Equality Opportunity: Marriage Litigation and Iowa's Equal Protection Law

*Suzanne B. Goldberg, Sarah Hinger, & Keren Zwick**

Discrimination claims against longstanding rules invite the public and the courts to rethink the status quo and address overarching legal and social commitments to equality together with questions specific to the case at hand.[1] Lawsuits seeking marriage rights for same-sex couples quintessentially illustrate this multilayered nature of law reform litigation, as the debates they provoke focus not only on the rights of same-sex couples but also on the meaning of marriage and the meaning of equality more generally. While few other than lawyers, judges, and perhaps some reporters

---

* Suzanne B. Goldberg is Clinical Professor and Director of the Sexuality & Gender Law Clinic at Columbia Law School. Sarah Hinger and Keren Zwick, both Columbia Law School Class of 2009, were students in the Clinic and co-authors of the amicus brief that is this essay's focus, along with Katherine L. Harris and Sadie R. Holzman, also Columbia Law School Class of 2009.

1. Historically, this link between law reform litigation and social change has been most apparent in connection with challenges to race and sex discrimination in schools and at work. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (rejecting racial segregation in education); United States v. Virginia, 518 U.S. 515 (1996) (invalidating sex-based admissions rule); Frontiero v. Richardson, 411 U.S. 677 (1973) (rejecting military's sex-based employment benefits rule). While these cases sought direct change in areas of education and employment, they also expanded equality jurisprudence and, arguably, strengthened social commitments to end race and sex stereotyping. Numerous scholars have commented on the role of litigation in these social movements. As Robert C. Post has observed, "constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture." *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003); s*ee also* Robert C. Post and Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007) (discussing the relationship between developments in constitutional law and cultural politics regarding abortion); William N. Eskridge Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) (arguing that most changes in later twentieth-century constitutional doctrine responded to identity-based social movements); Tomiko Brown-Nagin, *Elites, Social Movements and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005) (addressing recent U.S. Supreme Court affirmative action cases and analyzing the role of legal action in mobilizing social movements). Public discourse surrounding the cases brought by Guantanamo Bay detainees provides another contemporary example of the relationship between litigation and broader social change. While constitutional challenges to the detentions may help focus attention on the detentions specifically, the public debate ultimately involves a wider-ranging exploration of American culture and values than the due process questions in the case reach. *See, e.g.*, Almerindo Ojeda, Op-Ed., *Guantanamo Bay and the Betrayal of American Values*, S.F. CHRON., June 17, 2008, at B7, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/06/17/EDOQ11A397.DTL; Mark H. Buzby, Op-Ed., *Guantanamo is a Model Prison (Really)*, WALL ST. J., June 4, 2008, at A19, *available at* http://online.wsj.com/article/SB121253762342343273.html?mod=relevancy.

actually read the equal protection and due process arguments that the presiding court will consider, many community members where marriage litigation is taking place become fully engaged in debating the equality and fundamental rights questions implicated by the legal claims.[2]

This degree of popular attention certainly exists in Iowa, where talk of gay couples marrying took center stage even before a lawsuit was filed in the Iowa district court in 2005.[3] The suit, which was brought by six lesbian and gay couples and eventually joined by some of the couples' children,[4] is one of many marriage equality suits to be filed in recent years[5] and is the first to be filed in the Midwest.

Yet while the public debate may be wide-ranging, it typically misses the ways in which the lawsuit may have long-term consequences for a state's equality jurisprudence that extend well beyond marriage.[6] In Iowa,

---

2. For example, as California's marriage cases worked their way through state courts, the L.A. Times ran a weeklong series of conversations in its on-line edition covering the various facets of the debate over equal marriage rights. *See, e.g.*, Ron Prentice and Lorri L. Jean, Op-Ed., *Dust-Up: Golden State, Same-Sex Marriages*, L.A. TIMES, July 30, 2007, http://www.latimes.com/news/opinion/la-op-dustup30jul30,0,6536452.story. Public conversation often continues even after a state high court hands down its ruling. In Massachusetts, for example, after the state Supreme Judicial Court ruled in favor of marriage equality, opponents of marriage rights for same-sex couples continued to challenge the ruling's legal and social force. *See* Katie Zezima, *Vote on Same-Sex Marriage is Delayed in Massachusetts*, N.Y. TIMES, July 13, 2006 at A16, *available at* http://www.nytimes.com/2006/07/ 13/us/13gay.html#.

3. In March of 2004, about nine months before the *Varnum* litigation was filed, forty same-sex couples, accompanied by supporters, attempted to obtain marriage licenses in Johnson County, Iowa. *See* Christina Preiss, *Wedding Bells Don't Chime for 40 Same-Sex Couples*, THE DAILY IOWAN, Mar. 1, 2004, *available at* http://media.www.dailyiowan.com/media/storage/paper599/news/2004/03/01/Metro/Wedding.Bells.Dont.Chime.For.40.SameSex.Couples-622242.shtml. At the same time, the Iowa Senate rejected a resolution to place an amendment prohibiting same-sex couples from marrying on the ballot. *See* S.J. Res. 2002, 80th Gen. Assem., 2d Sess. (Iowa as defeated Mar. 23, 2004).

4. Amended Petition for Declaratory Judgment and Supplemental Injunctive and Mandamus Relief, Varnum v. Brien, No. CV5965 (Iowa Dist. Aug. 30, 2006), 2006 WL 4803848.

5. For cases in which courts have ruled in the plaintiff couples' favor, see Kerrigan v. Comm'r of Pub. Health, No. 17716, 2008 WL 4530885 (Conn. Oct. 28, 2008) (holding that the state constitution requires equal access to marriage for same and opposite sex couples); *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (same); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (same); Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Circ. Ct. Dec. 3, 1996) (same); *cf.* Baker v. State, 744 A.2d 864 (Vt. 1999) (holding that the Vermont Constitution requires the state to provide the benefits of marriage equally to same- and different-sex couples). Other courts have upheld the denial of marriage rights to same-sex couples under their respective state constitutions. *See, e.g.*, Andersen v. King County, 138 P.3d 963 (Wash. 2006); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005); Standhardt v. Superior Ct., 77 P.3d 451 (Ariz. Ct. App. 2003).

