DEFENDING DISABILITY IN THE AGE OF ORIGINALISM

DANIELLE M. SHELTON †

Abstract

Disability rights advocates have predominantly focused on federal statutory law, with only sporadic attention to the role of constitutional law. Recent developments in constitutional law occasioned by originalism likely have triggered even less confidence in the role of the Constitution as a source of disability rights. While a heightened focus on achieving rights through legislation makes sense in the age of originalism, it does not mean that disability advocates can abandon constitutional advocacy. To the contrary, originalism's ascent requires a new kind of disability constitutional advocacy, one focused not on expanding constitutional rights for disabled persons but rather on defending statutory rights in the face of new constitutional challenges. Using a recent Iowa Supreme Court case as an example, this Article explores the far-reaching threat originalism poses to disability rights and posits an approach for defending disability rights against that threat.

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† Professor of Law, Drake University Law School, Of Counsel, The Weinhardt Law Firm. I thank Samantha Lamrock and the *Wayne Law Review* for sponsoring the symposium, "Disability and the Law," and for the feedback and insights gained from my co-presenters and other participants. I also thank Thomas Mayes, a brilliant scholar who provided invaluable input on this Article at critical junctures. All work is, of course, my own.

I. INTRODUCTION

Disability advocacy has long prioritized federal statutory law.[1] Major federal legislation—the Americans with Disabilities Act,[2] the Fair Housing Act,[3] and the Individuals with Disabilities Education Act[4]—show how effective this federal legislative strategy has been.[5] This "robust" and "successful" legislative strategy has traditionally left little space for constitutional advocacy.[6]

Notwithstanding the sensibility of a disability rights strategy focused on expanding rights through federal legislation, ten years ago, Professor Michael Waterstone argued for a role for "constitutional disability law."[7] While maintaining the "preeminence of a statutory strategy,"[8] a "forward-looking" "disability constitutional law"[9] would provide an additional way to advance disability rights law.[10] His vision focused on an expanded and "more contextualized vision of equal protection"[11] that would "rehabilitate *City of Cleburne v. Cleburne Living Center*,"[12] a Supreme Court of the United States ("SCOTUS") opinion which held that discrimination on the

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1. *See* Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 529 (2014) (footnotes omitted) ("Modern disability law is primarily a statutory field. The main relevance of constitutional law is to provide the basis for congressional legislation, either through Section 5 of the Fourteenth Amendment, the Spending Clause, or the Commerce Clause. Although historically disability advocates pursued constitutional theories to reform institutions and achieve access to schools, today the key tool for disability rights is litigation under federal statutes. By and large, this strategy has been successful: the Americans with Disabilities Act (ADA) addresses discrimination in employment, government programs and services, and access to privately owned places of public accommodation. The Fair Housing Act covers discrimination in housing, and the Individuals with Disabilities in Education Act provides a right to education for school-age children with disabilities.").

2. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (1990) (amended 2008).

3. The Fair Housing Act (FHA), 42 U.S.C. §§ 3601–3631 (1968) (amended 1988).

4. Americans with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1482 (1975) (amended 2004).

5. Waterstone, *supra* note 1, at 529.

6. *See id.*

7. *See generally id.*

8. *Id.*

9. *Id.* at 529.

10. *Id.* at 560–61, 569–70 (explaining why a positive vision of both federal and state constitutional rights could complement legislative strategy and benefit people with disabilities). Professor Waterstone also noted gains in LGBTQ rights through constitutional advocacy. Since then, changes to the constitutional landscape have made that call more urgent. Waterstone, *supra* note 1, at 530–33.

11. *Id.* at 548.

12. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Waterstone, *supra* note 1, at 534.

basis of disability is entitled only to rational basis review.[13] Since then, others have claimed space for disability rights in constitutional law, including Professor Jamelia Morgan, whose essay, *Disability's Fourth Amendment*, explored the Fourth Amendment through the lens of disability.[14] She showed how the "[f]ailure to acknowledge the importance of disability" has led to a lack of "adequate protection to the Fourth Amendment rights of disabled people."[15] This and other scholarship showed how a "forward-looking" constitutional disability law agenda could accompany a legislative agenda.[16]

While a forward-looking constitutional disability law remains worthwhile, constitutional law has itself experienced "seismic" changes over the past three years based upon the ascent of originalism.[17] By the end of the 2022 term, the SCOTUS had issued three major opinions, including *Dobbs v. Jackson Women's Health Organization*,[18] that embraced originalism[19] and overruled long-standing constitutional precedents[20] Once a "fringe theory," originalism is widely understood to

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13. *Cleburne*, 473 U.S. at 448; Waterstone, *supra* note 1, at 529–34 ("[A]lmost all recent forward-looking disability scholarship has either helped provide a theoretical foundation for or analyzed statutory or other types of policy reform, with sparse discussion of disability constitutional law."). Paradoxically, perhaps the largest impact of disability in the realm of federal constitutional law has been as a vehicle to promote states' rights via the "new federalism." *See* Katie Eyer & Karen M. Tani, *Disability and the Ongoing Federalism Revolution*, 133 YALE L.J. 839, 929–30 (2024) (explaining the "foundational importance of disability-related cases" in the progression of the SCOTUS's "new federalism").

14. *See* Jamelia Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489 (2022).

15. *Id.* at 489, 550 ("Issues relating to disability are undertheorized in the Supreme Court's Fourth Amendment jurisprudence.").

16. *See id.*; *see also* Robyn M. Powell, *Including Disabled People in the Battle to Protect Abortion Rights: A Call-to-Action*, 70 UCLA L. REV. 774, 794 (2023).

17. Erwin Chemerinsky, *Originalism Has Taken Over the Supreme Court*, ABA J. (Sept. 6, 2022, 8:00 AM), https://www.abajournal.com/columns/article/chemerinsky-originalism-has-taken-over-the-supreme-court [https://perma.cc/63J8-D5PR].

18. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

19. Some scholars have argued that *Dobbs* blended originalism with other interpretative doctrines. *See, e.g.*, The Federalist Society at UVA Law, *2023 Originalism Symposium Panel #1: Was Dobbs an Originalist Opinion?*, YOUTUBE, at 5:25 (Apr. 20, 2023), https://www.youtube.com/watch?v=I1p7Bam9JyQ [https://perma.cc/D5QR-PK5A] (comments of Professor Lawrence Solum). Still, *Dobbs* is squarely situated as part of the "seismic" change that has happened in constitutional law on which this Article reflects.

20. Chemerinsky, *supra* note 17; *see also* Mark S. Kende, *How to Interpret the Constitution Using a "New Pragmatism,"* AM. CONST. SOC'Y: EXPERT F., L. & POL'Y ANALYSIS (Dec. 9, 2024), https://www.acslaw.org/expertforum/how-to-interpret-the-constitution-using-a-new-pragmatism/ [https://perma.cc/69ZQ-2AX5].

be the new normal in the SCOTUS.[21] In the words of Dean Erwin Chemerinsky, "originalism is ascendant and will be for years to come."[22]

Indeed, it was a "seismic" change in Iowa constitutional law that prompted the questions that ultimately led to this Article: What does the rise of originalism[23] mean for disability constitutional law?[24] A theory of constitutional rights grounded on looking backwards in time to a period in which people with disabilities were misunderstood, mistreated, and lacked basic human rights hardly seems ideal.[25] Does originalism's rise mean that a disability constitutional law vision is less hopeful than ever, suggesting perhaps a doubling down on a legislative strategy? Still, what role exists for disability constitutional advocacy? And what does disability constitutional advocacy look like in the age of originalism?

These are big and important questions, and this Article does not endeavor to answer them in the aggregate. Rather, this Article explores these questions through the lens of a recently decided Confrontation Clause opinion decided in the Iowa Supreme Court. Through examining this opinion and its implications, I explore the looming intersection between originalism and disability rights.

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21. *See* Chemerinsky, *supra* note 17.

22. *Id.* ("But with three Trump justices joining the conservatives already on the court, originalism is ascendant and will be for years to come.").

23. While originalism can mean different things, in this Article, I use the term "originalism" to refer to the mode of constitutional interpretation associated with "ideological conservatism," which Justice Antonin Scalia championed and which has more recently been advanced to various degrees by the conservative members of the SCOTUS. *See* Michael Clemente, Note, *A Reassessment of Common Law Protections for "Idiots,"* 124 YALE L.J. 2746, 2749 n.9, 2803 (2015). This originalism focuses on the "original public meaning of [the constitutional] text at the time it was ratified" and is the "most common" originalist approach. *See* Michael L. Smith, *Abandoning Original Meaning*, 86 ALB. L. REV. 43, 47–48 (2023). In "stipulating" to this understanding of originalism for the purposes of this Article, I thank Professor Lawrence Solum for this wise recommendation (and for a brilliant article). *See* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U.L. REV. 1243, 1247 (2019) ("But 'originalism' is just a name for a theory or a set of theories. One might think that it is the substance of the theory that is important—not the name. If the word 'originalism' is confusing, use another word . . . . Or just stipulate: '"Originalism" shall be the view that constitutional interpretation should have characteristics A, B, and C.' It is not as if any of these techniques for resolving merely verbal disagreements are a secret.").

24. *See* Clemente, *supra* note 23, at 2803.

25. For example, in 1843, disability advocate Dorothea Dix explained the inhumane treatment of people with mental disabilities in asylums. *See* Dorothea Dix, *"I Tell What I Have Seen"—The Reports of Asylum Reformer Dorothea Dix*, 96 AM. J. PUB. HEALTH 622, 622 (2006) ("I found, near Boston, in the Jails and Asylums for the poor, a numerous class brought into unsuitable connexion with criminals and the general mass of Paupers. I refer to Idiots and Insane persons . . . .").

This Article proceeds in three parts. First, it examines *State v. White*,[26] the recent Iowa Supreme Court case that struck down the practice of one-way remote testimony for witnesses under Iowa's Confrontation Clause.[27] Next, drawing from the *State v. White* example, it explores potential implications of originalism for disability rights, showing how originalism threatens statutory disability rights. Finally, it argues for a new constitutional advocacy to protect disability rights, exploring what such advocacy might look like in the age of originalism.

II. THE EXAMPLE OF *STATE V. WHITE*

A recent Iowa Supreme Court case, *State v. White*,[28] illustrates the threat originalism poses to disability rights. To be clear, *White* was not understood to be a disability rights case. Nowhere in the approximately two hundred pages of briefing or court decisions are people with disabilities mentioned.[29] Rather, *White* is explicitly a case about criminal defendants' Confrontation Clause rights and, to a lesser extent, about the right to testimonial accommodations for child victims and witnesses.[30] Yet despite not ostensibly being about disabled people, *White* closes the door to long-standing testimonial accommodations long allowed by the Iowa statute at issue in *White*[31]—for victims and witnesses with mental disabilities.[32]

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26. State v. White, 9 N.W.3d 1 (Iowa 2024).

27. *Id.*

28. *Id.*

29. *Id.*; Appellant's Brief and Argument and Request for Oral Argument, State v. White, 9 N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 6880484; Appellant's Brief and Argument and Request for Oral Argument, State v. White, 9. N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 9549630; Appellee's Brief, State v. White, 9 N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 6880542; Appellee's Brief, State v. White, 9 N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 9549631; Appellant's Reply Brief and Argument, State v. White, 9 N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 6880540; Appellant's Reply Brief and Argument, State v. White, 9 N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 9549632.

