



## Justice Is Blind

**Throughout its history, the Iowa Supreme Court has been forceful and fearless in preserving and protecting the rights of every Iowan**

**By Michael Gartner**

On July 4, 1839, the three justices of the Supreme Court of the territory of Iowa ruled that slavery should not, could not, and would not exist in Iowa.

That was the first ruling of the Supreme Court, and it stopped a former slave named Ralph from being shipped back to his owner in Missouri because of failure to keep up with the installments he negotiated to buy his freedom for \$550 and work in the lead mines of Dubuque.

It came exactly one year after Iowa became a territory and more than seven years before Iowa was admitted to statehood. The three judges issued an opinion that protected Ralph and all men like him under the territorial laws. They did it without the vote of the people and without fear of how those elsewhere might react against them personally.

Since then, the Supreme Court has issued another 10,014 opinions. Nearly 150 years ago — just after the Civil War — it ruled that Iowa's schools could not be segregated. It took 76 years before the Supreme Court of the United States reached the same conclusion. More than 100 years ago, it was the first court in the nation to rule that there's no such thing as a false opinion — protecting

opinionated speech some 50 years before the U.S. Supreme Court made a similar ruling. Indeed, throughout its history the Iowa Supreme Court has been forceful and fearless in preserving and protecting the rights of every Iowan.

It has also waded deep into the issues that sometimes bind, sometimes rend this state. In those 10,014 decisions, it has dealt with hoglots and sex offenders and illegal aliens. It has dealt with battling husbands and wives, battling neighbors, and battling corporations. It has resolved fights over land, fights over money, and fights over children.

It has been doing that now for 171 years, ensuring that Iowa lives up to its cherished motto: Our Liberties We Prize, Our Rights We Will Maintain. (Compare that stirring motto with, say, the motto of Washington State, which is “by and by,” or New Mexico, which boasts “it grows as it goes.”) During these 171 years, 105 men and two women have served on the court, always with distinction. In the early years, they rode into town on horseback and slept overnight on beds pulled down from oak cabinets in the back chambers of the stately court in the Capitol building, where the judges sat at an imposing, hand-carved black walnut bench and could gaze out the large windows that looked down on the city. Then, as now, they ruled, always, in accord with the constitution of the state — first, the one enacted in 1846 and, then, the current constitution, which was enacted by the Iowa Legislature in 1857 and has been amended 47 times since then. (The 43rd amendment, passed in 1992, repealed a section of the constitution that said: “Any citizen of this State who may hereafter be engaged, either directly, or indirectly, in a duel, either as principal, or accessory before the fact, shall forever be disqualified from holding any office under the Constitution and laws of this State.”)

The Constitution is simple and eloquent. It begins this way: “All men and women are, by nature, free and equal, and have certain inalienable rights — among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.” (The “and women” was added as an amendment in 1998.) It goes on to say that the legislature “shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.”

These statements, which echo the Declaration of Independence, could not be more clear. Everyone in this state is entitled to the equal protection — and equal benefit — of the laws.

And so when yet another important civil-rights case reached the court last year, the current seven justices continued along the path set out for this state in 1839 and demanded by writers of the constitution in 1857. They ruled, unanimously, in *Varnum v. Brien* that two people of the same sex can marry one another and thus avail themselves of all those inalienable rights, be sheltered by that equal protection of the laws, and pursue and obtain that safety and happiness we all

want.

It was as simple as that.

The decision was not about religious marriage, not about lifestyles, not about politics, not about sex. It was neither a jump off the historical path of the court nor a lurch into “judicial activism.” It was simply another in a continuing line of decisions that preserve and protect the rights of all Iowans. It was groundbreaking only in the sense that few other states have recognized same-sex marriage. But — as the unanimity of the decision illustrated — it was a decision that was logical in its reasoning and demanded by the Iowa constitution.

The judges really had no other choice.

The seven men and women who signed the decision are a varied lot, and thankfully we do not know their religious, social or personal views. We simply know they have taken an oath to follow the Iowa and U.S. constitutions.

Chief Justice Marcia Ternus, the first woman to be named chief and only the second woman to serve on the court, was appointed to the Supreme Court in 1993 by then-Governor Terry Branstad. Mark Cady, who wrote the opinion, was appointed to the court in 1998, also by Gov. Branstad. Michael Streit was appointed to the Court of Appeals in 1996 by Gov. Branstad and to the Supreme Court in 2001 by Gov. Tom Vilsack. David Wiggins, Daryl Hecht and Brent Appel are also Vilsack appointees, and David Baker, the newest member of the court, was appointed by Gov. Chet Culver in 2008. Ternus, Streit, Hecht, Appel and Baker are native Iowans; Cady is an Iowan by education — Drake and Drake law school — and Wiggins, too, is a Drake law graduate. All practiced law in Iowa. Most had brilliant academic records.

