v. Usher & Thayer*.<sup>396</sup> The case involved the competency of a black witness, identified only as "Hinton," in a case where one of the parties was white and the other black.<sup>397</sup> Apparently the white party wanted to call Hinton as a witness but ran afoul of a provision of the Iowa statutes "that an Indian, a negro, a mulatto, or a black person, shall not be allowed to give testimony in any case wherein a white person is a party."<sup>398</sup> The white party attempted to waive the provision, arguing that "this provision was designed for the benefit of, and to protect the white person; and that the defendants having waived this objection, by offering to introduce the witness, the plaintiff, being a negro, cannot object."<sup>399</sup> The Iowa Supreme Court rejected the proposition:

This position would be tenable, if the provision . . . was alone for the benefit of the white person. But as already shown, this is not the language of the Code, and so far as relates to the reason and policy of the law, we can conceive of quite as weighty considerations for excluding the testimony, when offered by, as when offered against, a white man. If the plaintiff was a white man, it would be clear that the witness would, if objected to, be incompetent, when offered by the defendants. So also, if offered by the plaintiff, a negro, against the defendants. Why, then, should the law make him competent for a white person against a negro? It is said that the reason he is incompetent for the black against the white person, is, that the blacks are clannish and might confederate to the great injury and prejudice of white suitors. But, on the other hand, it is not to be disguised that from the dependent position of this unfortunate portion of our population upon white persons, they might be used as instruments by them, to injure and prejudice black suitors. And indeed, there would appear to be quite as strong reasons for excluding such witnesses in one case, as the other. When both parties are black, such witnesses are competent; otherwise

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395. ACTON & ACTON, *supra* note 366, at 88.

396. *Motts v. Usher & Thayer*, 2 Iowa 82, 82 (1855).

397. *Id.* at 83.

398. *Id.*

399. *Id.*

not, if objection is made.<sup>400</sup>

While the convention was in session, the Republican-controlled legislature repealed the Iowa code provision construed in *Motts*, setting the stage for the convention debate.<sup>401</sup> W. Penn Clarke described the judicial and legislative setting:<sup>402</sup>

I shall support the amendment of the gentleman from Henry (Mr. Clarke) because I think the present condition of the laws in this State requires it. This question has been raised here in consequence of the decision of the Supreme Court in the case of *Motts vs. Usher and Thayer* . . . [The Supreme] Court held that under our present laws a negro could not testify in any case, and as a consequence of that decision, the General Assembly at it[s] late session provided for the testimony of negroes being received . . .<sup>403</sup>

W. Penn Clarke then noted that the Democratic Party had arrayed itself against the statutory change to allow blacks to testify and declared that he was “in favor of putting it beyond the power any Legislature to exclude negroes from testifying, where it may be for the benefit of the negro, and for the benefit of the white man also.”<sup>404</sup>

The tenor of the debate was harsh, as is suggested by the interplay between Rufus Clarke and Democrat and former Iowa Supreme Court Justice J.C. Hall of Des Moines County. Immediately after Clarke proposed his amendment, Hall spoke: “Mr. HALL. I move to amend by adding ‘Negroes, Indians, Knaves, and Fools.’ Mr. CLARKE of Henry. I presume the gentleman offering that amendment has some personal interest to secure in attaching the two latter classes to Negroes and Indians; if so I have no particular objection.”<sup>405</sup> Justice Hall’s amendment failed for want of a

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400. *Id.*

401. See ACTON & ACTON, *supra* note 366, at 178–79.

402. LORD, *supra* note 269, at 178.

403. *Id.*

404. *Id.* Republican James F. Wilson from Jefferson County, who later served in the Iowa House and Senate and the U.S. House and Senate, noted that “[t]he Democratic State Convention passed a resolution denouncing that repeal; the Republican State Convention passed a resolution endorsing it . . .” *Id.* at 180.

405. *Id.* at 172. Jonathan C. Hall was appointed to fill a vacancy on the Iowa Supreme Court occasioned by the retirement of Justice John F. Kinney. *Iowa’s Supreme Court: Territorial and State Supreme Court Justices in Review*, in 26 ANNALS OF IOWA 3, 13 (1944). Justice Hall served from February 15, 1854, to January 15, 1855. *Id.* It has been observed that Justice Hall “dominated” the presentation of the Democrat case and that

second.<sup>406</sup> Next came Democratic farmer George Gillaspay of Wapello County:

Mr. GILLASPY. I suppose, Mr. Chairman, that the people of the State of Iowa sent the members of this Convention here to make a Constitution, which would provide for the white race first. But to my utter astonishment, upon the second or third day of our deliberations, a proposition was offered by some gentleman to provide for the education of the blacks and mulattoes, before he had ever said a word about the whites.

I am opposed to the amendment, now before the Convention, and shall vote against it. I shall oppose every thing of the kind that may be offered, which would hold out any inducement to the blacks and mulattoes to come into this State. The gentleman from Henry (Mr. Clarke) seems to be very tenacious about this matter, and does not move in any thing, unless there is a “nigger in the wood-pile,”<sup>407</sup> connected

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“Jonathan Hall and the Democrats took a racist point of view.” ACTON & ACTON, *supra* note 366, at 86, 88. One contemporary, Judge George G. Wright, described Justice Hall as “that man of generous heart, among the leaders of the bar in early days.” *A Historic Reunion*, *supra* note 93, at 33. The Republican president of the 1857 convention, Francis Springer, characterized Justice Hall in equally charitable terms:

Judge Hall . . . had held with credit a seat on our Supreme bench. He was an able man among able men. He was endowed by nature with a large heart and a larger brain. As an advocate, lawyer and jurist his place was in the front rank of the Iowa bar. Though not possessed, perhaps, of the culture and scholarly attainments of some of his contemporaries, yet for strength and depth of mind, for logical force and power of argumentation he was entitled to rank with the foremost men in the State.

*Id.* at 37–38.

406. LORD, *supra* note 269, at 172.

407. I apologize to readers for whom inclusion of the bigoted language of the mid-nineteenth century is painful. The use of such language without modification raises issues upon which reasonable people differ. After due consideration, I found myself in agreement with the assessment of Professor Randall Kennedy, made with reference to original documents from the middle of our nineteenth century, that such offensive words are best presented “as they appeared in their historical context.” Randall Kennedy, *A Note On The Word “Nigger”*, HARPWEEK, <http://blackhistory.harpweek.com/1Introduction/IntroLevelOne.htm> (last visited Mar. 15, 2018) (follow “A Note on the Word “Nigger”). As Professor Kennedy argued:

Cultural literacy requires detailed knowledge about the oppression of racial minorities. A clear understanding of “nigger” is part of this knowledge. To

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with it.<sup>408</sup>

Shortly thereafter, Justice Hall rejoined the debate:

Mr. HALL. I notice that the gentleman from Henry (Mr. Clarke) has a great idea of sticking in this “nigger” question upon every possible occasion, and I know that he puts his gloves on before he touches it. I want the gentleman to handle it without his gloves. I want him to come plainly out and say what he means. If we are to incorporate into our Constitution such a provision as this, I want it to define in so many terms the class of persons it is intended cover.<sup>409</sup>

Rufus Clarke’s response was notable and direct. He sought to broaden the import of his proposed amendment and place it in the context of broader values to be affirmed:

Standing here, as I do, with my whole heart echoing to the sentiment . . . that “we came here to seek after the principles of eternal truth and justice, and to incorporate them into our constitution.” I know of no such beings as “negroes and Indians.” I came here not to insert anything in our constitution recognizing any differences in the classes of men. I came here to establish principles that are eternal, and I can assure the gentleman from Des Moines [Mr. Hall] that I am, ever have been, and ever shall be in earnest when questions of principles are under discussion; and the gentleman’s sneers, and his cries of “nigger,” will not influence me any more than the passing of the idle wind.<sup>410</sup>

W. Penn Clarke expressed regret at the tone of the debate:

I regret that whenever questions of this character are brought up here, instead of their being met as they should be, insinuations are thrown out about negro questions, negro philanthropy, &c. The world is presumed to be progressive, and it is progressive, and I have

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paper over that term or to constantly obscure it by euphemism is to flinch from coming to grips with racial prejudice that continues to haunt the American social landscape.

*Id.*

408. LORD, *supra* note 269, at 172. Gillaspay was the unsuccessful Democratic candidate for Lieutenant Governor later that year, and the unsuccessful Democratic candidate for Governor in 1869. ACTON & ACTON, *supra* note 366, at 88 (“Ottumwa farmer George Gillaspay was a hard-core segregationist Democrat.”).

409. LORD, *supra* note 269, at 172.

410. *Id.* at 173 (alteration in original).

progressed somewhat with it, and at my stage of life, I have come to the conclusion that we should look upon these matters as questions of natural right and duty, and not have them met with sneers and jests.<sup>411</sup>

In responding to Justice Hall, Rufus Clarke noted the existing language of section 4, as he paraphrased it, “the declaration that every man shall be judged by the character which he has established in the community” and not by his beliefs on matters of religion.<sup>412</sup> “I wish to carry out that principle in full,” he said, and then continued to link the issues of religion and race:

[A]nd if any poor, down trodden creature belonging to the human family receives a benefit from it, God be praised. It is for this reason I wish to set forth this principle in the constitution, that somebody may be benefitted who might otherwise have his rights denied to him. . . . If it be not right to deprive me of my rights on account of my religious belief, it is not right to deprive me of them because I come from any particular place or country, or because I have a particular hue to my skin?<sup>413</sup>

Rufus Clarke denied the allegation that he was seeking to secure special rights for blacks, claiming a broader goal: “Now, my object is not to secure any particular amount of advantage to that class of the community; but it is to prevent my fellow citizens, in their prejudice and madness, from trampling upon all principle and making laws which would work injustice to their fellow men.”<sup>414</sup>

Rufus Clarke’s opponents declined to engage him on the high moral plane he occupied. Amos Harris described Clarke’s beliefs as a “mania” and reintroduced a form of Justice Hall’s motion, to add the words “except Indians, negroes, knaves and fools.”<sup>415</sup> Harris’s motion received only his

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411. *Id.* at 179. William Penn Clarke has been described as an “ardent foe of slavery” and a “leading light” among Republicans at the convention. *ACTON & ACTON, supra* note 366, at 86. He has been called one of the Republicans “most prominent in debate.” *A Historic Reunion, supra* note 93, at 33 (remarks of Judge George G. Wright).

