

Gambling, Greyhounds, and Gay Marriage: How the Iowa Supreme Court Can Use the Rational-Basis Test to Address *Varnum v. Brien*

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ABSTRACT: In the 2007 case Varnum v. Brien, a Polk County, Iowa judge ordered the state of Iowa to begin processing marriage licenses for same-sex couples. One of the rationales for striking down the gay-marriage ban was that it failed to pass rational-basis review. If the Iowa Supreme Court chooses to uphold the ruling, it should choose to apply rational basis “with teeth,” a form of scrutiny that has appeared in U.S. Supreme Court cases where the court suspected invidious legislative motives were at work. Applying this test would most accurately follow U.S. Supreme Court precedent and would be a wise tactical move in handling such a volatile issue, leaving open future legislative and judicial avenues for addressing gay marriage.

| | | |
|------|---|-----|
| I. | INTRODUCTION..... | 415 |
| II. | LEGAL CONTEXT..... | 417 |
| | A. RATIONAL BASIS | 418 |
| | 1. The Traditional Deferential Rational-Basis Test..... | 419 |
| | 2. Rational Basis with Bite..... | 420 |
| | B. GAY-MARRIAGE RULINGS IN OTHER STATES..... | 422 |
| III. | IOWA LAW | 424 |
| | A. IOWA SUPREME COURT JURISPRUDENCE..... | 425 |
| | B. RACII AND RATIONAL-BASIS REVIEW IN IOWA..... | 427 |
| | C. VARNUM V. BRIEN..... | 430 |

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| | | |
|-----|---|-----|
| IV. | ADDRESSING <i>VARNUM</i> AND THE IOWA SAME-SEX-MARRIAGE BAN | 432 |
| A. | <i>LOOKING TO U.S. SUPREME COURT PRECEDENT TO FASHION A TOOTHY RATIONAL-BASIS ANALYSIS IN THE SAME-SEX-MARRIAGE SETTING</i> | 433 |
| B. | <i>RATIONAL-BASIS-WITH-TEETH REVIEW SHOULD APPLY TO THE IOWA SAME-SEX-MARRIAGE BAN</i> | 438 |
| C. | <i>RACI II AS PRECEDENT</i> | 440 |
| D. | <i>UPHOLDING VARNUM WITHOUT PROVOKING BACKLASH</i> | 442 |
| V. | CONCLUSION | 448 |

I. INTRODUCTION

With the case *Varnum v. Brien*,¹ Judge Robert Hanson, a Fifth District Court Judge in Polk County, Iowa, stirred the nation's political passions when he ordered the state to begin processing marriage certificates for gay couples.² The decision came in the thick of the presidential-caucus season, and thus incited fear of an impending backlash against the gay-rights movement.³ Conservative candidates clamored over each other to condemn the ruling,⁴ while gay couples clamored to get marriage licenses in the narrow hours before Judge Hanson stayed his ruling pending appeal.⁵

There is a chance that the ruling might survive. Afoot for decades now, the forward-marching gay-rights movement has both inspired popular approval of gay lifestyle⁶ and prompted pleas to legalize same-sex marriage.⁷ More Americans today believe that homosexuality is an inherited trait rather than an acquired one, and in the past twenty-five years, support for homosexuality as an alternative lifestyle has increased from thirty-four percent to fifty-seven percent.⁸ *Lawrence v. Texas*, *Romer v. Evans*, and their

1. *Varnum v. Brien*, No. CV5965 (Iowa Dist. Ct. Aug. 30, 2007), *appeal filed*, No. 05771 (Iowa 2007), available at <http://data.lambdalegal.org/pdf/legal/varnum/varnum-d-08302007-ia-district.pdf>.

2. *Iowa Judge Stays Ruling That OK'd Gay Marriage*, MSNBC.COM, Aug. 31, 2007, <http://www.msnbc.msn.com/id/20531786/>; Teddy Davis, *Iowa Gay Marriage Ruling Stirs '08 Race*, ABC NEWS.COM, Aug. 31, 2007, <http://abcnews.go.com/Politics/Decision2008/story?id=3548239>.

3. See Dan Gilgoff, *Gay Rights Advance May Be Pyrrhic Victory*, POLITICO, Sept. 5, 2007, <http://www.politico.com/news/stories/0907/5659.html> (predicting political damage to the gay-rights movement due to the *Varnum* ruling).

4. See Posting of Michael Cooper to The Caucus Blog, *Iowa + Gay Marriage = Candidate Statement*, <http://thecaucus.blogs.nytimes.com/2007/08/30/iowa-gay-marriage-candidate-statement/> (Aug. 30, 2007, 18:49 EST) (referring to Mitt Romney's statement condemning the ruling as the act of an "activist court").

5. David Pitt, *Iowa Gay Marriage Applications Halted*, USA TODAY.COM, Aug. 31, 2007, http://www.usatoday.com/news/nation/2007-08-30-338900618_x.htm.

6. Lydia Saad, *Tolerance for Gay Rights at High-Water Mark*, GALLUP, May 29, 2007, <http://www.gallup.com/poll/27694/Tolerance-Gay-Rights-HighWater-Mark.aspx>.

7. See, e.g., Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L.J. 134, 134-70 (1987) (explaining the constitutional basis for upholding same-sex marriages); Karen M. Loewy, *The Unconstitutionality of Excluding Same-Sex Couples from Marriage*, 38 NEW ENG. L. REV. 555, 555-60 (2004) (discussing various arguments against gay marriage and why they should fail); Vincent J. Samar, *Privacy and Same-Sex Marriage: The Case for Treating Same-Sex Marriage as a Human Right*, 68 MONT. L. REV. 335, 336-48 (2007) (arguing that same-sex marriage is a human right that society should protect). See generally WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996) (arguing for same-sex marriage); JASON PIERCESON, *COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA* (2005) (providing a broad history of gay rights in North America); Richard A. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 MICH. L. REV. 2456 (1994) (providing an analysis of the justifications of civil-rights law).

8. Saad, *supra* note 6.

ancestors have made provisions that classify against homosexuals increasingly difficult to justify.⁹

Should the Iowa Supreme Court choose to strike down the same-sex-marriage ban, *Varnum* presents a chance for the court to do so without granting full-blown marriage rights to same-sex couples. The court need not exacerbate the ongoing culture war by treating homosexuals as a protected class or by embracing an all-inclusive definition of marriage. Instead, the court could use a minimalist rational-basis “with bite” analysis to invalidate the same-sex-marriage ban and leave the state’s elected representatives to negotiate for full gay-marriage rights in public view.¹⁰ A rational-basis decision would shift the debate away from the divisive issue of marriage back to human equality—from “Do homosexuals deserve the traditional privilege of marriage?” to “How should we provide equal access to government benefits and protections to all people, including homosexuals?” In the distant future, the outcome will be the same, but the journey to that point could actually be shorter and less traumatic.

Evidence already exists that the Iowa Supreme Court is willing to exploit a more rigorous rational-basis analysis when it needs to.¹¹ In 2004, the court handed down *Racing Ass’n of Central Iowa v. Fitzgerald* (“*RACI II*”), a challenge to substantially higher tax rates that the state imposed on gambling at racetracks compared to gambling in riverboat casinos.¹² The U.S. Supreme Court had remanded the case, ruling that the tax did not violate conventional rational-basis equal protection.¹³ Nonetheless, the Iowa Supreme Court applied its own rational-basis-with-bite analysis and found that the law violated Iowa’s equal-protection clause.

Likewise, in handling *Varnum*, the Iowa Supreme Court could apply a heightened rational-basis-with-bite test to invalidate the same-sex-marriage ban. This Note does not advocate in favor of or against striking down the ban, but rather advocates for a particular method of striking down the ban if the court chooses that path. Part II of this Note is an overview of U.S. Supreme Court case law. It discusses cases where the Court utilized the standard regimen of equal-protection scrutiny, as well as more subtle cases

9. Adrienne Butcher, Note, *Selective Constitutional Analysis in Lawrence v. Texas: An Exercise in Judicial Restraint or a Willingness to Reconsider Equal Protection Classification for Homosexuals?*, 41 HOUS. L. REV. 1407, 1430 (2004) (“[P]ost-*Lawrence* legislators will be hard-pressed to conjure legitimate public interests to justify antihomosexual discrimination considering both *Lawrence*’s decriminalization of homosexual sex and the decline of morality-based legislation.”).

10. See *infra* Part IV.D (discussing how a minimalist decision could avoid backlash against the gay-rights movement).

11. See *infra* Part III.B (describing the court’s novel application of rational-basis review in *Racing Ass’n of Central Iowa v. Fitzgerald* (*RACI II*), 675 N.W.2d 1 (Iowa 2004)).

12. *RACI II*, 675 N.W.2d at 3–5.

13. *Id.* at 4.

where the Court felt motivated to protect a disfavored class of people and applied a heightened rational-basis test “with teeth.” Part II concludes by describing state-level litigation over gay-marriage prohibitions and contrasting cases that employ standard rational-basis review to uphold same-sex-marriage bans with those that employ more exacting levels of analyses to strike them down. Part III describes Iowa law as it stands and evaluates the strong possibility that the *RACI II* decision provides grounds for applying a more rigorous inquiry into the state’s gay-marriage ban. Part IV advocates for the application of a toothy rational-basis inquiry in the *Varnum* case in order to remain faithful to U.S. Supreme Court precedent and to minimize the backlash of upholding a ruling that invalidates the Iowa gay-marriage ban.

II. LEGAL CONTEXT

Courts could easily adapt U.S. Supreme Court precedent to protect homosexuals from same-sex-marriage bans on the grounds that marriage is a fundamental right.¹⁴ The most relevant case is *Loving v. Virginia*,¹⁵ in which the Court struck down Virginia’s anti-miscegenation law, which prohibited interracial marriages, holding that it violated the Due Process Clause and the Equal Protection Clause.¹⁶ After *Loving*, the Court also wielded both clauses to invalidate state laws that invaded the right to marry for specific classes of people. For instance, the Court has struck down state laws denying marriage to men who could not prove that their child-support payments were up-to-date¹⁷ and laws interfering with prison inmates’ right to marry.¹⁸ As the Court has explained, the right to marry is an essential liberty because it is “an expression of emotional support and public commitment.”¹⁹ With

14. See Richard M. Lombino, II, *Gay Marriage: Equality Matters*, 14 S. CAL. REV. L. & WOMEN’S STUD. 3, 11–12 (2004) (“[T]he Supreme Court has found that the right to marry is a fundamental liberty protected by the Constitution through both the Equal Protection Clause and the Due Process Clause.”). The fundamental nature of the right to marry has received treatment in numerous legal works. See, e.g., 16A AM. JUR. 2D *Constitutional Law* § 575 (1998) (identifying marriage as a fundamental right); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 123–26 (2007) (discussing the early cases defining marriage as a fundamental right); Randi E. Frankle, Comment, *Does a Marriage Really Need Sex?: A Critical Analysis of the Gender Restriction on Marriage*, 30 FORDHAM URB. L.J. 2007, 2009–10 (2003) (summarizing case law on this point).

15. *Loving v. Virginia*, 388 U.S. 1 (1967).

16. *Id.* at 4–7, 12–13.

17. *Zablocki v. Redhail*, 434 U.S. 374, 382–87 (1978).

18. *Turner v. Safley*, 482 U.S. 78, 82 (1987); see also *Boddie v. Connecticut*, 401 U.S. 371, 372–83 (1971) (invalidating a law requiring divorce seekers to pay filing fees and court costs because it unduly interfered with the right to marry).

19. *Turner*, 482 U.S. at 95–96; see also Ariel J. Graff, *Free Exercise and Hybrid Rights: An Alternative Perspective on the Constitutionality of Same-Sex Marriage Bans*, 29 U. HAW. L. REV. 23, 44 (1997) (“[In *Turner*,] the Court recognized that individuals’ fundamental freedom to marry is

the basic right to marry as a foundation, this Note analyzes how a rational-basis-with-teeth review could evolve into a potent instrument for dealing with same-sex-marriage bans.