So Chief Ternus and her colleagues brought to that ruling — and to all their rulings — personal histories grounded in Iowa values and steeped in Iowa law.

As far as anyone can remember, the integrity of the Iowa Supreme Court has never been questioned — going back to that first territorial court. (But there have been temptations. Thomas Wilson, one of those first three justices, later resigned to practice law in Dubuque. In one case, he successfully defended a Chippewa Indian accused of murder, according to a 1938 article in a state historical publication. “The grateful warrior later sent word by a trader that he had ‘two handsome Indian girls as presents for wives,’” according to the article. “The Judge said afterward, ‘My wife very unreasonably objected, and the presents were not sent.’”) And as far as anyone can remember, ever since the court went in 1962 to a merit system of appointing judges there has never been any organized, statewide opposition to a justice because of a ruling of the court.

So it is odd that the Varnum ruling has stirred such opposition to the three

justices — Ternus, Streit and Baker — who are on the ballot this year for an up-or-down vote on continuation on the court for another eight years. It's odder, still, that the opposition is coming from the religious right. You have to wonder if the religious people who are so upset by the ruling have ever read it. Anyone who has read Justice Cady's 67-page decision — clear and eloquent — would quickly see that it's not about forcing churches to marry same-sex couples. It's about equal rights and marriage by civil authorities. And — and the religious right doesn't seem to get this — it's about freedom of religion.

"We, of course, have a constitutional mandate to protect the free exercise of religion in Iowa, which includes the freedom of a religious organization to define marriages it solemnizes as unions between a man and a woman," Judge Cady wrote. "This mission to protect religious freedom is consistent with our task to prevent government from endorsing any religious view."

The decision goes on: "Civil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals." But, "this approach does not disrespect or denigrate the religious views of many Iowans who may strongly believe in marriage as a dual-gender union, but considers, as we must, only the constitutional rights of all people, as expressed by the promise of equal protection for all. We are not permitted to do less, and we would damage our constitution immeasurably by trying to do more."

So the Varnum case, really, is as much a ringing endorsement of religious freedom in this state as it is an endorsement of equal rights for all.

And yet instead of praising the court for its strong words about religious freedom in this state, fundamentalist ministers and politicians like the defeated Bob Vander Plaats are campaigning — with huge sums of money shipped in by conservative organizations outside Iowa — to remove the three justices who are up this year. (The other justices aren't on the ballot this year. Justice Wiggins is on the ballot in 2012 and Justices Appel, Cady and Hecht in 2016.) They would have these justices replaced somehow by men or women who would undo the decision — as if that were even possible without changing the Iowa constitution.

Had they been around in 1839, would they have tried to remove the three justices who said slavery could not exist in Iowa? Would Congressman Steve King have called Justices Charles Mason, Joseph Williams and Thomas Wilson "rogues," the term he has used to describe the current court? Would King have said that those three judges had "usurped the letter of the Constitution and the Code of Iowa to suit their whim?" That's what he said about the current court.

Had they been around in 1868, would they have tried to remove the justices who ruled that 12-year-old Susan Clark of Muscatine had every right to go to her neighborhood school — a school that rejected her because she was of the

“colored race?” (The court said: “Now, it is very clear, that, if the board of directors are clothed with a discretion to exclude African children from our common schools, and required them to attend (if at all) a school composed wholly of children of that nationality, they would have the same power and right to exclude German children from our common schools, require them to attend (if at all) a school composed wholly of children of that nationality, and so of Irish, French, English and other nationalities....”) Would Bob Vander Plaats have read that decision and then gone before a Rotary Club and said “all your liberties are up for grabs?” That’s what the Varnum decision means, he told the Rotary Club of Des Moines last month.

Had they been around in 1873, would they have tried to remove the justices who ruled that a mixed-race woman named Coger could eat in the main dining-room of a steamship — a steamship that had tried to make her eat in the pantry? (“In our opinion the plaintiff was entitled to the same rights and privileges while upon defendant’s boat, notwithstanding the negro blood, be it more or less, admitted to flow in her veins, which were possessed and exercised by white passengers.”) Would Jeff Mullen, a pastor in Waukee, have read the decision and declared, “Our freedoms are in peril today because of judges?” That’s what he says about the Varnum case in a Web video he posted.