412. *LORD, supra* note 269, at 173.

413. *Id.*

414. *Id.* at 173, 174 (“I only ask you to establish this principle, that the Legislature shall make no law ostracizing a whole class, sect or party of men, or deprive them of rights belonging to any other citizen, on account of their belonging to such class, sect or party.”).

415. *Id.* at 174 (“The mania which the gentleman has upon this particular subject is very well known here . . .”).

vote.<sup>416</sup>

Justice Hall took to the floor and linked Rufus Clarke's proposed amendment to the immigration of blacks into Iowa.<sup>417</sup> He declared: "The gentleman from Henry [Clarke] may have escaped from or released himself from these shackles of prejudice; but I have not."<sup>418</sup> Justice Hall spoke of the underlying policy as he saw it:

I understand that the citizens of this State are composed of white people. And I believe it is not the policy of this State to do any one act, however trivial, however seemingly unimportant it may be, that may invite this class of population here, and after they get here give them all the rights of citizens.<sup>419</sup>

Justice Hall continued, "I cannot become a slanderer and libeller of my own race and the race of my fathers for the purpose of elevating the negro."<sup>420</sup>

After some maneuvering, Rufus Clarke narrowed his proposal to encompass only the testimonial competency of blacks, seeking to add to section 4 the language: "Nor shall any person be rendered or held thus incompetent to give testimony in consequence of his or her belonging to any particular sect, class, society or party."<sup>421</sup> He explicitly linked the elimination of race-based incompetency to the existing prohibition on incompetency based on religious belief: "Now if this principle is correct when applied to religious belief, I cannot see why, nor where it is too broad when applied to man as a class, or party or society."<sup>422</sup>

George Gillaspay spoke of his duty to the white race:

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416. The Harris amendment was seconded by Jonathan Hall. After a somewhat lengthy debate, the Harris amendment was defeated 1 to 33. *Id.* at 174-76.

417. *Id.* at 176.

418. *Id.* at 177.

419. *Id.* at 176.

420. *Id.* at 177.

421. *Id.* at 180. Rufus Clarke secured unanimous consent to modify his original language to read: "or in consequence of belonging to any particular sect, class or party of men; but persons convicted of infamous crimes shall be liable to such disabilities as the laws may provide." *Id.* That formulation lost 11 to 22. *Id.* Rufus Clarke then proposed his narrower formulation. *Id.* at 183. "I have so narrowed down my proposition that it does not now apply to anything except the giving of testimony in courts of justice." *Id.*

422. *Id.* at 180-81.

I came here to represent exclusively the interests of the white race, and I am in favor of retaining the word “white” exclusively in every part of the constitution, and I hope that this Convention, in every thing they may do here, will look to the interests of the white race alone.<sup>423</sup>

He predicted the adoption of Clarke’s amendment would result in the defeat of the new constitution:

I will go home to my constituents, and hold the gentleman from Jefferson, [Mr. Wilson,] and the gentleman from Henry, [Mr. Clarke,] and the republican party responsible for every vote they may give here. I know that the gentleman from Jefferson county is shaking in his boots in view of this responsibility. I know that the people of Jefferson county . . . are not prepared to endorse the doctrine that the negro is as good, or perchance better, than the white man. I dare gentlemen here to incorporate into the constitution the amendment of the gentleman from Henry. If they want to see the constitution defeated, let them insert this provision so repugnant to the free people of Iowa, as it ought to be to every man in the country. If the negro is to be placed upon an equality with the white man, by the adoption of the amendment now proposed here, it will defeat the constitution in my judgment . . .<sup>424</sup>

Opponents of the Clarke amendment sought to leave the matter in the hands of the legislature.<sup>425</sup> Justice Hall made the argument:

I concede the right of the gentleman from Henry [Mr. Clarke] coming from the county he does, and having passed through the canvass he has, to carve out and worship his beautiful Gods in ebony when he has made them, but I ask gentlemen who are differently situated to leave this question to the Legislature.<sup>426</sup>

Yet another member by the name of Clark—Republican lawyer John T. Clark of Alamakee County—responded to Justice Hall.<sup>427</sup> He questioned why blacks should receive disparate treatment:

In the first place, I ask [the] gentlemen to tell me upon principle, why the colored man should be singled out above all other men, and why he

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423. *Id.* at 188.

424. *Id.* at 189 (alterations in original).

425. *Id.* at 191 (“I propose, then, to leave this question just where it has been in years past—in the hands of the Legislature.”).

426. *Id.* at 190.

427. *Id.* at 191.

should be made the exception to the general rule, that allows any other man to testify in the courts of justice in this State, and permits his credibility to go to the jury for what it is worth.<sup>428</sup>

John Clark spoke of his feeling toward blacks, stating that “I am one of those, although I have never been an Abolitionist, who believe that the negro by nature is just as good as the white man.”<sup>429</sup> He blamed the condition of blacks on the institution of slavery: “[W]ith all the demoralizing influences exerted by such a system as that of the slave trade, it is no wonder that you find the African the ignorant and degraded being that he is.”<sup>430</sup> His conclusion was that “it is evident to my mind that the degradation of the negro is not owing to his color, but to the unnatural position which he occupies in our country.”<sup>431</sup>

The equal rights argument was advanced by W. Penn Clarke later in the debate.<sup>432</sup> Responding to Justice Hall’s observation that the question of the competency of black witnesses was not raised in either the 1844 or the 1846 convention, W. Penn Clarke traced the cause to changes in the Democratic party:

[I]t is a notorious fact that in the days of those conventions, the Democratic party was the party of equal rights, and not a party of class legislation and prejudice; and that was the reason, perhaps, why this question was not raised in those conventions. But there has been, not a progress, but a going backward in the position of this party during the last five years. It was formerly a party with “free trade and sailors’ rights” inscribed upon their banners. And if there was any one thing about the Democratic party of which I was proud, although I was opposed to the party, it was that it had emblazoned upon its flag “equal rights for all.” But during the last five years the principle has been stricken down; this motto has been erased from its escutcheon, and therefore it is necessary for this question to be raised at this time.<sup>433</sup>

Thus he declared, “I am in favor of lifting up, not the black man alone, but every man who, by misfortune or misconduct, has fallen below that standard of virtue and morality which should be the standard of every

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428. *Id.*

429. *Id.*

430. *Id.* at 191–92.

431. *Id.* at 192.

432. *Id.* at 196.

433. *Id.* at 197.

man.”<sup>434</sup>

At the conclusion of a lengthy debate, Rufus Clarke moved to postpone further consideration of section 4 of the bill of rights.<sup>435</sup> The motion passed over the objections of the opponents of allowing blacks to testify on the same basis as whites.<sup>436</sup> After some conflict, section 4 and the Clarke amendment were referred to a select committee.<sup>437</sup>

An interesting exchange about the topic of black witness competency occurred on February 11th, when Muscatine County Republican farmer and engineer J.A. Parvin spoke about a petition he had received from almost 200 of his constituents, both Republicans and Democrats.<sup>438</sup> The petitioners wished to protest against the convention adopting a constitutional provision “excluding blacks and mulattoes from giving testimony in our courts of justice, and also excluding them from holding property, thus overturning the action of the last legislature in regard to that portion of our population.”<sup>439</sup> Parvin restated his opinion that the action of the legislature could not be overturned:

I stated here the other day that I believed this principle was so firmly fixed in the minds of the people of this State, that no party of men would dare, even if they had the power, to reinstate the disability which the late legislature removed. . . . The principle of that legislation is so just and righteous, not only on account of the blacks, but also on account of the whites, that the people will never sanction the disability being again brought into force.<sup>440</sup>

Justice Hall then gave a very carefully parsed response: “Now there is not a democrat in this body who would be willing to have a restrictive clause in the constitution concerning the right of negroes and mulattoes to testify.

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434. *Id.* at 197–98.

435. *Id.* at 200.

436. Rufus Clarke first attempted to withdraw his amendment, which was not agreed to. *Id.* He then moved to postpone consideration of section 4, which was agreed to on a vote of 18 to 14, with Gillaspay, Hall, and Harris among the no votes. *Id.*

437. The select committee, to which the first, fourth, tenth and eighteenth sections of the bill of rights were referred, consisted of Rufus Clarke, Amos Harris, and Republican and future U.S. Senator James F. Wilson of Jefferson County. *Id.* at 223–26.

438. *Id.* at 395.

439. *Id.* (“They protest against anything being done here that shall do away with the rights secured to the blacks of this State by the action of the last general assembly.”).

440. *Id.*

It is all gammon to intimate that any democrat here wants any such restriction in the constitution.”<sup>441</sup> The only gammon<sup>442</sup> in the debate seems to have been on the part of Justice Hall. Clearly the Democrats were attempting to avoid a loss that would have constitutionalized the testimonial competency of blacks. They wanted to postpone a decision to a time, and a forum, where they might prevail. According to Justice Hall, the Democrats were “willing to leave the constitution in that respect as they found it, and permit the legislature to act as they deem best upon this subject.”<sup>443</sup> It seems clear that there were Democrats in the body who would have been willing to have a restrictive clause in the constitution concerning the rights of blacks to testify—Justice Hall was surely one himself—but they simply did not have the votes for the inclusion of such a clause.<sup>444</sup>

The select committee to which section 4 had been referred reported back to the convention on February 23rd.<sup>445</sup> Unable to reach consensus, the three-member select committee submitted three separate reports.<sup>446</sup> Republican lawyer James Wilson of Jefferson thought a constitutional provision on the point unnecessary: “After careful examination of the subject,” he announced, “the undersigned can come to no other conclusion than that the object sought to be attained by the amendment proposed in the convention, is secured by the first section of the bill of rights.”<sup>447</sup>

Wilson reached his conclusion by returning to first principles, starting with the language of section 1 of the bill of rights: “All men are by nature

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441. *Id.*

442. *Gammon* was apparently used in the sense of the British informal usage, meaning deceitful nonsense or bosh, rather than meaning a smoked or cured ham. *Gammon*, DICTIONARY.COM, <http://dictionary.com/browse/gammon?> (last visited Feb. 19, 2018).