30. *See generally White*, 9 N.W.3d at 1.

31. IOWA CODE ANN. § 915.38(1)(a) (West 1998) (amended 2022).

32. As described below, the testimonial accommodation struck down in *White* was not just authorized by statute for children. The statute extended the same protection to victims and witnesses with mental disabilities: "In addition, upon a finding of necessity, the court may allow the testimony of a victim or witness with a mental illness, an intellectual disability, or other developmental disability to be taken as provided in this subsection, regardless of the age of the victim or witness." § 915.38(1)(c). This statutory scope is generally consistent with the working definition of mental disabilities used in disability scholarship. *See, e.g.*, Morgan, *supra* note 14, at 498–99 (quoting *What Are Psychiatric Disabilities?*, NAT'L REHAB. INFO. CTR. (May 12, 2014), https://naric.com/?q=en/FAQ/what-are-psychiatric-disabilities [https://perma.

The question before the court in *White* was whether one-way remote testimony by child witnesses violates a criminal defendant's Confrontation Clause rights under the Iowa Constitution.[33] The court held that it did.[34] Before examining the contours of the court's holding and its implications for disability rights, I start by describing what one-way remote testimony is and why it exists.

One-way remote testimony allows a witness to testify via video.[35] Rather than testifying in the courtroom, the witness testifies remotely, typically from a separate room in the courthouse.[36] The particulars vary, but generally, lawyers and the court reporter are present in the room with the witness, while the defendant and the jury remain in the courtroom.[37] The judge may be in the courtroom or may be in the room with the witness.[38] A live video allows the defendant and jurors to observe the witness examination at all times.[39] The defendant is also able to communicate with defense counsel at all times.[40] However, critically, in one-way remote testimony, the witness does not have a video showing the defendant or anything in the courtroom.[41]

The purpose of one-way remote testimony is to allow the child to be in a room in which she does not have to see the defendant.[42] The benefits of such are generally understood to be two-fold.[43] First, it avoids the psychological trauma occasioned when a child has to testify in open court

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cc/JDN9-7V2D]) (omissions in original) (defining "psychiatric or mental disabilities" as including "anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), bipolar disorder, schizophrenia, major depression, and personality disorders . . . phobias such as agoraphobia, eating disorders . . . personality disorders such as borderline personality disorder and antisocial personality disorder, and dissociative disorders such as dissociative identity disorder and depersonalization disorder"); *see also Enforcement Guidance on the ADA and Psychiatric Disabilities*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Mar. 25, 1997), https://www.eeoc.gov/laws/guidance/enforcement-guidance-ada-and-psychiatric-disabilities [https://perma.cc/86JZ-DQSF] (same).

33. *White*, 9 N.W.3d at 3.

34. *Id.* at 3, 15.

35. Margaret Brancatelli, *Facilitating Children's Testimony: Closed Circuit Television*, 43 PROSECUTOR 40, 40 (2009).

36. *Id.* at 41.

37. *Id.* at 40–41.

38. *Id.*

39. *Id.*

40. *Id.* at 41.

41. *See* Brancatelli, *supra* note 35, at 40–41.

42. Olivia W. Weinstein, *Coy v. Iowa: Reconciling a Defendant's Right to Confrontation with a Child-Witness' Interest in Avoiding Undue Psychological Trauma*, 23 LOY. L.A.L. REV. 415, 416 (1989).

43. *Id.*

in the presence of the defendant.[44] Such psychological trauma is well-documented and includes "immediate as well as lasting distress."[45]

Second, it may lead to more reliable testimony from the child because testifying in court may "intimidate" the child and therefore "may well impede the discovery of truth."[46] In an amicus brief in *Maryland v. Craig*, the American Psychological Association summarized research showing the negative impact that face-to-face confrontation with the defendant has on a child's ability to provide complete and reliable testimony:

> [T]he presence of the defendant in and of itself may affect children's ability or willingness to describe events accurately. Children are more likely to refuse to identify a culprit when he is physically present than when his picture is presented in a photo lineup. Research studies indicate that correct identifications occur only half as often when children face the defendant as when they do not have to face the defendant.[47]

Thus, one-way remote testimony is understood as often necessary to further the State's interests by facilitating the prosecution of crimes against children and other vulnerable persons.[48]

In *White*, the children, aged eight and eleven years old, were testifying against their father, the defendant.[49] Before they testified, the trial court held a preliminary hearing to address the State's request that the two children be permitted to testify by one-way remote video.[50] The trial court found that one-way remote testimony was necessary to avoid the children being traumatized by testifying in front of the defendant.[51] The trial court also found that in court testimony "could prevent [the two children] from

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44. *Id.*

45. Brief for American Psychological Association as Amicus Curiae in Support of Neither Party, Maryland v. Craig, 497 U.S. 836 (1990) (No. 89-478), 1990 WL 10013093, at *9 (detailing research on distress for child witnesses from face-to-face confrontation).

46. *See* Weinstein, *supra* note 42, at 416.

47. Brief for American Psychological Association as Amicus Curiae in Support of Neither Party, Maryland v. Craig, 497 U.S. 836 (1990) (No. 89-478), 1990 WL 10013093, at *19.

48. David Lauter, *Remote Testimony by Child Abuse Victims OKd: Judiciary: A Youngster's Well-Being May Outweigh a Defendant's Right to Face His Accuser, the Supreme Court Says. The Ruling Upholds Laws in 25 States*, L.A. TIMES (June 28, 1990, 12:00 AM), https://www.latimes.com/archives/la-xpm-1990-06-28-mn-1016-story.html [https://perma.cc/P6C6-Y3UZ] ("To make those cases easier to prosecute, the majority of states have adopted procedures—most employing closed-circuit television--to shield children from having to sit in the same room with the defendant when they testify.").

49. State v. White, 9 N.W.3d 1, 4–5 (Iowa 2024).

50. *Id.* at 4.

51. *Id.*

reasonably communicating."[52] The one-way remote testimony thus proceeded as follows:

> Consistent with its order granting the State's motion, the court permitted M.W. and J.W. to testify outside of the courtroom. Specifically, M.W. and J.W. testified in the judge's chambers, which is to say, the judge's office. The judge, the lawyers, and the court reporter were all in the chambers when M.W. and J.W. testified. The [c]ourt did not allow White to be in the chambers. White and the jurors had to remain in the courtroom where they viewed the testimony through a "one-way" closed-circuit television system. The [c]ourt did not use "two-way" television system . . . . This meant that M.W. and J.W. could not see White when they testified against him.[53]

Nothing about the practice of one-way remote testimony was new. The Iowa statute, which allowed the practice, had been in existence for decades.[54] Likewise, dozens of other states allow the same practice.[55] One-

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52. *Id.*

53. *Id.* at 4–5.

54. IOWA CODE ANN. § 915.38(1)(a) (West 1998) (amended 2022). The trial court in *White* allowed this alternate procedure because it found that "the two boys [aged eight and eleven] were terrified by the prospect of testifying about their father's beatings in his physical presence." *White*, 9 N.W.3d at 15 (Christensen, J., dissenting).

55. *See White*, 9 N.W.3d at 18–19 (Christensen, J., dissenting) (emphases and alterations in original) (compiling laws from other states) ("Further, Iowa Code section 915.38(1) is similar to procedures used by courts in other states. *See* Alaska Stat. § 12.45.046(e) (2023) ("The attorneys may pose questions to the child and have visual contact with the child during questioning, but *the mirrors shall be placed to provide a physical shield so that the child does not have visual contact with the defendant* and jurors." (emphasis added)); Ariz. Rev. Stat. Ann. § 13-4253(A) (2024) ("The court shall permit the defendant to observe and hear the testimony of the minor in person *but shall ensure that the minor cannot hear or see the defendant*." (emphasis added)); Conn. Gen. Stat. § 54-86g(a) (2023) ("If the defendant is excluded from the room or screened from the sight and hearing of the child, the court shall ensure that the defendant is able to observe and hear the testimony of the child, *but that the child cannot see or hear the defendant.*" (emphasis added)); Fla. Stat. § 92.54(4) (2023) ("In such a case, the court shall permit the defendant to observe and hear the testimony of the victim or witness, *but must ensure that the victim or witness cannot hear or see the defendant*." (emphasis added)); Kan. Stat. Ann. § 22-3434(c)(4) (2023) ("[T]he court shall permit the defendant to observe and hear the testimony of the child in person, *but shall ensure that the child cannot hear or see the defendant*." (emphasis added)); Ky. Rev. Stat. Ann. § 421.350(2) (West 2023) ("The court shall permit the defendant to observe and hear the testimony of the child in person, *but shall ensure that the child cannot hear or see the defendant.*" (emphasis added)); La. Stat. Ann. § 15:283(B) (2024) ("The *court shall ensure that the protected person cannot see or hear the accused* unless such viewing or hearing is requested for purposes of identification." (emphasis added)); Md. Code Ann., Crim. Proc. § 11-303(g) (LexisNexis

way remote testimony, in Iowa and elsewhere, had withstood both federal and state Confrontation Clause challenges.[56] On the federal constitutional front, in 1990, the SCOTUS upheld, in *Maryland v. Craig*,[57] the constitutionality of one-way remote testimony for vulnerable witnesses. The Court acknowledged that face-to-face confrontation "enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person" as well as serving a "strong symbolic purpose."[58] Even so, it stressed that the Confrontation Clause does not "guarantee[] criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial."[59] It thus held:

> [W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant . . . the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous

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2024) ("This section does not allow the use of two-way closed circuit television or other procedure that would let a child victim see or hear a defendant or child respondent."); Minn. Stat. § 595.02(4)(c)(1) (2023) ("[T]he defendant can see and hear the testimony of the child in person and communicate with counsel, *but the child cannot see or hear the defendant* . . . ." (emphasis added)); N.J. Rev. Stat. § 2A:84A-32.4(f) (2023) ("'[C]losed circuit television' . . . shall allow for the live observation of the victim or witness by the defendant, jury, and judge during the course of testimony or cross-examination, *while excluding a victim or witness from directly hearing or viewing the defendant during the proceedings.*" (emphasis added)); 42 Pa. Cons. Stat. § 5985(a) (2024) ("The court shall permit the defendant to observe and hear the testimony of the child victim or child material witness *but shall ensure that the child cannot hear or see the defendant.*" (emphasis added)); 11 R.I. Gen. Laws § 11-37-13.2(b) (2024) ("The court shall permit the defendant to observe and hear the testimony of the child in person, *but ensure that the child cannot hear or see the person alleged to have committed the assault.*" (emphasis added)); Tex. Code Crim. Proc. Ann. art. 38.071(3)(a) (West 2023) ("The court shall permit the defendant to observe and hear the testimony of the child and to communicate contemporaneously with his attorney during periods of recess or by audio contact, *but the court shall attempt to ensure that the child cannot hear or see the defendant.*" (emphasis added)); Utah R. Crim. P. 15.5(b)(1)(B) ("[T]he court shall ensure that the child cannot hear or see the defendant . . . .")).