6. Although most marriage litigation has involved state constitutional claims, questions of marriage equality for same-sex couples have been addressed at the federal level as well. The Defense of Marriage Act (DOMA)—signed into law on September 21, 1996, in the midst of the state constitutional marriage litigation in Hawaii— provides that the federal government will not recognize same-sex couples' marriages. 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006). Some U.S.

specifically, while *Varnum v. Brien* focuses directly on marriage equality, the case also engages an ongoing conversation among the state's courts about how Iowa's equality guarantees should be enforced.

This essay introduces an amicus brief filed with the Iowa Supreme Court on behalf of three Iowa constitutional law scholars that addresses these broad questions about the future of Iowa equal protection law.[7] In publishing the brief with the University of Iowa College of Law's *Journal of Gender, Race & Justice*, we aim to show why, both in Iowa and around the country, courts would be better off embracing a single standard of equal protection review rather than the ossified and often ineffective federal tiered approach.[8] By highlighting the brief's implications for issues beyond marriage, we also aim to illustrate the point that law reform litigation, especially regarding contested social issues, often implicates not only the specific claim before the court but also other far-reaching questions about the jurisprudential status quo.

The question that is the brief's focus—whether the federal approach to equal protection review is the ideal means of enforcing the equality guarantee—has been the subject of debate for some time, not only in Iowa but also in other states, in the academic literature, and in the United States Supreme Court.[9] As every law student learns, the U.S. Supreme Court has evolved a tiered framework for equal protection claims.[10] Through this framework, courts typically impose rigorous scrutiny on a small set of classifications (race, alienage, national origin, sex, and non-marital

---

Supreme Court Justices have weighed in as well. In their respective opinions in *Lawrence v. Texas*, 539 U.S. 558 (2003), Justices O'Connor and Scalia came to differing conclusions regarding the viability of restrictive marriage laws under federal equality jurisprudence. Justice O'Connor suggested that the laws excluding same-sex couples from marriage could be upheld because "preserving the traditional institution of marriage" would amount to a legitimate state interest. *Id.* at 585 (O'Connor, J., concurring in the judgment). By contrast, Justice Scalia observed that the rejection of a morals-based rationale at issue in *Lawrence* would lead logically to the recognition of equal marriage rights. *Id.* at 601 (Scalia, J., dissenting).

7. The scholars include Robert C. Hunter of Drake University School of Law, Jean C. Love, currently on the Santa Clara University School of Law faculty and formerly a professor at the University of Iowa College of Law, and Maura Strassberg of Drake University School of Law. Professor Suzanne B. Goldberg and students in the Columbia Law School Sexuality & Gender Law Clinic, Katherine L. Harris, Sarah Hinger, Sadie R. Holzman, and Keren Zwick authored the brief. Local counsel, David H. Goldman, Brent A. Cashatt, and Kodi A. Peterson of Babich, Goldman, Cashatt, and & Renzo, P.C., also assisted with the brief.

8. *See infra* notes 11–19 and accompanying text. This argument is further developed in Part II.A. of the accompanying amicus brief.

9. *See infra* notes 16–19, 26–29.

10. *See generally* Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 668–791 (3d ed. 2006) (summarizing the development of tiered equal protection analysis in case law).

parentage).[11] The result of this stratified approach is that although suspect and quasi-suspect classifications receive careful review, many other forms of government line-drawing receive little more than a judicial rubber stamp. So, for example, courts have sustained distinctions based on age,[12] mental capacity,[13] sexual orientation,[14] and other characteristics over strong dissents that the distinctions are either arbitrary or bias-infected.[15]

Even in its early years, the tiered framework drew disagreement from Justice Marshall, who condemned the Court for adhering to a "rigid two-tier model" after it had "apparently lost interest in recognizing further 'fundamental' rights and 'suspect' classes."[16] Then-Justice Rehnquist also disparaged the approach, describing it as "a series of conclusions unsupported by any central guiding principle."[17] Academic commentators have criticized the tiers for functioning like barriers to equality[18] and creating a situation in which cases subject to rational basis review are

---

11. Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481, 496–503 (2004).

12. *See, e.g.*, Mass. Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (upholding a statute establishing age fifty as the mandatory retirement age for uniformed police officers).

13. *See, e.g.*, Heller v. Doe, 509 U.S. 312 (1993) (finding Kentucky's statutory procedures for involuntary civil commitment based on mental retardation valid under rational basis review).

14. *See, e.g.*, Lofton v. Sec. of Dep't of Children and Family Servs., 358 F.3d 804 (11th Cir. 2004), *reh'g en banc denied by* 377 F.3d 1275 (upholding Florida's ban on adoption by lesbians, gay men, and bisexuals). Recently, in both California and Connecticut, state supreme courts have determined that sexual orientation-based classifications warrant heightened scrutiny. *See In re* Marriage Cases, 183 P.3d 384, 443 (Cal. 2008); Kerrigan v. Commissioner of Public Health, No. 17716, 2008 WL 4530885, at *13 (Conn. Oct. 28, 2008).

15. *See Murgia*, 427 U.S. at 321 (Marshall, J., dissenting) ("There is simply no reason why a statute that tells able-bodied police officers . . . that they no longer have the right to earn a living [as officers] merely because they are 50 years old should be judged by the same minimal standards of rationality that we use to test economic legislation that discriminates against business interests."); *Heller*, 509 U.S. at 336–37 (Souter, J., dissenting) ("[T]he distinctions wrought by the Kentucky scheme cannot survive even that rational-basis scrutiny, requiring a rational relationship between the disparity of treatment and some legitimate governmental purpose, which we have previously applied to a classification on the basis of mental disability."); *Lofton*, 377 F.3d at 1291 (Barkett, J., dissenting) ("The ban on homosexual adoption at issue here violates the Equal Protection Clause of the Fourteenth Amendment because Florida's proffered rational basis is expressly refuted by the state's own law and practice and because a class consisting of all homosexual citizens was targeted solely on the basis of impermissible animus.").

16. *Murgia*, 427 U.S. at 318–19 (Marshall, J., dissenting).

17. Trimble v. Gordon, 430 U.S. 762, 777 (1977).

18. *See, e.g.*, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004); Gerald Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17 (1972); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 163–65 (1984); G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1 (2005); Kenneth L. Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977).