443. LORD, *supra* note 269, at 395.

444. Justice Hall seems to have been clear about the inclusion of provisions in the constitution that would have encouraged blacks to come into the state:

I understand that the citizens of this State are composed of white people. And I believe it is not the policy of this State to do any one act, however trivial, however seemingly unimportant it may be, that may invite this class of population here, and after they get here give them all the rights of citizens.

*Id.* at 176. Presumably he would have been just as clear about provisions that would have discouraged blacks from coming into the state.

445. *Id.* at 651.

446. *Id.*

447. *Id.*

free and equal, 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.”<sup>448</sup> He then associated the question of testimonial competency to the basic rights:

The right of protecting life, liberty and property, being guaranteed by the constitution to every man, it follows as a consequence, that every one is entitled to exercise all these rights necessary to the full enjoyment of the right thus guaranteed. This point being determined, it follows that the citizen thus having the right guaranteed to him of protecting his life, liberty and property, by application to the courts of justice, he also has the right to introduce testimony; for without this right, the protection held out to him by the constitution, would be no better than heartless mockery—it would be but to invite him into the temple of Justice, while the doors are bolted and barred against him. Testimony is as essential to the protection of life, liberty and property, in courts of justice, as air is to the enjoyment of animal life; and every interference with the right is an act of usurpation not warranted by the constitution.<sup>449</sup>

Rufus Clarke agreed with Wilson’s reasoning, to a point: “I fully concur with his reasoning, so far as the same goes to show that such amendment as is proposed *ought not* to be necessary.”<sup>450</sup> But, he pointed out, a statute abridging the fundamental right to testify identified by Wilson had passed supreme court review:

The Legislature of our own state has once blackened our statute book with a most infamous law, depriving one whole class and race of men from being witnesses in courts of law, against the spirit and letter of this same *first section*, and that, too, under our old Constitution.

That law remained in full force, a disgrace and reproach to our state, *yet sustained in all our courts*, until it was repealed at the last session of our legislature!<sup>451</sup>

It was reported that the third member of the select committee, Amos Harris, was “confined to his room by indisposition,” and his report was presented by Gillaspay.<sup>452</sup> Harris started by suggesting the purpose of the

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448. *Id.* (emphasis in original).

449. *Id.* at 651–52.

450. *Id.* at 652.

451. *Id.*

452. *Id.*

proposed amendment: “[I]t was conceded that the main object of the amendment was to place mulattoes and negroes, and perhaps Indians too, equal to any and all other class of persons as to the right of giving testimony in courts of justice . . . .”<sup>453</sup> He then asserted that “all admit [the right to testify] can only be denied them by affirmative prohibitory legislation, under the present constitution.”<sup>454</sup> He concluded with a curious observation:

No especial provisions being inserted to operate for the immediate benefit of any other particular class of persons in the State, with the record of the convention pointing to the fact that certain things were done in order to more certainly secure the rights of such persons of color, in matters of testimony—could in the opinion of the undersigned but be construed as pointing to such persons as those, to protect the rights of whom, the constitution soon to be submitted to the electors of the State was especially framed, and of course according to them a higher standard for integrity and intelligence than is allowed for those less deeply colored, a distinction it is hoped this convention is not prepared to make.<sup>455</sup>

The bill of rights was taken up again the next day, February 24th.<sup>456</sup> As to section 4, Wilson observed that he and Harris came to the same conclusion—that the provision should be adopted from the 1846 constitution without amendment—although they reached that judgment by very different paths.<sup>457</sup> After a discussion as to the status of the amendment of Rufus Clarke, which had been under discussion when section 4 was referred to the select committee, W. Penn Clark proposed an amendment, an addition to section 4, which was adopted by a vote of 18 to 17:

And any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person not interested in the subject matter of the suit, who may be cognizant of any fact material to the case; and parties to suits may be witnesses as provided by law.<sup>458</sup>

By March 4th, the language of section 4 on point had gone through the

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453. *Id.* at 653.

454. *Id.*

455. *Id.*

456. *Id.* at 732.

457. *Id.* at 734.

458. *Id.* at 735 (noting affirmative votes included John Clark, Rufus Clarke, W. Penn Clarke, and J.A. Parvin; negative votes included George Gillaspay, J.C. Hall, Amos Harris, Francis Springer, and James Wilson).

committee of revision and had been changed slightly to its current form:

[A]nd any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law.<sup>459</sup>

In that form, section 4 was approved as part of the general approval of the preamble and bill of rights, by a vote of 26 to 6.<sup>460</sup> On March 5th, the constitution was adopted, by a vote of 25 to 7.<sup>461</sup> Rufus Clarke, W. Penn Clarke, and George Gillaspay voted for the constitution on final passage.<sup>462</sup> Justice J.C. Hall voted against the constitution.<sup>463</sup> All four made statements expressing their reservations about their vote and said they had not yet decided how they would vote in the public referendum on the new constitution.<sup>464</sup>

Iowa historian Professor Benjamin Shambaugh evaluated the changes in the bill of rights crafted by the delegates in 1857: “Section four declares that the testimony of any person (including Negroes), not disqualified on account of interest, may be taken and used in any judicial proceeding.”<sup>465</sup>

At a reunion of members of the 1857 convention in 1882, the 25th anniversary of their work, the Republican president of that body, Judge Francis Springer, spoke of “important new provisions” they added to the new constitution.<sup>466</sup> The first of which he spoke was section 4 of the bill of rights.<sup>467</sup> He gave the background present as the convention engaged in its consideration of that section:

Section 4 of the bill of rights contains an important provision concerning the administration of justice. It relates to witnesses. The statutes of

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459. *Id.* at 1006.

460. *Id.* at 1008 (noting affirmative votes included John Clark, Rufus Clarke, W. Penn Clarke, J.C. Hall, Amos Harris, J.A. Parvin, Francis Springer, and James Wilson; negative votes included George Gillaspay).

461. *Id.* at 1054 (noting affirmative votes included John Clark, Rufus Clarke, W. Penn Clarke, George Gillaspay, J.A. Parvin, Francis Springer, and James Wilson; negative votes included J.C. Hall and Amos Harris).

462. *Id.* at 1054–55.

463. *Id.* at 1054.

464. *Id.* at 1054–55.

465. SHAMBAUGH, *HISTORY*, *supra* note 242, at 348.

466. *A Historic Reunion*, *supra* note 93, at 43.

467. *Id.*

Iowa, all through our early history, and down to the winter of 1856-7, were stained by the presence of a law born of the spirit of the Dred Scott decision, and based upon its principles. This law said, in substance, this: "That no negro, mulatto, or Indian, or black person (whatever that may mean in addition to the three other classes) shall be a witness in any court or in any case against a white person." This law was repealed by the General Assembly that was in session at Iowa City during a part of the time that our convention was in session.<sup>468</sup>

Judge Springer explained why they thought it necessary to amend section 4 of the bill of rights to guarantee blacks the right to testify when the legislature had just accomplished the same result: "Our convention decided to bury that law so deep that there should be no danger of its resurrection."<sup>469</sup>

The import of the change in section 4 of the bill of rights was clear.<sup>470</sup> According to Judge Springer: "This provision vindicates the doctrine of the equality of men before the law, and decrees that in all the broad limits of Iowa there shall be no distinction of race or color with respect to the admiss[i]bility of witnesses."<sup>471</sup> It should be noted, although the controversy as to the testimonial rights of citizens on the basis of race swirled around the other parts of section 4, at the end of the process, the 1857 constitution<sup>472</sup> retained the language of the 1846 constitution<sup>473</sup> as to religious tests for

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468. *Id.* (remarks of Judge Francis Springer).

469. *Id.* (remarks of Judge Francis Springer).

470. *See id.* (remarks of Judge Francis Springer).

471. *Id.* at 43-44 (remarks of Judge Francis Springer).

472. IOWA CONST. art. I, § 4 (1857):

No religious test shall be required as a qualification for any office, or public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion; and any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law.

*Compare* IOWA CONST. art. II, § 4 (1844), *with* IOWA CONST. art. I, § 4 (1857) (including minor punctuation changes and the addition of the language: "and any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law").

473. IOWA CONST. art. I, § 4 (1846):

testimonial competency: “[N]o person shall be . . . rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion . . . .”<sup>474</sup>

With the constitutions of 1846 and 1857, Iowa first guaranteed and then reaffirmed witness competence without regard to religious belief.<sup>475</sup> But, as it turned out, it had not precluded challenges to witness credibility based on religious belief. In 1877<sup>476</sup> and again in 1881,<sup>477</sup> the Iowa Supreme Court

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No religious test shall be required as a qualification for any office or public trust, and no person shall be deprived of any of his rights, privileges or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion.

474. IOWA CONST. art. I, § 4 (1857).

475. See Paul W. Kaufman, Note, *Disbelieving Nonbelievers: Atheism, Competence, and Credibility in the Turn of the Century American Courtroom*, 15 YALE J.L. & HUMAN. 395, 413 (2003).

476. *Id.* at 413 n.109; *State v. Elliot*, 45 Iowa 486, 488–89 (1877). The case involved a dying declaration of “a materialist” who “believed in no God or future conscious existence.” *Elliot*, 45 Iowa at 488–89. Asserting in religious terms why dying declarations are reliable, the court acknowledged that proof of religious belief was not competent as to admissibility, but cited an Iowa statute under which “[f]acts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility.” *Id.* at 489 (citing IOWA CODE § 3637 (1873)); Kaufman, *supra* note 475, at 413 n.109.

477. *Searcy v. Miller*, 10 N.W. 912, 915 (Iowa 1881). At issue in *Searcy* was the testimony of a fact witness for the defendant in an action on a promissory note. *Id.* at 912–15. On cross-examination the witness was asked about his religious beliefs, to which defense counsel objected unsuccessfully. *Id.* at 915.

*Question.* Have you any religious belief? *Answer.* Well, it is very weak, if I have any religious principles. I am not much of a religious man. *Question.* Have you any belief in a state of future rewards or punishments? *Answer.* It is very faint. I am actually not a believer in these articles. *Question.* Have you any belief in a Supreme Being? *Answer.* I do not know what it is. Of course, there is a first cause for something, but I do not know what it is. I do not know anything to believe upon it.

