2017 Law Day Luncheon Keynote Address
May 1, 2017, Davenport, IA
Iowa Supreme Court Justice Thomas D. Waterman

Colleagues and fellow Quad Citians: We gather together on Law Day to celebrate what makes America *exceptional*—our rule of law and the individual liberties we cherish.

All of us here, especially the lawyers and judges, have a vital role to play in protecting the rule of law and safeguarding civil rights.

I've been asked to discuss the ways the 14th Amendment has transformed our Democracy. The American Bar Association selected that theme to recognize the upcoming 150th anniversary of this post-civil war amendment. We'll revisit the highlights of how 14th Amendment has changed America. I'll note the ways Iowa courts have led the nation in advancing civil liberties.

But then I'll address contemporary *threats* to our freedom and the rule of law, threats arising in unlikely places—our nation's colleges and universities.

First, the historical highlights, which are familiar to us. The United States Constitution is the oldest in use in the world today. We won our freedom from a tyrannical Monarchy. Our revolutionary leaders understood that concentrations of power in one leader or institution leads to despotism and abuse. So the framers wove into our constitution a brilliant set of checks and balances including an independent judiciary and a bill of rights ratified to limit the power of the *Federal* government. But the bill of rights did not protect against abuse of *state* or local government power, and the original constitution, ratified in our nation's fragile infancy, left intact the institution of slavery.

It took the cathartic Civil War to set the stage for the next big constitutional step forward: the emancipation of slaves and the post-war amendments. The civil war killed over 600,000 Americans, a percentage of the population equal to six *million* Americans today. Iowa contributed more soldiers per capita to the Union army than any other State, and 13,000 Iowa volunteers lost their lives during that conflict. Illinois suffered comparable burdens and provided our nation with our greatest president, Abraham Lincoln.

The post-war amendments, ratified during Reconstruction in 1868-70, had both immediate effect and great promise unfulfilled for another century. The 13th amendment prohibited slavery; the 15th amendment extended voting rights to the freed slaves; although voting rights of women were not confirmed until the 19th amendment was ratified in 1920.

The 14th Amendment did three important things. First, it said that states could not deprive persons of life, liberty, or property without due process of law. Second, it said that states could not deny anyone equal protection of the laws. And third, it expressly extended *citizenship* to all persons born in the United States, including the newly freed slaves. In doing so, it overruled *Dred Scott*, our national supreme court's worst decision, which had denied rights to a slave who reached free soil.

Iowa had led the way. In 1839, 17 years before *Dred Scott* got it wrong, the Supreme Court of the Territory of Iowa got it right, in its first decision, *In re Ralph*, granting freedom to a slave brought to Iowa.

Despite the 14th Amendment's guarantee of equal protection, state-sanctioned racial discrimination and segregation persisted, especially in the South where some still called the civil war "the war of northern aggression."

The 14th amendment's great promise of equal protection fell victim to judicial interpretation in 1896, when the U.S. Supreme Court ruled in *Plessy v. Ferguson* that "separate but equal" facilities satisfied the 14th Amendment. The Supreme Court didn't overrule *Plessy* until 1954 when *Brown v. Bd. of Educ*. declared unconstitutional government-sanctioned segregation.

Yet Iowa had led the way in desegregation. In 1868, Alexander Clark, an African American in Muscatine sued and won an order from the Iowa District court compelling the Muscatine School district to admit his daughter into an all-white school. The Iowa Supreme Court affirmed, rejecting the argument that separate schools segregated by race satisfied the equality our law demands. And in 1873, the Iowa Supreme Court ruled in favor of a mixed race passenger, Emma Coger, who successfully challenged a river steamship company's white-only rule for first class dining. This was 8 decades before *Brown v. Bd. of Educ*.

Meanwhile, the U.S. Supreme Court in 1905 began actively using the 14th amendment's due process guarantee to strike down state laws regulating businesses for public health and welfare, beginning with *Lochner* in 1905. Thus, for a while, the Supreme Court would not allow states to adopt wage and hour laws. Only after the Great Depression and President Franklin Roosevelt's court-packing threat did the Court adopt its now familiar deference to economic regulations.