56. *Id.*; *see also* Cole Wintheiser, Comment, *Confronting Justice Head-On: The Role of States in Protecting Face-to-Face Confrontation*, 168 U. PA. L. REV. ONLINE 203, 213 (2020) ("During the trial, prosecutors invoked a state statute that permitted a child victim of sexual assault to deliver testimony via a one-way, closed-circuit television system.").

57. Maryland v. Craig, 497 U.S. 836, 857 (1990).

58. *Id.* at 846–47.

59. *Id.* at 836–37, 844.

> adversarial testing and thereby preserves the essence of effective confrontation.[60]

In reaching its conclusion, the Court relied on public policy, namely a "State's interest in the physical and psychological well-being of child abuse victims."[61] The Court pointed to the "growing body" of research showing "psychological trauma" incurred by children forced to be face-to-face with the defendant in court.[62]

One year before *Craig*, the Iowa Supreme Court had reached a similar conclusion about Iowa's Confrontation Clause.[63] In *In re J.D.S.*, the court held that "the [remote testimony] procedure [was] reasonable" and "did not violate [the respondent's] right of confrontation under the federal or Iowa constitutions."[64] Having been in existence for decades and having

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60. *Id.* at 857.

61. *Id.* at 837, 853.

62. *See id.* at 855 (first citing Brief for American Psychological Association as Amicus Curiae in Support of Neither Party, Maryland v. Craig, 497 U.S. 836, 857 (1990) (No. 89-478), 1990 WL 10013093; then citing G. Goodman et al., *Testifying in Criminal Court: Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims*, 57 MONOGRAPHS SOC'Y FOR RSCH. CHILD DEV. 1 (1992) (presented as conference paper at annual convention of American Psychological Association in August 1989")) (noting the "growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court"). *See also* Diane Geraghty, *Confrontation and Hearsay in Criminal Child-Abuse Prosecutions*, 1991 PREVIEW S. CT. CASES 119, 119 ("Prosecutors encounter special problems of proof in child abuse cases. Assaults against children normally occur in private, without witnesses and often without physical corroboration. Further, the child victim may be incompetent to testify in court, or may be traumatized by the prospect of having to face his or her abuser at trial.").

63. *In re* J.D.S., 436 N.W.2d 342, 347 (Iowa 1989) (en banc). In *In re J.D.S.*, The Iowa Supreme Court upheld the constitutionality of the "predecessor to section 915.38," *State v. White*, 9 N.W.3d 1, 17 (Iowa 2024) (Christenson, J., dissenting) (quoting *J.D.S.*, 426 N.W.2d at 347), allowing the alternate procedure for the child witness in that case. *J.D.S.*, 426 N.W.2d at 347. There, the court held that "the procedure [was] reasonable and [held] that it did not violate [the respondent's] right of confrontation under the federal or Iowa constitutions." *White*, 9 N.W.3d at 17. (alterations in original) (quoting *J.D.S.*, 426 N.W.2d at 347). According to the majority:

> [W]e must correct our statement in *J.D.S.* about the Iowa Constitution. Contrary to our statement in *J.D.S.*, the Iowa Constitution does not permit one-way mirrors or other procedures that prevent witnesses from seeing the accused. As to that statement, *J.D.S.* reflects a demonstrably erroneous view of the Iowa Constitution. Therefore, as to that statement, we must overrule *J.D.S.*

White, 9 N.W.3d at 13 (majority opinion). The dissent, though, contended that the majority's view was inaccurate because *J.D.S.* was not simply "a mere 'counterargument'"; "[i]t is the controlling precedent." *Id.* at 16 (Christensen, J., dissenting).

64. *Id.* at 16 (Christensen, J., dissenting) (quoting *In re J.D.S.*, 436 N.W.2d at 347) (first and second alteration in original).

withstood Confrontation Clause challenges, it would appear that the practice was not in jeopardy.

White, though, rejected these long-standing precedents using originalism.[65] The court's reliance on originalism was not surprising: weeks before this decision, the same court had overruled the right to abortion under the Iowa Constitution using originalism.[66] The court's opinion in *White* embraced an originalist interpretation.[67] The court began by stating that it was "bound by the 'words used by the framers,'" and that the "meaning of those words was fixed when they were adopted."[68] It went on to explain that it "must read the framers' words 'in historical perspective'" and "as they were 'commonly understood' at the time of their adoption."[69]

Using that originalist lens, the court next interpreted the meaning of the right to confrontation under Iowa's constitution.[70] It defined its inquiry as looking back to what that clause meant in 1857, the "time when [Iowa's] Constitution was adopted."[71] Unlike some other state constitutions,[72] Iowa's Confrontation Clause does not contain an explicit "face-to-face" requirement.[73] Thus, the court's first task was to establish that Iowa's

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65. *See White*, 9 N.W.3d at 6–7, 13.

66. *See* Planned Parenthood of the Heartland, Inc. v. Kim Reynolds *ex rel.* State, 9 N.W.3d 37, 44 (Iowa 2024).

67. *White*, 9 N.W.3d at 6–7, 13.

68. *Id.* at 6 (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78 (2012) (discussing the "Fixed-Meaning Canon" that "[w]ords must be given the meaning they had when the text was adopted"); *cf.* Save Our Stadiums v. Des Moines Indep. Cmty. Sch. Dist., 982 N.W.2d 139, 146 n.3 (Iowa 2022) (emphasizing the importance of "holding to the original public meaning of the words of [a] statute at the time it was enacted").

69. *White*, 9 N.W.3d at 6–7 (quoting N.W. Halsey & Co. v. City of Belle Plaine, 104 N.W. 494, 495–96 (1905)).

70. *White*, 9 N.W.3d at 7.

71. *Id.*

72. *See* Wintheiser, *supra* note 56, at 217 (first citing ARIZ. CONST. art. II, § 24; then citing COLO. CONST. art. II, § 16; then citing DEL. CONST. art. I, § 7; then citing IND. CONST. art. I, § 13; then citing KAN. CONST. § 10; then citing KY. CONST. § 11; then citing MASS. CONST. art. XII; then citing MO. CONST. art. I, § 18(a); then citing MONT. CONST. art. II, § 24; then citing NEB. CONST. art. I, § 11; then citing N.H. CONST. pt. I, art. 15; then citing OHIO CONST. art. I, § 10; then citing OR. CONST. art. I, § 11; then citing S.D. CONST. art. VI, § 7; then citing TENN. CONST. art. I, § 9; then citing WASH. CONST. art. I, § 22; and then citing WIS. CONST. art. I, § 7.) (noting that seventeen states could be grouped together as having the more explicit "face to face" language within their respective clauses).

73. IOWA CONST. art. I, § 10; *see also* Wintheiser, *supra* note 56, at 233 ("The arguments in this Comment, therefore, are aimed at those States that have not directly opined on the extent to which their state confrontation clauses protect the right to face-to-face confrontation: Alaska, Arizona, Iowa, New Jersey, and Tennessee.").

Constitution nonetheless requires such face-to-face confrontation.[74] To that end, the court referenced many historical sources.[75]

It first provided the definition of "confrontation" from an 1856 dictionary, which referenced face-to-face confrontation.[76] It next cited a case from 1869, in which the Iowa Supreme Court held that under Iowa's Confrontation Clause the defendant "has the right to see the witnesses against him, face to face."[77] It further cited an 1871 decision of the Iowa Supreme Court, which described the defendant's "right to be confronted with the witnesses against him,"[78] noting that "[t]heir testimony can be given only . . . face to face with the accused."[79] It cited to three cases from other states from the same period that "acknowledged" the defendant's "right to face-to-face confrontation."[80] Finally, it cited to Justice Scalia's opinion in *Coy v. Iowa*,[81] as well as to the Iowa Supreme Court's citation in *State v. Rogerson* to an excerpt from *Coy* as supporting a historical "face-to-face" requirement.[82] In sum, the court concluded that "the confrontation right enshrined in Article I, Section 10 of the Iowa Constitution includes a guarantee of face-to-face confrontation between the accused and trial witnesses."[83]

The court's next step was to decide whether the one-way remote testimony violates the Iowa constitutional right to "face-to-face" confrontation.[84] The court held it does.[85] The court reasoned:

> At a minimum, face-to-face confrontation requires that trial witnesses must be *both* visible to the accused *and also* able to see the accused. Two-way visibility—the ability to see each other—is inseparable from the idea of a face-to-face confrontation. So when the witness and the accused are prevented from seeing each

74. *White*, 9 N.W.3d at 7 (citing State v. Reidel, 26 Iowa 430, 437 (Iowa 1969)).

75. *White*, 9 N.W.3d at 7.

76. *Id.* (citing SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 85 (1755)).

77. *White*, 9 N.W.3d at 7 (quoting *Reidel*, 26 Iowa at 437).

78. *White*, 9 N.W.3d at 7 (alteration and omission in original) (quoting State v. Collins, 32 Iowa 36, 40 (Iowa 1871)).

79. *White*, 9 N.W.3d at 7 (alteration and omission in original) (quoting Collins, 32 Iowa at 40).

80. *White*, 9 N.W.3d at 7.

81. Coy v. Iowa, 487 U.S. 1012, 1016 (1988); *White*, 9 N.W.3d at 8 (quoting same).

82. *White*, 9 N.W.3d at 8 (citing State v. Rogerson, 855 N.W.2d 495, 498 (Iowa 2014)).

83. *White*, 9 N.W.3d at 8.

84. *Id.*

85. *Id.*

> other, there can be no face-to-face confrontation, and the Iowa Constitution cannot be satisfied.[86]

The court described the history of crimes against children and child witnesses in Iowa and elsewhere at the time Iowa's constitution was ratified:

> We have also considered the idea that crimes against children are purely modern phenomena that the framers could not anticipate. This is not so. For instance, under the 1839 territorial laws, any male "of the age of fourteen years and upwards" could be imprisoned for "not less than twenty years" upon conviction of having "carnal knowledge of any female child under the age of ten years." Iowa Stat. div. I, § 20 (1839). Under the 1851 Code, "any person" who "carnally kn[e]w and abuse[d] any female child under the age of ten years" could be punished by life imprisonment. Iowa Code § 2581 (1851); *see also State v. Newton*, 44 Iowa 45, 47 (1876) (noting that under section 3861, "[c]arnal knowledge of a female child under ten years of age" constituted the crime of rape).
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> * * *
>
> And our cases confirm that children have long testified in criminal cases. For instance, in our 1899 opinion in *State v. Desmond*, we described the testimony of thirteen-year-old girls in a sexual abuse case involving an eleven-year-old victim. 109 Iowa 72, 80 N.W. 214, 214 (Iowa 1899). Or consider *State v. Blair* from 1929. 209 Iowa 229, 223 N.W. 554, 556 (1929). In *Blair*, an eleven-year-old sexual assault victim testified about the assault, that it "caus[ed] her much pain 'inside.'" *Id.* And her testimony was corroborated by testimony from her seven-year-old sister and her ten-year-old brother. *Id.*[87]

The court concluded:

> It seems clear enough . . . that the founding generation was familiar with crimes against children as well as the important role that child witnesses could play in the prosecution of those crimes.