*Id.* at 914–15. The *Searcy* court engaged in a clumsy sleight of hand to get to the statutory provision that would allow testimony as to credibility. *Id.* at 915. The court traced the “heretofore” language to first enactment in 1851 and noted that the code of 1851 provided: “The terms ‘heretofore’ and ‘hereafter,’ as used in this Code, have relation to the time when this statute takes effect.” *Id.* (quoting IOWA CODE § 53 (1873); IOWA CODE § 35 (1851); THE CODE OF IOWA AS REPORTED TO THE FOURTEENTH GENERAL ASSEMBLY BY THE COMMISSIONERS FOR THE REVISION OF THE STATUTES pt. 1, tit. 1, ch.

allowed the use of religious belief to attack credibility, although in a 1911 case the court apparently acknowledged the danger that inquiry into religious views could be used to improperly discredit a witness.<sup>478</sup>

Three states—Arizona,<sup>479</sup> Oregon,<sup>480</sup> and Washington<sup>481</sup>—adopted constitutional prohibitions on inquiries into religious belief to challenge

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4, § 9 (1872)). But then the court interprets the term “heretofore” in the statutory section (“Facts which have heretofore caused the exclusion of testimony . . .”) to mean not 1851, but 1846:

At the time when section 2389 of the Code of 1851 was enacted . . . no case had found its way into the appellate court of this state in which the provisions of article 1, § 4, of the constitution, had been applied and enforced. Up to that time the decisions of courts in England and in this country had excluded as incompetent witnesses who were “insensible to the obligations of an oath from defect of religious sentiment and belief;” and no different rule had been practically authorized by the adjudications of the supreme court of this state. Now, when the word “heretofore” was used in section 2389, we think it must have referred to facts which the courts had heretofore held should cause the exclusion of testimony, rather than to a constitutional provision intended to govern the action of courts, but which had never received judicial application.

*Searcy*, 10 N.W. at 915. The supreme court curiously took the position that a provision of the constitution ratified by the people is somehow not “practically authorized” as a governing proposition of law until enforced by the courts. *See id.*

478. *State v. Browning*, 133 N.W. 330, 333 (Iowa 1911). The case involved a criminal prosecution for extortion in which “[t]wo of the witnesses for the state were Jews.” *Id.* After taking the “orthodox oath,” the Jewish witnesses “were each asked by defendant’s counsel as to whether or not there was any other form of oath which they regarded as of higher or greater sanctity or greater solemnity or more binding upon him than the oath taken.” *Id.* Declaring “the questions propounded were evidently framed for the purpose of discrediting the witness[.]” the *Browning* court held, “For the purpose of discrediting the witness the inquiries were inadmissible[.]” for which it cited *Searcy*, *Dedric*, and—inappropriately since it goes to admissibility and not credibility—article I, section 4 of the Iowa constitution. *Id.* (citing IOWA CONST. art. I, § 4; *Dedric v. Hopson*, 17 N.W. 772 (Iowa 1883); *Searcy*, 10 N.W. at 912).

479. ARIZ. CONST. art II, § 12 (1912) (“[N]or shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned touching his religious belief in any court of justice to affect the weight of his testimony.”).

480. OR. CONST. art. I, § 6 (1859) (“No person shall be rendered incompetent as a witness, or juror in consequence of his opinions on matters of religion; nor be questioned in any Court of Justice touching his religious belief to affect the weight of his testimony.”).

481. WASH. CONST. art. I, § 11 (1889) (“[N]or shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.”).

credibility. Iowa did not adopt such a protection.<sup>482</sup> Although it is unclear whether it was more than a theoretical problem, the prejudicial treatment of nonbeliever witnesses was finally corrected in Iowa only in 1983 with adoption of a rule of evidence that provided, “Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.”<sup>483</sup> The 1983 Committee Comment is instructive: “While no Iowa counterpart to Rule 610 can be found, the Committee feels that it is in accord with Iowa practice and policy recognizing personal freedom of religious or non-religious expression.”<sup>484</sup> Today, every state in the Union has either adopted the Federal Rule of Evidence 610 prohibition on credibility challenges based on religious belief or reached the same result by a different path.<sup>485</sup>

One hundred thirty-nine years after Stephen Hempstead called upon the constitutional convention of 1844 to “do away . . . with this inquiring into a man’s religious opinions[,]” Iowa finished what had been started at the first constitutional convention by adopting the rule at long last barring evidence of religious belief or nonbelief on the matter of credibility.<sup>486</sup>

The final religious liberty issue addressed by the convention—whether to adopt a guarantee against individual compulsion in matters of religion—gave the members a final opportunity to advance the core values of voluntarism and democracy.<sup>487</sup>

## VI. THE GENERAL RELIGION CLAUSE

*“Why not assume that the framers of the constitution, and the people*

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482. Rules of Evidence, ch. 219, r. 610, 1983 Iowa Acts 713, 720 (repealed 2002).

483. *Id.* The current text reads: “Evidence of a witness’s religious beliefs or opinions is not admissible to attack or support the witness’s credibility.” IOWA R. EVID. 5.610. The Iowa rule was based on Federal Rule of Evidence 610, which dates back to 1975 and in its earlier form read: “Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.” Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926. In its current form the rule reads: “Evidence of a witness’s religious beliefs or opinions is not admissible to attack or support the witness’s credibility.” FED. R. EVID. 610.

484. 7 LAURIE KRATKY DORÉ, EVIDENCE Rule 5.610. Religious Beliefs or Opinions, in 7 IOWA PRACTICE SERIES (2017 ed.) (1983 Advisory Committee Comment).

485. Vestal, *supra* note 2977, at 85 n.153.

486. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 39.

487. See IOWA CONST. art. II, § 3 (1844).

*who voted it into existence, meant exactly what it says?*"<sup>488</sup>

The final religious liberty issue addressed by the 1844 convention was the form of the general religion clause.<sup>489</sup> The convention adopted a general religion clause formulation that expanded upon the federal First Amendment Establishment and Free Exercise Clauses:

The legislature shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates, for building or repairing places of worship, or for the maintenance of any minister or ministry.<sup>490</sup>

The Iowa provision was broader than the federal Establishment Clause.<sup>491</sup> The Iowa constitution of 1844 contained an establishment clause<sup>492</sup> and a free exercise clause that were virtually identical to their counterparts in the federal Constitution.<sup>493</sup> In addition, the Iowa constitution contained a clause not found in the federal Constitution, a guarantee against the compulsion of individuals with respect to religion: "[N]or shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates, for building or repairing places of worship, or for the maintenance of any minister or ministry."<sup>494</sup>

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488. *Rudd v. Ray*, 248 N.W.2d 125, 136 (Iowa 1976) (Uhlenhopp, J., dissenting) (quoting *Lake Cty. v. Rollins*, 130 U.S. 662, 670 (1889)).

489. *See* IOWA CONST. art. II, § 3 (1844).

490. *Id.*

491. *Compare* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."), with IOWA CONST. art. II, § 3 (1844) ("The legislature shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates, for building or repairing places of worship, or for the maintenance of any minister or ministry.*") (emphasis added).

492. *Compare* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . ."), with IOWA CONST. art. II, § 3 (1844) ("The legislature shall make no law respecting an establishment of religion . . .").

493. *Compare* U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise thereof . . ."), with IOWA CONST. art. II, § 3 (1844) ("The legislature shall make no law . . . prohibiting the free exercise thereof . . .").

494. IOWA CONST. art. II, § 3 (1844). Essentially identical provisions are found in the Iowa constitutions of 1846 and 1857. *Compare* IOWA CONST. art. II, § 3 (1844), with IOWA CONST. art. I, § 3 (1846) (substituting "general assembly" for "legislature" and noting minor punctuation changes), and IOWA CONST. art. II, § 3 (1857) (substituting "General Assembly" for "legislature," noting minor punctuation changes, and substituting "or the

What did the members of the convention intend by their inclusion of the third clause of Iowa's general religion clause? There are a number of sources to which we might turn for guidance: the contemporaneous statements of the members, the record of sister-state enactments available to the convention, an evaluation of the historical context in which the convention acted, and of course, the language of the provision itself. Alas, these potential sources of guidance are not as helpful as we might wish.

There are no available contemporaneous statements of the convention members as to the formulation of the general religion clause.<sup>495</sup> The existing contemporaneous reports of the convention indicate a number of times the bill of rights was discussed, none of which report a discussion of the general religion clause that became article II, section 3.<sup>496</sup>

The record of sister-state enactments is slightly more helpful, but not dispositive. By 1844, 16 of the 26 states had constitutional provisions prohibiting government compulsion for the support of religion.<sup>497</sup> Reviewing the provisions in chronological order is helpful in understanding them. The oldest anticomulsion clause in 1844 was the Maryland provision of 1776.<sup>498</sup> Drafted at a time when establishment was practiced in some colonies, the Maryland provision contained both a typical anticomulsion clause<sup>499</sup> and an authorization for the legislature to "lay a general and equal tax for the support of the Christian religion."<sup>500</sup>

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maintenance" for "or for the maintenance").

495. See SHAMBAUGH, FRAGMENTS, *supra* note 67, at 9.

496. *Id.* at 9 (mentioning the appointment of standing committee on the bill of rights consisted of Grant, Hepner, Delashmutt, Langworthy, Hawkins, Benedict, and Blankenship), 10–11 ("The amendments to the Bill of Rights having been gone through with, it was ordered to be engrossed . . ."), 11 (indicating report of Bill of Rights Committee received), 24–25 (noting a floor debate on slavery, religious tests, publication requirement), 34–42 (noting a floor debate on judiciary, standing armies, treason, contracts, slavery, poll taxes, religious tests, foreigners, libel, transportation of criminals, titles of nobility, and emigration), 43 (noting a provision regarding treason and ordering a third reading), 150 (mentioning Governor Lucas's proposal for seven articles to be added), 159–62 (referencing Lucas's proposal for seven additional articles on legislative authority, transportation of criminals, imprisonment, capital punishment, hereditary honors, foreign corporations, exclusions from execution; third reading and passage).