"dismissed out of hand."[19]

Notably, Iowa has long been sensitive to the problems of inconsistency and inadequacy associated with weak review of government-imposed inequalities. In its very first case, the Iowa Supreme Court recognized a former slave's right to personhood while the federal jurisprudence took the opposite position.[20] Several decades later, the Iowa court again embraced a more robust understanding of equality than the federal courts when it rejected segregation in passenger trains, which the U.S. Supreme Court, by contrast, sustained as permissible twenty-three years later in the notorious *Plessy v. Ferguson* decision.[21]

More recently, and in a much different context, the Iowa high court broke from the federal approach yet again, insisting on robust review of a "non-suspect" classification.[22] The U.S. Supreme Court had heard an Iowa case involving a challenge to a law that taxed raceways but not riverboat casinos, and found no federal equal protection problem with the state's raceway/casino distinction.[23] On remand, however, the Iowa Supreme Court determined that it could not meaningfully enforce the Iowa constitution's equality guarantees[24] if it followed the federal approach.[25] Explaining that "all legislation" must be subject to "meaningful review," the state high court then conducted a careful review and rejected the very classification that

---

19. Lawrence Gene Sager, *Fair Measure: The Legal Status of Unenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1216 (1978).

20. *Compare In re* Ralph, Morris 1 (Iowa 1839) (abolishing slavery in Iowa) *with* Scott v. Sandford, 60 U.S. 393 (1856) (upholding slavery under the U.S. Constitution).

21. *Compare* Coger v. The N. W. Union Packet Co., 37 Iowa 145, 154–55 (Iowa 1873) (invalidating the use of segregated facilities on passenger trains under the Iowa Constitution) *with* Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding segregation in passenger cars under the Federal Constitution). Indeed, even prior to *Plessy*, the U.S. Supreme Court had demonstrated its divergent approach to equality analysis, holding that racial segregation was not an injury within the meaning of the Fourteenth Amendment and that Congress lacked the power under Section 5 of the Fourteenth Amendment to create a remedy for claimed injuries. *See Civil Rights Cases*, 109 U.S. 3 (1883).

22. *Compare* Fitzgerald v. Racing Ass'n of Cent. Iowa (*RACI I*), 539 U.S. 103 (2003) *with* Racing Ass'n of Cent. Iowa v. Fitzgerald (*RACI II*), 675 N.W.2d 1 (Iowa 2004).

23. In sustaining the classification, the Court explained that

> The Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

RACI I, 539 U.S. at 107 (internal citations omitted).

24. IOWA CONST. art. I, §§ 1, 6.

25. *RACI II*, 675 N.W.2d at 9 (discussing Iowa's "constitutional obligation to safeguard constitutional values by ensuring *all* legislation complies with those values") (emphasis in original, internal citations omitted).

survived federal equal protection review.[26]

In deciding the tax case, the Iowa court focused not only on the specifics of distinguishing between raceways and riverboats but more generally on the relationship between state and federal equal protection review. Iowa and federal equality guarantees, it observed, sometimes "warrant divergent analyses."[27] The court reinforced this point in several subsequent cases addressing issues ranging from zoning in college towns[28] to parental rights in state-initiated adoption proceedings.[29]

Consequently, when the marriage lawsuit was filed in Iowa, not only did it join in an already vigorous public debate about the value of marriage and the rights of same-sex couples, but it also entered a lively jurisprudential deliberation about how best to ensure meaningful equal protection review under the Iowa Constitution.[30] In particular, although the Iowa high court has committed itself to robust review in several recent cases, it has not yet committed expressly to applying meaningful equality review in all equal protection challenges.

The question of how the court will conduct equal protection review has, in turn, important ramifications for the future of equality in Iowa. If the state were to adopt the "toothless" approach it condemned in *RACI II* in its review of the marriage law's distinction between same- and different-sex couples,[31] the plaintiffs would face a more difficult (though not insurmountable) burden in proving the impermissibility of the different marriage rules for same- and different-sex couples.[32]

---

26. *Id.*

27. *Id.* at 5; *see also In re* Det. of Hennings, 744 N.W.2d 333, 338–39 (Iowa 2008) (citing *RACI II* for the proposition that Iowa equal protection analysis may diverge from federal equal protection analysis); Sanchez v. State, 692 N.W.2d 812, 817 (Iowa 2005) (same).

28. Ames Rental Prop. Ass'n v. City of Ames, 736 N.W.2d 255, 258–59 (Iowa 2007).

29. *In re* S.A.J.B., 679 N.W.2d 645, 648 (Iowa 2004).

30. For example, the Court's decision in *RACI II* led former Iowa Governor Thomas J. Vilsack to remark that it is "fairly clear . . . that Iowa's supreme court is prepared to create a whole different structure of equal protection under the state constitution which may not necessarily be the same as under the federal Constitution." Thomas J. Vilsack, *Reflections of a Participant on American Democracy and the Constitution*, 55 DRAKE L. REV. 887, 891 (2007).

31. The statute challenged in *Varnum* declares that "[o]nly a marriage between a male and a female is valid." Iowa Code § 595.2(1) (2001).

32. *See supra* note 23. The plaintiffs and amici contended that the marriage law's classification violated even the weakest form of equal protection review. *See* Proof Brief of Plaintiffs-Appellees, Varnum v. Brien, No. 07-1499 (Iowa, filed Mar. 28, 2008), *available at* http://data.lambdalegal.org/pdf/legal/varnum/lambda-legal-proof-brief-of-plaintiffs-appellees-iowa-supreme-court.pdf; *infra* Part IV of the accompanying amicus brief. The point here is thus not that robust equality review is necessary for the plaintiffs to prevail but rather that meaningful review would more starkly highlight the absence of a legitimate justification for the distinction between same- and different-sex couples.

In addressing the proper equal protection analytic framework to carry out the Iowa Constitution's equal protection guarantees, the amicus brief that follows argues that the state cannot continue to exclude same-sex couples from marriage without a "credible" and "realistically conceivable" justification.[33] The "purely superficial"[34] review that is typical of the federal approach should not be applied. The brief argues, further, that with meaningful review, none of the state's interests—whether in responsible procreation, resource conservation, or promoting the integrity of "traditional marriage"—provide a legitimate explanation for the state's restricting marriage to different-sex couples.[35]

Returning now to the point made at the outset, we can see that while law reform litigation can have a transformative effect on the public debate and on the legal issue before the court, we miss an important measure of the litigation's transformative potential if we limit our focus to those frames. Instead, as Iowa marriage litigation illustrates, challenges to a government's line-drawing between groups of people can prompt broad and profound questions about a legal system's commitment to enforcing its own equality guarantees. In raising these questions, lawsuits like *Varnum* thus offer an important opportunity not only to ensure meaningful equality in the case before the court, but also to ensure a meaningful approach to equality claims in the state's jurisprudence as a whole.