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86. *Id.* at 8–9.
87. *Id.* at 13–14 (alterations in original).

> But we see no reason to think that the framers would have denied the right of confrontation to an accused just because the case against him depended on the testimony of children.[88]

The court explained its view of stare decisis, stressing the limitations of that doctrine.[89] According to the court, its allegiance to the Constitution requires it *not* to follow "erroneous precedent."[90] For that proposition, it quoted Justice Clarence Thomas: "When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it. This view of stare decisis follows directly from the Constitution's supremacy over other sources of law—including our own precedents."[91]

Whether correct or not, this view of stare decisis differs from the more expansive view of stare decisis previously employed by the Iowa Supreme Court.[92]

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88. *Id.*

89. *White*, 9 N.W.3d at 13.

90. *Id.*

91. *Id.* (quoting Gamble v. United States, 587 U.S. 678, 718 (2019) (Thomas, J., concurring)).

92. *State v. Brown*, 930 N.W.2d 840, 854 (Iowa 2019), illustrates this shift. There, over the dissent's objection, the majority relied on stare decisis in upholding the constitutionality of certain traffic stops:

> Our holding today recognizes this need for consistency by adhering to our prior holdings. See Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 249 (Iowa 2018) ("From the very beginnings of this court, we have guarded the venerable doctrine of stare decisis and required the highest possible showing that a precedent should be overruled before taking such a step." (quoting McElroy v. State, 703 N.W.2d 385, 394 (Iowa 2005))); see also Book v. Doublestar Dongfeng Tyre Co., 860 N.W.2d 576, 594 (Iowa 2015) ("Stare decisis alone dictates continued adherence to our precedent absent a compelling reason to change the law."). Stare decisis "is an important restraint on judicial authority and provides needed stability in and respect for the law." Kiesau v. Bantz, 686 N.W.2d 164, 180 (Iowa 2004) (Cady, J., dissenting), overruled on other grounds by Alcala v. Marriott Int'l Inc., 880 N.W.2d 699, 708 & n.3 (Iowa 2016). Though it is "our role as a court of last resort . . . to occasionally reexamine our prior decisions, we must undertake this weighty task only for the most cogent reasons and with the greatest caution." Id."

Brown, 930 N.W.2d at 854. The dissent argued that "the doctrine of stare decisis does not excuse us from considering the validity of pretextual stops under the Iowa Constitution." *Id.* at 871. *See also* Brief of University of Iowa and Drake University Law Professors as Amici Curiae, Planned Parenthood of the Heartland, Inc. v. Reynolds *ex rel.* State, 975 N.W.2d 710 (Iowa 2022) (No. 21-0856), 2021 WL 6772613, at *9–12. As the law professors' brief noted: "Stare decisis is especially important when a supreme court's composition recently has changed. In that circumstance, when followed, it refutes the cynical view that a supreme court is a political institution guided by the justices' personal values, rather than the law." *Id.* at *11.

The court's interpretation of the Iowa Constitution's Confrontation Clause also rejected its long-standing practice of relying on SCOTUS precedent in deciding Confrontation Clause challenges.[93] Recall that the SCOTUS had in 1990 in *Maryland v. Craig*[94] upheld the constitutionality of the practice of one-way remote testimony,[95] a precedent that the Iowa Supreme Court had followed [96] The court in *White*, though, stated that "the federal interpretation should not govern our interpretation" of the Iowa Constitution.[97] The court explained that its role is to "decide what the Iowa Constitution means"[98]:

> [W]e see no other path. Our court must decide what the Iowa Constitution means. That is our duty. We believe this duty requires us to "provide at a minimum the degree of protection" that our constitution "afforded when it was adopted." *Wright*, 961 N.W.2d at 402 (quoting *Jones*, 565 U.S. at 411, 132 S.Ct. 945). And for the reasons explained, we do not believe *Craig*'s approach affords that minimum degree of protection. So we cannot follow *Craig*.[99]

In not following *Craig*, the court "stood alone" among other states.[100]

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93. *See* State v. Rupe, 534 N.W.2d 442, 444 (Iowa 1995) (treating *Maryland v. Craig*, 497 U.S. 386 (1990) as governing whether the defendant's right to confrontation was violated).

94. *Craig*, 497 U.S. at 836.

95. *Id.* at 855.

96. *See* sources cited *supra* note 93.

97. State v. White, 9 N.W.3d 1, 11–12 (Iowa 2024).

98. *Id.* at 11.

99. *Id.* at 11–12.

100. *Id.* at 19 (Christensen, C.J., dissenting). In response to this criticism by the dissent, the majority in *White* cited an Indiana case and Michigan case as "but see" examples, stating:

> Finally, we note the dissent's concern that after our decision today, Iowa 'stands alone' as the only state that has not followed *Craig* when interpreting a state confrontation right. *But cf. Brady v. State*, 575 N.E.2d 981, 986–87 (Ind. 1991) (citing *Craig* when analyzing the federal confrontation right but not when describing the state confrontation right); *People v. Jemison*, 505 Mich. 352, 952 N.W.2d 394, 400 (2020) (limiting '*Craig* only to the specific facts it decided').

White, 9 N.W.3d at 11.

Neither of these cases, though, holds that *Craig* is applicable to state confrontation clause analysis. *See id.* To the contrary, *People v. Jemison*, 952 N.W.2d 394, 396 (Mich. 2020), narrowly interpreted *Craig*, which would only be necessary if *Craig* applied. *Jemison*, 952 N.W.2d at 396 ("*Crawford* did not specifically overrule *Craig,* but it took out its legs. To reconcile *Craig* and *Crawford*, we read *Craig*'s holding according to its narrow facts."). And *Brady v. State*, 575 N.E.2d 981, 987 (Ind. 1991), unlike *White,* recognized that "[t]o a considerable degree, the federal right of confrontation and the state right to a face-to-face

The court's opinion thus is a death knell for the long-standing practice in Iowa—authorized by Iowa's legislature—of one-way remote testimony for vulnerable witnesses.[101] That holding, of course, had direct implications in *White*: the jury's conviction of White was reversed and a new trial required.[102] To the extent their testimony was needed (and under the facts of the case it almost certainly would be to secure a conviction), the eight and eleven-year-old children would be required to testify again and be cross-examined again.[103] This time, they would be required to testify not only so that the defendant could see them, but also so that they could see the defendant.[104] *White* leaves open the question of whether such face-to-face confrontation must be in person or whether it can occur via two-way remote testimony.[105]

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meeting are co-extensive." That position is quite unlike the Iowa Supreme Court's position that it makes no difference if "parallel state and federal provisions 'contain nearly identical language and have the same general scope, import, and purpose.'" *White*, 9 N.W.3d at 11 (quoting State v. Brown, 930 N.W.2d 840, 847 (Iowa 2019)). In any event, *White* is regarded as the "most negative" treatment of *Craig* by Thomson Reuters' Westlaw (using Westlaw, search "497 U.S. 836"; then click "Negative Treatment" (last visited Nov. 26, 2024)).

101. *See* IOWA CODE ANN. § 915.38(1)(a) (West 1998) (amended 2022). The court makes clear that the "practice" of one-way remote testimony is unconstitutional in Iowa but avoids directly stating that it is striking down the part of Iowa's statute that expressly authorizes that practice. *White,* 9 N.W.3d at 13. The dissent is more direct, stating: "I would instead uphold the constitutionality of section 915.38(1)(a) and affirm White's convictions." *Id.* at 16 (Christensen, C.J., dissenting).

102. *White,* 9 N.W.3d at 15.

103. *See id.* at 13.

104. *See id.*

105. *See id.* at 14 (holding that the question of two-way remote testimony was not before the court and that the "record does not describe an actual two-way system"). The dissent argued the issue was ripe for the court to decide:

> Meanwhile, the majority concludes that the use of a one-way video system violates the Iowa Constitution, but it does not decide whether a two-way video system complies with the Iowa Constitution. In short, the majority is not giving White what he asks for while also guaranteeing another appeal if he gets less than he asks for. Why isn't the majority deciding the entire case? Surely the majority doesn't think it needs more briefing on [A]rticle I, section 10 or that new insights may emerge. Does the majority anticipate that some new authoritative treatise on the 1857 Iowa Constitution will be published between now and a potential second appeal? I doubt that will occur. The majority protests that the "record does not describe an actual two-way system." The majority turns a blind eye to the fact that we are all very familiar with two-way video systems, having been through the changes wrought by the COVID-19 pandemic. The majority knows what is possible with two-way video and should either approve such a procedure or indicate that the in-person appearance of a child witness is always required. This is exactly the type of remand that a trial court judge dreads. A third trial would further traumatize the child witnesses.

Id. at 20.

III. IMPLICATIONS FOR DISABILITY RIGHTS

White is no doubt harmful for victims and witnesses with mental disabilities in Iowa.[106] By holding that one-way remote testimony is unconstitutional under Iowa's constitution, *White* closes the door to a practice that has long provided crucial accommodations for people with mental disabilities.[107] Some witnesses may still testify yet endure trauma from doing so.[108] Others may not testify, or may testify less reliably, because of the strain of being face-to-face in the courtroom with the defendant.[109] And, of course, *White* may also pave the way for the Iowa Supreme Court to strike down two-way remote testimony by witnesses with mental disabilities[110] as well as call into question statutory hearsay exceptions for non-testimonial statements by witnesses with mental disabilities.[111]

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106. *See id.* at 15–16.

107. *White*, 9 N.W.3d at 15.

108. *See* source cited *supra* note 62.

109. *Id.*

110. That would certainly raise interesting post-conviction relief questions about convictions secured via Zoom trials. During the COVID-19 pandemic, many states, including Iowa, conducted criminal proceedings, including witness testimony, virtually. *See Proclamation of Disaster Emergency*, STATE OF IOWA (Apr. 27, 2020), https://governor.iowa.gov/sites/default/files/documents/Public%20Health%20Proclamation%20-%202020.03.26.pdf [https://perma.cc/9PPG-Z4S5]; *see also* Michael Milov-Cordoba, *Remote Court Three Years Later*, STATE CT. REP. (Apr. 13, 2023), https://statecourtreport.org/our-work/analysis-opinion/remote-court-three-years-later [https://perma.cc/3V4P-LBER]. While states have "largely sidestepped" Confrontation Clause questions arising from virtual criminal trials during COVID, the supreme courts of those states that have directly answered the question have held that two-way remote testimony does not violate their Confrontation Clause. *Id.* (citing State v. Tate, 985 N.W.2d 291 (Minn. 2023); State v. Smith, 636 S.W.3d 576 (Mo. 2022); State v. Mercier, 479 P.3d 967 (Mont. 2021)). At least one commentator has suggested a need to expand *Craig*. Wayne A. Comstock, Note, *The Rise in Remote Testimony: Exploring Sufficient Public Policies Under Craig*, 108 IOWA L. REV. 1369, 1397–98 (2023).