Although the Iowa Supreme Court could apply heightened scrutiny to the state gay-marriage ban under either the Due Process Clause or the Equal Protection Clause, rational basis with teeth would more closely adhere to established U.S. Supreme Court precedent. A traditional rational-basis analysis is almost completely deferential to the government's chosen goal and the means that the government chooses to achieve that goal. Alternatively, rational basis with teeth refers to a body of past U.S. Supreme Court cases in which the Court purported to apply the traditionally deferential rational-basis analysis but struck down a state enactment anyway, suggesting that the Court applied more scrutiny than it purported.²⁰ Rational-basis-with-teeth cases most often came up when the Court suspected that the legislating body harbored animus toward a class of people. These cases are uncommon, but not so uncommon as to rule them out as effective precedent.

A. RATIONAL BASIS

Most Fourteenth Amendment cases are mundane rational-basis inquiries. Similar methods of analysis apply to Fourteenth Amendment claims under both the Due Process Clause and the Equal Protection Clause. Courts have traditionally used three levels of scrutiny when addressing equal-protection cases.²¹ The highest of the three tiers is strict scrutiny, a high standard reserved for statutes that burden a "suspect class" or invade a "fundamental right."²² The second tier, intermediate scrutiny, is applicable to laws targeting "quasi-suspect classes" such as women, but is still rigorous enough to strike many of them down.²³ Courts apply the rational-basis test to the remainder of equal-protection cases.²⁴ Similarly, strict scrutiny applies to laws that impinge on fundamental freedoms under the Due Process Clause.²⁵ Because there is no middle tier of scrutiny for due-process cases, rational basis applies to the rest. Most rational-basis cases, many of which challenge economic or commercial regulations, employ an exceedingly

not limited to the proactive context, but rather exists as an independent constitutional right.").

20. See *infra* Part II.A.2 (describing these cases in greater detail).

21. EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 14–16 (2004).

22. *Id.* A prototypical strict-scrutiny classification is race. See *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("[Race] classifications are subject to the most exacting scrutiny.").

23. GERSTMANN, *supra* note 21, at 15.

24. 16B AM. JUR. 2D *Constitutional Law* § 813 (2008).

25. 16A AM. JUR. 2D *Constitutional Law* § 387 (1998).

deferential test.²⁶ However, in a few cases where illegitimate legislative motives were lurking, the Supreme Court has struck down statutes by applying rational basis with teeth, a far less deferential analysis.

The Iowa Supreme Court has a choice between the two forms of rational-basis inquiries. As the law stands, the Equal Protection Clause does not include homosexuals as a protected class,²⁷ and the U.S. Supreme Court is no longer predisposed to defining new protected classes.²⁸ Similarly, it is unlikely that the Court would be willing to identify gay marriage as a specific fundamental right under the Due Process Clause.²⁹ As a result, the Iowa Supreme Court could join a very small group of states and blaze a completely novel trail by applying heightened scrutiny to the gay-marriage ban. Alternatively, it could apply a rational-basis-with-bite analysis to invalidate the gay-marriage ban without upending established U.S. Supreme Court precedent.

1. The Traditional Deferential Rational-Basis Test

In traditional jurisprudence, the rational-basis test has been extremely deferential, hardly subjecting legislative actions to scrutiny at all.³⁰ The standard two-step formulation of the test requires that (1) the legislature pursue a legitimate goal and (2) the means chosen to attain that goal are not “arbitrary or irrational.”³¹ In practice, if a court can think of any plausible government interests and can conceive of reasons to support the government’s methods for achieving those interests, the law stands.³²

26. See *infra* Part II.A.1 (describing the deferential rational basis test).

27. Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 268 (6th Cir. 1995); see also *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (refusing to extend protected status to homosexuals); *Doe v. Webster*, 769 F. Supp. 1, 2 (D.D.C. 1991) (“It is widely held that the appropriate level of equal protection constitutional analysis to be employed in cases involving homosexuals is ‘rational basis’ analysis.”).

28. Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 35.

29. *Id.* at 37–38 (suggesting that the Court is reluctant to expand the list of fundamental substantive-due-process freedoms); see also *supra* notes 14–19 and accompanying text (stating that marriage is a fundamental right that could be coupled with more rigorous rational-basis analysis to strike down same-sex-marriage bans).

30. See Daniel A. Crane, *Faith, Reason, and Bare Animosity*, 21 CAMPBELL L. REV. 125, 137 (1999) (stating that rational basis “has been particularly lax”).

31. *E.g.*, *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (demonstrating the Court’s deferential approach under the rational-basis test); *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972) (same); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (same).

32. Neelum J. Wadhvani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 811 (2006); see also *Madden v. Kentucky*, 309 U.S. 83, 88 (1940) (challenger must “negative every conceivable basis” for the law); Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 114–15 (1998) (stating that courts will uphold laws whether or not the “conceivable ‘state of facts’” actually exists, whether the state of facts would be convincing if it

An early manifestation of such a deferential standard arose in *Williamson v. Lee Optical of Oklahoma, Inc.*, a case that upheld a state law forbidding opticians from fitting old or duplicate lenses into eyeglass frames without a prescription.³³ Admitting that the law might be a “needless” and “wasteful” one, the Court nonetheless conjectured its own health and safety justifications for the law.³⁴ Later, in *FCC v. Beach Communications, Inc.*, the Court held outright that a challenger must “‘negative every conceivable basis which might support [the law].’”³⁵ As Justice Stevens’s concurrence pointed out, such a relaxed standard is really no review at all because any explanation that the Court could imagine to justify the law would satisfy the test.³⁶

2. Rational Basis with Bite

The Iowa Supreme Court could rely on cases where the U.S. Supreme Court has subjected state actions to a more aggressive form of rational-basis review. Sometimes called rational basis “with teeth”³⁷ or “bare animosity” review³⁸—among other labels—the Court is less likely to uphold laws that it believes are motivated by invidious animosity.³⁹ Until the late 1960s, the Court applied traditional rational-basis analysis to Fourteenth Amendment cases whenever suspect classifications were absent, regardless of the legislature’s motives.⁴⁰ Eventually, however, the Court made a subtle shift in its approach and began applying a heightened form of rational basis to laws where invidious animosity was present.

did exist, or whether the classification’s supporters ever thought of it in the first place (quoting LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1443 (2d ed. 1988)).

33. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 486 (1955).

34. *Id.* at 487 (stating that the state legislature could have concluded that eyeglass users needed new prescriptions every time they lost or broke lenses).

35. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

36. *Id.* at 323 n.3 (Stevens, J., concurring); Clark Neily, *One Test, Two Standards: The On-and-Off Role of “Plausibility” in Rational Basis Review*, 4 GEO. J.L. & PUB. POL’Y 199, 203 (2006).

37. Wadhvani, *supra* note 32, at 808.

38. Crane, *supra* note 30, at 138.

39. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 60 (1996).

40. In *McDonald v. Board of Election Commissioners*, Chief Justice Earl Warren described the rational-basis test as such, “[S]tatutory classifications will be set aside only if no grounds can be conceived to justify them.” *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 809 (1969). However, by 1972, commentators had noted a shift in some U.S. Supreme Court cases toward a more stringent standard. See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–20 (1972) [hereinafter *Evolving Doctrine*] (noting the new “bite” in the Court’s rational-basis cases); see also Gerald Gunther, *Commentary*, 71 CHI.-KENT L. REV. 813, 814 (1996) (noting that the Burger Court’s rational-basis cases were considerably less deferential than those of the Warren Court).

The 1968 case *Levy v. Louisiana* provided an early example of the Court's use of rational basis with bite to strike down invidious classifications.⁴¹ In *Levy*, the Court struck down a state statute that prevented five illegitimate children from collecting tort damages for the wrongful death of their biological mother, who had raised them; the law would have allowed the damages if the children had been legitimate.⁴² The Court ruled that states have broad powers when classifying people, but that they "may not draw a line which constitutes an invidious discrimination against a particular class."⁴³ The majority purported to apply a rational-basis test, but did not even bother to consider possible legitimate goals underlying the classification against illegitimate children.⁴⁴ In striking the law down, the Court asserted that it had "been extremely sensitive when it comes to basic civil rights and [had] not hesitated to strike down an invidious classification even though it had history and tradition on its side."⁴⁵

In *USDA v. Moreno*, the Court invalidated a law that denied food stamps to individuals who lived in households where one or more persons unrelated to the individual also lived.⁴⁶ Justice Brennan, looking to the legislative history, noted that the law was intended to target "'hippies' and 'hippie communes.'"⁴⁷ The Court struck down the law, stating that "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."⁴⁸

Similarly, in *City of Cleburne v. Cleburne Living Center*, Justice White peered through a municipality's proffered justifications for denying a special-use permit to a home for the mentally retarded, even though he declined to define the mentally retarded as a suspect class.⁴⁹ The city argued that local residents were uneasy about living near a home for the mentally

41. See *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (striking down a classification against illegitimate children in a rational-basis inquiry).

42. *Id.*

43. *Id.* at 71.

44. *Id.* at 71–72.

45. *Id.* at 71 (internal citations omitted). The Court continued to rule in this area under the rational-basis standard until it began overtly applying intermediate scrutiny in 1977. See *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (holding that "classifications based on illegitimacy fall in a 'realm of less than strictest scrutiny'" that "'is not a toothless one'" (citation omitted)). See generally Benjamin G. Ledsham, Note, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373 (2007) (discussing the intermediate-scrutiny standard applied to state bans on same-sex marriage and their effect on illegitimate children).

46. *USDA v. Moreno*, 413 U.S. 528, 537 (1973).

47. *Id.* (quoting the California Director of Social Welfare).

48. *Id.* at 534.

49. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447–49 (1985). Justice White decided that the mentally retarded as a class were both too amorphous and too well protected by statutes to warrant protected status. *Id.* at 442–47.

retarded, that the home's residents would be subject to harassment by junior-high students attending school nearby, and that the home was on an uninhabitable floodplain.⁵⁰ Nonetheless, Justice White ruled that the city's denial "rest[ed] on an irrational prejudice against the mentally retarded" and was therefore invalid under rational-basis review.⁵¹ *Cleburne* is especially notable because it explicitly denied protected status to a group of people, but applied rational basis with teeth to strike down a law that classified against that group nonetheless. Cases from *Levy* to *Cleburne* show that it is not unusual for the U.S. Supreme Court to protect politically unpopular classes of people from hostile government enactments.

B. GAY-MARRIAGE RULINGS IN OTHER STATES

The Iowa Supreme Court has not addressed the state's gay-marriage ban yet, but it would not be alone in striking down a same-sex-marriage ban using a rational-basis-with-teeth analysis. State courts that have accorded some sort of heightened rational-basis scrutiny beyond the traditionally deferential test uniformly strike down same-sex-marriage prohibitions. Conversely, courts in other states applying the traditional deferential rational-basis review typically uphold gay-marriage bans.

A couple of state courts have applied rational basis with teeth to strike down gay-marriage bans. In *Baker v. Vermont*, the Vermont Supreme Court found that, under its more exacting version of the federal rational-basis test, the state's gay-marriage ban was unconstitutional.⁵² The court expressly acknowledged the inconsistent way that the U.S. Supreme Court applied the rational-basis test in cases such as *Moreno* and *Cleburne*, and that, in Vermont, a "more stringent" version applied.⁵³ The court stated that "[j]ust as commentators have noted the United States Supreme Court's obvious yet

50. *Id.* at 447–49.

51. *Id.* at 450. In another case, the Court struck down a Texas law denying access to public schools to children of illegal immigrants. *Plyler v. Doe*, 457 U.S. 202, 227 (1982). While it is unclear exactly which standard of review the Court applied, it rejected the state's proffered justifications for the law as reflecting its "intention to discriminate." *Id.*; see also Crane, *supra* note 30, at 142 (interpreting the holding in *Plyler* as stating that "a mere dislike of the presence of illegal aliens within the borders of the United States would not justify the visitation of punishment upon their innocent children"); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 382 (1999) (stating that the Court in *Plyler* demanded more under rational-basis review than it had ordinarily). See generally Rebecca E. Greenlee, *Equal Protection Analysis Bite Grows Stronger: Plyler v. Doe*, 17 REV. JUR. U. INTERAMERICANA P.R. 335 (1983).