* * *

INTEREST OF AMICI

Professors Robert C. Hunter, Jean C. Love, and Maura Strassberg, (collectively "Amici") are constitutional law scholars who have taught or currently teach constitutional law in Iowa. They have individual expertise relating to both the United States Constitution and the Iowa Constitution. They have substantial expertise relating to both Iowa and federal constitutional law. Their expertise enables Amici to evaluate tiered equal protection analysis in a manner that will supplement rather than duplicate the arguments presented by the parties. In their independent analysis, Amici conclude that tiered equal protection analysis is not in keeping with Iowa's equal protection jurisprudence as developed by this Court under the Iowa Constitution.

---

33. *See infra* Part II.B of the accompanying amicus brief; *RACI II*, 675 N.W.2d at 7 & n.3.

34. *See infra* Part II.B of the accompanying amicus brief; *RACI II*, 675 N.W.2d at 7 & n.3.

35. For development of the reasoning on this point, *see infra* Part III of the accompanying amicus brief.

INTRODUCTION & SUMMARY OF ARGUMENT

Iowa has a robust equal protection jurisprudence centered on a fact-based, context-sensitive review of all classifications. This review requires a "realistic" comparison between the proffered state interest and the burden placed on individuals by the challenged classification, as this Court has repeatedly affirmed. *See, e.g.*, *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 n.3 (Iowa 2004) (hereinafter *RACI II*); *In re A.W.*, 741 N.W.2d 793, 812 (Iowa 2007).

By contrast, the federal tiered approach to equal protection review is far less consistent and careful. As detailed below, the tiered framework's variable application often fails to provide clear, meaningful review, especially when claims are subjected to weak rational basis review. *RACI II*, 675 N.W.2d at 8 n.3 (describing federal equal protection analysis as, at times, "superficial").

Amici argue, therefore, that this Court should explicitly embrace, as it has implicitly done in the past, a context-sensitive analysis of *all* classifications, including the one at issue in this case. This approach requires the Court to weigh the state's interests in excluding same-sex couples from marriage against the serious burden imposed on those couples and their children through the exclusionary classification. Ultimately, as Amici show, fact-sensitive review that is consistent with Iowa's longstanding approach to equal protection analysis requires invalidation of the challenged marriage classification.

ARGUMENT

The case before this Court presents the very situation where Iowa and federal equal protection law "warrant divergent analyses" because they differ in "scope, import, [and] purpose." *RACI II*, 675 N.W.2d at 5. Unlike the federal guarantee, which has been construed to require three distinct tiers of equal protection review, Iowa's equal protection jurisprudence turns, in *all* cases, on the relative consideration of the burden on an individual's rights and the state's interests. *Compare Heller v. Doe*, 509 U.S. 312, 319 (1993) (affording a "strong presumption of validity" to classifications considered under rational basis review) *with RACI II*, 675 N.W.2d at 9 (asserting that "*all* legislation" must be subject to thorough, "meaningful review" (citation omitted) (emphasis in original)). In analyzing equal protection claims, including the claim in the instant case—that Iowa's marriage law severely burdens the plaintiffs without adequate justification from the state—application of a context-sensitive, balancing approach, rather than tiered review, would be truest to Iowa's constitutional values.

I. IOWA HAS A ROBUST TRADITION OF EQUALITY THAT CALLS FOR INDEPENDENT ANALYSIS TO ADEQUATELY PROTECT INDIVIDUAL RIGHTS.

Since the state's founding, Iowa has been strongly committed to treating its citizens equally and to protecting their individual rights and liberties.[1] To hold these values paramount, this Court has, when necessary, departed from the rigid federal framework and engaged in its own, independent equal protection analysis.

A. Iowa Departs from the Federal Government's Approach to Equal Protection When Doing So Is In Keeping With Iowa's Robust Tradition of Equality.

This Court recognizes that its "constitutional obligations" could require it to "employ a different analytical framework" than that used by federal courts to insure meaningful enforcement of the Iowa Constitution's equal protection guarantees. *RACI II*, 675 N.W.2d at 4-5; *see also In re Det. of Hennings*, 744 N.W.2d 333, 338-39 (Iowa 2008) (citing *RACI II* for the proposition that Iowa equal protection analysis may diverge from federal equal protection analysis); *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 258-59 (Iowa 2007) (same); *State v. Simmons*, 714 N.W.2d 264, 277 (Iowa 2006) (same); *Sanchez v. State*, 692 N.W.2d 812, 817 (Iowa 2005) (same); *In re S.A.J.B.*, 679 N.W.2d 645, 648 (Iowa 2004) (same).

Principles of state sovereignty, which encourage states to actively protect individual rights, reinforce the Court's inclination to adopt its own standard. As Justice Brennan observed, state courts can and should interpret their constitutions independent of federal jurisprudence to insure full protection of individual rights.

> [S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law . . . [F]ederal law . . . must not be allowed to inhibit the independent protective force of state law—

---

1. Iowa's commitment to equality finds explicit support in two clauses of Iowa's constitution. Article I § 1 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, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."

Similarly, Article I § 6 states, "All laws of a general nature shall have a uniform operation; the general assembly shall not grant any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."

> for without it, the full realization of our liberties cannot be guaranteed.

William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977) (hereinafter Brennan). Endorsing Justice Brennan's reinforcement of state sovereignty in constitutional interpretation, several state supreme courts have found their respective state constitutions to guarantee individual rights beyond the protections of the U.S. Constitution. *See, e.g., Dow v. New Haven Independent, Inc.*, 549 A.2d 683, 689 (Conn. 1987) (relying on state sovereignty principles as a basis for affirming stronger state protection for freedom of the press); *State v. Dubose*, 699 N.W.2d 582, 597 (Wis. 2005) (setting an independent state test for assessing whether out-of-court identifications violate due process); *LeCroy v. Hanlon*, 713 S.W.2d 335, 338 (Tex. 1986) (invoking Brennan's view of state sovereignty to support stronger state protections than federal protections for the right of access to courts).