497. See, e.g., MD. CONST. art. XXXIII (1776).

498. *Id.*

499. *Id.* ("[N]or ought any person to be compelled to . . . maintain, or contribute, unless on contract, to maintain any particular place of worship, or any particular ministry . . .").

500. *Id.* ("[Y]et the Legislature may, in their discretion, lay a general and equal tax

The next oldest anticomulsion clauses in 1844 were all enacted after the Revolution and after disestablishment was well underway: Vermont (1793), Georgia (1798), Kentucky (1800), and Ohio (1802).<sup>501</sup> The Kentucky, Ohio, and Vermont constitutions contain very similar language that individuals may not be compelled to “attend, erect, or support” any place of worship or ministry.<sup>502</sup> The Georgia constitution included language that individuals may not be compelled “to attend any place of worship contrary to his own faith and judgment” or “to pay tithes, taxes, or any other rate, for the building or repairing [of] any place of worship, or for the maintenance of any minister or ministry.”<sup>503</sup>

Four anticomulsion clauses still in effect in 1844 were adopted between 1816 and 1820, as disestablishment was all but universal: Indiana (1816), Illinois (1818), Alabama (1819), and Missouri (1820). Illinois, Indiana, and Missouri adopted the common “attend, erect, or support” formulation.<sup>504</sup> Alabama adopted the Georgia “tithes, taxes, or other rates”

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for the support of the Christian religion; leaving to each individual the power of appointing the payment over of the money, collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county: but the churches, chapels, globes, and all other property now belonging to the church of England, ought to remain to the church of England forever.”).

501. GA. CONST. art. IV, § 10 (1798); KY. CONST. art. X, § 3 (1800); OHIO CONST. art. VIII, § 3 (1802); VT. CONST. ch. I, art. 3 (1793).

502. KY. CONST. art. X, § 3 (1800) (“[T]hat no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent . . . .”); OHIO CONST. art. VIII, § 3 (1802) (“[T]hat no man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent . . . .”); VT. CONST. ch. I, art. 3 (1793) (“[T]hat no man ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience . . . .”).

503. GA. CONST. art. IV, § 10 (1798) (“No person within this State shall . . . be compelled to attend any place of worship contrary to his own faith and judgment; nor shall he ever be obliged to pay tithes, taxes, or any other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or hath voluntarily engaged to do.”).

504. ILL. CONST. art. VIII, § 3 (1818) (“[W]e declare . . . that no man can, of right, be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent . . . .”); IND. CONST. art. I, § 3 (1816) (“That no man shall be compelled to attend, erect, or support any place of Worship, or to maintain any ministry against his consent . . . .”); MO. CONST. art. XIII, § 4 (1820) (“[T]hat no man can be compelled to erect, support, or attend any place of worship, or to maintain any minister of the gospel, or teacher of religion . . . .”).

formulation.<sup>505</sup> After a 10-year hiatus, another six anticomulsion clauses still in effect in 1844 were enacted between 1830 and 1838: Virginia (1830), Delaware (1831), Michigan (1835), Tennessee (1835), Arkansas (1836), and Pennsylvania (1838).<sup>506</sup> Four adopted the “attend, erect, or support” formulation without modification,<sup>507</sup> and one adopted a functionally identical “frequent or support” formulation.<sup>508</sup> Michigan’s constitution of 1835 is interesting in that it includes both the “attend, erect, or support” formulation *and* the “tithes, taxes or other rates” formulation.<sup>509</sup>

Two other states adopted anticomulsion clauses before the Iowa clause became effective with the constitution of 1846.<sup>510</sup> The New Jersey constitution of 1844 included “tithes, taxes, or other rates” language,<sup>511</sup> which is not surprising since it was a reenactment of the anticomulsion provision in the New Jersey constitution of 1776.<sup>512</sup> The anticomulsion

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505. ALA. CONST. art. I, § 3 (1819) (“No person within this state shall . . . be compelled to attend any place of worship, nor shall any one ever be obliged to pay any tythes, taxes, or other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry.”).

506. ARK. CONST. art. 2, § 3 (1836); DEL. CONST. art. I, § 1 (1831); MICH. CONST. art. I, § 4 (1835); PA. CONST. art. IX, § 3 (1838); TENN. CONST. art. I, § 3 (1835); VA. CONST. art. III, § 11 (1830).

507. ARK. CONST. art. II, § 3 (1836). (“[W]e declare . . . [t]hat . . . no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent.”); DEL. CONST. art. I, § 1 (1831) (“[N]o man shall, or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent . . . .”); PA. CONST. art. IX, § 3 (1838) (“[N]o man can, of right, be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent . . . .”); TENN. CONST. art. I, § 3 (1835) (“[T]hat no man can, of right, be compelled to attend, erect or support any place of worship, or to maintain any Minister against his consent . . . .”).

508. VA. CONST. art. III, § 11 (1830) (“No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever . . . .”).

509. MICH. CONST. art. I, § 4 (1835) (“[N]o person can of right be compelled to attend, erect, or support, against his will, any place of religious worship, or pay any tithes, taxes or other rates, for the support of any minister of the gospel or teacher of religion.”).

510. N.J. CONST. art. I, § 3 (1844); TEX. CONST. art. I, § 4 (1845).

511. N.J. CONST. art. I, § 3 (1844) (“[N]or under any pretence whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately and voluntarily engaged to perform.”).

512. Compare N.J. CONST. art. XVIII (1776), with N.J. CONST. art. I, § 3 (1844).

clause of the Texas constitution of 1845 adopted the “attend, erect, or support” formulation.<sup>513</sup>

Then came the Iowa convention, which adopted a variation of the “tithes, taxes, or other rates” language: “[N]or shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates, for building or repairing places of worship, or for the maintenance of any minister or ministry.”<sup>514</sup>

What was the Iowa convention trying to do when it adopted a formulation other than that newly adopted by every state but one since 1776? There are a number of possible explanations. It is certainly possible that a member of the convention with ties to New Jersey proposed the language and the convention adopted it, unmindful of the history dating the New Jersey formulation to 1776.<sup>515</sup> This would explain the “tithes, taxes, or other rates” language.<sup>516</sup> But the convention included only one member whose native state was New Jersey, a member who does not seem a likely candidate for such a role.<sup>517</sup> In the alternative, it is possible that the convention members simply referred to the most recent enactment of an anticomulsion clause when they drafted the Iowa provision. That would have been New Jersey, which would explain the “tithes, taxes, or other rates” language.<sup>518</sup> But it might be thought the four Northwest Ordinance states already admitted—Ohio, Indiana, Illinois, and Michigan—would have been more logical models for the Iowa drafters. Each had an anticomulsion clause.<sup>519</sup> Among the four, Michigan was the most recent constitution, dated 1835.<sup>520</sup> Recourse to Michigan would explain the “tithes, taxes, and other

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513. TEX. CONST. art. I, § 4 (1845) (“[N]o man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent . . .”).

514. IOWA CONST. art. II, § 3 (1844).

515. See PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at lxxv (1942) (noting the New Jersey constitutional convention of 1844 met beginning May 14 and adjourned on June 29, and public ratification of the constitution occurred on August 13).

516. Compare *id.* at 5, with IOWA CONST. art. II, § 3 (1844).

517. Andrew Hooten was a 57-year-old Democratic farmer from Des Moines County who had lived in Iowa for five years at the time of the convention. SHAMBAUGH, FRAGMENTS, *supra* note 67, at 409. He opposed official prayer. He was not a member of the standing committee on the bill of rights. *Id.* at 9.

518. See IOWA CONST. art. II, § 3 (1844).

519. See, e.g., ILL. CONST. art. VIII, § 3 (1818); IND. CONST. art. I, § 3 (1816); MICH. CONST. art. I, § 4. (1835); OHIO CONST. art. VIII, § 3 (1802).

520. MICH. CONST. (1835).

rates” language, but Michigan also included the “attend, erect, or support” language Iowa did not adopt.<sup>521</sup>

Rather than an accident of the model from which the members worked, it is certainly possible they intended their adoption of nonstandard language to have substantive effect, a possibility considered below.

Virtually identical provisions<sup>522</sup> were found in the constitution of 1846<sup>523</sup> and the constitution of 1857, the latter of which remains in effect today.<sup>524</sup>

The constitutional convention of 1846 apparently did not consider making any changes in section 3 of the bill of rights. Professor Shambaugh does not list the general religion clause as one that engendered discussion<sup>525</sup> and notes that the only change in the bill of rights was a new section “which aimed to disqualify all citizens who should participate in dueling from holding any office.”<sup>526</sup>

The record in 1857 was similarly unexceptional. Unlike section 4 of the

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521. Compare IOWA CONST. art. II, § 3 (1844), with MICH. CONST. art. I, § 4 (1835).

522. Compare IOWA CONST. art. II, § 3 (1844), with IOWA CONST. art. I, § 3 (1846) (replacing “legislature” with “General Assembly” as well as making minor changes in punctuation).

523. IOWA CONST. art. I, § 3 (1846):

The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or for the maintenance of any minister or ministry.

524. IOWA CONST. art. I, § 3 (1857):

The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.

Compare IOWA CONST. art. II, § 3 (1844), with IOWA CONST. art. I, § 3 (1857) (substituting “General Assembly” for “legislature,” making minor punctuation changes, and substituting “or the maintenance” for “or for the maintenance”).

525. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72 at 191 (“The discussion for the most part was confined to those subjects upon which there had been a marked difference of opinion in the earlier Convention or which had received attention in the campaigns of 1845.”).