52. *Baker v. Vermont*, 744 A.2d 864, 886 (Vt. 1999); *Developments in the Law: The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2019–20 (2003) (stating that the *Baker* court declined to define homosexuals as a suspect classification or to identify a fundamental right in gay marriage and instead applied a more exacting, state-specific, rational-basis analysis in order to avoid appearing to apply its own value judgment).

53. *Baker*, 744 A.2d at 871–74, 872 n.5.

unstated deviations from the rational-basis standard, so have this Court's holdings often departed from the federal test."⁵⁴ The court then held that the legislature had to devise a statutory scheme to afford the same marriage rights to same-sex couples.⁵⁵ Likewise, the Supreme Judicial Court of Massachusetts struck down its state same-sex-marriage ban in *Goodridge v. Department of Public Health*.⁵⁶ There, the court collapsed its equal-protection and due-process inquiries into a single test, declining to rule on whether the case deserved strict scrutiny because the ban failed even the rational-basis test.⁵⁷ The court found that the extreme mismatch between the ban's ends and means indicated the legislature's prejudice against homosexuals.⁵⁸

Baker and *Goodridge* therefore demonstrate alternative methods of applying the Court's higher anti-animus rational-basis inquiry. In *Baker*, the Vermont Supreme Court explicitly acknowledged that it was following U.S. Supreme Court rational-basis-with-bite cases.⁵⁹ In *Goodridge*, the court did not expressly apply rational basis with bite, but nonetheless struck down the state gay-marriage ban, emphasizing that rationality review is not always "toothless."⁶⁰

New Jersey is another example of a state that applied a seemingly deferential analysis to strike down the state same-sex-marriage ban. In New Jersey, courts require statutes to "bear a substantial relationship to a legitimate governmental purpose,"⁶¹ reflecting a continuum approach rather than the hard-and-fast tier system found in federal jurisprudence.⁶² The New Jersey Supreme Court found that the state's policy of reigning in discrimination against homosexuals, coupled with the harm to children that is caused by withholding the legal benefits of marriage in same-sex-parent households, precluded the state from advancing any legitimate interest in

54. *Id.* at 872.

55. *Id.* at 886.

56. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

57. *Id.* at 960–61; see also Renée M. Landers, *A Marriage of Principles: The Relevance of Federal Precedent and International Sources of Law in Analyzing Claims for a Right to Same-Sex Marriage*, 41 NEW ENG. L. REV. 683, 698 (2007) (discussing the SJC's use of a rational-basis standard of review in *Goodridge*).

58. *Goodridge*, 798 N.E.2d at 968.

59. *Baker v. Vermont*, 744 A.2d 864, 872–73 (Vt. 1999).

60. *Goodridge*, 798 N.E.2d at 960 n.20.

61. *Lewis v. Harris*, 908 A.2d 196, 212 (N.J. 2006) (citing *Caviglia v. Royal Tours of Am.*, 842 A.2d 125, 132 (N.J. 2004)).

62. In equal-protection cases, the New Jersey Supreme Court balances the nature and significance of the affected right, how extensively the government intrudes on that right, and the public necessity for doing so. *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985). This is a sliding-scale approach where the more important the personal right is, the greater the public justification must be to sustain the law invading that right. *Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth Twp.*, 364 A.2d 1016, 1036 (N.J. 1976).

banning same-sex marriages.⁶³ The court went on to hold that the legislature had to either allow same-sex couples to marry or create a separate scheme to provide same-sex couples the same rights as other married couples.⁶⁴ Only the state courts that apply the conventional rational-basis level of review predictably uphold their states' same-sex-marriage bans.⁶⁵ The highest courts of Washington⁶⁶ and Maryland⁶⁷ applied traditionally deferential rational-basis tests in upholding their state bans. In *Hernandez v. Robles*, the New York Court of Appeals merely asked whether a "rational legislature" could decide to make the benefits of marriage available only to opposite-sex couples.⁶⁸ The court stated that the legislature could rationally have found that it could promote stability in opposite-sex relationships by withholding access to marriage from homosexuals and that, despite empirical evidence to the contrary, the legislature could rationally believe that having opposite-sex parents benefits children more than having same-sex parents.⁶⁹ Thus, courts applying the deferential rational-basis test uphold gay-marriage bans while courts using any level of review more stringent than conventional rational basis strike them down.

III. IOWA LAW

The Iowa Constitution provides: "All men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty . . . and pursuing and obtaining safety and happiness."⁷⁰ A constitutional amendment in 1998 added "and

63. *Lewis*, 908 A.2d at 218 ("[W]e cannot find a legitimate public need for an unequal legal scheme of benefits and privileges.").

64. *Id.* at 221. The court stated that it would reserve ruling on whether New Jersey must allow actual marriage for same-sex couples partially to avoid stumbling further into the "cultural clash" over the divisive issue. *Id.*

65. For more discussion on the various standards that state courts employ in gay-marriage-prohibition cases, see Joseph R. Grodin, *Same-Sex Relationships and State Constitutional Analysis*, 43 WILLAMETTE L. REV. 235, 240–46 (2007).

66. *Andersen v. King County*, 138 P.3d 963, 980 (Wash. 2006) ("Under the rational basis standard, the court may assume the existence of any conceivable state of facts that could provide a rational basis for the classification." (citing *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001))).

67. *Conaway v. Deane*, 932 A.2d 571, 629 (Md. 2007) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961))). Maryland also found that same-sex marriages were not a fundamental right. *Id.* at 627.

68. *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

69. *Id.* An intermediate appellate court in Indiana has also upheld that state's same-sex-marriage prohibition under a conventional rational-review test. *See Morrison v. Sadler*, 821 N.E.2d 15, 22 (Ind. Ct. App. 2005) (stating that the law's challenger must negate every conceivable basis for the law and that the court will not inquire into the legislature's actual motives).

70. IOWA CONST. art. I, § 1.

women” to this provision,⁷¹ but thus far Iowa’s courts have not had occasion to interpret this language.⁷² Article I, section 6 states that “[a]ll laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.”⁷³ Despite these provisions, the Iowa General Assembly amended state law in 1998 to read, “only a marriage between a male and a female is valid.”⁷⁴

Until *Varnum*, the Iowa Supreme Court has never had the opportunity to decide what level of scrutiny should apply to the same-sex-marriage ban. While Iowa has a statute specifically prohibiting same-sex marriages,⁷⁵ it also has a judicial tradition of expanding civil liberties beyond federal boundaries. More importantly, in *RACI II*, the Iowa Supreme Court indicated that it is willing to apply more rigorous rational-basis review in appropriate situations. Relying on *RACI II* and a tradition of expanding civil liberties, the court could fashion a rational-basis-with-teeth opinion to strike down the same-sex-marriage ban.

A. IOWA SUPREME COURT JURISPRUDENCE

Iowa applies the same method of analysis to state equal-protection and due-process cases as courts that apply federal law.⁷⁶ As under federal equal-protection analysis, an Iowa statute that burdens a protected class is subject to strict scrutiny.⁷⁷ Similarly, the Iowa Supreme Court applies an intermediate level of scrutiny in equal-protection cases to statutes based on gender.⁷⁸ Also, under due-process analysis, as in federal courts, the Iowa Supreme Court applies strict scrutiny to statutes that unduly impinge on

71. 1997 Iowa Acts 763.

72. Paul Benjamin Linton, *Same-Sex “Marriage” Under State Equal Rights Amendments*, 46 ST. LOUIS U. L.J. 909, 921 (2002).

73. IOWA CONST. art. I, § 6.

74. H. File 382, 77th Gen. Assem., Reg. Sess. (Iowa 1998), available at <http://www2.legis.state.ia.us/GA/77GA/legislation/HF/00300/HF00382/980408.html>; IOWA CODE § 595.2(1) (2007); see also Andrea L. Clausen, Note, *Marriage of Same-Sex Couples in Iowa: Iowa Code § 595.2 Is Not Constitutional Under the Iowa Constitution Article I, §§ 1, 6, and 9*, 6 J. GENDER RACE & JUST. 451, 455 (2002) (describing how the bill also provided for establishing a Domestic Partners Task Force to assess issues “related to and faced by domestic partners,” but the task force never formed).

75. IOWA CODE § 595.2(1).

76. *Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 690 (Iowa 2002) (“We usually deem the federal and state due process clauses to be identical in scope, import and purpose.”); Linton, *supra* note 72, at 922 (stating that the Iowa Constitution “should not be interpreted to require recognition of same-sex marriages in violation [of] the public policy of the State of Iowa, if the Equal Protection Clause is not so interpreted”).

77. *Sanchez v. State*, 692 N.W.2d 812, 817 (Iowa 2005) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)).

78. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998).

fundamental liberties such as marriage.⁷⁹ Ordinarily, if there is not a protected class, a quasi-suspect class, or a fundamental right, the Iowa Supreme Court applies a standard deferential rational-basis test under both streams of analysis.⁸⁰

Although Iowa often remains on par with the U.S. Supreme Court's interpretations of personal liberties, the Iowa Supreme Court has expanded personal liberties beyond federal jurisprudence. For example, in *State v. Pilcher*, the Iowa Supreme Court struck down the state's anti-sodomy law, at least as far as it applied to "sodomitical practices performed in private by adult persons of the opposite sex."⁸¹ The court reasoned that "[g]overnmental intrusion into 'fundamental matters' cannot be distinguished on the basis of marital status."⁸² The U.S. Supreme Court did not strike down a state anti-sodomy law until twenty-six years later in *Lawrence v. Texas*.⁸³

The Iowa Supreme Court also has signaled a willingness to keep up with evolving social conventions. In *Callender v. Skiles*, the court held that a biological father had at least a cognizable procedural-due-process right to visit his child.⁸⁴ The father had conceived the child in an extra-marital relationship, and the child was living with the woman and her husband.⁸⁵ The court stated that "[o]ur constitution is not merely tied to tradition, but recognizes the changing nature of society."⁸⁶ It went on to note that social stigmas regarding illegitimate children have slackened in the recent past and that "[i]f we recognize parenting rights to be fundamental under one set of circumstances, those rights should not necessarily disappear simply because they arise in another set of circumstances involving consenting adults that have not traditionally been embraced."⁸⁷

The state's independence from federal law extends to gender and sexuality issues. While the Iowa Supreme Court looks to the law as it is

79. See *Sioux City Police Officers' Ass'n v. City of Sioux City*, 495 N.W.2d 687, 695–96 (Iowa 1993) (citing *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978)) (stating that marriage is a fundamental right); *State v. Hartog*, 440 N.W.2d 852, 854 (Iowa 1989) (stating that strict scrutiny applies when a statute invades a fundamental right).

80. See *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 259–60 (Iowa 2007) ("A legislative judgment is presumed to be supported by facts known to the [legislature], unless facts judicially known or proved preclude that possibility." (quoting *Egan v. United States*, 137 F.2d 369, 375 (8th Cir. 1943))).

81. *State v. Pilcher*, 242 N.W.2d 348, 359 (Iowa 1976).

82. *Id.* at 358.

83. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

84. *Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999).

85. *Id.* at 184.

86. *Id.* at 190 (citing *Redmond v. Carter*, 247 N.W.2d 268, 273 (Iowa 1976)).

87. *Id.* The court also reasoned that "[t]he nontraditional circumstances in which parental rights arise do not diminish the traditional parental rights at stake." *Id.*

evolving elsewhere to inform its decisions,⁸⁸ it was the first state court to usurp the legislature and invalidate the common-law action for “alienation of affections,”⁸⁹ which reformers considered to be loaded with antiquated gender-specific stereotypes and to be invasive toward family privacy.⁹⁰ In another case, the court invalidated a child-custody restriction that a judge imposed on a gay father barring him from visiting his children when an “unrelated adult” was present.⁹¹ The court held that “[the] unusual provision was obviously imposed on account of [the father’s] homosexual lifestyle.”⁹² Over the past two decades, the Iowa Court of Appeals also has refused to allow sexual orientation to factor into family-law considerations.⁹³ Recognizing and repudiating anti-gay sentiment is not new to Iowa jurisprudence.