The next big step forward for the 14th amendment was the incorporation doctrine in the 1960's under Chief Justice Earl Warren. The Warren Court relied on the 14th amendment's due process clause to extend most of the protections of the federal Bill of Rights against the states. These include the landmark decisions *Gideon v. Wainright* on the right to counsel in state prosecutions –at government expense for the indigent, and *Miranda v. Arizona,* requiring the now familiar warnings before interrogations in police custody.

Next the U.S. Supreme Court relied on the 14th amendment due process clause to recognize constitutional rights to privacy, including abortion in *Roe v. Wade*. More recently, courts relied on the 14th amendment equal protection clause to extend the right to marry to same sex couples nationwide culminating in the 5 to 4 decision by the SCOTUS in 2015 striking down laws remaining in over 30 states that still restricted marriage to couples of the opposite sex.

There again, Iowa had led the way. In 2009, the Iowa became the third State in the nation, the first in the Midwest, and the first by a *unanimous* state supreme court decision, to recognize a constitutional equal protection right for same-sex couples to marry.

That's the big picture. The 14th amendment has profoundly shaped our Democracy, from ending racial segregation to allowing same sex marriage, and extending our basic civil liberties in the bill of rights to protect against any government action, including state and local.

But the work is never done. Vigilance is forever required to protect our liberties. In the few minutes remaining, I want to touch on the growing threat to our democratic values at—sadly—American campuses.

We all should be concerned about the growing use of the "heckler's veto" at state universities such as UC Berkeley, where Ann Coulter became the latest provocative speaker to be disinvited because protesters didn't want to hear her message. This despite Woodrow Wilson's observation that "Nothing chills nonsense like exposure to the air."

We see college administrators provide "trigger warnings," "speech codes" and "safe spaces" but fail to protect the rights of certain speakers to be heard. Last August, the President of the University of Chicago, Robert Zimmer, pushed back, and warned,

"Free speech is at risk at the very institution where it should be assured: the university. Invited speakers are disinvited because a segment of a university community deems them offensive, while other orators are shouted down for similar reasons. Demands are made to eliminate readings that might make some students uncomfortable. Individuals are forced to apologize for expressing views that conflict with prevailing perceptions. In many cases, these efforts have been supported by university administrators. Yet what is the value of a university education without encountering, reflecting on and debating ideas that differ from the ones that students brought with them to college?"

Popular speech needs no protection. Because it is popular. It is the unpopular, controversial speech that needs first amendment protection. Recall the black arm bands the Des Moines students wore to high school to protest the Vietnam war in the famous *Tinker* decision. Recall that a Jewish lawyer with the ACLU in the late 1970's went to court to defend the first amendment right of the Nazi party to march in Skokie, a Chicago suburb with many Holocaust survivors.

We grew up understanding that the answer to controversial speech is to debate it, not censure it. As Thomas Jefferson noted, "Truth can stand by itself." We frequently heard our leaders respond, "I disagree with what you are saying but I will fight for your right to say it." I fear today's students are learning a different lesson: "You have no right to speak."

At an Ivy league college this year, students put up a "Blue lives matter" poster honoring police, next to a display featuring the Black Lives matter movement. The *Blue* lives display was ripped down by vandals, and the college administration, fearing student unrest, denied permission to a student organization that sought to put it back up,. What lesson does that teach?

Our politics are polarized. This will get worse, not better, if our universities graduate students who don't understand or value free speech. The health of our Democracy requires free and open debate. Our students should learn to engage differing viewpoints. We need more speech, not less.

Civility is important. So too is a reasonably thick skin. Courts and college administrators alike must continue to discern the lines between free speech and hate crimes; between unpopular ideas and actionable harassment.

As lawyers and judges, we know the importance of a fair hearing and zealous advocacy. Our community life needs the oxygen of spirited debate. But on some campuses training our next generation, the air is getting thin.

Thanks for listening.