526. SHAMBAUGH, HISTORY, *supra* note 242 at 300.

bill of rights, the religious tests provision, which was the vehicle for so much controversy over racial matters, section 3 was not the subject of extended discussion in the 1857 convention.<sup>527</sup> The Committee on Preamble and Bill of Rights did not propose any revisions to section 3,<sup>528</sup> and no amendments were initially offered from the floor.<sup>529</sup>

The only amendment proposed to section 3 came on the 38th day of the convention, March 4th, when Republican banker James C. Traer of Benton County questioned the wording of the section:

I would call the attention of the convention to the third section [of the bill of rights], which reads, “the general assembly shall make no law respecting *an* establishment of religion, &c.” I think the language used is not exactly correct. It appears to me that it would be better to have it read “*the* establishment of religion,” instead of “*an* establishment of religion.”<sup>530</sup>

Republican lawyer John Clark from Alamakee County responded: “The word ‘the’ might be just as well. But I think ‘an’ is well enough.”<sup>531</sup> Republican lawyer Rufus Clarke from Henry County offered a substantive clarification: “As the section stands now, it is equivalent to saying that there shall be no law for the establishment of any religion. If it was changed so as to read ‘*the* establishment of religion,’ it might seem that it referred to the establishment of some particular religion.”<sup>532</sup> Traer accepted the Clarke clarification, and the discussion moved on.<sup>533</sup>

Although the Clarke clarification is not dispositive of the issue, it does offer support to the proposition that the framers did not view section 3 of the bill of rights as protection against the establishment of a single state religion—“the establishment of some particular religion” in Clarke’s formulation—but rather viewed it as a protection against state support for religious activities of any sort—“the establishment of any religion” in Clarke’s clarification.<sup>534</sup>

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527. LORD, *supra* note 269, at 101.

528. *See id.*

529. *Id.* at 118.

530. *Id.* at 1007.

531. *Id.*

532. *Id.*

533. *Id.* (“Very well; I am not particular. I desired merely to call the attention of the convention to the language used in that section.”).

534. *Id.*

Section 3 was approved as part of the general approval of the preamble and bill of rights by a vote of 26 to 6.<sup>535</sup> On March 5th, the constitution was adopted by a vote of 25 to 7.<sup>536</sup>

The intent of the convention might also be understood through an evaluation of the historical context in which it acted. A good starting point is the historical analysis of the Iowa religious anticompulsion clause by the Iowa Supreme Court the one time it addressed the issue in the 1976 case of *Rudd v. Ray*.<sup>537</sup>

*Rudd* involved the constitutionality of the state of Iowa providing dedicated chapels and state-employee chaplains in the state's prisons.<sup>538</sup> Judge D.B. Hendrickson of the Lee County District Court ruled that the provision of dedicated, sectarian chapels and state-employee chaplains violated article I, section 3 of the Iowa constitution but not the First Amendment of the federal Constitution.<sup>539</sup>

In reviewing the holding of the trial court, Justice K. David Harris wrote for the en banc majority;<sup>540</sup> Justice Harvey Uhlenhopp dissented, joined by Justice Maurice Rawlings.<sup>541</sup> The analysis of the majority started with the assertion that “[t]he history, purpose and intended meaning of Art. I, § 3 of our constitution can be clearly traced and described” and then proceeded to state its historical interpretation:

Like similar provisions included in the constitution of all sister states Art. I, § 3 has a common origin and parallel history with the First Amendment to the United States Constitution. All such provisions were aimed at disestablishment of state churches or, in cases of later western states such as Iowa, at preventing the establishment of state churches.<sup>542</sup>

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535. *Id.* at 1008.

536. *Id.* at 1054.

537. *Rudd v. Ray*, 248 N.W.2d 125, 132 (Iowa 1976).

538. *Id.* at 130–33.

539. *Id.* at 125, 132.

540. *Id.* at 126, 133. Justice Harris was joined by Chief Justice Moore and Justices M.L. Mason, Clay LeGrand, Warren Rees, W. Ward Reynoldson, and Mark McCormick. *Id.* at 133.

541. *Id.* Justice Rawlings joined in the second division of Justice Uhlenhopp's dissent. *Id.* at 137. The first division dealt with the analysis under the First Amendment of the federal Constitution; the second division dealt with the analysis under article I, section 3 of the Iowa bill of rights. *Id.* at 133–37.

542. *Id.* at 130.

The majority noted the difference in language between the federal and Iowa provisions but simply repeated the assertion that the Iowa provision was meant to forestall the establishment of an official state church:

To the extent our provision differs from the First Amendment to the United States Constitution we think our framers were merely addressing the evils incident to the state church. The framers addressed and provided a defense against the evils incident to a state church, forced taxation to support the same, and the payment of ministers from taxation.<sup>543</sup>

As to the language “nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates, for building or repairing places of worship, or for the maintenance of any minister or ministry,”<sup>544</sup> the *Rudd* majority was not convinced the quoted language “in any way disturbs the balance” between the Establishment and Free Exercise Clauses of the First Amendment to the federal Constitution.<sup>545</sup> This was true, said the majority, because the cited language of article I, section 3:

was inscribed in our constitution to prevent the establishment of a state church. The language was borrowed . . . from eastern states which had earlier struggled with the same problem. The provision of ministers and places of worship within the prisons in this state is lawful, not in order to spread or encourage religion there, but rather in order to accord the prisoners their guaranteed right to exercise it.<sup>546</sup>

These pronouncements of the *Rudd* majority were highly questionable as a matter of history.<sup>547</sup> By the time the Iowa convention met in 1844, church establishment was a distant memory, both spatially and temporally.<sup>548</sup> Only four New England states had established churches after the Revolution, all separated from Iowa by a thousand miles.<sup>549</sup> In all but one of these states, disestablishment had occurred a generation before the Iowa convention.<sup>550</sup> The final state to disestablish its churches had done so more than a decade

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543. *Id.* at 132.

544. IOWA CONST. art. II, § 3 (1844).

545. *Rudd*, 248 N.W.2d at 132.

546. *Id.* at 132–33.

547. *See* HOWE, TRANSFORMATION, *supra* note 82, at 164–65.

548. *See id.*

549. *Id.*

550. *Id.*

before the Iowa convention.<sup>551</sup> Disestablishment was followed by the Second Great Awakening.<sup>552</sup> Its underlying principles of voluntarism and democracy were flatly antithetical to the establishment of a state church.<sup>553</sup>

In addition, the language of the federal Establishment Clause, which the Iowa constitution incorporated without change, had proven fully effective as a guard against the establishment of an official church.<sup>554</sup> Both at the federal level and with respect to the states, there had been absolutely no effort to establish any official churches.<sup>555</sup> By the time the Iowa convention met, the wording of the federal Establishment Clause and its state equivalents had been equal to the task for over half a century.<sup>556</sup> It strains credulity to believe that the Iowa convention felt the need to *augment* the time-tested language of the federal Establishment Clause; much less that the other 16 states with anticomulsion clauses similarly felt such a need.

At such a spatial and temporal remove, one might ask, why would the framers of the Iowa constitution insert a *second* provision merely to deal with the issue of establishment? The answer is, contrary to the pronouncement of the *Rudd* majority, they did not.<sup>557</sup> The nation had long before moved on beyond the issue of establishment.<sup>558</sup> The third clause of the Iowa constitution's general religion clause—"nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates, for building or repairing places of worship, or for the maintenance of any minister or ministry"<sup>559</sup>—was clearly in response to the antebellum commitment to voluntarism and liberty, not the revolutionary commitment to disestablishment.<sup>560</sup>

The *Rudd* majority erred in its pronouncement that the third clause of the Iowa general religion provision was intended to safeguard against the long-distant threat of establishment.<sup>561</sup> It also erred as a matter of statutory

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551. *Id.* at 165.

552. *Id.* at 171.

553. *Id.* at 165.

554. *Id.* at 164–65; IOWA CONST. art I, § 3 (1844).

555. HOWE, TRANSFORMATION, *supra* note 82, at 165.

556. *Id.* at 164–65.

557. *Rudd v. Ray*, 248 N.W.2d 125, 132–33 (Iowa 1976).

558. HOWE, TRANSFORMATION, *supra* note 82, at 164.

559. IOWA CONST. art. II, § 3 (1844).

560. HOWE, TRANSFORMATION, *supra* note 82, at 164–65.

561. *Rudd*, 248 N.W.2d at 132–33.

interpretation. Simply put, the *language* of the Iowa general religion clause<sup>562</sup> is broader than that in the federal Establishment Clause.<sup>563</sup> The important question is, what does that difference mean? The correct answer is supplied by the minority opinion in *Rudd*, authored by Justice Uhlenhopp.<sup>564</sup>

The Uhlenhopp dissent started from the realization that article I, section 3 of the Iowa constitution “goes a step further” than the federal Establishment Clause.<sup>565</sup> Justice Uhlenhopp had difficulty under the federal Establishment Clause with the practice of using state funds to provide chapels and chaplains for state prisons.<sup>566</sup> But he found the federal challenge “unnecessary, however, because of additional express language in the Iowa Constitution.”<sup>567</sup>

Justice Uhlenhopp started by reading the language of article I:

Section 3 of our Iowa Bill of Rights, in addition to the establishment and free exercise clauses, has this additional third part,

nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.<sup>568</sup>

Using the language of the provision, he agreed with the trial court that the practice of using state funds to provide chapels and chaplains violated the Iowa constitution:

Like the trial court, I am unable to square the third part of § 3 with two practices here. One practice is that of permitting exclusive and permanent use for religious purposes of space in a building which the state built and maintains, heats, and lights, from tax funds. I think this violates the portion of the third part, “nor shall any person be compelled to . . . pay . . . taxes . . . for building or repairing places of worship . . .” The other practice is that of paying salaries and benefits to the three chaplains from tax funds. I think this violates the portion of the third

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562. See, e.g., IOWA CONST. art. I, § 3 (1857); IOWA CONST. art. I, § 3 (1846).

563. U.S. CONST. amend. I.

564. *Rudd*, 248 N.W.2d at 133 (Uhlenhopp, J., dissenting).

565. *Id.*

566. *Id.* at 134–35 (“I find this direct financial support very difficult to reconcile with language of the United States Supreme Court in *Everson v. Board of Education of the Twp. Of Ewing . . .*”).

567. *Id.* at 135.

568. *Id.* (quoting IOWA CONST. art. I, § 3).

part, “nor shall any person be compelled to . . . pay . . . taxes . . . for . . . the maintenance of any minister, or ministry.”<sup>569</sup>

Justice Uhlenhopp’s dissent in *Rudd* directly confronted the majority’s historical rationale for article I, section 3—the supposed threat of the establishment of a state church:

The court majority justifies use of tax funds for these practices by a process of construction of the third part of § 3: historically, the evil aimed at was taxation for the support of a state church; this is not support of a state church; ergo this is not within the prohibition.