111. Another part of the Iowa statute at issue in *White* authorizes admission of certain recorded statements under the residual hearsay exception. *See* IOWA CODE ANN. § 915.38(3) (West 1998) (amended 2022) ("The court may upon motion of a party admit into evidence the recorded statements of a child, as defined in section 702.5, describing sexual contact performed with or on the child, not otherwise admissible in evidence by statute or court rule if the court determines that the recorded statements substantially comport with the requirements for admission under rule of evidence 5.807."). Other scholars have argued that because "sexual abuse is a prevalent problem for adults with intellectual disabilities, the justice system needs to ensure that the voices of these victims can be heard." Alison G. Geter, Comment, *Hearing the Unheard: Crafting a Hearsay Exception for Intellectually Disabled Individuals*, 87 MISS. L.J. 469, 470–71 (2018). *See also* Geraghty, *supra* note 62, at 119 ("In these cases the [c]ourt has been sensitive both to the special problems of proof presented by child witnesses, and to the traditional role of

Even so, people with mental disabilities were invisible in *White*.[112] They were not a party to the case, nor did any party or amicus curiae represent their perspectives.[113] No amicus curiae filed a brief on their behalf. In the hundreds of pages of briefing (as well as in the court's opinion), no mention is made of people with disabilities.[114] A search of the term "disability" and its derivatives reveals a passing reference in one brief and in the court's opinion to the fact that the criminal defendant was not disabled.[115]

In sum, no one reading the court's opinion in *White* would know that it harmed people with mental disabilities.[116] No one would know that it eliminated a long-standing and hard-fought statutory protection.[117] While judicial opinions obviously have unmentioned implications outside of the four corners of the case, what is notable in *White* is that the court's opinion strikes down a statutory protection that benefited two and only two groups of people: children and people with mental disabilities.[118] Yet only one of those groups is mentioned: children.[119]

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confrontation in promoting accurate factfinding under our adversarial system of justice. Now the constitutional relationship between hearsay and the Sixth Amendment in child abuse cases is again before the [c]ourt.").

112. *White*, 9 N.W.3d at 1.

113. *Id.*; Appellant's Reply Brief and Argument, State v. White, 9 N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 9549632; Appellee's Brief, State v. White, 9 N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 99549631; Appellant's Brief and Argument and Request for Oral Argument, State v. White, 9 N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 9549630.

114. *White*, 9 N.W.3d at 1; Appellant's Reply Brief and Argument, State v. White, 9 N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 9549632; Appellee's Brief, State v. White, 9 N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 99549631; Appellant's Brief and Argument and Request for Oral Argument, State v. White, 9 N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 9549630.

115. *White*, 9 N.W.3d at 1; Appellant's Reply Brief and Argument, State v. White, 9 N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 9549632; Appellee's Brief, State v. White, 9 N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 99549631; Appellant's Brief and Argument and Request for Oral Argument, State v. White, 9 N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 9549630.

116. *See White*, 9 N.W.3d at 1.

117. *See id.*

118. *Id.*; IOWA CODE ANN. § 915.38(1)(a) (West 1998) (amended 2022). That does not mean that other groups would not arguably benefit from similar accommodations. *See* Rachel Harris, *Behind the Screen: The Constitutionality of Remote Testimony for Survivors of Domestic Violence*, 49 HASTINGS CONST. L.Q. 178, 180–83 (2022) (arguing for an expansion in remote testimony for domestic violence survivors); Allie Reed & Madison Alder, *Virtual Hearings Put Children, Abuse Victims at Ease in Court*, NYLAG (July 23, 2020, 2:36 pm), https://nylag.org/virtual-hearings-put-children-abuse-victims-at-ease-in-court/ [https://perma.cc/ZR3B-KF4R] (describing benefits of virtual hearings for adult and child abuse victims).

119. *White*, 9 N.W.3d at 1.

Further, the invisibility of people with mental disabilities in *White* is not just one of optics or transparency. As Professor Jamelia Morgan has argued in the context of the Fourth Amendment, "disability erasure" inflicts harm by leaving out critical information about the constitutional discourse.[120] In *White*, that erasure meant that the court reached a decision about the original meaning of the Confrontation Clause that did not consider the meaning in the context of people with mental disabilities.[121] The court's opinion goes into detail about why requiring face-to-face confrontation for children is consistent with the original meaning of Iowa's Confrontation Clause.[122] But it does not address whether requiring face-to-face confrontation for people with mental disabilities is consistent with the original meaning of Iowa's constitution.[123] Some evidence suggests that at or around that time, at least some people with mental disabilities were "dealt with outside of formal legal proceedings,"[124] which would raise unique arguments about the original meaning of "face-to-face" confrontation for people with mental disabilities.[125] Further, at that time, Iowa's constitution disenfranchised people deemed to be "idiots,"[126] further suggesting a unique legal landscape for people with mental disabilities.[127]

A deep dive into the original understanding of confrontation as pertaining to people with mental disabilities might not be identical to that of children. By addressing the historical understanding of confrontation vis-à-vis child witnesses, the court suggests that such understanding

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120. Morgan, *supra* note 14, at 561 (showing how "disability erasure produces and reinforces vulnerabilities to police violence for disabled people").

121. *White*, 9 N.W.3d at 1.

122. *Id.* at 7–8. Despite its detail, the court's original meaning analysis as it pertains to children is itself inadequate. Most notably, while the opinion points out some historical evidence that shows at least some children did testify in open court in the 1850's, it does not show that alternate practices were not allowed for some children. *See id.* That would be the historical focus that is pertinent because remote testimony laws do not categorically say that children can never testify face-to-face in court but rather such laws permit some children to provide remote testimony when there is a case-specific showing of necessity. In any event, whether the court's original meaning analysis vis-à-vis child witnesses is sound or not, the court performed no parallel analysis for victims with mental disabilities.

123. *Id.*

124. Clemente, *supra* note 23, at 2774.

125. *See White*, 9 N.W.3d at 1.

126. IOWA CONST. art. II, § 5 (amended 2008). When ratified in 1857, the Iowa Constitution stated "[n]o idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector."

127. In 2008, Amendment 47 repealed and substituted this language for "[a] person adjudged mentally incompetent to vote or a person convicted of any infamous crime shall not be entitled to the privilege of an elector." *Id.*

matters to its originalist approach.[128] Perhaps then, armed with more historical information or historical information tethered to those with mental disabilities, the court might have reached a different or narrower ruling. But merits aside, it is troubling that in over two hundred pages of constitutional discourse that culminated in eliminating a long-standing practice that benefited people with mental disabilities, no one mentioned them.[129]

And those harms alone would be reason enough for disability advocates to take note.[130] But the implications of *White* extend beyond the Confrontation Clause and witnesses with mental disabilities in Iowa.[131] Below I show the ways in which *White* signals the threat to disability rights arising from the ascent of originalism.

First, it seems likely that at least some other state courts—and perhaps eventually the SCOTUS—will be inclined to follow *White* and thus that the long-standing practice of one-way remote testimony may be struck down in other states.[132] Statutes like Iowa's exist in many states.[133] And as *White* shows, changes in constitutional understanding arising from originalism mean that it does not matter that those statutes have previously withstood constitutional challenge.[134] While not every state court will be receptive to revisiting the meaning of their state constitutions under originalism, some likely will.[135] Indeed, advocacy already is underway that advances an originalist understanding of the Confrontation Clause in state courts under state constitutions.[136]

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128. *See White*, 9 N.W.3d at 8–10.

129. *Id.*; Appellant's Reply Brief and Argument, State v. White, 9 N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 9549632; Appellee's Brief, State v. White, 9 N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 99549631; Appellant's Brief and Argument and Request for Oral Argument, State v. White, 9 N.W.3d 1 (Iowa 2024) (No. 22-0522), 2023 WL 9549630.

130. I do not suggest that *White* is unique insofar as it leaves out the perspective of people with disabilities. *See, e.g.*, Powell, *supra* note 16, at 794 ("Notwithstanding enduring a lengthy history of reproductive oppression, people with disabilities have traditionally been ignored in public and scholarly discourse about reproductive rights."). My point is that leaving out a disability perspective is harmful.

131. *See White*, 9 N.W.3d at 1.

132. Of course, the Sixth Amendment's Confrontation Clause, including *Maryland v. Craig*, 497 U.S. 836 (1990), could be revisited and expanded on originalism grounds as well.

133. *See White*, 9 N.W.3d at 1, 18–19 (Christensen, C.J., dissenting).

134. *Id.*

135. *See, e.g.*, Planned Parenthood of the Heartland, Inc. v. Kim Reynolds *ex rel.* State, 9 N.W.3d 37, 43–44 (Iowa 2024) (finding that the right to an abortion is not a fundamental right under the Iowa Constitution).

136. *See* Wintheiser, *supra* note 56, at 237 (arguing for reliance on "the States and on state constitutional law to remedy the wrong done by the Supreme Court in *Craig*" and

Second, *White* suggests what is perhaps obvious: all things being equal (and notably they are not under originalism), the ascent of originalism is not favorable for people with disabilities. A method of constitutional interpretation that looks to the 1700s and 1800s for the meaning of constitutional rights may leave behind evolving understandings of disability.[137] Originalism is thus uniquely harmful to those who historically lacked power as well as those who were not understood. Mentally disabled people fit both categories.

During the period in which Iowa's constitution was ratified, little was understood about the nature of mental disabilities, which resulted in the legal system's egregious treatment of persons with mental disabilities. In one instance, a person with intellectual disabilities was tried and convicted of stealing a horse.[138] As punishment, he was hanged "despite evidence that he had been teased and manipulated into taking the horse by a group of passing gentlemen."[139] Thus, disability advocates must not only be

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urging that "[i]t is time for States, and state court judges and justices, to recognize the important role they can play in securing individual liberty, and to acknowledge and protect the right of face-to-face confrontation"); *see also* Milov-Cordoba, *supra* note 110.

137. There exists a long history of abuse and discrimination against people with disabilities, particularly mental disabilities. Some discrimination stemmed from a fundamental lack of understanding about mental disabilities. "Throughout the common law, idiocy was usually defined by juxtaposition with lunacy." Clemente, *supra* note 23, at 2772. Some stemmed from blatant and disturbing bias against people with disabilities. For example, a "British clergyman and economist," Thomas Malthus, in 1798, "advocate[d] that all people 'defective' in any way, who look or behave or function differently than the rest of society, should be identified and eliminated." Therefore, "[o]nly those who can make the greatest contribution to society, would survive." Minn. Governor's Council on Dev. Disabilities, *Parallels in Time: A History of Developmental Disabilities*, MINN. GOV'T, https://mn.gov/mnddc/parallels/3.html [https://perma.cc/54CN-946S].
The same is true for children. In the mid-1800s, society (and by extension, the legal system) lacked an enlightened understanding of childhood. *See* Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. ON FIGHTING POVERTY 313 (1998); Jonathan Montgomery, *Children as Property?*, 51 MOD. L. REV. 323, 323 (1988). In 1880, for example, the age of "consent" for sexual acts in Iowa was ten years old, which meant that it was not a crime to have "consensual" sexual relations with a child who was aged ten and older. *See* Stephen Robertson, *Age of Consent Laws [Table]*, CHILD. & YOUTH IN HIST., https://chnm.gmu.edu/cyh/primary-sources/24.html [https://perma.cc/VBG6-DA6T]. We should be wary of a method of interpretation that suggests, let alone requires, that we base present-day rights of children on an outdated understanding of childhood.