B. RACI II AND RATIONAL-BASIS REVIEW IN IOWA

Although the Iowa Supreme Court rarely has invalidated laws under the traditional rational-basis test, it is now willing to subject some enactments to more rigorous rational-basis analysis. Until the Iowa legislature attempted to set taxes on greyhound racetrack gambling higher than those at riverboats, few of its enactments had ever faced aggressive applications of the rational-basis test. Before the Iowa Supreme Court decided *RACI II*, the most notable rational-basis-with-bite case was *Bierkamp v. Rogers*, in which the court struck down Iowa’s guest statute, which prohibited non-paying passengers from collecting judgments against their own negligent drivers.⁹⁴ The court found that the law irrationally discouraged hospitable drivers from giving free rides to others, and did not prevent collusive lawsuits against insurance companies.⁹⁵

88. See *Bierkamp v. Rogers*, 293 N.W.2d 577, 580 (Iowa 1980) (stating that the court should overrule Iowa’s guest statute because many other state courts have already done so).

89. *Fundermann v. Mickelson*, 304 N.W.2d 790, 791–92 (Iowa 1981).

90. Rachel F. Moran, *Law and Emotion, Love and Hate*, 11 J. CONTEMP. LEGAL ISSUES 747, 776 (2001). At least a handful of states actually still retain this tort. William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L.J. 985, 1009 (2001).

91. *In re Marriage of Walsh*, 451 N.W.2d 492, 492 (Iowa 1990).

92. *Id.* at 493.

93. Compare *In re Marriage of Kraft*, No. 99-1719, 2000 WL 1289135, at *2 (Iowa Ct. App. Sept. 13, 2000) (granting a gay father full visitation rights and refusing to impose limits on talking about his sexuality with his child), and *In re Marriage of Cupples*, 531 N.W.2d 656, 657 (Iowa Ct. App. 1995) (holding that the trial court had properly viewed a parent’s sexual orientation “as a nonissue”), with *Hodson v. Moore*, 464 N.W.2d 699, 701 (Iowa Ct. App. 1990) (holding that while considering the behavior of those sharing the custodial parent’s home is important, a “discreet homosexual relationship” is not a “per se bar” to a parent’s custody).

94. *Bierkamp v. Rogers*, 293 N.W.2d 577, 585 (Iowa 1980).

95. *Id.* at 584.

In striking down the law in *Bierkamp*, the court used analytic tools familiar in toothy rational-basis-review settings. First, the court reserved the right to review legislation that has proven over time to be improvident, stating that “the passage of time may call for a less deferential standard of review as the experimental or trial nature of legislation is less evident.”⁹⁶ Second, the court scrutinized the under- and over-inclusive nature of the statutes, admitting that such an inquiry is usually reserved for strict-scrutiny analysis.⁹⁷ Yet, unlike heightened rational-basis-review cases from the U.S. Supreme Court, this opinion probed the statute’s means rather than its end goal, which did not seem to be colored by a vindictive legislative motive.⁹⁸ Thus, in *Bierkamp*, the court was willing to invalidate a law without even a finding of invidious intent.

However, it is the paucity of preexisting rational-basis-with-teeth case law that makes *RACI II* all the more notable. In *RACI II*, the Iowa Supreme Court, purporting to use rational-basis review, struck down another economic regulation ostensibly because of its unacceptable means, not because of impermissible legislative goals. The case was a challenge to a taxation scheme that set rates for gambling racetracks to automatically increase annually until the rate would be nearly two times higher than that of riverboat casinos.⁹⁹ After the Iowa Supreme Court invalidated the law, the U.S. Supreme Court remanded the case, unanimously ruling that the tax did not violate the federal Equal Protection Clause.¹⁰⁰ Though the Iowa Supreme Court initially struck down the taxation scheme on federal grounds only,¹⁰¹ on remand the court struck down the tax on state constitutional grounds.¹⁰²

Before invalidating the tax scheme in *RACI II*, the Iowa Supreme Court announced that two new methods for analyzing state equal-protection claims were available to the state’s courts, allowing them to extend personal

96. *Id.* at 581.

97. *Id.* at 584.

98. *Id.* (“However laudable and legitimate may be the state purpose of fostering hospitality, the distinctions drawn in the guest statute do not reasonably or substantially further that goal.”). The Iowa Supreme Court invalidated another statute under rational-basis review in *Federal Land Bank of Omaha v. Arnold*, 426 N.W.2d 153, 161 (Iowa 1988). That case involved a challenge to a law setting shorter mortgage-redemption periods for “member” institutions that belonged to the FDIC or similar associations. *Id.* at 155. The court struck down the law, disapproving of the arbitrary means chosen, not the goal. *Id.* at 157–58.

99. *Racing Ass’n of Cent. Iowa v. Fitzgerald (RACI II)*, 675 N.W.2d 1, 4 (Iowa 2004). The statute at issue imposed a twenty-percent annual tax on gross receipts from gambling games such as slot machines in riverboats but taxed the same games at racetracks starting at twenty-two percent with automatic two-percent annual increases up to a maximum of thirty-six percent. *Id.*

100. *Id.* (citing *Fitzgerald v. Racing Ass’n of Cent. Iowa*, 539 U.S. 103 (2003)).

101. *Racing Ass’n of Cent. Iowa v. Fitzgerald (RACI I)*, 648 N.W.2d 555, 563 (Iowa 2002).

102. *RACI II*, 675 N.W.2d at 16.

liberties beyond established U.S. Supreme Court precedent.¹⁰³ Under the first form of analysis, the state court can still adhere to the federal framework but apply the structure differently.¹⁰⁴ Thus, a court following this first approach might apply the U.S. Supreme Court's suspect-classification, quasi-suspect classification, and rational-basis rubric but arrive at a conflicting destination and strike down a statute that would have passed federal scrutiny.¹⁰⁵ Under the second form of analysis, a state court is able to erect a new analytical structure if the claimant shows a "legal deficiency in the federal principles."¹⁰⁶ For example, a litigant could persuade the court to subject a previously unprotected class of people, such as homosexuals, to quasi-suspect or suspect status. After setting forth these two new methods, the court held that, because the racetracks failed to propose a new framework, the court would follow the first form of analysis and independently apply the rational-basis test.¹⁰⁷

A rational-basis-with-bite analysis followed. Applying the rational-basis test "independently" of the U.S. Supreme Court, the Iowa Supreme Court stressed that state courts might reach a broader definition of rational-basis review, especially in light of "the ill-defined parameters of the equal protection clause."¹⁰⁸ The court rejected three asserted grounds for upholding the law. First, in response to the state's proffered motive of favoring riverboats to further the economic development of river communities, the court ruled that riverboats could not exclusively support river communities because many of them were located on inland waters and because many racetracks are found in river communities.¹⁰⁹ Second, the law unfairly failed to vindicate gambling operators' past financial reliance on the

103. In setting forth its twin avenues allowing Iowa state courts to carry their constitutional analyses beyond federal boundaries, the Iowa Supreme Court relied on Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985).

104. *RACI II*, 675 N.W.2d at 5.

105. Williams, *supra* note 103, at 1219. As an example, Williams cited the California Supreme Court's decision to treat women as a suspect classification subject to strict scrutiny, unlike the U.S. Supreme Court, which treats women as a quasi-suspect class. *Id.* at 1219–20. Compare *Hardy v. Stumpf*, 576 P.2d 1342, 1344 (Cal. 1978) ("Classifications predicated on gender are deemed suspect in California."), and *In re Marriage of Bouquet*, 546 P.2d 1371, 1373 (Cal. 1976) ("[S]ex based classifications are inherently suspect."), with *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (stating that intermediate scrutiny applies to gender classifications (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723–24 & n.9 (1982))).

106. *RACI II*, 675 N.W.2d at 5, 6 (quoting *In re Det. of Garren*, 620 N.W.2d 275, 280 n.1 (Iowa 2000)).

107. *Id.*

108. *Id.* (quoting *Miller v. Boone County Hosp.*, 394 N.W.2d 776, 781 (Iowa 1986)).

109. *Id.* at 9–11 ("[I]t appears that both types of gambling enterprises have the potential to enhance the economic climate of the communities in which they are located.").

preferential tax because the changes were completely prospective.¹¹⁰ Third, the tax rates could not serve the state's objective of favoring riverboats because "the item taxed—gambling revenue—is identical" regardless of whether a floating casino or land-based establishment earned it.¹¹¹ Thus, just as the U.S. Supreme Court had done in *Cleburne* and other cases, the Iowa Supreme Court rejected a series of seemingly rational grounds and struck down the government's classification. Since *RACI II*, the Iowa Supreme Court has offered litigants the chance to argue for abandoning the federal mode of analysis if they can give good reasons to do so.¹¹²

C. VARNUM V. BRIEN

In *Varnum v. Brien*, six same-sex couples¹¹³ sued the state of Iowa¹¹⁴ to compel it to grant them marriage licenses. Polk County District Court Judge Robert Hanson granted summary judgment to the plaintiffs, striking down Iowa's same-sex-marriage prohibition¹¹⁵ and ordering the state to begin processing marriage licenses for a couple of hours before staying his order pending appeal.¹¹⁶

The *Varnum* opinion opened by accepting as fact most of the empirical evidence that the plaintiffs offered in support of gay marriage.¹¹⁷ Most

110. *RACI II*, 675 N.W.2d at 12 (stating that there is no rational basis for preventing harm to gambling businesses that relied on the tax scheme because the tax "is triggered not by whether the business engaged in gambling prior to the implementation of new tax rates, but on whether the gambling takes place in a floating casino").

111. *Id.* at 15.

112. *See Sanchez v. State*, 692 N.W.2d 812, 817 (Iowa 2005) ("Because neither party in this case has argued that our equal protection analysis under the Iowa Constitution should differ in any way from our analysis under the Federal Constitution, we decline to apply divergent analyses in this case." (citing *RACI II*, 675 N.W.2d at 5)).

113. The plaintiff couples were (1) Kate and Trish Varnum of Cedar Rapids, Iowa; (2) Larry Hoch and David Twombly, retired teachers of Urbandale, Iowa; (3) Dawn and Jen BarbouRoske, Girl Scouts leaders, along with their children, McKinley and Breeanna, of Iowa City, Iowa; (4) Reva Evans and Ingrid Olson and their son, Jamison, of Council Bluffs, Iowa; (5) Jason Morgan and Chuck Swaggerty of Sioux City, Iowa; and (6) Bill Musser, musician, and Otter Dreaming, church organist, of Decorah, Iowa. Lambda Legal, Plaintiff Couples in Lambda Legal's Iowa Marriage Lawsuit: *Varnum v. Brien* (Dec. 13, 2005), <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/varnum-plaintiffs.html>.

114. The named defendant was Timothy J. Brien, Recorder for Polk County, Iowa. *Varnum v. Brien*, No. CV5965, slip op. at 16 (Iowa Dist. Ct. Aug. 30, 2007), *appeal filed*, No. 05771 (Iowa 2007), *available at* <http://data.lambdalegal.org/pdf/legal/varnum/varnum-d-08302007-ia-district.pdf>.

115. IOWA CODE § 595.2(1) (2007).

116. *Varnum*, at 62. Roughly twenty couples received expedited marriage certificates before Judge Hanson stayed his order. Henry C. Jackson, *Iowa Gay Couple Wed in Short Window of Legal Opportunity*, DAILY REV. (Hayward, Cal.), Sept. 1, 2007.