The difficulty with this process of construction is the language of the third part of § 3.<sup>570</sup>

In relying on the plain language of article I, section 3, Justice Uhlenhopp first distinguished the language under review from clauses that “are abstract and general such as ‘due process of law,’ [as to which] historical antecedents are needed to fill in meaning.”<sup>571</sup> He continued:

Due process does not have “a fixed content unrelated to time, place and circumstances.’ It is ‘compounded of history, reason, the past course of decisions . . . .’” . . . Other clauses in the Bill of Rights contain broad sweeping guarantees which make historical background useful to understanding—such as freedom of speech and of press, and indeed “establishment of religion” and “free exercise thereof.” But the language in the third part of § 3 is of the opposite kind, *concrete* and *specific*: no one may be taxed for building or repairing places of worship or for maintaining any minister or ministry.<sup>572</sup>

Having differentiated the language of article I, section 3 from language that is abstract or general, Justice Uhlenhopp turned to constitutional language that is “uncertain or ambiguous.”<sup>573</sup> “A constitutional clause may also be uncertain or ambiguous,” he wrote, “making the historical setting

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569. *Id.* (quoting IOWA CONST. art. I, § 3) (alterations in original).

570. *Id.*

571. *Id.*

572. *Id.* at 135–36 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162, 163 (1951) (citing *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) *overruled by* *Bd. of Regents v. Roth*, 408 U.S. 564 (1972)) (Frankfurter, J., concurring)).

573. *Id.* at 136.

useful in ascertaining the meaning intended.”<sup>574</sup> But, he concluded:

Here however we have clear, definite, unambiguous language: no taxation for building or repairing places of worship or maintaining any minister or ministry. Hence the principle applies that construction is unnecessary and we are to be guided by the ordinary meaning of the words.<sup>575</sup>

Justice Unlenhopp found support in the words of the U.S. Supreme Court dealing with constitutional provisions that are not abstract or general, ambiguous or indefinite:

Why not assume that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At first glance, its reading produces no impression of doubt, as to the meaning. It seems all sufficiently plain; and in such case there is a well-settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people adopting it. This intent is to be found in the instrument itself; and, when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.<sup>576</sup>

Having established the proposition that construction is inappropriate where constitutional language is clear, unambiguous, and definite, Justice Uhlenhopp proceeded to argue the article I, section 3 language as to tax support for “places of worship”<sup>577</sup> and “ministers”<sup>578</sup> met the standard. “We

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574. *Id.*; see, e.g., *Missouri Pac. Ry. Co. v. Kansas*, 248 U.S. 276 *passim* (1919).

575. *Rudd*, 248 N.W.2d at 136.

576. *Id.* (quoting *Lake Cty. v. Rollins*, 130 U.S. 662, 670 (1889)).

577. *Id.*

The proscription on tax support in the third part of § 3 extends to “places of worship.” I do not see any question about the two chapels we have here: they are places of worship. A chapel is defined as “A place of worship; a lesser or inferior church, sometimes a part of or subordinate to another church.”

*Id.* (quoting *Place of Worship*, BLACK’S LAW DICTIONARY (4th ed. 1951)).

578. *Id.* at 136–37.

Nor can I see any question about the three chaplains we have here: they are ministers. By definition the Merit Department specifications require that chaplains in state institutions “perform professional pastoral work in providing counseling and worship services,” and the specifications further mandate

should not strain to find obscurity or ambiguity when the constitutional language is clear[.]” he concluded, “I would hold that legislative appropriation of tax funds to provide and maintain prison chapels and chaplains violates the third part of § 3 of the Iowa Bill of Rights.”<sup>579</sup>

Surely Justice Uhlenhopp was correct. The language “nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates, for building or repairing places of worship, or for the maintenance of any minister or ministry” is not abstract or general, uncertain or ambiguous.<sup>580</sup> Engaging in constitutional construction to force the Iowa constitutional general religion provision into conformity with the federal religion provision was inappropriate.<sup>581</sup> It would honor the work of the 1844, 1846, and 1857 Iowa constitutional conventions for a future Iowa Supreme Court, presented with an appropriate case, to carefully construe article I, section 3, give the provision its full effect, and reverse the error of the *Rudd* majority.<sup>582</sup> A reexamination of *Rudd* would be especially appropriate given the Iowa Supreme Court’s contemporary debate on the appropriate divergence of state and federal constitutional interpretation.<sup>583</sup> This is especially true because the anticomulsion language of the Iowa general religion clause is neither “similar” nor “identical” to the federal religion clause.<sup>584</sup> Such a reexamination would be consistent with “the importance of independently interpreting our Iowa Constitution.”<sup>585</sup>

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“Graduation from college and a seminary and ordination as a pastor in one of the recognized faiths or denominations and three years of pastoral experiences.” The actual activities of these chaplains are those of a minister—they conduct worship services, they provide religious counseling, and they administer the sacraments.

Moreover, the framers of the third part of § 3 spoke broadly in connection with ministers. The framers did not limit the proscription to certain kinds or classes of ministers; taxes cannot be used to maintain “any” minister or ministry.

*Id.*

579. *Id.* at 137.

580. IOWA CONST. art. I, § 3.

581. *See Rudd*, 248 N.W.2d at 135.

582. *See Id.* at 133; *see generally* LORD, *supra* note 269; SHAMBAUGH, FRAGMENTS, *supra* note 67.

583. *State v. Short*, 851 N.W.2d 474, 483 (Iowa 2014) (“[T]here is powerful evidence that the Iowa constitutional generation did not believe that Iowa law should simply mirror federal court interpretations”).

584. *Id.* at 486–87.

585. *Id.* at 507 (Cady, C.J., concurring specially).

The final unanswered question about the Iowa constitutional religious anticomulsion clause is: Why did the convention adopt the “tithes, taxes, or other rates”<sup>586</sup> formulation and not the more common “attend, erect, or support”<sup>587</sup> formulation? As noted above, it could have been a matter of the influence of a convention member from New Jersey<sup>588</sup> familiar with that formulation, or the convention may have relied on the most recent enactment of a religious anticomulsion clause. The reason for using the language could have been the convention’s reliance, to some extent, on the most recent constitution of another Northwest Ordinance state, Michigan’s constitution of 1835.<sup>589</sup>

It is also possible, and plausible, given the convention’s other actions consistent with the underlying principles of voluntarism and democracy, that the decision to use the “tithes, taxes, or other rates” language was purposeful.<sup>590</sup> Here, the theory would be the more typical language—individuals ought not be compelled to “attend, erect, or support” religion—sounded too much in terms of compelled payments from citizens directly to religious institutions; what was needed was a clear statement prohibiting governmental support of religion—“nor shall any person be compelled to . . . pay . . . taxes . . . for building or repairing places of worship, or the maintenance of any minister, or ministry.”<sup>591</sup> Such a formulation would be completely consistent with the actions of the convention on other matters of religious freedom. It would evidence fidelity to the underlying principles of voluntarism and democracy.

## VII. CONCLUSION

The Iowa constitutional convention of 1844 advanced the values of voluntarism and democracy. Its members rejected compulsory public prayer, discrimination on the basis of religious belief, and compulsory participation in and support of religious activities. They evidenced what Iowa historian Professor Benjamin Shambaugh called the “liberal religious spirit of the pioneers.”<sup>592</sup>

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586. IOWA CONST. art. I, § 3.

587. IND. CONST. art. I, § 3; MO. CONST. art. I, § 10; *see also* MICH. CONST. art I, § 4.

588. *See supra* note 515 and accompanying text.

589. *See supra* note 519 and accompanying text.

590. *See supra* notes 503–14 and accompanying text.

591. IOWA CONST. art. I, § 3 (1857).

592. SHAMBAUGH, HISTORY, *supra* note 242, at 193.

That liberal spirit continued to the convention of 1846. It extended—as to discrimination on the basis of religious belief and compulsory participation in and support of religious activities—to the convention of 1857, although that gathering reflected a fundamental shift in the politics of the young state.<sup>593</sup>

Current Iowa Supreme Court Chief Justice Mark Cady suggests there is an especially Iowa element in this:

As a territory, we were loosely governed by many of the basic rights and common law shared by our developing nation around us. Yet, like the broad, wide open plains of Iowa prairie life, those concepts took on a more expansive meaning, and the idea of personal liberty and equality took on a uniquely Iowa flavor.<sup>594</sup>

Of course, the conventions were not uniformly liberal on all issues. On matters of race, the record was uneven and in some important respects was lamentable.<sup>595</sup> On the issue of slavery, the members of the conventions were steadfast in opposition and wrote their convictions into the constitutions they authored.<sup>596</sup> The 1857 convention constitutionalized the end of limitations on testimonial competency based on race.<sup>597</sup> But the members of the 1844 convention were unwilling to extend the rights of citizenship to blacks and considered excluding blacks from the state as a matter of constitutional law.<sup>598</sup> The language of the members of the 1857 convention who opposed the testimonial competency provisions for blacks was horrible.<sup>599</sup>

In some respects, the Iowa courts evidenced the same liberal spirit. The first case ever decided by the Iowa Supreme Court for the Iowa Territory

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593. See SHAMBAUGH, *THE CONSTITUTIONS*, *supra* note 72, at 218.

594. Cady, *supra* note 71, at 1135–36.

595. See, e.g., SHAMBAUGH, *THE CONSTITUTIONS*, *supra* note 72, at 142–44, 246–47; *see also* Cady, *supra* note 71, at 1138 (citing LORD, *supra* note 269, at 653).

596. IOWA CONST. art. I, § 23 (1857) (“There shall be no slavery in this State; nor shall there be involuntary servitude, unless for the punishment of crime.”); IOWA CONST. art. I, § 23 (1846) (“Neither slavery nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this state.”); IOWA CONST. art. II, § 22 (1844) (“Neither slavery nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State.”); SHAMBAUGH, *THE CONSTITUTIONS*, *supra* note 72, at 161.

597. SHAMBAUGH, *THE CONSTITUTIONS*, *supra* note 72, at 270.

598. *Id.* at 140–44.

