BREAK ON THROUGH: 
THE OTHER SIDE OF VARNUM 
AND THE CONSTITUTIONALITY OF 
CONSTITUTIONAL AMENDMENTS

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I. INTRODUCTION

In April 2009, the Iowa Supreme Court decided Varnum v. Brien.¹ The court’s decision opened the door for same-sex couples to be married in 
Iowa.² The ruling was heralded by supporters of same-sex marriage as a 
breakthrough in civil rights.³ Across the state, advocates of equal rights for

2. Id. at 907.
3. See Jeff Eckhoff & Grant Schulte, Unanimous Ruling: Iowa Marriage No 
   Longer Limited to One Man, One Woman, DES MOINES REG. (Apr. 3, 2009), 
http://www.desmoinesregister.com/article/20090403/NEWS/90403010/Unanimous- 
   ruling--Iowa-marriage-no-longer-limited-to-one-man--one-woman.
gay and lesbian persons celebrated the court’s ruling.4 Same-sex couples embraced exercising their newly recognized liberty.5 The Iowa Supreme Court was praised for its steadfast adherence to the principles enumerated in the state constitution.6 Iowa was once again at the forefront of the nation in the area of civil rights.7

Yet not everyone approved of the court’s decision. Many supporters of the traditional, one-man–one-woman concept of marriage saw the court’s ruling as overstepping the role the judicial branch should play in state government.8 In their view, marriage should be limited to opposite-sex couples; thus, the court erred in denouncing that limitation.9 They vowed to take action.10

The surest way to override the court’s decision in Varnum is to enact an amendment to the Iowa Constitution that specifically defines marriage as a union between a man and woman. After the Varnum ruling, opponents of same-sex marriage pledged to start the process of amending the state constitution to deny marriage to gay and lesbian persons.11 The court had relied on language in the Iowa constitution in determining marriage was not limited to opposite-sex couples.12 With this amendment there would be no ambiguity; only traditional, one-man–one-woman marriages would be recognized in Iowa.

This Note examines what the constitutional landscape would look like assuming an amendment overturning the Varnum decision comes to pass.

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6. See Eckhoff & Schulte, supra note 3.
8. See Eckhoff & Schulte, supra note 3.
9. See Xiong, supra note 5.
11. See id.
It examines arguments proponents of same-sex marriage could make before the Iowa Supreme Court as to why such an amendment is unconstitutional. It also provides answers to possible counterarguments put forth by opponents of same-sex marriage.

Part II includes an overview of same-sex marriage in Iowa. It starts by examining marriage requirements before the \textit{Varnum} decision, specifically the gender-specific language of the state’s marriage statute. Next, \textit{Varnum v. Brien} is reviewed, with particular focus on the court’s analysis of both the judicial scrutiny necessary to determine the constitutionality of the marriage statute and the government objectives advanced in support of that statute. Part II concludes with a look at the effect the court’s decision had on the state.

Part III considers a hypothetical amendment to the Iowa Constitution that reinstates the gender-specific restrictions on marriage in Iowa. This Part sets forth arguments proponents of same-sex marriage may have against such an amendment. Specifically, this Part examines whether anything can be done to oppose a constitutional amendment that takes away a right the state supreme court made available to a particular class of people. The examination analyzes constitutional language and theories advanced by constitutional scholars.

Part IV provides an overall conclusion, including a determination of whether the hypothetical amendment could be found unconstitutional. Ultimately, due primarily to the absence of substantive limitations regarding amendments to the state constitution and the possibility the court would dismiss the case as a political question, the hypothetical amendment would likely pass constitutional muster. Yet that does not mean arguments against its constitutionality are not available. If the courthouse door were to be opened to hear arguments against this amendment, proponents of same-sex marriage could move forward with several challenges to its constitutionality.

\section*{II. SAME-SEX MARRIAGE IN IOWA}

\subsection*{A. Marriage in Iowa Pre-Varnum}

Iowa Code section 595.2 recognized valid marriages as only those marriages occurring between a male and a female.\footnote{13} This specific restriction regarding the genders of the marrying couple was relatively new

\footnote{13. \textit{Iowa Code} § 595.2 (2009).}
in comparison to the state’s codified laws on marriage. The requirement limiting marriage between a male and female was introduced in 1998. By removing any ambiguity pertaining to the gender makeup of persons seeking marriage, it stands to reason the legislature’s primary purpose in enacting the statute was to deny marriage to same-sex couples.