117. *Varnum*, at 13. Because the order addressed opposing motions for summary judgment, Judge Hanson accepted all of the plaintiffs' alleged facts as undisputed because the defendant denied them for lack of knowledge. *Id.*

notably, Judge Hanson found that the following facts were supported by the evidence: sexual orientation is an immutable individual characteristic;¹¹⁸ parents' sexual orientation has no impact on the development of their children;¹¹⁹ there is a history of prejudice against homosexuals in Iowa;¹²⁰ and homosexuals are politically powerless.¹²¹

Judge Hanson invalidated the ban on three alternative grounds: (1) same-sex marriage is a fundamental substantive-due-process right entitled to strict-scrutiny protection;¹²² (2) the ban was a sex-based classification subject to intermediate equal protection;¹²³ and (3) the same-sex-marriage ban failed even rational-basis scrutiny. The opinion's rational-basis analysis had teeth. Judge Hanson acknowledged five proffered government interests in upholding the same-sex-marriage ban. The first three interests related to responsible child-rearing, and the fourth was the state's interest in conserving resources.¹²⁴ Judge Hansen classified those first four together as legitimate legislative goals, focusing his scrutiny on the state's fifth proffered justification, "promoting the concept of fundamental marriage or the integrity of traditional marriage." Judge Hanson launched a rigorous rational-basis test, citing *RACI II* to justify using the higher level of scrutiny.¹²⁵ He held that because the legislature's fifth motive was merely a

118. *Id.* at 27.

119. *Id.* at 31. Judge Hanson noted the following:

Numerous leading organizations . . . (e.g., the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers and the Child Welfare League of America) have issued statements confirming that lesbian and gay parents are as effective as heterosexual parents

Id. Judge Hanson continued, "[I]t is also well-established that children do not need a parent of each gender to be well adjusted, that both men and women have the capacity to be good parents, and that children do not need male and female role models in the home to develop normally." *Id.* at 32.

120. *Id.* at 40–42.

121. *Id.* at 42–43.

122. *Varnum*, at 45. Judge Hanson found that the law was over-inclusive because it attempted to strengthen heterosexual marriages by preventing an entirely different group, homosexuals, from being married. He then found that the statute was under-inclusive because it attempted to encourage procreation by allowing all heterosexuals to marry regardless of interest in procreation or fertility. *Id.* at 46.

123. *Id.* at 47 (citing *M.R.M., Inc. v. City of Davenport*, 290 N.W.2d 338, 340–41 (Iowa 1980) (holding that a prohibition on people giving massages to members of the opposite gender is a sex-based classification)).

124. *Id.* at 50–51. The first three state-proffered interests were (1) promoting procreation, (2) promoting childrearing by a father and a mother in a marriage relationship, and (3) promoting stability in opposite-sex relationships where children may be born. *Id.* at 50.

125. *Id.* at 51 (citing *Racing Ass'n of Cent. Iowa v. Fitzgerald (RACI II)*, 675 N.W.2d 1, 7–8 & n.3 (Iowa 2004)).

moral renouncement of same-sex marriage, the ban was unconstitutional.¹²⁶ In a judicial maneuver present in other rational-basis-with-teeth cases, Judge Hanson found that because the legislature's legitimate goals were merely concurrent with an underlying animus toward homosexuals, the entire same-sex-marriage ban could not stand.¹²⁷

Judge Hanson then invalidated the means-end relationship between the marriage ban and the other legitimate state interests in promoting procreation and conserving state resources by using an aggressive rational-basis inquiry. In light of *RACI II*, he held that the claimed purpose of the law must be "realistically conceivable," or "credible."¹²⁸ He also applied the under- and over-inclusive test, a method of evaluation that courts normally reserve for strict-scrutiny cases but that nonetheless appeared under the *RACI II* rational-basis analysis,¹²⁹ holding that an absolute ban properly served none of the remaining interests.¹³⁰ The burden was on the defendants (the proponents of the same-sex-marriage ban) to offer some proof of the law's rationality, despite the fact that a statute's proponents generally do not have the burden of proof in a rational-basis case.¹³¹ Judge Hanson's enhanced inquiry into the same-sex-marriage ban's means-end relationship is a working example of rational basis with teeth under a new Iowa jurisprudential framework.

IV. ADDRESSING *VARNUM* AND THE IOWA SAME-SEX-MARRIAGE BAN

When deciding *Varnum*, the Iowa Supreme Court can apply rational basis with teeth to strike down the gay-marriage ban. U.S. Supreme Court cases support invalidating state laws based on animus toward homosexuals as a class, and the Iowa Supreme Court could rely on *RACI II* in applying a rigorous rational-basis test. In applying this analysis, the court could issue a narrow ruling, simply striking down the ban and allowing the legislature some time to respond. This process would minimize popular backlash that could slow the gay-rights movement.

126. *Id.* at 51, 53.

127. *See Varnum*, at 53 (stating that because animus as a legislative objective is prohibited under U.S. Supreme Court jurisprudence, this purpose is likewise illegitimate under the Iowa Constitution).

128. *Id.* at 51 (citing *RACI II*, 675 N.W.2d at 7 & n.3).

129. *RACI II*, 675 N.W.2d at 10.

130. *Varnum*, at 56-59.

131. *Id.* at 60-61; *see also* Glowacki v. State Bd. of Med. Exam'rs, 501 N.W.2d 539, 541 (Iowa 1993) (stating that a law's challenger has the burden of overcoming the "strong presumption of constitutionality [that] cloaks every statute" (citing Larsson v. Iowa Bd. of Parole, 465 N.W.2d 272, 273 (Iowa 1990))).

A. *LOOKING TO U.S. SUPREME COURT PRECEDENT TO FASHION A TOOTHY RATIONAL-BASIS ANALYSIS IN THE SAME-SEX-MARRIAGE SETTING*

How should the Iowa Supreme Court structure its rational-basis analysis when addressing *Varnum*? In the past, the U.S. Supreme Court has held that animus toward homosexuals is an impermissible legislative motivation, so the Iowa Supreme Court could hold that a legislative desire to harm homosexuals as a class invalidates the same-sex-marriage ban. There is a significant body of U.S. Supreme Court and Iowa Supreme Court case law that permits the court to look to objective indicators of legislative motivation to determine whether this class-based animus exists.¹³² The Iowa Supreme Court could rely on these cases when handling *Varnum*.

The Iowa Supreme Court's analysis could begin by announcing that a simple desire to harm a politically unpopular group of people is an illegitimate legislative motive. Support exists for this in federal case law since, even in simple rational-basis cases, the U.S. Supreme Court has ruled that states cannot enact laws designed merely to harm homosexuals as a class. In *Romer v. Evans*, the Court struck down an amendment to Colorado's state constitution that barred the state government, agencies, municipalities, and school districts from using homosexuality as a basis for anti-discrimination laws.¹³³ Consequentially, heterosexuals who experienced discrimination because of their sexual orientation could seek remedies from the state. People with an alternative sexual orientation could not.

Justice Kennedy refused to take the state's amendment at face value. Colorado had attempted to justify the law as a means for conserving resources to fight other forms of discrimination,¹³⁴ but Justice Kennedy reasoned that the amendment specially targeted the homosexual community, and therefore could not satisfy rational-basis review.¹³⁵ Instead,

132. *Cf. McCreary County v. ACLU of Ky.*, 545 U.S. 844, 853–54 (2005) (applying an objective test of legislative motivation in the Establishment Clause setting).

133. *Romer v. Evans*, 517 U.S. 620, 635 (1996). Colorado's amendment 2 read:

"Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination."

Id. at 624 (quoting COLO. CONST., art. II, § 30b).

134. *Id.* at 635.

135. *Id.* There is controversy over whether the standard that was applied in *Romer* was rational basis with teeth or just the traditional deferential version of that test. *Compare* SUSAN GLUCK MEZEY, *QUEERS IN COURT* 65–66 (2007) (noting that some scholars believe that the Court applied a "second order" of rational-basis review (internal quotations omitted)), *with* Richard F. Duncan, *The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-*

he held that the amendment's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."¹³⁶ In other words, the Court found that because the amendment was a product of hostility toward homosexuals, it was invalid despite seemingly legitimate proffered motives. *Romer* thus ruled out animus toward homosexuals as a legitimate legislative motive under rational-basis review.¹³⁷

The Supreme Court again repudiated anti-homosexual animus as a legitimate legislative motive in *Lawrence v. Texas*, a due-process case.¹³⁸ The Court nullified a statute prohibiting "deviate sexual intercourse . . . with another individual of the same sex," including sodomy.¹³⁹ Instead of considering only the narrow issue of whether homosexual intercourse is a fundamental right, the Court framed the issue more broadly as one of personal autonomy and intimacy. Justice Kennedy wrote that confining the Court's inquiry to sex would demean the individual autonomy of homosexuals, "just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."¹⁴⁰ The opinion avoided applying a specific standard of review¹⁴¹ or precisely identifying the right at issue.¹⁴² The Court also evaded the question of whether homosexuals are a protected class under the Equal Protection

Gender Marriage, 6 WM. & MARY BILL RTS. J. 147, 151 n.25 (1997) (arguing that Justice Kennedy did not apply a rational-basis-with-teeth test because amendment 2 was "a rare kind of law that could not pass even this 'toothless' standard"). For the purposes of this Note, the actual level was immaterial because the Court found that the government, acting out of animus, could not deny freedoms to homosexuals as a specific class.

136. *Romer*, 517 U.S. at 632.

137. See Melanie D. Price, *The Privacy Paradox: The Divergent Paths of the United States Supreme Court and State Courts on Issues of Sexuality*, 33 IND. L. REV. 863, 885 (2000) (stating that broad discrimination against gays and lesbians will be "hard-pressed to survive rationality review" even if not warranting heightened scrutiny).

138. *Lawrence v. Texas*, 539 U.S. 558 (2003).

139. *Id.* at 563. The statute defined same-sex deviate intercourse as "any contact between any part of the genitals of one person and the mouth or anus of another person; [or] the penetration of the genitals or the anus of another person with an object." *Id.*

140. *Id.* at 567.

141. See Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916-17 (2004) (stating that the Court does invoke the "talismanic verbal formula of substantive due process" but is unclear about what right was at stake and what level of review was necessary).

142. See *Lawrence*, 539 U.S. at 574 (broadly defining the liberty interest at issue). The Court in *Lawrence* followed *Planned Parenthood of Southeastern Pennsylvania v. Casey* by refusing to create a constitutional ledger with discrete rights falling either within or outside the constitutionally protected column. Justice Kennedy wrote, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

Clause.¹⁴³ Despite these omissions, Justice Kennedy placed on Texas the burden of justifying the statute's intrusion into liberty, and struck the law down.¹⁴⁴

Lawrence therefore announced that majoritarian disfavor for a given practice is no longer a legitimate legislative purpose.¹⁴⁵ One commentator described the *Lawrence* analysis as a "crystallization" of the due-process and equal-protection inquiries.¹⁴⁶ Forbidding sodomy seems innocuous if considered in a vacuum—the problem does not surface "without some underlying commitment to equality among groups."¹⁴⁷ Thus, *Lawrence* instructs courts to begin an analysis by identifying which liberty the law limits,¹⁴⁸ then ask whether the state is "[expressing] its disapproval of gay people" by "[crafting] a law that makes it a crime to engage in behaviors connected in some way with being gay."¹⁴⁹ Alternatively, as Martha Nussbaum noted, the concern is with "we-they" distinctions that reflect irrational prejudice geared toward isolating disfavored groups.¹⁵⁰ Ultimately, "animosity against gay people [lacks] even a legitimate government purpose."¹⁵¹

The common thread in Fourteenth Amendment analysis, apparent in cases such as *Romer* and *Lawrence*, is the U.S. Supreme Court's skepticism of animus that lurks beneath the surface of publicly offered legislative motives. Legislators can also always mask their anti-gay sentiments with alternative justifications for their actions; states can always hide invidious agendas by sending lawyers to court to invent legitimate goals after the fact.¹⁵² Not all legislators have the same reasons in mind when they vote to approve a

143. See Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 437 (2005) ("[B]ecause Justices Kennedy and O'Connor generally disfavor identifying new fundamental rights or suspect classes, both of their opinions in *Lawrence* rule the Texas statute deficient without applying a heightened standard of review.").