Indeed, this Court highlighted the value of independent state constitutional analysis when it recognized, in *RACI II*, that state courts regularly depart from federal jurisprudence when interpreting their own constitutions. *RACI II*, 675 N.W.2d at 6 ("'Examples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court.'" (quoting Brennan)).

B. Iowa's Jurisprudence Secures Stronger Equality Protections than does Federal Equal Protection Law.

Iowa's willingness to depart from the tiered federal analytical framework is in line with its history of providing broader protections under state equality provisions than those secured by the Federal Constitution.

The Court's decision in *RACI II* provides the most recent and direct example of Iowa's broader protection of equality. The U.S. Supreme Court sustained the Iowa law at issue against a federal equal protection challenge, finding no constitutional violation in a statute that taxed raceways but not riverboat casinos. *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103 (2003). Yet on remand, this Court applied Iowa's own equal protection law and struck down the very same classification. *RACI II*, 675 N.W.2d at 16.

The Iowa Supreme Court's commitment to broader equality protection began much earlier, when it decided its very first case. *See In re Ralph*, Morris 1 (Iowa 1839). In that case, the Court recognized a former slave's right to personhood at a time when federal jurisprudence took the contrary position. *Contrast In re Ralph*, Morris 1, 7 (Iowa 1839) (rejecting attempts by a Missouri slave owner to have Ralph, a former slave, forcibly returned

to Missouri) *with Dred Scott v. Sandford*, 60 U.S. 393 (1856) (upholding a Missouri slave owner's right to have Dred Scott treated as property and returned to him, and finding that Scott's residence outside Missouri did not emancipate him) *and M'Cutchen v. Marshall*, 33 U.S. 220 (1834) (treating slaves as property to be bequeathed or freed in accordance to the owner's will).

Grounding its analysis in Iowa's independent constitutional guarantees, the Court in *In re Ralph* affirmed the wide-reaching and fundamental principle that all persons are to be treated equally under the law. The Court held that where an action "illegally restrains a human being of his liberty, it is proper that the laws, which should extend equal protection to [persons] of all colors and conditions, should exert their remedial interposition." *In re Ralph*, Morris at 7.

Similarly, when this Court invalidated the use of segregated facilities on passenger trains, it expressly relied on "the broad and just ground of the equality of all [persons] before the law which is not limited by color, nationality, religion or condition in life." *Coger v. Nw. Union Packing Co.*, 37 Iowa 145, 154 (Iowa 1873). *Cf. Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding racially segregated public accommodations), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). In addition, for almost a century, this Court's interpretation of Iowa's constitution in *Clark v. Board of Directors* secured equal protection for racial minority school children where federal jurisprudence did not. 24 Iowa 266 (1868) (invalidating racial segregation in public schools). *Cf. Brown*, 347 U.S. 483 (ordering public schools to desegregate).

More recently, in *RACI II*, 675 N.W.2d, as well as in *Bierkamp v. Rogers*, 293 N.W.2d 577 (Iowa 1980), the Court affirmed that its commitment to a broad equal protection guarantee extends beyond racial classifications. In *Bierkamp*, this Court found that Iowa's equality protections required a departure from federal equality jurisprudence when it struck down a statute that limited a driver's liability for injuries to passengers. 293 N.W.2d at 578. The U.S. Supreme Court, by contrast, found an analogous state statute did not violate the Fourteenth Amendment. *Silver v. Silver*, 280 U.S. 117 (1929).[2] In *Bierkamp*, as in *RACI II* and numerous other cases, this Court insured that all Iowans are treated equally in all aspects of their lives, providing protections beyond the limited guarantees of federal equal protection.

2. The United States Supreme Court has on numerous appeals declined to reconsider this issue for want of a substantial federal question. *See, e.g.*, *Hill v. Garner*, 434 U.S. 989, dismissing appeal from 561 P.2d 1016 (Or. 1977); *White v. Hughes*, 423 U.S. 805, dismissing appeal from 519 S.W.2d 70 (Ark. 1975); *Cannon v. Oviatt*, 419 U.S. 810, dismissing appeal from 520 P.2d 883 (Utah 1974). As this Court recognized in *Bierkamp*, these U.S. Supreme Court decisions were binding on both state and federal courts and thus effectively foreclosed courts from considering the issue on federal constitutional grounds. *Bierkamp*, 293 N.W.2d at 579.

II. A CONTEXT-SENSITIVE BALANCING APPROACH IS THE BEST WAY TO PROVIDE THE MEANINGFUL JUDICIAL REVIEW NECESSARY TO SECURE THE BROAD RANGE OF RIGHTS PROTECTED BY IOWA'S CONSTITUTION.

This Court's equal protection jurisprudence reflects a context-sensitive balancing analysis. Explicit adoption of that approach here, as distinct from the inflexible and often inadequate federal tiered framework, will better facilitate full and careful consideration of Iowa's core constitutional concerns in assessing equal protection claims.

Chief among the concerns reflected in this Court's decisions are: (1) the importance of the state interest proffered to justify the challenged classification, including whether the stated goals are "permissible" and "realistic," *RACI II*, 675 N.W.2d at 9, and (2) the significance of the right or privilege at stake and the degree of harm to the individual burdened, including the degree to which the challenged classification is over- or under-inclusive. *See, e.g., RACI II*, 675 N.W.2d at 10 (citing *Bierkamp*, 293 N.W.2d at 584); *In re S.A.J.B.*, 679 N.W.2d at 651. These factors are important in *all* equal protection determinations, and applying a balancing approach that values substance over formula better enables the Court to consider them.

A. Tiered Equal Protection Analysis Fails to Provide the Meaningful Review Required by the Iowa Constitution.

The federal framework of tiered analysis does not provide an adequate mechanism for reviewing Iowa equal protection claims for several reasons.