B. Varnum v. Brien

In April 2009, the Iowa Supreme Court determined Iowa Code section 595.2 violated Iowa’s Bill of Rights—in particular, the Iowa Constitution’s equal protection clause. The equal protection clause restricts Iowa’s lawmaking body from giving any class of citizens a privilege not made available to all citizens. The Varnum decision opened matrimony to same-sex couples by declaring the statute unconstitutional. Indeed, the court, in considering which of two remedies to award the plaintiffs, gave as broad a right as that enjoyed by opposite-sex couples.

Varnum involved six same-sex couples who brought suit against the Polk County recorder after all were denied their requests for a marriage license because of their sexual orientation. The district court determined the Iowa law limiting marriage to opposite-sex partners was unconstitutional. The district court judgment was appealed directly to the Iowa Supreme Court due to the significant constitutional implications involved in the decision.

The Iowa Supreme Court considered four factors in determining the level of judicial scrutiny to apply to the state statute: (1) the history of

14. Compare id. § 1464 (1851) (requiring males be at least sixteen years old and females be at least fourteen years old for a marriage to be valid), and id. § 10429 (1939) (imposing restrictions on marriage licenses granted to males and females who had not attained the then-prescribed age of majority), with id. § 595.2 (2009) (stating marriage is valid only between a male and female).
16. Varnum, 763 N.W.2d at 907.
18. Varnum, 763 N.W.2d at 907.
19. Id. at 906–07 (deciding between access to civil marriage and a “parallel civil institution[] for same-sex couples” (citations omitted)).
20. Id. at 872.
21. Id. at 874.
22. IOWA R. APP. P. 6.1101(2)(a) (noting “[c]ases presenting substantial constitutional questions as to the validity of a statute” are retained by the supreme court).
discrimination against homosexuals, (2) whether a person’s sexual orientation has any relation to his or her ability to contribute to society, (3) the immutability of sexual orientation, and (4) the degree of political powerlessness traditionally held by homosexuals.23

Regarding the history of discrimination, the court noted gay and lesbian persons had “long been the victim[s] of purposeful and invidious discrimination because of their sexual orientation.”24 It pointed out the state legislature was aware of this fact, as sexual orientation is a protected characteristic in the Iowa Civil Rights Act.25

In determining the relationship between a person’s sexual orientation and his or her ability to contribute to society, the court once again noted the legislature previously considered the issue, having reached the conclusion there was no relationship.26

In examining the immutability of sexual orientation, the court found immutability of a characteristic is recognized when that characteristic “is ‘so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change [it].’”27 The court determined sexual orientation, being “highly resistant to change,” forms a significant part of an individual’s identity.28

Regarding the degree of political powerlessness traditionally held by gay and lesbian persons, the court acknowledged legal protections were given to members of this class.29 However, the court concluded gay and lesbian persons did not possess enough political power to overcome the discrimination they faced.30 The court also observed the political power

24. Id. at 889.
25. Id.; see, e.g., Iowa Code § 216.6 (2009) (noting it is an unfair employment practice to refuse to hire a job applicant solely because of the applicant’s sexual orientation).
26. Varnum, 763 N.W.2d at 890–91; see, e.g., Iowa Code § 216.9(1)(a) (noting it is an unfair practice to exclude a person from participation in an academic program because of the person’s sexual orientation).
27. Varnum, 763 N.W.2d at 893 (alteration in original) (citations omitted).
29. See id. at 894–95 (identifying protections in employment, housing, education, and public accommodations).
30. Id. at 895. The court found gay and lesbian persons’ political situation comparable to that of women during the time period that gender-based discrimination was being examined by the United States Supreme Court. Id.
they possessed had “done little to remove barriers to civil marriage.”

The cumulative effect of the court’s analysis of each factor led it to conclude section 595.2 needed to pass a more exacting level of judicial scrutiny than that ordinarily applied to state legislation. While the plaintiffs argued for the most intense level of scrutiny, the County advocated for the less exacting intermediate scrutiny. Ultimately, the court found the statute could not pass even the intermediate level of scrutiny, so requiring it to pass more stringent scrutiny was unnecessary.