138. *The Proceedings of the Old Bailey. 30th June 1825*, PROCEEDINGS OF THE OLD BAILEY, https://www.oldbaileyonline.org/record/18250630 [https://perma.cc/M5BD-65XS].

139. SIMON JARRETT, THOSE THEY CALLED IDIOTS: THE IDEA OF THE DISABLED MIND FROM 1700 TO THE PRESENT DAY 139–40 (2020). Regarding use of the label "idiots," the book explains that it uses the "terminology in use at the various time periods described," which "includes idiocy, imbecility, mental deficiency, moron, mental handicap and so on."

vigilant but must use whatever space originalism may allow to bring a disability perspective to courts.[140]

Third, *White* highlights that originalism, as a method of constitutional interpretation, attaches less significance to stare decisis than other methods.[141] It is not just that originalism might cause a court to interpret a constitutional provision differently than prior courts using a different methodology; it is that originalism empowers a court to make sweeping changes by all but eliminating the role of precedent as a barrier.[142] Disability advocates should thus expect disruption to long-standing constitutional precedents.

Fourth, *White* highlights the significance of state courts and state constitutions for disability rights.[143] The practice that the court struck down in *White* remains constitutional under the Sixth Amendment to the Federal Constitution.[144] Yet in Iowa, that makes no difference because the state court's interpretation of its state constitution trumps a more favorable federal court interpretation of the federal Constitution.[145] As the court in *White* emphasized, "when it comes to 'questions of state constitutional law, the Supreme Court "is, in law and in fact, inferior in authority to"'

Id. at 18. It, of course, further acknowledges that "[n]one of these of course are acceptable terminology outside their historical context in public discourse today, all having become terms of abuse or anachronistic." *Id.*

140. The dissent in *White* provides an example of what advocacy in this space might entail. It points out that "[o]riginalism has limits. It cannot account for a technology that didn't exist in 1857—when the Iowa Constitution was ratified—and a type of case that would not have been brought in 1857." State v. White, 9 N.W.3d 1, 16 (Iowa 2024) (Christensen, C.J., dissenting). It also distinguishes the two cases "decided some 150 years ago" and upon which the majority relied:

> Neither case has anything to do with traumatized child witnesses or one-way video technology. Indeed, the type of child abuse committed by the defendant here potentially would not even have been prosecuted in the nineteenth century. *See Rowe v. Rugg*, 117 Iowa 606, 91 N.W. 903, 903–04 (1902) (stating the "general rule" that a parent may administer "moderate" corporal punishment to a child); *State v. Gillett*, 56 Iowa 459, 9 N.W. 362, 363 (1881) (approving a jury instruction to that effect).

White, 9 N.W.3d at 20.

141. *Id.* at 11–13 (majority opinion). While some variation exists, originalism is widely regarded as being in "tension" with stare decisis. *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1926, 1939 (2017) (addressing whether the "tension between originalism and stare decisis can be resolved as a matter of principle" and exploring Justice Scalia's treatment of "stare decisis as a limited, pragmatic exception to originalism").

142. *White*, 9 N.W.3d at 13 (stating that there is no obligation to follow "erroneous precedent").

143. *See generally id.* at 10–13.

144. U.S. CONST. art. VI; *see White*, 9 N.W.3d at 10–12; *see generally* Maryland v. Craig, 497 U.S. 836, 854 (1990).

145. *See White*, 9 N.W.3d at 10–12.

this court."[146] That may prove to be a stark reality for disability rights, as statutory disability rights are struck down as violating state constitutional provisions, despite passing federal constitutional muster

Fifth, *White* shows that harm to disability rights from originalism can happen in indirect and insidious ways.[147] *White* was not a case ostensibly about disability rights.[148] Further, *White* was a case in which the constitutionality of the statutory right appeared to be long settled.[149] While these factors explain why it was not on the radar of disability advocates, going forward disability rights advocates should expect disruption of seemingly settled rights and protections.

Sixth, considerations of public policy matter little under originalism.[150] As the dissent in *White* points out, the Iowa legislature designed the statute allowing remote testimony to allow the practice in "cases *just like* this one."[151] That appears not to count under originalism.[152] In *Craig,* though, such public policy was at the forefront of the Court's Confrontation Clause analysis.[153] There, the Court emphasized that "a State's interest in the physical and psychological well-being of child abuse

146. *Id.* at 10 (quoting State v. Wright, 961 N.W.2d 396, 403 (Iowa 2021)).

147. *See supra* pp. 198–200.

148. *See supra* pp. 198–99.

149. *See supra* note 54 and accompanying text.

150. *See generally* Solum, *supra* note 23, at 1244 ("Originalists argue that the meaning of the constitutional text is fixed and that it should bind constitutional actors. Living constitutionalists contend that constitutional law can and should evolve in response to changing circumstances and values.").

151. *White*, 9 N.W.3d at 16 (Christensen, C.J., dissenting) (alteration in original) (citing 1998 Iowa Acts 161 (codified at IOWA CODE § 915.38 (1998)) ("The legislature adopted section 915.38(1)(a) to cover cases *just like* this one."). The United States Supreme Court in *Craig* likewise emphasized this purpose in upholding Maryland's remote testimony law. Maryland v. Craig, 497 U.S. 836, 854 (1990) (quoting Wildermuth v. State, 530 A.2d 275, 286 (Md. 1987)) ("The statute at issue in this case, for example, was specifically intended 'to safeguard the physical and psychological well-being of child victims by avoiding, or at least minimizing, the emotional trauma produced by testifying.'").

152. The majority in *White* does not mention, let alone give weight to, public policies, including the public policies underpinning one-way remote testimony. *White*, 9 N.W.3d at 1–15. Rather, the majority rejects *Craig*, which held that the "state['s] interest in protecting child witnesses from the trauma of testifying" may "outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *White*, 9 N.W.3d at 17 (quoting *Craig*, 497 U.S. at 850).

153. *Craig*, 497 U.S. at 850 (quoting Mattox v. United States, 156 U.S. 237, 259–60 (1895) (holding that face-to-face confrontation "must occasionally give way to considerations of public policy and the necessities of the case"); *see also* Comstock, *supra* note 110, at 1397–98 (arguing that the "public policy" justification set forth in *Craig* should be expanded to allow for remote testimony occasioned by the COVID pandemic).

victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."[154]

Finally, *White* highlights that legislative gains require constitutional vigilance and constitutional advocacy.[155] Whether new or old, statutory rights are not immune from novel constitutional attack.[156] These attacks may come from the expansion of certain constitutional provisions, which operate to reduce disabled persons' statutory rights.[157] That is what happened in *White*.[158] But originalism's threat also may come from the narrowing of certain constitutional provisions that are crucial to Congress's authority to enact pro-disability, federal legislation.[159] "Section 5 of the Fourteenth Amendment, the Spending Clause, or the Commerce Clause" have historically been interpreted to provide authority for pro-disability, federal legislation.[160] Originalism may breathe new

154. *Craig*, 497 U.S. at 853.

155. While *White* was pending in the Iowa Supreme Court (and not on my radar), my focus was on expanding disability rights by securing legislation that allowed courts to appoint guardians ad litem for crime victims with mental disabilities. As my own experience shows, a legislative strategy to secure rights must nonetheless leave ample space for constitutional vigilance and advocacy.

156. Waterstone, *supra* note 1, at 542–44 (describing various attacks on statutory disability rights post-*Cleburne*). While Professor Waterstone's primary focus is on constitutional advocacy to expand disability rights, he broadly envisions constitutional advocacy as "part of [the] effort" needed to keep statutory rights gained through "legislative lawyering." *Id.* at 556.

157. As others have noted, originalism can function to expand, as well as negate, our existing understanding of constitutional rights. *See* Nathalie Beauchamps, *Originalism: A Conservative Doctrine or An Opportunity to Expand Rights?*, HARV. C.R.-C.L.L. REV. (2024) ("What is striking about the *Bruen* opinion is that it represents one of the few ways that originalism is used to expand a right rather than to limit it. While most progressives view originalism as a rights-stripping doctrine, even conservative jurists have failed to take originalism to its logical extent by exercising the various ways it could be used to expand rights."). It is this expansion of the constitutional rights of some—in this example, confrontation rights of criminal defendants—that may result in the reduction of others' statutory rights.

158. *White*, 9 N.W.3d at 9–11.

159. Waterstone, *supra* note 1, at 542–46.

160. *Id.* at 529 (discussing US. CONST. art. I, § 8, cl. 1, 3; US. CONST. amend. XIV, § 5).

life[161] into challenges regarding Congress's authority to enact crucial legislation such as the Americans with Disabilities Act.[162]

IV. A NEW DISABILITY CONSTITUTIONAL ADVOCACY

Having recognized the potential implications of originalism for disability rights, the question becomes how disability advocates might respond. This Part first explores what constitutional advocacy in the age of originalism might entail. Following that, it considers how advocates can use amici briefs to advance a disability perspective.

A. Disability Constitutional Advocacy Under Originalism

First and foremost, disability constitutional advocacy in the age of originalism requires awareness of the threat and thus vigilance.[163] Disability advocates should expect direct and indirect challenges to statutory disability rights, even those that are long-standing.[164]

Still, recognition and vigilance only go so far as a strategy. The question quickly shifts to what advocates can do. Constitutional advocacy to address the threat of originalism necessarily entails claiming whatever space originalism allows to advocate for disability rights. One can note the limitations and even contradictions of originalism yet nonetheless strategically advocate within it.[165]

Frontal attacks on originalism will only go so far with those courts comprised of originalists. As Professor Lawrence Solum said, "[i]f conservative judges are making selective use of history to make originalist arguments for conservative result, then the only way to sow this is to make

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161. While concerns occasioned by originalism may be new, that a new constitutional jurisprudence might threaten parts of the ADA is not. *See* James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91, 96 (2000) (describing the potential of "the new jurisprudence of federalism" to "disrupt[] the effectiveness of the federal civil rights laws, including the ADA, as they apply to state and local governments"); *see also* Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 369 (2024) (finding that *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984) is overruled, the Court uses originalism without regard to the specific implications for disability rights in terms of regulations).

162. U.S. DEP'T OF JUST. C.R. DIV., *Protecting the Constitutionality of the ADA*, ARCHIVE, https://archive.ada.gov/5yearadarpt/iii_constitionality.html [https://perma.cc/A2CL-TBR2].

163. *See supra* Part II.

164. *See supra* pp. 194–96; pp. 200–04.

165. *See, e.g.*, Clemente, *supra* note 23, at 2803 ("While this Note employs an originalist methodology, it does not enter the larger debate regarding the merits of originalism.").

better originalist arguments to the contrary."[166] This does not require allegiance to the doctrine of originalism, nor does it foreclose non-originalist arguments or other legal strategies.[167]

But by framing arguments and information within an originalist framework, disability advocates can bring a disability perspective into constitutional discourse that impacts disabled people.[168] For example, an argument that attempts to tie present day harm to the original meaning of a constitutional provision will likely fare better than an argument that relies on an evolving meaning of the Constitution, e.g., an argument that the present day harm should govern our interpretation of the provision.[169]

A disability lens also can bring forth perspectives and information that would not otherwise be before a court. As *White* shows, disability advocates cannot rely on the parties, or courts, to advance a disability perspective.[170] Proactive constitutional advocacy thus brings "disability-specific"[171] information into the constitutional discourse, reducing harmful disability "erasure."[172] In this way, constitutional advocacy by disability

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166. Debra Cassens Weiss, *Justice Jackson Uses Originalism to Undercut 'Conservative Juristocracy'*, A.B.A. J. (Dec. 13, 2022), https://www.abajournal.com/news/article/justice-brown-jackson-uses-originalism-to-undercut-conservative-juristocracy#google_vignette [https://perma.cc/Z6NG-BR9E].