First, as the Court recognized in *RACI II*, the federal application of tiered equal protection analysis is not sufficiently rigorous to meet the requirements of the Iowa Constitution. In disagreeing with the U.S. Supreme Court regarding the tax classification at issue in that case, this Court found federal rational basis review inadequate because it permitted the U.S. Supreme Court to sustain the classification, even though the state offered "no explanation of or justification for" the statutory distinction between raceways and riverboat casinos. *RACI II*, 675 N.W.2d at 13 n.6. The Court recognized this shortcoming as indicating a larger problem in that many cases subject to rational basis review are "dismissed out of hand." *Id.* at 13 n.5 (citing Lawrence Gene Sager, *Fair Measure: The Legal Status of Unenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1216 (1978)). This assessment of rationality review's flaw is consistent with the U.S. Supreme Court's own observation that rational basis review does not require a legislature to "articulate at any time the purpose or rationale supporting its classification." *Heller*, 509 U.S. at 320. As this Court explained, the often

"toothless" tiered review used for enforcing the federal equal protection guarantee cannot substitute for a more thorough assessment under the Iowa Constitution. *See RACI II*, 675 N.W.2d at 9.

Second, this Court has emphasized that "*all* legislation" challenged on equality grounds must be subject to thorough, meaningful review. *RACI II*, 675 N.W.2d at 9 (citations omitted) (emphasis in original). Yet the very purpose of tiered analysis is to differentiate among equal protection claims based solely upon the nature of the classification. *See, e.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) ("[W]hen conducting rational basis review we will not overturn such government action unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the government's actions were irrational. In contrast, when a State discriminates on the basis of race or gender, we require a tighter fit between the discriminatory means and the legitimate ends they serve." (internal quotations and citations omitted)).

Through these categorical distinctions, tiered analysis creates a large gap between rigorous strict scrutiny and strongly deferential rational basis review. *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481, 491 (2004) (arguing that "a unitary standard would potentially narrow the gap between the virtually assured fatal blow dealt to classifications under strict scrutiny and the rubber stamp regularly received by classifications subject to rational basis review"). Under tiered analysis, strict scrutiny applies only to claims based on race or national origin and is almost always fatal. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (describing racial classifications as "constitutionally suspect" and subject to "the most rigid scrutiny"). Intermediate scrutiny, which is applied to sex- and illegitimacy-based classifications, is likewise an imposing standard. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 545 (1996) (striking down sex-based school admissions rule because it could not be supported by an "important governmental objective" that was "substantially related" to the challenged classification).

By contrast, rational basis review, which applies to the overwhelming majority of classifications, provides the weakest form of review. *See* Jeffrey M. Shaman, *Constitutional Interpretation: Illusion and Reality* 90 (2001) (explaining that rational basis "scrutiny that was supposed to be minimal in theory turned out to be nonexistent in practice"); *FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993) (asserting that under rational basis review, "a legislative choice is not subject to courtroom factfinding and may be . . . unsupported by evidence or empirical data"). In short, the variable quality of review under the tiered approach cuts precisely against this Court's commitment to meaningful review across the board.

Third, even the three tiers themselves are not applied consistently, leading both U.S. Supreme Court Justices and the courts of other states to

observe that the mechanistic framework interferes with meaningful analysis.[3] As then-Justice Rehnquist stated, federal equal protection jurisprudence can be read as amounting to "a series of conclusions unsupported by any central guiding principle." *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting). Justice Marshall similarly condemned the tiered framework's unpredictability for its failure to provide notice to interested parties or guidance to judges in future cases. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 320-21 (1976) (Marshall, J., dissenting). Picking up on these concerns, the New Jersey Supreme Court rejected the use of tiers in its own equal protection analysis, asserting that "[m]echanical approaches to the delicate problem of judicial intervention . . . divert a court from the meritorious issue," *Right to Choose v. Bryne*, 450 A.2d 925, 936 (N.J. 1982) (internal quotations omitted), and "prevent[] a full understanding of the clash between individual and governmental interests." *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 632 (N.J. 2000).

B. When Evaluating Equal Protection Claims, the Court has Given, and Should Continue to Give in This Case, Context-Sensitive Consideration to the State's and the Burdened Party's Interests, Rather than Applying Mechanical Tiered Review.

Given the tiered framework's flaws, this Court should, as it has in the past, meaningfully compare the state's interests and the burdens placed on individuals,[4] rather than simply validating any "reasonably conceivable"

---

3. Although the United States Supreme Court has occasionally applied what can be considered a stronger analysis under rational basis review, *see, e.g., Romer v. Evans*, 517 U.S. 620 (1996) (considering a classification based on sexual orientation); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (reviewing differential treatment based on mental retardation), this Court's jurisprudence suggests that meaningful, contextual review should be applied not just occasionally but consistently in *all* cases. *RACI II*, 675 N.W.2d at 10. *See also* Goldberg, 77 S. Cal. L. Rev. at 514-16 (describing and critiquing the U.S. Supreme Court's inconsistent application of searching rational basis review)

Faced with a similar problem, the Vermont Supreme Court recognized that occasional divergence in favor of more searching review in some cases is insufficient and rejected the tiered framework, adopting a balancing approach to equal protection analysis. *Baker v. State*, 744 A.2d 864, 872-73 (1999).

4. Other states have similarly abandoned tiered review for an approach that focuses on the burdening of individual rights as compared to the state's interest in the challenged classification. *See State v. Ostrosky*, 667 P.2d 1184, 1192-93 (Alaska 1983) ("The applicable standard of review for a given [equal protection] case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme."); *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985) (When deciding equal protection claims,

explanation for a classification subject to rational basis review. *Contrast RACI II*, 675 N.W.2d at 7 n.3 *with Heller*, 509 U.S. at 320.

This comparison, as explained by the Court in past cases, requires that the government provide "reasons justifying a particular classification" that are "credible" and "*realistically* conceivable."[5] *RACI II*, 675 N.W.2d at 7 & n.3 (internal citations and quotations omitted) (emphasis in original); *see also Ames*, 736 N.W.2d at 260; *In re A.W.*, 741 N.W.2d at 812; *Sanchez*, 692 N.W.2d at 818. In contrast, tiered equal protection review requires plaintiffs to rebut "*every conceivable*" government interest. *Heller*, 509 U.S at 320 (emphasis added). By insisting on realistic justifications and rejecting the "purely superficial analysis" fostered by tiered review, this Court's contextual approach has enabled meaningful enforcement of Iowa's equality guarantees. *RACI II*, 675 N.W.2d at 7 n.3.