144. Randy E. Barnett, *Kennedy's Libertarian Revolution*, NAT'L REV. ONLINE, July 10, 2003, <http://www.nationalreview.com/comment/comment-barnett071003.asp>.

145. See *Lawrence*, 539 U.S. at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.").

146. Pamela S. Karlan, *Colloquium: The Boundaries of Liberty After Lawrence v. Texas*, 102 MICH. L. REV. 1447, 1449 (2004).

147. *Id.* at 1448.

148. *Id.* at 1451.

149. *Id.* at 1457.

150. MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 195 (1999) ("[H]omosexuals are subject to a deeper kind of social antagonism, connected not only with their acts but also with their identity.").

151. Karlan, *supra* note 146, at 1450–51.

152. Koppelman, *supra* note 32, at 121.

law.¹⁵³ However, as the Court has stated before, “[e]xamination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country.”¹⁵⁴ A court must strike at the invidious intent, even if the legislature’s proffered legitimate goals really could have reflected the true motives of some of the law’s supporters.¹⁵⁵ Thus, *Romer* and *Lawrence* indicate that the Court views classifications drawn against gays and lesbians as presumptively resting on illicit motives even if the state proffers seemingly legitimate goals.¹⁵⁶ These principles readily apply when addressing *Varnum*. In *Lawrence*, the law forbidding intimate sexual acts really only targeted homosexuals themselves. The same is true for a same-sex-marriage ban. Preventing homosexuals from marrying is essentially an attack on them as a group.

The Iowa Supreme Court could redress the legislative animus toward homosexuals by correctly applying U.S. Supreme Court precedent and avoiding mistakes made by other state courts. States that purport to apply rational-basis tests to same-sex-marriage-ban challenges mistake what the U.S. Supreme Court has said for what it has actually done. Even in cases where the U.S. Supreme Court explicitly declines to find a fundamental new right or a protected class, it stringently analyzes states’ actions where prejudice seems to be lurking.¹⁵⁷ This is because, despite the Court’s occasional language to the contrary, the rigid tier system of scrutiny is melting into a fluid sliding scale—with the result that some opinions purporting to apply a deferential test are actually quite exacting.¹⁵⁸ For decades, various Supreme Court Justices have argued in favor of a sliding-scale approach.¹⁵⁹ Recent cases like *Romer* and *Lawrence* confirm the Court’s

153. See *Edwards v. Aguillard*, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting) (“[D]iscerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite.”).

154. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 861 (2005).

155. Koppelman, *supra* note 32, at 132. Koppelman wrote that where these kinds of classification exist, the Court avoids separating legitimate goals from illegitimate ones because of the presumption that such classifications are meant to separate citizens who are “fully human from the untermenschen [subhuman].” *Id.* at 132–33 (translation added).

156. *Id.*

157. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442, 448 (1985) (declining to identify the mentally retarded as a quasi-suspect class, but later finding no rational basis for withholding a permit for a home for the mentally retarded).

158. See *id.* at 451 (Stevens, J., concurring) (stating that the Court’s cases “reflect a continuum of judgmental responses to differing classifications” and that nominal standards are inadequate to explain these outcomes).

159. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 520–21 (1970) (Marshall, J., dissenting) (arguing that equal-protection analysis should vary with the character of the classification, the importance of the benefit that the government is withholding, and the state’s interests in doing

willingness to engage in minimalist decisions that aggressively target legislative animus by purporting to apply rational-basis review but covertly engaging in a much more aggressive and complex inquiry.

The Iowa Supreme Court should follow the U.S. Supreme Court's lead and not be swayed by other states' cases that improperly apply U.S. Supreme Court precedent. The New York Court of Appeals, for instance, declined to inquire into the objective purpose of its state same-sex-marriage ban, holding instead that the law survived challenge because it was not based "solely on ignorance and prejudice against homosexuals."¹⁶⁰ The Court of Appeals of Maryland likewise purported to apply *Cleburne* and found that homosexuals are not a quasi-suspect class.¹⁶¹ It then proceeded to employ a highly deferential rational-basis test to uphold the same-sex-marriage ban without acknowledging the implications of U.S. Supreme Court precedent.¹⁶² Iowa could, at a minimum, acknowledge the subtleties in federal jurisprudence and probe deeper than other state courts have. Two state high courts, Vermont and Massachusetts, have done this already to require same-sex civil union or marriage, respectively.

Looking to outwardly objective signs of legislative motive would be a conventional and straightforward way to approach the same-sex-marriage ban in Iowa. Instead of attempting to read the minds of the legislators, courts have inferred purpose by evaluating external indicators. In *Washington v. Davis*, for example, the U.S. Supreme Court held that "invidious discriminatory purpose may often be inferred from the totality of the relevant facts" when ferreting out discriminatory legislative motives in equal-protection cases.¹⁶³ *Village of Arlington Heights v. Metropolitan Housing Development Corp.* likewise authorized judicial inquiry into both direct and circumstantial evidence, including the "historical background," "the specific sequence of events leading up to the challenged decision," and "contemporary statements by members of the decisionmaking body."¹⁶⁴ Of course, the same goes for Iowa judges, who "may properly consider the objects sought to be attained and the circumstances under which the [statute was] enacted."¹⁶⁵

Recent Establishment Clause jurisprudence also provides guidance for objectively discerning legislative motive. In *McCreary County v. ACLU of*

so); *Evolving Doctrine*, *supra* note 40, at 17–18 (describing increasing discontent among Supreme Court Justices with a tier-based hierarchy).

160. *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006).

161. *Conaway v. Deane*, 932 A.2d 571, 605–16 (Md. 2007).

162. *See id.* at 629–35 (applying a conventional rational-basis test).

163. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

164. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977).

165. *Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 376 N.W.2d 878, 881 (Iowa 1985) (citing *Smith v. Linn County*, 342 N.W.2d 861, 863 (Iowa 1984)).

Kentucky, the Court had to deduce whether the defendant county governments had erected Ten Commandment displays in their courthouses intending to promote religion.¹⁶⁶ Once the counties became aware that the displays unconstitutionally endorsed religion, they added framed copies of the Magna Carta, the Bill of Rights, and other secular civic documents.¹⁶⁷ The Court refused to believe that the original motive to endorse religion had changed. It invalidated the displays, holding that “purpose needs to be taken seriously . . . and needs to be understood in light of context.”¹⁶⁸ As one commentator wrote of the *McCreary* case, “[f]ocusing on the government purpose analysis allowed the Court to delve into the entire recent history preceding the government action at issue.”¹⁶⁹ By analogy, if the Iowa legislature exhibits objective symptoms of animus toward homosexuals, the same-sex-marriage ban can be subject to rational basis with bite. To determine whether the legislature exhibited impermissible intent in passing the same-sex-marriage ban, the Iowa Supreme Court could structure its analysis according to these U.S. Supreme Court cases and look to external signs of legislative hostility toward homosexuals as a class.

B. RATIONAL-BASIS-WITH-TEETH REVIEW SHOULD APPLY TO THE IOWA
SAME-SEX-MARRIAGE BAN

Looking to external circumstances, the Iowa Supreme Court could hold that a stricter form of rational-basis analysis is appropriate when a legislature behaves with hostility toward homosexuals, as Iowa’s legislature has. In 1995, the Iowa House of Representatives approved a budget amendment prohibiting Iowa’s public universities from spending tax money on programs that have “either the purpose or effect of encouraging or supporting homosexuality as a positive alternative lifestyle.”¹⁷⁰ Five years later, Republican legislators reacted angrily when Governor Vilsack ordered the state not to discriminate based on sexual orientation and gender identity when hiring public workers.¹⁷¹ In 2004, the Iowa Senate refused to approve Jonathan Wilson’s nomination to the State Board of Education because he

166. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 850–53 (2005).

167. *Id.* at 853–54.

168. *Id.* at 874.

169. Kristi L. Bowman, *Seeing Government Purpose Through the Objective Observer’s Eyes: The Evolution-Intelligent Design Debates*, 29 HARV. J.L. & PUB. POL’Y 417, 455 (2006).

170. Lyle Muller, *Gay Rights Supporters Lash Out*, THE GAZETTE (Cedar Rapids, Iowa), May 4, 1995, at B3. When the State Senate struck down the measure that prohibited educational spending on pro-homosexual programming without debate, Senator Allen Borlaug, a Republican from Protivin who supported the measure, exclaimed, “I think it stinks and I’m ashamed of you people.” *Id.*

171. Jonathan Roos & Jeff Zeleny, *GOP Leaders: Rescind Gay Civil Rights Order*, DES MOINES REG., Feb. 24, 2000, at B4.

was openly gay and reportedly supported the “gay agenda,”¹⁷² including “promoting a [homosexual] lifestyle.”¹⁷³ Wilson denied promoting homosexuality to heterosexuals; he had, however, previously lost his position on the Des Moines School Board after twelve years of service when “he announced he was gay and said public schools should teach tolerance, respect and nondiscrimination for gays and lesbians.”¹⁷⁴

The circumstances surrounding the same-sex-marriage ban’s enactment show that it was part of a wider cultural backlash against homosexuals. The ban’s supporters characterized the ban as a “pre-emptive move” against the same-sex-marriage movement.¹⁷⁵ The Iowa General Assembly overtly targeted same-sex marriage when it passed House File 382 in 1998, joining a group of over thirty states passing similar measures during the backlash against the Hawaii Supreme Court’s decision in *Baehr v. Lewin*,¹⁷⁶ which struck down Hawaii’s same-sex-marriage ban.¹⁷⁷ By 2001, at least thirty-five states had also joined the federal government in refusing to recognize out-of-state same-sex unions.¹⁷⁸

The state-law changes themselves bespeak no legislative purpose other than stifling homosexuals as a class. Before the ban, section 595.2(1) of the Iowa Code read as follows: “A marriage between a male and a female each eighteen years of age or older is valid.”¹⁷⁹ The 1998 amendment changed it to read, “Only a marriage between a male and a female is valid” and moved the minimum age language to a different section.¹⁸⁰ The Act did not accompany other legislation serving the interests of procreation or otherwise encouraging stable marriages,¹⁸¹ nor does it seem to address any other public-policy concern. In fact, other contemporaneous amendments that

172. Rod Boshart, *Appointment of Gay Attorney Defeated*, THE GAZETTE (Cedar Rapids, Iowa), Apr. 14, 2004, at A5.

173. Marc Hansen, *Wilson Isn’t the Only One with an Agenda*, DES MOINES REG., Apr. 8, 2004, at B1.

174. *Id.*

175. *Ban on Same-Sex Marriages Gains Support in Legislature*, THE GAZETTE (Cedar Rapids, Iowa), Feb. 13, 1998, at A11. The legislature also voted to prohibit the recognition of out-of-state gay marriages in 1998. Rod Boshart, *Senate Frowns on Gay Unions: Same-Sex Marriages Done Outside Iowa Not Sanctioned Here*, THE GAZETTE (Cedar Rapids, Iowa), Mar. 27, 1998, at A11.

176. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

177. IOWA CODE § 595.2(1) (2007); see also WILLIAM STACY JOHNSON, A TIME TO EMBRACE: SAME-GENDER RELATIONSHIPS IN RELIGION, LAW, AND POLITICS 34 (2006) (“[T]he *Baehr* case produced an immediate and vociferous anti-gay backlash, one that is being felt to this day.”).

178. *Id.* See generally ELLEN ANN ANDERSEN, OUT OF THE CLOSETS & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION (2006).

179. IOWA CODE § 595.2(1) (1997).

180. *Id.*

181. *Id.*

would have perpetuated marriage failed.¹⁸² These included an amendment that would have allowed couples to retain their marriage licenses after one spouse undergoes a sex change¹⁸³ or another that would have allowed couples to stay married where one marriage partner misrepresented his or her age.¹⁸⁴ Instead, the Act was an attack on gays and a reassurance that they would remain a class apart.