[That woman Coger, incidentally, was quite a woman. She didn’t meekly acquiesce in the captain’s request that she leave the dining-room. She put up quite a fight, which the court noted in a sexist comment. “While we may consider that the evidence, as to her words and conduct, does not tend to establish that female delicacy and timidity so much praised, yet it does show an energy and firmness in defense of her rights not altogether unworthy of admiration,” the court said. “But neither womanly delicacy nor unwomanly courage has anything to do with her legal rights and the remedies for their deprivation.”]

Had they been around in 1901, would they have tried to remove the judges who ruled that newspapers [and, thus, everyone] had a right to criticize entertainers — specifically the Cherry Sisters of Cedar Rapids, perhaps one of the worst acts in theatrical history? “If ever there was a case justifying ridicule and sarcasm — aye, even gross exaggeration — it is the one now before us. According to the record, the performance given by the plaintiff and the company of which she was a member was not only childish, but ridiculous in the extreme. A dramatic critic should be allowed considerable license in such a case.”

This was the offending passage, written in 1901 in The Des Moines Leader: “Billy Hamilton, of The Odebolt Chronicle, gives the Cherry Sisters the following graphic write-up on the late appearance in his town: ‘Effie is an old jade of 50 summers, Jessie a frisky filly of 49, and Addie, the flower of the family a capering monstrosity of 35. Their long skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds

like the wailings of damned souls issued therefrom. They pranced around the stage...strange creatures with painted faces and hideous mien. Effie is spavined, Addie is stringhalt, and Jessie, the only one who showed her stockings, has legs with calves as classic in their outlines as the curves of a broom handle.”

Any Iowan would agree today that each of those decisions — surely controversial at the time (or they wouldn't have gotten to court) — made this state a better place, a place where we prove over and over again that we do prize our liberties and maintain our rights.

Justices Mason, Wilson and Williams went on to hand down 215 opinions after that historic first decision about slavery. They initially had been appointed to four-year terms by President Martin Van Buren, and when those terms were up President John Tyler reappointed them to another four years. (Judge Mason, the first chief, was a New Yorker who had graduated first in his class at West Point in 1829. Graduating second was Robert E. Lee.)

After Iowa became a state, the Supreme Court justices — there were three at the time — were elected by the Legislature for six-year terms. The new constitution of 1857 — the one that still guides our judges — provided for the election of the judges by the people to terms of six years. Over the years, the number of judges has changed — to four in 1864, five in 1876, six in 1894, seven in 1913, eight in 1927 and nine in 1929. The number was cut back by attrition to seven in 2000.

From 1857 until 1962, the judges were elected in partisan elections — except for a five-year experiment in holding nonpartisan elections from 1913 to 1918, an experiment that apparently didn't work out. In 1962, Iowans approved a constitutional amendment that moved to the merit selection of judges. Under the so-called Missouri plan, a 15-member judicial-nominating commission consisting of Iowans from all walks of life sends the governor a list of three candidates for an opening on the court. The governor then chooses one of those. That person serves a year and then goes on the ballot for an up-or-down vote for a full eight-year term. After eight years, another vote is held. Mandatory retirement age is 72. An effort to go back to electing judges failed in 1986.

In the past half century, this selection process has given the state some justices who were brilliant, some who were practical, some who were stern and some who were engaging. But all have been men and women who understood this state and who cherished its constitution.

It was not popular in 1839 for a judge to rule that slavery could not exist here. Indeed, 18 years later the United States Supreme Court ruled — in the dreadful and embarrassing Dred Scott case — that Negroes were property. It was not popular in 1868 to rule that Iowa's schools could not refuse black children. Indeed, the United States Supreme Court didn't have the courage to do that until 1954. It was not popular in 1873 to rule that a mixed-race woman had all the

rights in this state of any other lowan. Indeed, the U.S. government didn't pass its ground-breaking civil-rights legislation until 1964.

Now, of course, the idea of slavery is unfathomable, the idea of segregated schools is unthinkable, the idea of public discrimination is unpalatable. In each, Iowa's court has led the way. It would have been a great injustice if Iowa's judges those many years ago had been thrown out for guaranteeing equal rights to all Iowans, as our Iowa Constitution so plainly guarantees, and it would be a great injustice if any of the current judges are voted out in November.

Justice is blind.

But injustice is not. **CV**

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