This Court's decision in *Ames Rental Property Ass'n v. City of Ames*, 736 N.W.2d 255 (Iowa 2007), for example, illustrates this context-specific analysis of the interests at stake. The case upheld a zoning ordinance restricting the ability of unrelated persons to live together in single family zones. *Id.* at 259. After careful consideration, the Court determined that the plaintiffs' evidence did not sufficiently show that the residency requirement posed an unreasonable burden on housing arrangements. By way of example, the plaintiffs had argued that the classification violated the state's equal protection guarantee because "a fifteen-member family could live in a tiny one-bedroom house with fifteen cars parked in the streets and driveways, while four unrelated people cannot live in a fifteen bedroom house with no cars at all." *Id.* at 261 n.5. The Court found that this and the other examples provided were not "typical of reality," and therefore were unpersuasive. *Id.* at 261 nn.4-5. The Court counseled that establishing a burden sufficient to violate equal protection "requires more than imagining extreme examples." *Id.* at 260. As the *Ames* holding demonstrates, the context-specific approach did not pre-determine the case in favor of either party, but instead supported meaningful review of both parties' positions.

Under this current approach, the Court likewise gives careful review to the legitimacy and factual basis of the government's interests. In *Ames*, the Court's contextual analysis considered the unique situation of Ames as a

---

the New Jersey Supreme Court considers "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.").

5. Once again, Iowa is not alone in developing a state-specific, context-sensitive equal protection test emphasizing the need for government interests to have a factual basis. The Alaska Supreme Court requires the connection between the government interest and the classification to be "substantial," *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 791 (Alaska 2005), which can be deduced through a "less speculative, less deferential means-to-ends inquiry." *Id.* at 791 n.48 (quotations omitted). Vermont has adopted a similar requirement. *Baker*, 744 A.2d at 872 ("Vermont courts . . . engage in a meaningful, case-specific analysis to insure that any exclusion from the general benefit and protection of the law would bear a just and reasonable relation to the legislative goal.").

college town, *Id.* at 261 & n.6, and the government's reliance on existing experience in managing the effect of student populations on the broader community. *Id.* at 261. The Court also recognized the legislature's conscious attempt to minimize burdens through the law's "flexible and expansive" definition of "family." *Id.* at 262. While traditional rational basis review might have led the Court to the same conclusion as this balancing approach produced, it would have bypassed the careful, fact-based review required in Iowa's constitutional jurisprudence.

This Court conducted a similar contextual analysis in *In re A.W.*, 741 N.W.2d 793 (Iowa 2007), when it considered a challenge to the state Indian Child Welfare Act's classification of "Indian children." Unlike the federal law, which limited "Indian children" to members of a federally recognized tribe, the state law included all ethnic Indian children within its scope. *Id.* at 799. The Court first found that the federal government had not delegated authority to the state legislature to expand the federal definition. *Id.* at 810-11. The Court then added that it had an "axiomatic" duty to consider whether Iowa's definition of "Indian children" violated the state equal protection guarantees, even assuming the legislature had had authority to regulate in this area. *Id.* at 808. In conducting its equal protection analysis, this Court carefully weighed the state's interests and the burdens placed on affected children. *Id.* at 808 n.12. While the Court found the legislature's goal of preserving Indian tribes "laudatory," *Id.* at 810, it also held that this interest was not served by the classification because the children at issue had no relationship with "the reservation or traditional [tribal] society." *Id.* at 812. Comparing the stated goal, which was not served by the classification, to the severe burden placed on children through prolonged proceedings to terminate parental rights, the Court concluded that the classification violated the state equal protection guarantee. *Id.* at 812.

As a part of a context-sensitive, fact-based analysis in all equal protection challenges, this Court also insists in *all* cases—and should insist here—that a reasonable fit exist between classifications and their justifications. *RACI II*, 675 N.W.2d at 10 (citing *Bierkamp*, 293 N.W.2d at 584) (establishing that "as a classification involves extreme degrees of overinclusion and underinclusion . . . it cannot be said to reasonably further [the legislative] goal"); *see also Ames*, 736 N.W.2d at 260 (using the reasonable fit requirement to review the constitutionality of a zoning statute); *Claude v. Guarantee Nat'l Ins. Co.*, 679 N.W.2d 659, 665 (Iowa 2004) (invoking the reasonable fit requirement in assessing the validity of legislation distinguishing between hit-and-run and miss-and-run drivers); *In re S.A.J.B.*, 679 N.W.2d at 651 (applying the reasonable fit requirement in reviewing a statutory classification distinguishing between indigent parents in state-initiated proceedings and in private party adoptions).

This approach again contrasts with federal tiered review, which typically takes issue with a statute's precision only when applying

heightened review. *See Bierkamp*, 293 N.W.2d at 584 (citing *McGinnis v. Royster*, 410 U.S. 263 (1973)). As the Court established in *Bierkamp*, the Iowa Supreme Court's evaluation of a classification's over- or under-inclusivity in all cases "necessarily merges the standards applicable under the [] tiered approach." *Bierkamp*, 293 N.W.2d at 584.

In re S.A.J.B., 679 N.W.2d 645 (Iowa 2004), provides a particularly strong example of the Court's attention to the need for a reasonable fit between the classification and the legislative goal. The Court considered a law that provided counsel to indigent parents in state-initiated parental rights termination proceedings, but not in private party adoption proceedings that also involved terminating parental rights. *In re S.A.J.B.*, 679 N.W.2d at 647-48. The Court rejected the state's argument that the classification was reasonably related to the state's interest, which the state defined as insuring counsel only when the state was an active participant. *Id.* at 650. Focusing on the statute's realistic effect, the Court found the differing state role in the two situations did not alter the analysis where the burden on the plaintiff, possible termination of the parent-child relationship, remained the same. *Id.*

In all of the cases just discussed, the Court considered vastly different laws and circumstances, and in each, conducted a thorough, fact-based review. With a consistently focused inquiry across a range of classifications, the Court carefully compared the facts marshaled by both sides, weighed the importance of the government's interest and the burden placed on individual rights, and reached a determination based upon an assessment of these considerations. By applying this balancing approach to the case at bar, the Court will continue its past practice and will be well-situated to give effect to the constitutional values that have long grounded Iowa's equal protection analysis.

III. BALANCING THE STATE'S INTERESTS IN THE MARRIAGE CLASSIFICATION AGAINST THE BURDEN ON THE COUPLES EXCLUDED FROM MARRIAGE DEMONSTRATES THAT IOWA'S MARRIAGE STATUTE IS UNCONSTITUTIONAL.