C. RACI II AS PRECEDENT

RACI II could serve as a secure precedent for overturning Iowa's same-sex-marriage ban while recognizing U.S. Supreme Court precedent in this area. At minimum, *RACI II* is evidence of the Iowa Supreme Court's willingness to apply a more stringent analysis even while it purports to apply a traditional rational-basis test. Even though the opinion is unclear about what activates a toothy rational-basis review, it opened the door for the court to use class-based animus toward homosexuals as such a trigger.

RACI II is evidence that the Iowa Supreme Court would apply an aggressive rational-basis test, at least in some circumstances. Instead of upholding classifications that rest on any "conceivable" state of facts under conventional rational-basis analysis,¹⁸⁵ the court in *RACI II* distinguished between "specious" classifications—ones that would survive only conventional rational-basis review—and "credible" classifications.¹⁸⁶ Specious classifications are "apparently right or proper" or "superficially fair, just or correct but not so in reality."¹⁸⁷ Credible classifications differ from specious ones because they are "capable of being credited or

182. S. 77, 1998 2d Sess., Journal at 923 (Iowa 1998), available at <http://www2.legis.state.ia.us/GA/77GA/Session.2/SJournal/00900/00923.html>.

183. S. 5344, 77th Gen. Assem., 2d Sess. (Iowa 1998), available at <http://www2.legis.state.ia.us/GA/77GA/Legislation/S/05300/S05344/Current.html>.

184. S. 5343, 77th Gen. Assem., 2d Sess. (Iowa 1998), available at <http://www2.legis.state.ia.us/GA/77GA/Legislation/S/05300/S05343/Current.html>.

185. See, e.g., *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (holding that if a court can conceive of a plausible reason for the statutory classification, it is valid regardless of whether the legislature actually contemplated that reason); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (holding that a court should uphold an economic regulation unless it is so arbitrary "as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators"); see also Wadhvani, *supra* note 32, at 812–18 (describing instances of deferential rational-basis tests in Supreme Court cases).

186. *Racing Ass'n of Cent. Iowa v. Fitzgerald (RACI II)*, 675 N.W.2d 1, 7 n.3 (Iowa 2004) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1736 (unabr. ed. 2002)). The court stated that its distinction between "credible" and "specious" classifications demanded that the court "probe to determine if the constitutional requirement of some rationality" in the law exists, rather than a conventional "superficial analysis." *Id.* (quoting *Greenwalt v. Ram Rest. Corp.*, 71 P.3d 717, 730–31 (Wyo. 2003)).

187. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2187 (unabr. ed. 2002)).

believed” and “entitled to confidence.”¹⁸⁸ The Iowa Supreme Court could easily find that justifications underlying the same-sex-marriage ban are “specious” because of their anti-homosexual undertones, just as Judge Hanson did in his *Varnum* trial order.

What exactly triggers this rigorous rational-basis scrutiny is unclear, but this by no means forecloses using such a test in a civil-liberties case such as *Varnum*. Subtextually, *RACI II* indicated that the court was concerned that riverboat operators had unduly influenced the legislative process. The court stated that article I, section 6 of the Iowa Constitution is a “Jacksonian” provision protecting against “favoritism and special treatment” benefiting a minority.¹⁸⁹ Others have observed that many states enacted such provisions “to curb the granting of ‘special’ or ‘exclusive’ privileges, after a series of abuses by the relatively unfettered state legislatures responding to powerful economic interests.”¹⁹⁰ Consequently, it is still possible that the Iowa Supreme Court may rely on *RACI II* when employing a toothier rational-basis analysis in reviewing *Varnum*.

Moreover, since the disputed statute in *RACI II* was a tax law, the court had even less business scrutinizing the legislature’s chosen means. Tax statutes, as Justice Cady pointed out in his dissent, should receive particular deference because they involve “political give-and-take and an awareness of local conditions.”¹⁹¹ Similarly, the U.S. Supreme Court has held that in taxation, “even more than in other fields, legislatures possess the greatest freedom in classification.”¹⁹² In tax cases, an ultra-deferential “palpably arbitrary” or “invidious” standard applies both to the legislature’s choice of interests and to its means for furthering them.¹⁹³ In fact, one commentator

188. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 532 (unabr. ed. 2002)).

189. *Id.* at 5 & n.2 (citation omitted); see also *Andersen v. King County*, 138 P.3d 963, 972 (Wash. 2006) (stating that “an independent state analysis is not appropriate unless the challenged law is a grant of positive favoritism to a minority class” under a similar privileges and immunities clause in the Washington State constitution); *Washington v. Smith*, 814 P.2d 652, 661–62 (Wash. 1991) (Utter, J., concurring) (“[S]tate privileges and immunities clauses were intended to prevent people from seeking certain privileges or benefits to the disadvantage of others. The concern was prevention of favoritism and special treatment for a few, rather than prevention of discrimination against disfavored individuals or groups.” (citing *State v. Clark*, 630 P.2d 810, 814 (Or. 1981))).

190. Williams, *supra* note 103, at 1207.

191. *RACI II*, 675 N.W.2d at 18 (Cady, J., dissenting) (quoting *Metro. Sports Facilities Comm’n v. County of Hennepin*, 478 N.W.2d 487, 489 (Minn. 1991)).

192. *Id.* (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40–41 (1973)).

193. See *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359–60 (1973) (“States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests.”); *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934) (stating that “[c]ollateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry” and that taxation schemes can legitimately “restrict[] or even destroy[] particular occupations or businesses”).

has criticized the fact that the Iowa Supreme Court in *RACI II* was willing to overturn a tax statute more than they have criticized the other aspects of the decision.¹⁹⁴ For these reasons, the *RACI II* decision could support more stringent inquiries into areas more susceptible to invidious legislative abuse, such as civil liberties.

D. UPHOLDING VARNUM WITHOUT PROVOKING BACKLASH

With *RACI II* as a backdrop, *Varnum* presents the Iowa Supreme Court the chance to respond to Judge Hanson's ruling in nearly any way it sees fit. The court should issue a narrow decision that could advance human liberties without setting back the gay-rights movement in the long term. It also could be an opportunity to develop case law in this area gradually rather than attempting to create a sweeping new legal principle before other areas of the law have caught up.

Iowans are ready to accept same-sex relationships, but not necessarily full marriage rights. In general, legal observers caution that activists should attain less-controversial rights before usurping the political process with a court ruling compelling the government to recognize same-sex relationships.¹⁹⁵ Americans are more tolerant of consensual private sexual behavior than gay marriage.¹⁹⁶ In 2003, a *Des Moines Register* poll found that less than a quarter of Iowans supported gay marriage, but nearly half of respondents supported granting equal legal rights as married couples.¹⁹⁷ In the meantime, Iowa's populace has been acclimating to state laws that prohibit sexual-orientation or gender-identity discrimination in private employment, public accommodations, housing, education, and credit

It is exceedingly rare for the U.S. Supreme Court to strike down differential taxes. One notable exception was *Allegheny Pittsburgh Coal Co. v. Commission of Webster County*, in which the county appraised homes for taxation purposes based on their last sale price, resulting in one plaintiff paying thirty-five times the amount of comparable homeowners. *Allegheny Pittsburgh Coal Co. v. Comm'n of Webster County*, 488 U.S. 336, 341 (1989). The tax on gaming at racetracks in *RACI II*, however, would have remained at less than twice the amount on gaming in riverboats. *RACI II*, 675 N.W.2d at 4. Moreover, the U.S. Supreme Court has been distinguishing away the *Allegheny* case since its arrival. See *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 109–10 (2003) (upholding the Iowa gambling tax scheme and distinguishing it from *Allegheny*); *Nordlinger v. Hahn*, 505 U.S. 1, 12–16 (1992) (upholding a property-tax scheme similar to the one in *Allegheny*).

194. See Hillary Schlueter, Note, *The Return of Lochnerizing: The Iowa Supreme Court's Invalidation of Gambling Taxes*, 9 J. GENDER RACE & JUST. 713, 718–22 (criticizing the *RACI II* court for improperly applying a less deferential test).

195. See Klarman, *supra* note 143, at 477 (stating that “court decisions produce backlashes by commanding that social reform take place in a different order than might otherwise have occurred”).

196. Jeffrey Rosen, *The Next Cultural War*, in *A YEAR AT THE SUPREME COURT* 73, 84 (Neal Devins & Davison M. Douglas eds., 2004).

197. Editorial, *Just Don't Call It Marriage*, *DES MOINES REG.*, Oct. 20, 2003, at A8.

practices.¹⁹⁸ While no law prohibits such discrimination by public employers, Governor Culver issued an executive order in October 2007 creating a council to attain a diverse state-government workforce that includes people of different sexual orientations and gender identities.¹⁹⁹ Aside from recognizing out-of-state same-sex civil unions and marriages, few legal battles remain for activists to fight in Iowa.

Despite the legal progress Iowa has made toward recognizing equal rights for homosexuals, the complete destruction of the same-sex-marriage ban could backfire. The gay-rights movement seeks a broad array of equality for homosexuals,²⁰⁰ but same-sex marriage is its most polarizing and contentious sub-issue.²⁰¹ Winning same-sex-marriage cases before public opinion catches up could foment a crippling backlash.²⁰² Conversely, the court would appear to be meddling with the democratic process if it usurps the legislature;²⁰³ therefore, the court should manage its docket to put off ruling on the case and allow the glacier of public opinion to slide forward as much as possible.²⁰⁴ As California demonstrated, it is still possible to jump the gun even when public approval seems favorable—even though public opinion appeared to oppose Proposition 8,²⁰⁵ anti-gay activists still prevailed in overturning the California Supreme Court's opinion granting full

198. Iowa prohibits discrimination based on sexual orientation and gender identity in a number of areas. See IOWA CODE § 216.6(1) (2007) (private employment); *id.* § 216.7(1) (public accommodations); *id.* § 216.8(1) (housing and real estate); *id.* § 216.9 (education); *id.* § 216.10 (credit practices); see also *id.* § 216.11 (aiding or abetting in such discrimination or retaliating against someone based on sexual orientation or gender identity); *id.* § 216.11A (interference with someone's activities based on sexual orientation).

199. Exec. Order No. 4 (Oct. 26, 2007), available at <http://www.governor.iowa.gov/administration/docs/eo/04-071026.pdf>; see Lambda Legal, Iowa: Relationship Recognition Information, <http://www.lambdalegal.org/our-work/states/iowa.html> (last visited Sept. 20, 2008) (showing that Iowa has no statutes prohibiting public employers from discriminating based on sexual orientation).

200. See Shailagh Murray, *Quandary over Gay Rights Bill: Is It Better to Protect Some or None?*, WASH. POST, Oct. 18, 2007, at A23 (noting the recent split among lesbian, gay, bisexual, and transgender advocacy groups over whether to accept the Employment Non-Discrimination Act without provisions for protecting against gender-identity discrimination).

201. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 465 (2006).

202. *Id.*

203. Rosen, *supra* note 196, at 84.

204. Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 26 (1994).

205. One poll released just a couple weeks after the California decision found that Californians supported gay marriage by a fifty-one percent to forty-two percent majority, reflecting a long-term upward trend in public support. John Wildermuth, *California Majority Backs Gay Marriage*, S.F. CHRON., May 28, 2008, at A-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/05/28/MNOU10U8MB.DTL&tsp=1>; see also *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008) (holding that same-sex couples should be “extend[ed] the designation of marriage” in a ruling that was handed down on May 15, 2008).

marriage rights in the 2008 elections.²⁰⁶ The Iowa Supreme Court could hedge its bet by allowing the legislature to gauge public opinion by choosing between civil unions and full marriage rights rather than trying to issue an opinion that exceeds public opinion.