599. See, e.g., *id.* at 143.

was *In re Ralph*, a fugitive slave case correctly decided in 1839, 17 years before the U.S. Supreme Court erred in deciding *Dred Scott*.<sup>600</sup> As Chief Justice Cady wrote, in the *In re Ralph* case, “We refused to treat a human being as property to enforce a contract for slavery and held our laws must extend equal protection to persons of all races and conditions.”<sup>601</sup> He also noted cases in which “we struck blows to the concept of segregation long before the United States Supreme Court’s decision in *Brown v. Board of Education*.”<sup>602</sup>

The members of the 1844 Iowa constitutional convention and the constitution they wrote were the products of that liberal religious spirit that elevated voluntarism and democracy.<sup>603</sup> They were imbued with a sense of religion that rejected compulsory public prayer, discrimination on the basis of religious belief, and compulsory participation in and support of religious activities.<sup>604</sup> Their efforts informed the deliberations of the constitutional conventions of 1846 and 1857.<sup>605</sup> The state continues to benefit from their good work.

#### VIII. AFTERWORD: THIS WONDERFUL AND BEAUTIFUL COUNTRY

The story closes as it began, with Abner Kneeland. After his release from Boston’s Old House of Correction in the summer of 1838, he relocated to Van Buren County in the Iowa Territory and founded the community of Salubria.<sup>606</sup> And there he waited to see if his confidence in the citizens of Iowa on matters of religious liberty would be fulfilled.<sup>607</sup>

After his imprisonment in Massachusetts for blasphemy, one might have expected Kneeland to be reserved in religious discussions with his new neighbors.<sup>608</sup> And, shortly after his arrival in Iowa he wrote of his caution in such matters:

I have had but very few opportunities as yet, to disseminate any of my

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600. *In re Ralph*, Morris 1, 7 (Iowa 1839).

601. *Varnum v. Brien*, 763 N.W.2d 862, 877 (Iowa 2009).

602. *Id.* (citing *Clark v. Bd. of Dirs.*, 24 Iowa 266 (1868); *Coger v. The Nw. Union Packet Co.*, 37 Iowa 145 (1873); and noting *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

603. See SHAMBAUGH, HISTORY, *supra* note 242, at 186.

604. See *id.* at 193–94.

605. SHAMBAUGH, THE CONSTITUTIONS, *supra* note 72, at 194–98.

606. Whitcomb, *supra* note 6, at 350.

607. *Id.* at 349–50.

608. *Id.* at 346.

views in relation to theology, as I advance them very cautiously: but whenever there is a chance without appearing intrusive I do not shrink from what appears to be a duty—a duty I owe to my fellow beings.<sup>609</sup>

But as his history would have foretold, Kneeland's reticence did not last. The man described as “an infidel and scoffer at God and Christianity”<sup>610</sup> continued to advance his opinions on matters of religion: “Many an early minister of Iowa had a tilt with Kneeland, who delighted in assailing the Gospel and the teachings of the Bible. He was a fine appearing man, and had little difficulty in impressing the more ignorant of the settlers.”<sup>611</sup> His willingness to debate matters of religion apparently never left him.<sup>612</sup> Many years later, Aaron Harlan, who had settled the same valley in 1834, recalled of Abner Kneeland: “He did not at any time manifest a disposition to make proselytes, but any man who wanted to hear something new on religious subjects could wake him up and was apt to wish that he had not done so.”<sup>613</sup>

Kneeland's community at Salubria was also controversial. Described by one historian as the fruit of probably the first plan for colonization in the Iowa Territory, it was not successful.<sup>614</sup> It is said that “Salubria was in its best days only a cluster of farm houses; it never developed into a town or trading point.”<sup>615</sup> Settlers from Kneeland's First Society of Free Enquirers in Boston did not emigrate to Iowa.<sup>616</sup> The few inhabitants were described as a “queer order of people that for some years dwelt in Iowa[,]” and it was said that the “settlement was composed of reckless and deluded men and women, and was an eyesore to pure-minded people.”<sup>617</sup> Salubria itself was described as being “[o]ne of the strangest colonies in Iowa.”<sup>618</sup> Ultimately, the effort to establish Salubria was not successful.<sup>619</sup> By the dawn of the twentieth

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609. *Id.* at 353 (quoting Kneeland letters published in the *Investigator*).

610. *Making of Iowa: Chapter XXVII: Some Rather Extraordinary Colonies*, IAGENWEB PROJECT, <http://iagenweb.org/history/moi/moi27.htm> (last visited Mar. 16, 2018) [hereinafter *Making of Iowa*]. Other writers were more respectful. HERBERT L. MOELLER & HUGH C. MOELLER, *OUR IOWA: ITS BEGINNINGS AND GROWTH* 262 (1938) (“Mr. Kneeland did not believe in God or any kind of religion.”).

611. *Making of Iowa*, *supra* note 610.

612. Whitcomb, *supra* note 6, at 362.

613. *Id.*

614. *Id.* at 351.

615. *Id.*

616. *See id.* at 350, 354.

617. *Making of Iowa*, *supra* note 610.

618. MOELLER & MOELLER, *supra* note 610, at 262.

619. *See id.*; *Making of Iowa*, *supra* note 610; Whitcomb, *supra* note 6, at 354.

century, only the cemetery remained.<sup>620</sup>

Once in the Iowa Territory, Kneeland resumed his participation in Democratic politics. Just a year after his arrival, he ran as a Democrat for the upper house of the territorial legislature.<sup>621</sup> He lost, his opponent having received “a handsome majority.”<sup>622</sup> The electoral loss did not quench his thirst for partisan politics. By 1842 Kneeland had been elected chair of the Van Buren County Democratic Party.<sup>623</sup> The slate of candidates chosen under his leadership were met with opposition across party lines: “Great alarm was felt. Party lines were ignored and many ‘church democrats’ united with the whigs in supporting a union ticket to overthrow the ‘infidel party.’”<sup>624</sup>

Kneeland’s Democratic Party slate was defeated, leading one editor to write: “We hope sincerely that the good people of Van Buren county are not so far gone in bigotry as to attempt a conjunction of church and state—religion and politics.”<sup>625</sup>

From his arrival in Iowa, Abner Kneeland appears to have been taken by his adopted land.<sup>626</sup> Only a few days after his arrival he observed, “Altogether the country is the best, and most beautiful I ever saw[,]” and a short time later he said, “My thoughts are wholly taken up with this wonderful and beautiful country . . . .”<sup>627</sup> By June of 1839 he wrote:

Even aside from the persecution I have endured in my native state, I know of no place in Boston that could afford me half the pleasure, as to the beauty and grandeur of the scenery, as it does to sit in my front door here and look across the Des Moines River; to see the large branching trees on the nearest bank and the beautiful green forest on the opposite side—this wonderful country which is destined to outvie everything which can be even imagined in the East.<sup>628</sup>

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620. Whitcomb, *supra* note 6, at 358.

621. *Id.* at 354.

622. *Id.* (quoting the Burlington *Hawk-eye and Iowa Patriot* of October 14, 1840, that “[o]ur old friend, Capt. Hall, beat the notorious Abner Kneeland for the Council in Van Buren county, by a handsome majority”).

623. *Id.* at 354–55.

624. *Id.* at 355.

625. *See id.* at 354–55.

626. *See id.* at 353.

627. *Id.*

628. *Id.*

But Kneeland removed to Iowa, “this wonderful and beautiful country,” in search of religious liberty.<sup>629</sup> The confirmation that his decision had been the right one came in the decisions of the constitutional convention of 1844. The actions of his fellow citizens on matters of religious liberty embodied in the Iowa constitution of 1844 were what Abner Kneeland was seeking when he removed from Massachusetts to Iowa in 1839, after his release from his imprisonment for blasphemy.<sup>630</sup>

One historian wrote, less than a century later, that the influence of “Abner Kneeland, the freethinker[ and] the Pantheist” was fresh in the 1844 constitutional convention.<sup>631</sup> Van Buren County sent seven delegates to the assembly.<sup>632</sup> All were Democrats, but Kneeland was not among them.<sup>633</sup> In a sad irony of history, Abner Kneeland died suddenly on August 27, 1844,<sup>634</sup> six years after his release from the Boston prison and only six weeks before the Iowa constitutional convention advanced the religious liberty he sought on the far western frontier.

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629. *See id.*

630. *See id.* at 349 (indicating Kneeland moved to Iowa to find freedom and understanding).

631. IRVING BERDINE RICHMAN, *IOWAY TO IOWA: THE GENESIS OF A CORN AND BIBLE COMMONWEALTH* 327 (Benj. F. Shambaugh ed., 1931); *see also* Ruth A. Gallaher, *Abner Kneeland: Pioneer Pantheist*, in 20 *PALIMPSEST* 209 *passim* (1939).

632. *See* 1844 IOWA CONSTITUTIONAL CONVENTION MEMBERS 1–2 (1844), <https://www.legis.iowa.gov/docs/publications/BHT/860938.pdf>. As one of the most populous counties in the Territory, Van Buren County was authorized to send eight delegates to the 1844 constitutional convention. An Act to Provide for the Expression of the Opinion of the People of the Territory of Iowa Upon the Subject of the Formation of a State Constitution for the State of Iowa, 1844 Iowa Acts 349, ch. 9, § 5. Apparently eight were elected, but one did not attend. *See* SHAMBAUGH, *FRAGMENTS*, *supra* note 67, at 7 n.1. Professor Shambaugh reports “Mr. Morton [of Van Buren County] seems to have been permanently absent from the Convention.” *Id.*

633. Of the seven delegates from Van Buren County who attended, at least six were Democrats: Gideon S. Bailey, Paul Brattain, Thomas Charlton, Elisha Cutler Jr., David Ferguson, and John Hale Jr. *Id.* at 408–09. Gideon Bailey had run on the ill-fated Kneeland ticket in 1842. Whitcomb, *supra* note 6, at 354. The final delegate, John Davidson, is listed as a Whig on the Parvin listing and as a Democrat on the Iowa Standard listing. *See* SHAMBAUGH, *FRAGMENTS*, *supra* note 67, at 408.

634. Whitcomb, *supra* note 6, at 358.