167. For example, arguments steeped in originalism may not adequately convey the important policy reasons for different legislation and practices. As *White* shows, those policy reasons provide critical context that should be included as part of the disability perspective. *See* State v. White, 9 N.W.3d 1, 16–19 (Iowa 2024) (Christensen, C.J., dissenting).

168. *See* Waterstone, *supra* note 1, at 531–32 (describing the importance of "disability-specific thinking" in constitutional discourse).

169. *See* William N. Eskridge Jr., *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1116–17 (2015). Professor Eskridge did not, for example, argue that discrimination against same-sex marriage is unconstitutional because it is bad for people; he framed his argument in terms of original meaning which rejected class legislation. *Id.* at 1091–99. "Class legislation" refers to "laws burdening or advantaging minority without advancing a general public purpose." *Id.* at 1078–79. Professor Eskridge describes an Iowa Supreme Court case—from the mid-1800s no less—that struck down "class legislation" that treated land claims of "so-called half-breeds" differently. *Id.* at 1079 (quoting Reed v. *Wright*, 2 Greene 15, 29 (Iowa 1849).

170. *See White*, 9 N.W.3d at 16–19.

171. *See* Jasmine Harris, *The Aesthetics of Disability,* 119 COLUM. L. REV. 896, 969 n.448 (2019).

172. *See* Morgan, *supra* note 14, at 561 (showing how a "disability lens" in constitutional cases that impact people with disabilities can help reduce the "disability erasure" that reinforces "existing inequalities and subordination based on disability"). In the context of originalism, disability erasure entails more than just prioritizing the needs and experiences of person without disabilities over those with disabilities. It means that the experiences of people with disabilities may be left out completely absent a proactive approach to constitutional advocacy.

advocates may, even if not successful in the short-term, have the long-term value of advancing "core values" of disability rights.[173]

In suggesting that disability rights advocates constitutionally engage within the framework of originalism, I do not mean to suggest that this strategy is not without real challenges. One need not be a constitutional law scholar to understand that reverting to an understanding of rights that existed at a time when society mistreated and misunderstood disabled people is not ideal.[174]

Yet, I believe disability advocates should take heed of what Justice Kagan said at her confirmation hearing: that "[w]e are all originalists now."[175] That is, if originalism is here to stay in some way, shape, or form, advocacy for people with disabilities includes constitutional advocacy within the framework of originalism.[176] Ignoring originalism simply increases the likelihood that perspectives of people with disabilities will be left out of the new constitutional discourse originalism occasioned.[177]

Indeed, I would argue that one criticism of originalism—that judges can and do use it opportunistically[178]—also can be viewed as an

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173. *See* Waterstone, *supra* note 1, at 527 ("[R]eluctance to pursue constitutional claims impoverishes the disability rights movement, as constitutional claims engage courts in articulating our core values in a way that statutory claims do not.").

174. The Center for Disability Rights put bluntly why originalism is threatening to disabled people, posing the question of "[w]hat were the lives of people with significant disabilities like before 1868?" and answering it with a flat-out, "[n]on-existent." *SCOTUS Dobbs Decision Raises Serious Concerns for Future of Olmstead*, CTR. FOR DISABILITY RTS., https://cdrnys.org/blog/advocacy/scotus-dobbs-decision-raises-serious-concerns-for-future-of-olmstead/ [https://perma.cc/R7FS-9N5B].

175. *See* Kelsey Reichmann, *Justice Kagan Says it's Time for a Supreme Court Ethics Code*, COURTHOUSE NEWS SERV. (Sept. 22, 2023), https://www.courthousenews.com/kagan-time-for-supreme-court-ethics-code/ [https://perma.cc/A2BH-ZE2X]. In explaining her famous quote from her confirmation hearings, Justice Kagan has said that "the actual original understanding of what the document was meant to do and how it was meant to work" was that "constitutional meaning [would] evolve[]." *Id.*

176. *See* Damon Root, *Ketanji Brown Jackson and the Future of Progressive Originalism*, REASON (Dec. 15, 2022, 12:20 PM), https://reason.com/2022/12/15/ketanji-brown-jackson-and-the-future-of-progressive-originalism/ [https://perma.cc/4ZEZ-X9NN] (opining that if progressives simply "reject[] and denounc[e] originalism," they miss the opportunity to "properly challenge" originalist arguments). For a discussion of what "progressive originalism" may entail, and thus how it differs from conservative originalism, see, e.g. Jack Balkin, *Originalism is for Progressives*, BALKINIZATION (July 25, 2007), https://balkin.blogspot.com/2007/07/originalism-is-for-progressives.html [https://perma.cc/Z2ZH-T8VY].

177. *See* Root, *supra* note 176.

178. *See* Eskridge, *supra* note 169, at 1116 (challenging originalist scholars to engage with "the original meaning evidence" Professor Eskridge assembled supporting same-sex marriage and observing that "[i]f this does not happen, and these theorists and scholars do not step up to the plate, that is evidence that original meaning jurisprudence is hogwash,

opportunity for disability rights.[179] Even for a non-constitutional law scholar, it is evident that the search for "original meaning" is not one-dimensional,[180] or even among conservatives, a settled one.[181] The recent

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just another way for scholars and judges to filter their preferred constitutional results through a purportedly neutral mechanism, precisely the charge that critical academics have been making") (footnotes omitted).

179. Just as "the Marriage Equality Cases offer originalists and social movement lawyers important opportunities that they must not ignore or pass up," so too do constitutional cases impacting disability rights. *Cf.* Eskridge, *supra* note 169, at 1114. Indeed, the dissent in *State v. White*, 9 N.W.3d 1, 20 (Iowa 2024) at various points engages within the framework of originalism. *Id.* ("Indeed, the type of child abuse committed by the defendant here potentially would not even have been prosecuted in the nineteenth century. *See Rowe v. Rugg*, 117 Iowa 606, 91 N.W. 903, 903–04 (1902) (stating the "general rule" that a parent may administer "moderate" corporal punishment to a child); *State v. Gillett*, 56 Iowa 459, 9 N.W. 362, 363 (1881) (approving a jury instruction to that effect).").

180. As Professor David Crump explains, an originalist interpretation can be conceptualized in "three discrete steps," each of which arguably leaves room for advocacy. David Crump, *The Three Steps Required for Originalist Interpretation: How Distortions Appear at Each Stage*, 61 SANTA CLARA L. REV. 353, 355 (2021). Specifically:

> First, the interpreter must recognize the need for a reading that goes beyond the obvious and the literal: a reading, that is, that requires originalism. Second, the reader must figure out the original meaning, a puzzle that often is confusing. Finally, there is the third step: analogizing the original meaning with the claimed parallels of today.

Id.

181. *See, e.g.*, Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism: Fourth Amendment Jurisprudence During the Career of Justice Scalia*, 70 HASTINGS L.J. 75, 127–28 (2019). Rosenthal argues:

> As the preceding examples illustrate, the basic problem with an effort to apply Framing-era understandings to far different contemporary search and seizure controversies is the dubious nature of the entire enterprise. There is great danger, as Stephen Griffin has observed, when "originalism depends on using history without historicism, the use of evidence from the past without paying attention to historical context." When one gives proper attention to context, however, there may be no reliable means for analogizing or adapting Framing era understandings in a vastly different historical context. The past does not always contain neat parallels to the present. Justice Scalia, for one, grasped this point. In *Jones*, in response to Justice Scalia's reasoning that the attachment of a GPS device to a vehicle and its subsequent monitoring was a "search" within the original meaning of the Fourth Amendment because, in the Framing-era, any physical occupation of the property of another was regarded as a trespass, Justice Alito wrote: "[I]t is almost impossible to think of late-18th-century situations that are analogous to what took place in this case," such as when "a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner," which "would have required either a gigantic coach, a very tiny constable, or both." It is hard to disagree. Indeed, Justice Scalia responded: "[I]t is quite irrelevant whether there was an 18th century analog." That conclusion seems inescapable for an originalist, at least absent evidence that some methodology for conducting

"Trump too small" First Amendment case showcases different perspectives on originalism among the SCOTUS's conservative justices.[182] There, Justice Amy Coney Barrett—who describes herself as an originalist[183]—wrote separately to criticize the majority's brand of originalism:

> The Court claims that "history and tradition" settle the constitutionality of the names clause, rendering it unnecessary to adopt a standard for gauging whether a content-based trademark registration restriction abridges the right to free speech. That is wrong twice over. First, the Court's evidence, consisting of loosely related cases from the late-19th and early-20th centuries, does not establish a historical analogue for the names clause. Second, the Court never explains why hunting for historical forebears on a restriction-by-restriction basis is the right way to analyze the constitutional question.[184]

These examples suggest that some room for advocacy exists within originalism.[185]

> analogical reasoning or adaptation was somehow baked into the original meaning of the Fourth Amendment.

Id. (footnotes omitted).

182. *See* Vidal v. Elster, 602 U.S. 286, 311–12, 319 (2024) (Barrett, J., concurring in part); *see also* Moore v. United States, 602 U.S. 572, 592 (2024) (looking to history "before and after ratification of the Sixteenth Amendment"); United States v. Rahimi, 602 U.S. 680, 716–17 (2024) (Kavanaugh, J. concurring) (looking to the history of the First Amendment).

183. *See* Calvin R. Coker & Joel L. Reed, *A Handmaid's Tale: Amy Coney Barrett, Originalism, and the Specter of Religion*, 57 COMMC'N & DEMOCRACY 153, 162 (2023) (quoting from Justice Barrett's confirmation hearing testimony: "I interpret its text as text, and I understand it to have the meaning that it had at the time people ratified it. So that meaning doesn't change over time and it's not up to me to update it . . .").

184. *Vidal*, 602 U.S. at 311 (Barrett, J., concurring in part). Another self-described originalist, Justice Brett Kavanaugh (joined by Chief Justice Roberts), suggested in a concurrence a different view than the majority in *Vidal* on the significance of "historical pedigree." *See id.* (Kavanaugh, J., concurring in part) ("In my view, a viewpoint-neutral, content-based trademark restriction might well be constitutional even absent such a historical pedigree."). Tom "T.M." Wolf, director of Democracy Initiatives at the Brennan Center tweeted this about the ruling: "SCOTUS's opinion in Vidal v. Elster = rich text for the Court's originalist turn. Lots of scuffling about how/if to use history. Barrett with scorching anti-originalist commentary. Sotomayor tag-teaming. All told, more signs of rifts in the originalist consensus." Tom Wolf (@tomTMwolf), X (June 13, 2024, 12:39 PM), https://x.com/tomTMwolf/status/1801308324106818003 [https://perma.cc/6PVX-P3EM].