An overly broad ruling could also harm the gay-rights movement as much as an early decision. Cases like *Roe v. Wade* may have prematurely vindicated overbroad reproductive freedoms that the nation was still slowly evolving to accept anyway.²⁰⁷ By acting too forcefully in *Roe v. Wade*, the Supreme Court may have unnecessarily incited a vehement reaction, undermining the judiciary's authority and weakening the women's rights movement.²⁰⁸ In Alaska, the public reacted to rulings affording protected status to homosexuals by passing anti-gay-marriage constitutional amendments.²⁰⁹ Similarly, in *Baehr v. Lewin*,²¹⁰ the Hawaii Supreme Court remanded a challenge to Hawaii's same-sex-marriage ban to the trial court, relying on *Loving* to hold that the state had to demonstrate a compelling interest for restricting marriage to opposite-sex couples.²¹¹ Before the case could work its way back up, Hawaiians amended the state's constitution to ban same-sex marriages.²¹² The California Supreme Court was the first and only state high court to find that same-sex marriage is a fundamental right and that classifications based on sexual orientation are subject to strict

206. Randal C. Archibold & Abby Goodnough, *California Voters Ban Gay Marriage*, N.Y. TIMES, Nov. 5, 2008, <http://www.nytimes.com/2008/11/06/us/politics/06ballot.html>.

207. Sunstein, *supra* note 204, at 25.

208. *Id.*

209. See ALASKA CONST. art I, cl. 25 (defining marriage as including only one man and one woman); HAW. CONST. art I, cl. 23 (reserving the right to the legislature to restrict marriage to opposite-sex couples); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *5 (Alaska Super. Ct. Feb. 27, 1998) (requiring a compelling interest to deprive same-sex couples of marriage rights and putting the state's burden of justifying statutes that discriminate against homosexuals at "a more elevated position" on Alaska's sliding scale of scrutiny); *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (finding that bans on same-sex marriages are classifications based on gender and are subject to strict scrutiny under the Hawaii Constitution); see also DEBRAN ROWLAND, *THE BOUNDARIES OF HER BODY: THE TROUBLING HISTORY OF WOMEN'S RIGHTS IN AMERICA* 260 (2004) (noting that the Alaska and Hawaii backlashes caught gay-rights supporters and legal scholars off guard).

210. *Baehr*, 852 P.2d at 44.

211. *Id.* at 68. Despite finding an Equal Protection Clause violation, the Hawaii Supreme Court found that same-sex marriages were not a fundamental right. *Id.* at 57. The Alaska Supreme Court also found a fundamental right to "choose one's life partner and have a recognized nontraditional family" based upon more stringent sliding-scale analysis. *Brause*, 1998 WL 88743, at *6.

212. See HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples."). See generally David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19 (2000) (discussing the impetus for the constitutional change).

scrutiny.²¹³ Yet despite an initially hospitable political climate, anti-gay activists rallied supporters with predictions that marriage as an institution would go into “cardiac arrest,” generating enough support to kill gay marriage in that state.²¹⁴ A similar backlash could occur in Iowa if the Iowa Supreme Court does not tread carefully.

Consequentially, even if most Iowans accept homosexual relationships in the abstract, it would be preferable for the Iowa Supreme Court to minimize the impact of its opinion in order to avoid setting the gay-rights movement back. Few people on either side of the gay-rights debate believe that the courts would be the best agents of progress toward same-sex marriage, so it would be best to leave as much of the process as possible to voters and their representatives operating in public forums.²¹⁵ One possibility is a narrow “‘rationality’” method of review to permit room for the public to digest judicial progress.²¹⁶ A narrow minimalist ruling that is short on in-depth rationale, similar to *Romer*, could “ultimately build constitutional law on a much more solid foundation than a perfectionist approach that tries to produce social reform in a single leap.”²¹⁷

As Michael Klarman, a noted constitutional scholar, suggested, “[T]he Court’s legitimacy flows less from the soundness of its legal reasoning than from its ability to predict future trends in public opinion.” For instance, before the Supreme Court invalidated anti-miscegenation laws in *Loving*, seventy-two percent of Americans still opposed interracial marriage.²¹⁸ Similarly, legal scholars lambasted *Brown v. Board of Education* for desegregating America’s schools on sophistic legal principles.²¹⁹ Yet both these cases have blossomed into universally revered markers of legal progress in American jurisprudence.²²⁰ Courts have usurped legislatures before, and the same-sex-marriage issue is now squarely before the Iowa Supreme Court—presenting a serious chance to advance human rights without provoking overpowering backlash.

Such an opinion could be viable if it grew out of the precedent that the court set in *RACI II*. The court could merely find that the same-sex-marriage

213. *In re Marriage Cases*, 183 P.3d 384, 427, 441–42 (Cal. 2008).

214. Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES, Nov. 15, 2008, at A1.

215. CASS R. SUNSTEIN, RADICALS IN ROBES 128 (2005).

216. Sunstein, *supra* note 204, at 26.

217. SUNSTEIN, *supra* note 215, at 129 (“[W]hen society is divided, judges ought not to be too sure that they are right.”).

218. RICHARD M. ABRAMS, AMERICA TRANSFORMED: SIXTY YEARS OF REVOLUTIONARY CHANGE, 1941–2001, at 129 (2006) (citations omitted).

219. See Klarman, *supra* note 143, at 487–88 (describing political and scholarly criticism of the *Brown v. Board of Education* decision).

220. *Id.* at 488 (“In the fifty years since it was decided, *Brown* has become an American icon.”).

prohibition does not rationally relate to its stated goals because it is predicated on legislative animus, but remain silent on whether the proper remedy is to permit full-fledged marriage or only to create a parallel set of civil-union statutory rights.²²¹ The court could also abstain from identifying new positive rights for homosexuals or from making unnecessarily broad statements of fact that would prevent other gay-rights cases from working their way up the judicial system in the future.

This is exactly what the New Jersey Supreme Court did in striking down its state's same-sex-marriage ban. The court followed Vermont and Connecticut's lead and simply instructed the legislature to provide parallel rights to gay couples, reserving the right to pass on the methods chosen later when the dust settled.²²² Widespread discrimination still occurs in New Jersey, but now a clear legal basis exists for gradually tearing it down, providing lawyers with an opportunity to plan litigation strategically and creating a more comprehensive body of equal-protection case law at the same time.²²³ The legislature created a commission to hold public hearings on progress toward equality, serving as a public forum for prominent activists and academics to call attention to discrimination.²²⁴ Most importantly, the political branches can manage the movement toward full-fledged marriage around popular sentiment. Governor Corzine has promised to sign a marriage-equality law, but encouraged the legislature to pass the legislation in 2009 to prevent it from becoming an inflammatory wedge issue in the 2008 elections.²²⁵

Iowa should also issue a minimalist opinion that provides equal rights to homosexuals but leaves it to the legislature to make more sweeping changes in the immediate future. Issuing a narrow rational-basis decision is preferable because doing so would allow the court to remedy class-based

221. *Id.* at 478–79 (suggesting that the Massachusetts decision, *Goodridge*, which required full marriage equality for homosexuals, might have ignited less backlash if the court had only required civil unions).

222. *See* *Lewis v. Harris*, 908 A.2d 196, 221–22 (N.J. 2006) (granting the New Jersey legislature the right to follow Vermont's system or to provide full-fledged marriage without speculating on how the court would react); *Season Recap*, N.J. LAWYER, Aug. 13, 2007, at S4 (stating that the New Jersey Supreme Court chose its route in part because of the "uproar" caused by the *Goodridge* decision in Massachusetts).

223. *See* SUNSTEIN, *supra* note 215, at 129 ("In the area of sexual equality, the minimalist method eventually produced a broad prohibition on discrimination; so too with the long series of cases that led the Supreme Court to strike down racial segregation in *Brown v. Board of Education*.").

224. *See Committee Member Elected by General Council*, N.J. LAWYER, Oct. 22, 2007, at 9 (stating that the New Jersey Civil Union Review Commission began holding public hearings at which the New Jersey State Bar Association's President as well as members of the State Bar's Gay, Lesbian, Bisexual and Transgender Section testified).

225. Tina Kelley, *New Jersey Civil Union Law Has Fallen Short in Its First Year*, *Commission Is Told*, N.Y. TIMES, Oct. 28, 2007, at A30.

animus without accusing the thousands of Iowans who oppose same-sex marriage of bigotry or forcing them to feel as if they have to “accept” same-sex marriage. One common complaint among anti-gay activists is that they believe civil-rights activists are trying to force a lifestyle viewpoint on them. As one anti-gay activist said:

What gay activists really want is for people to approve of their lifestyle or be boxed into an inference of bigotry. Gay activists are trying to force public policy that brings legitimacy to their lifestyle and has people who disagree with them be considered less than good citizens.

This debate isn’t about benefits. It’s not about the actual institution of marriage. Rather, it’s about what they call equality in thinking, where everyone has got to either accept them or be a bigot.²²⁶

The court could avoid at least some of this criticism by allowing the legislature to decide for itself whether the state’s married heterosexual population would have to share marriage with same-sex couples. A narrow ruling without broader normative implications could reduce the popular perception that the court is ordering everyone to “accept” homosexuals.

The extensive empirical evidence findings in the *Varnum* opinion might provide the Iowa Supreme Court with another tool with which to tailor its opinion. By accepting academic findings that homosexuals are as effective as heterosexuals at parenting, Judge Hanson discounted one of the most salient objections to gay marriage and struck at the means–end relationship underlying the same-sex-marriage ban.²²⁷ The Iowa Supreme Court could point to these studies as further evidence of the legislature’s animus toward homosexuals. More importantly, by prohibiting classifications based on sexual orientation only to the extent that they are unsupported by empirical evidence, the court could limit the judges’ ability to stretch a ruling in *Varnum* into new and unintended contexts.

Relying on empirical evidence would not be a legal novelty. As one commentator observed, the U.S. Supreme Court has occasionally used empirical evidence to support its rulings in “equal protection cases in which the level of scrutiny is either so high or so low as to make empirical considerations moot.”²²⁸ Rational basis with teeth is one such middle level of

226. DANIEL R. PINELLO, *AMERICA’S STRUGGLE FOR SAME-SEX MARRIAGE* 166 (2006) (quoting an interview with Tim Nashif of the Oregon Family Council).

227. See *Varnum v. Brien*, No. CV5965, slip op. at 31 (Iowa Dist. Ct. Aug. 30, 2007), *appeal filed*, No. 05771 (Iowa 2007), available at <http://data.lambdalegal.org/pdf/legal/varnum/varnum-d-08302007-ia-district.pdf>.

228. Shawn Kolitch, Comment, *Constitutional Fact Finding and the Appropriate Use of Empirical Data in Constitutional Law*, 10 LEWIS & CLARK L. REV. 673, 697 (2006).

scrutiny. If the Iowa Supreme Court consciously applies a toothy rational-basis test, its ruling could accommodate the trial court's findings.

V. CONCLUSION

Americans are increasingly accepting of homosexuals.²²⁹ As today's tolerant youth grows up and takes control of our government, the legal burdens on homosexuals and their families will decrease.²³⁰ Eventually courts and legislatures will agree, as they have on issues of race and gender, that, at least in the abstract, discrimination against homosexuals was just another blight on America's collective political landscape.

If the Iowa Supreme Court wants to presage U.S. Supreme Court jurisprudence, it should look to the high court's previous toothy rational-basis cases. If the U.S. Supreme Court strikes down state gay-marriage bans, it will not be proclaiming new fundamental rights as it did in past civil-rights cases. Instead, the Court will more likely strike down bans with as little clamor as possible, wielding the finest and sharpest legal instruments it has. *Varnum* demands an answer from the Iowa Supreme Court on the most divisive gay-rights issue, and an exacting rational-basis test is a device delicate enough for the court to excise the gay-marriage ban from the state's books with as little trauma as possible.²³¹

229. Frank Newport, *Six in 10 Americans Agree That Gay Sex Should Be Legal*, GALLUP, June 27, 2003, <http://www.gallup.com/poll/8722/Six-Americans-Agree-Gay-Sex-Should-Legal.aspx> (noting long-term increases in popular support for gay rights and drastically higher acceptance of homosexuals among the young).

230. Klarman, *supra* note 143, at 485.

231. *See* Sunstein, *supra* note 204, at 26.