Iowa's equality jurisprudence, as described above, requires the Court in this case to evaluate the numerous burdens same-sex couples face on account of the statutory declaration that "[o]nly a marriage between a male and a female is valid." Iowa Code § 595.2(1) (2007). It must then weigh these burdens against the state's asserted interest in excluding same-sex couples from marriage and consider whether a sufficient fit exists between the challenged classification and the proffered government interests.

As the parties and Amici have briefed at length, the state's marriage law creates a status of fundamental importance and provides different-sex

couples access to a wide array of benefits, both tangible and dignitary; yet this status and its associated benefits are unavailable to same-sex couples. Trial Judgment p. 22, ¶¶ 33-35 (classifying these as material facts as to which there is no genuine issue).

Keeping in mind the significant burden that flows from the denial of an important right, Iowa's equal protection jurisprudence requires that the Court also consider the state's interest in retaining the exclusion. Here, the state seeks to justify imposing this burden as necessary to serve three goals: encouraging responsible procreation by heterosexuals, enabling conservation of state resources, and promoting the integrity of "traditional marriage." Trial Judgment p. 51.

Consistent with this Court's approach to equal protection, the core question in this case is whether the state's proffered interests in the challenged classification are sufficiently "credible" and "realistically conceivable" to justify depriving plaintiffs of a profoundly important set of rights and benefits. The lower court undertook this inquiry and found that the state's interests lack the factual grounding to support the classification challenged here. Trial Judgment p. 48-49, 55-56, 61.

More specifically, an interest in responsible procreation cannot explain the different treatment of same- and different-sex couples. As the lower court recognized, "by excluding all same-sex couples from marriage, the statute actually defeats the purpose of responsible procreation by excluding qualified individuals from marriage." Trial Judgment p. 58. In addition, both types of couples have and raise children, and the state's law makes no suggestion that sexual orientation is relevant to parenting ability. Trial Judgment p. 55 ("Defendant admits that nothing about a parent's sex or sexual orientation affects either that parent's capacity to be a good parent or a child's healthy development."); *see also In re Marriage of Cupples*, 531 N.W.2d 656, 657 (Iowa Ct. App. 1995) (finding sexual orientation a "nonissue" for custody determinations).

Moreover, no facts support the state's assertion that excluding same-sex couples from marriage serves the proffered interest in resource conservation. Trial Judgment p. 60-61. Instead, that reason, like the fifteen-car argument made in *Ames*, is not sufficiently "typical of reality" to be persuasive.

The state's third proffered interest—the promotion of the integrity of "traditional marriage"—is likewise unavailing. In fact, the lack of any realistic, factual basis is illustrated by this interest's failure to withstand even ordinary rational basis review. The lower court, while applying traditional rational basis review, found this aim to be discriminatory and illegitimate. The court understood that a desire to promote "traditional marriage" "means simply that one wishes to exclude same-sex couples from entering that union because that is the way things always have been" and firmly rejected this logic. Trial Judgment p. 51-53. *Cf. U.S. Dep't of Agric.*

v. Moreno, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (emphasis in original)).

Thus, the state's marital exclusion cannot survive an equal protection analysis that directly weighs the serious burdens imposed upon the plaintiff couples against the state's proffered interests, which lack factual or logical support.

IV. IOWA'S MARRIAGE LAW VIOLATES THE LITERAL TERMS OF IOWA'S EQUAL PROTECTION GUARANTEE, AND MUST BE INVALIDATED EVEN IF A BALANCING TEST IS NOT APPLIED.

Even if the Court does not adopt a balancing approach to equal protection analysis, a traditional tiered approach is not called for in this case. The challenged law imposes a burden on same-sex couples so substantial that it "is itself a denial of equal protection of the laws in the most literal sense." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

The U.S. Supreme Court has recognized that this type of literal violation of the terms of equal protection, though rare, can and should be invalidated even without applying the traditional tiered framework of federal jurisprudence. In *Romer*, the U.S. Supreme Court considered an amendment to Colorado's constitution that barred anti-discrimination protections for gay people in the state. *Id.* Because the measure precluded the state from providing "the protection of equal laws" to lesbians, gay men, and bisexuals, the Court declared the distinction to be unconstitutional in an analysis separate from its traditional rational basis review. *Id.* at 634. As the Court explained, the amendment was, by definition, improper because it had the "peculiar property of imposing a broad and undifferentiated disability on a single named group." *Id.* at 632.

Like the amendment invalidated in *Romer*, Iowa's marriage law draws a line that authorizes the state to provide protection—in the form of relationship recognition—to one group of Iowans but not to another. By limiting marriage to unions between men and women, Iowa Code § 595.2(1) (2007), the challenged statute excludes same-sex couples from accessing the protection provided by the state for adult interdependent relationships. Put another way, the marriage law bars same-sex couples from obtaining the legal status that grants relationship protection, which is made available to all other Iowans. Acceptance of this law would contradict the history and purpose of Iowa's Constitution, *see* Part I *infra*, and amount to an abandonment of Iowa's commitment to equality.

This Court has voiced an ongoing concern with legislation that renders

a person outside of the law. *See, e.g.*, *In re Ralph*, Morris 1 (Iowa 1839); *In re S.A.J.B.*, 679 N.W.2d 645 (Iowa 2004). *Cf. Romer*, 517 U.S. at 635 (finding it fundamental that a "State cannot [] deem a class of persons a stranger to its laws"). Iowa's marriage law imposes exactly this kind of exclusion and amounts to a per se denial of equal access to the law. Consequently, as *Romer* suggests, this Court can invalidate Iowa's exclusionary marriage law on its face, without the need for either tiered or balancing analysis.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court apply a context-sensitive balancing approach to insure meaningful enforcement of Iowa's equality guarantees, and invalidate Iowa's exclusion of same-sex couples from marriage.

Dated: March 28, 2008

Respectfully Submitted,

Suzanne B. Goldberg (*admission pro hac vice submitted)*
David H. Goldman
Brent A. Cashatt
Kodi A. Petersen
Attorneys for Amici Curiae*

*The attorneys and amici would like to thank Katherine L. Harris, Sarah Hinger, Sadie R. Holzman, and Keren Zwick for their assistance in authoring this brief.