185. The Court's newest member, Justice Ketanji Brown Jackson, has advanced a "progressive originalism." *See* Root, *supra* note 176. While this Article focuses on the

Disability lawyers may be hesitant to advocate within originalism for another reason: it is not our sphere. But we need not be constitutional law scholars to advocate for people with disabilities. Indeed, most judges and justices who invoke originalism are not constitutional law scholars.[186] That has not stopped them from expounding on original meaning,[187] and disability rights advocates should enter "the arena,"[188] lest a disability perspective be left out of this new constitutional discourse.

B. Use of Amicus Briefs

If constitutional advocacy to address originalism in courts is the goal, disability advocates need to consider realistic ways to achieve it. An obvious constraint, highlighted by *White*, is that disabled people may not be a party in cases affecting their rights and well-being.[189] Different options exist, ranging from advocating for favorable legislative findings, filing declaratory actions to perhaps get ahead of an issue, to filing amicus curiae briefs.[190] Indeed, advocating for a constitutional amendment may be an option, particularly at the state level.[191] While all options add value,

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implications of conservative originalism, it seems likely that progressive originalism could itself have influence over conservative originalism. *Id.*

186. *See* Smith, *supra* note 23, at 46. Smith states:

> The Court's opinions in *Bruen*, *Dobbs*, and *Kennedy* demonstrate a wide disconnect between academic discussion of originalism and the reality of judicial practice. While a sub-discipline of originalist scholars continue to churn out papers and books justifying the original public meaning approach, explaining the nuances of originalism, and claiming to determine the original public meaning of various words and phrases in the Constitution, the Court reached its decisions in *Bruen*, *Dobbs*, and *Kennedy* without any reliance on this work, direct or indirect.

Id. at 46.

187. *See, e.g.*, *supra* notes 146–52 and accompanying text.

188. *See* Theodore Roosevelt, *26th President of the United States: 1901 - 1909 Address at the Sorbonne in Paris, France: "Citizenship in a Republic,"* AM. PRESIDENCY PROJECT (Apr. 23, 1910), https://www.presidency.ucsb.edu/documents/address-the-sorbonne-paris-france-citizenship-republic [https://perma.cc/27D6-VBQM] (transcript) ("The credit belongs to the man who is actually in the arena . . . who strives valiantly; who errs, and comes short again and again, because there is no effort without error and shortcoming . . . .").

189. *See supra* text accompanying notes 113–14.

190. In addition to amicus briefs, disability advocates should also consider how legislative findings can support disability constitutional law for new legislation. For a discussion of the uses and purposes of legislative findings, see Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669 (2019).

191. Unlike amending the Federal Constitution, amendments to state constitutions can be a much more feasible undertaking. *See* Barker v. Hazeltine, 3 F. Supp. 2d 1088, 1092–94 (D.S.D. 1998) (comparing the heightened requirements for amending the federal constitution to the requirements for amending state constitutions); *see also* John

amicus briefs provide a straightforward means to advance a disability perspective in constitutional cases that implicate disability rights.[192]

Amicus, "friend of the court," briefs enable non-parties to file briefs to "assist the court in resolving issues."[193] Courts do not know what they do not know, and amicus briefs can offer information and perspectives not otherwise before the court. The Cato Institute, which advocates for libertarian-leaning constitutional interpretation, has a robust amicus program, which it describes as "provid[ing] information for the [c]ourt about the scope of the problem and the effects of possible rulings."[194] While disability rights organizations have filed amicus briefs, it appears there is room for more widespread engagement and a newfound need for such under originalism.[195]

While leave of court is typically required to file an amicus brief, court rules suggest that amicus briefs would be allowed in cases impacting disabled people. In Iowa, for example, the proposed amicus curiae "must identify the interest of the applicant and state the reasons an amicus curiae brief would assist the court in resolving issues preserved for appellate review in the case."[196] Further, the rules note when an amicus brief likely will be allowed, including when "[t]he proposed amicus curiae has a unique perspective or information that will assist the court in assessing the ramifications of any decision rendered in the present case."[197] An amicus brief on behalf of persons with mental disabilities in *White* would have done just that by providing a disability perspective about the Confrontation Clause question before the court.

Dinan, *Constitutional Amendment Processes in the 50 States*, STATE CT. REP., (July 24, 2023), https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states [https://perma.cc/K3DJ-2PZU].

192. *See, e.g.*, Anthony J. Franze, *The Confrontation Clause and Originalism: Lessons from* King v. Brasier, 15 J.L. & POL'Y 495, 495–96 (2008) (discussing the use and limits of originalism in interpreting the Confrontation Clause); Brief for William N. Eskridge Jr., et al. as Amici Curiae in Support of Respondents, Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144), 2013 WL 840011.

193. *See, e.g.*, IOWA R. CIV. P. 6.906.

194. *See Cato at the Supreme Court*, CATO INST., https://www.cato.org/about/cato-amicus-program [https://perma.cc/9JGY-HRXL].

195. For example, the Disability Rights Legal Center, has filed about two dozen amicus briefs in the past fifteen years. *Amicus Briefs*, DISABILITY RTS. LEGAL CTR., https://thedrlc.org/civil-rights/amicus-briefs/ [https://perma.cc/U4XD-QQ4Z]. The vast majority of these pertained to federal statutory issues. Likewise, the American Association on Intellectual and Developmental Disabilities notes on its amicus curiae briefs webpage that it "has taken a stand in US court cases on a number of issues . . . ." *See Amicus Curiae Briefs*, AM. ASS'N ON INTELL. DEV. DISABILITIES, https://www.aaidd.org/news-policy/policy/amicus-curiae-briefs [https://perma.cc/4JFG-FGF8].

196. IOWA R. CIV. P. 6.906.

197. *Id.*

The content of any amicus brief will vary because even under originalism, constitutional advocacy looks different in different cases.[198] An amicus brief filed on behalf of a children's rights organization illustrates one kind of constitutional advocacy that can occur within originalism.[199] In *Davis v. Washington*, the SCOTUS examined whether the use of a spontaneous, out-of-court statement to a government official implicated the Confrontation Clause.[200] The purpose of the brief was to "alert the Supreme Court to the impact its decision interpreting the Confrontation Clause may have on child abuse prosecutions":

> When a national children's rights organization asked me to draft an amicus brief in *Davis v. Washington* to alert the Supreme Court to the impact its decision interpreting the Confrontation Clause may have on child abuse prosecutions, I had no idea it was going to thrust me back in time to the laws and practices of seventeenth and eighteenth-century England. It was not long, however, before I made the acquaintance of Sir Walter Raleigh, the Privy Council, and the Marian statutes. History, I was reminded, has become central to confrontation doctrine since the Supreme Court's 2004 decision in *Crawford v. Washington*.[201]

Another example of constitutional advocacy within originalism is illustrated by an amicus brief filed in the same-sex marriage case. In *Windsor v. United States*,[202] Professor William Eskridge argued that the original meaning of the Equal Protection Clause prohibited same-sex

198. In discussing restrictions on abortion post-*Dobbs*, Professor Powell has explained the importance going forward of "recogniz[ing] how abortion restrictions are part of our nation's ugly history of weaponizing reproduction to subjugate disabled people." Powell, *supra* note 16, at 819. While her ultimate recommendation is that we accomplish this through legislation, her point also resonates in the sphere of constitutional litigation. *See id.*

199. Brief for the National Association of Counsel for Children as Amicus Curiae in Support of Respondents, Davis v. Washington, 547 U.S. 813 (2006) (Nos. 05-5224, 05-5705), 2006 WL 284227.

200. *Davis*, 547 U.S. at 814. The SCOTUS in *Davis* ultimately held the child's statement were not "testimonial" and therefore did not implicate the defendants' Confrontation Clause rights. *Id.* at 828; *see also* Franze, *supra* note 192, at 499 ("Writing for the *Davis* majority, Justice Scalia found no need to address any spontaneous declaration exception to confrontation and instead adopted a new standard for 'testimonial'—limited to the situations presented—that focused on whether the 'primary purpose' of the out-of-court statement was to assist police in responding to an 'ongoing emergency.'").

201. Franze, *supra* note 192, at 495–96.

marriage discrimination.[203] His amicus brief "assembl[ed]" relevant "original meaning evidence" to show that "class legislation," which he framed as including bans on same-sex marriage, violated the Fourteenth Amendment.[204]

Finally, because originalism may value a historical perspective, disability advocates can seek to bring historians into the constitutional discourse through amicus briefs. Recently, a group of historians filed an amicus brief in *United States v. Rahimi*,[205] a case in which the SCOTUS interpreted the Second Amendment in relation to orders banning domestic abusers from having weapons.[206] At least one commentator suggested that the historians' brief had a "major—if uncredited—impact on the majority opinion."[207]

Whether outcome changing or not, amicus briefs would bring a disability perspective that is otherwise missing into cases that impact disabled people. In a case like *White*,[208] an amicus brief—whether filed by a disability rights organization or directly by historians—could provide useful information in support of a favorable original meaning or, alternately, could discredit information about original meaning advanced by a party.[209] More broadly, an amicus brief could, by embracing the framework of originalism, frame the constitutional issue in a way that is, all things being equal, more favorable to disabled people. All of these measures would bring visibility to disabled people as opposed to the invisibility that occurred in *White*.[210]

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203. Eskridge, *supra* note 169, at 1116; *see* Brief of Eskridge Jr., Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144), 2013 WL 840011, at *40–41.

204. *See* Brief of Eskridge Jr., Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144), 2013 WL 840011, at *40–41.

205. United States v. Rahimi, 602 U.S. 680 (2024); Brief for Second Amendment Law Scholars as Amici Curiae in Support of Petitioner, United States v. Rahimi, 602 U.S. 680 (2024) (No. 22-915), 2023 WL 5489050.

206. *Rahimi*, 602 U.S. 680.

207. *See* Wolf, *supra* note 184 (discussing the role that the historian's amicus brief played in informing the Court's discussion of "spousal abuse").

208. State v. White, 9 N.W.3d 1 (Iowa 2024).

209. The dissent in *White* did this when it criticized the majority's use of "blurbs from two cases decided some 150 years ago." *See id.* at 17 (Christensen, C.J., dissenting) (criticizing the majority's characterization of State v. Reidel, 26 Iowa 430 (1869) and State v. Collins, 32 Iowa 36 (1871)). As the dissent explained, in one case the discussion relating to the child witness was dicta and the other case did not even involve a child witness.

210. *See supra* Section IV.B and text accompanying notes 113–16.

V. CONCLUSION

As *State v. White*[211] illustrates, the rise of originalism presents new challenges to the rights of people with disabilities. To address these challenges, disability rights advocates must prioritize a new kind of constitutional advocacy, which seeks to engage with the Constitution to protect existing statutory rights. Advocacy under originalism entails not only recognizing the wide-ranging threat posed by originalism but also using the space that exists within originalism to advocate for a pro-disability perspective. While an originalist interpretation of constitutional rights is far from ideal for people with disabilities, advocacy within an originalist framework is essential, not optional. Amici briefs allow disabled people's perspective to be included in the new constitutional understandings occasioned by originalism.

211. *White*, 9 N.W.3d at 1 (majority opinion).