To pass intermediate scrutiny, a statute “must be substantially related to an important governmental objective.” The County asserted several objectives it deemed important: maintaining the traditional concept of marriage; promoting child-rearing, procreation, and stability in opposite-sex relationships; and the conservation of state resources.

In support of maintaining tradition, the County argued the statute was necessary to preserve the integrity of marriage. The court, however, regarded this objective as little more than a circular argument—the statute was needed to maintain tradition, while tradition was necessary to preserve the statute. The court noted accepting this type of argument would result in “discrimination . . . [being] made an end in itself.” Thus, the objective was found not to be particularly important.

The court did, however, agree with the County that promoting an optimal environment for raising children is important. Yet, the court also noted that simply because a government objective is found to be important does not mean it will necessarily pass intermediate scrutiny—there must be a substantial relationship between the objective and the statute in

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31. Id. at 894. The court found action had actually been taken to strengthen the concept of traditional, opposite-sex marriage by specifically excluding gay and lesbian persons. Id. at 895.
32. Id. at 896.
33. Id.
34. Id.
35. Id. at 896–97 (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988)).
36. See id. at 897–904.
37. Id. at 898.
38. Id.
40. See id. at 899 (noting the County needed to forward a governmental purpose).
41. Id.
question. Here, the court determined the statute was both under- and overinclusive. Excluding same-sex couples from marriage simply because it was believed they would not be optimal parents—while not excluding other groups with questionable parenting skills—made the Iowa statute underinclusive. Additionally, the same-sex marriage ban was overinclusive because it restricted all same-sex couples from marriage, even those who had no desire to raise children.

Regarding the promotion of procreation, the court noted gay and lesbian persons are capable of procreating. Hence, the only way restricting same-sex marriage would result in increased procreation would be if gay and lesbian persons—being denied the right to procreate as they preferred—decided to procreate in the traditional, heterosexual manner. The court determined excluding same-sex couples from marriage would not cause gay and lesbian persons to “become” heterosexual; the exclusion would not make them more likely to engage in traditional procreation.

The court agreed with the County on the importance of promoting stability in opposite-sex relationships. However, the court failed to find a substantial relationship between this objective and the statute—excluding same-sex couples from civil marriage would likely do little to promote stability in opposite-sex marriages.

With respect to the conservation of state resources, the County attested to the increased benefits the State would be required to pay if

42. Id.
43. Id. at 900. A statute is underinclusive when its classifications “‘do[] not include all who are similarly situated with respect to the purpose of law.’” Id. at 899 (quoting Tussman & tenBroek, supra note 39, at 348). An overinclusive statute, in contrast, “includes more persons than those who are similarly situated with respect to the purpose of the law.” Id. at 900 (citing Tussman & tenBroek, supra note 39, at 351).
44. Id. The court noted child abusers, sexual predators, and violent felons were all thought to be less-than-optimal parents but were nevertheless allowed to marry. Id.
45. Id. The court further noted the inverse of this argument was underinclusive: not all same-sex couples currently raising children in Iowa—on whom the statute admittedly did not place any restrictions—would choose to marry. Id. at 900–01.
46. Id. at 902.
47. Id.
48. Id.
49. Id.
50. Id.
same-sex unions were recognized as marriages. The County hypothesized that because of the tax benefits granted to married couples, the state would earn less tax-generated revenue if marriage was broadened to include same-sex couples. The court reasoned, though, that excluding any group from civil marriage would serve the County’s proffered purpose of conserving state resources. Society’s desire for protection against such inequalities was determined to afford the court the authority to examine inequitable legislation, striking such a law down if its means did not justify its tendered ends.

In sum, after analyzing all of the County’s objectives, the court determined that while some were undoubtedly important, none were substantially furthered by the restriction on same-sex marriage. Hence, the state’s equal protection clause required more support than was offered for the statute’s same-sex marriage ban. Thus, the ban was lifted, and the institution of marriage was made available to gay and lesbian couples.

C. Immediate Aftermath of Varnum

1. Impact of the Court’s Decision

The Varnum opinion was filed on April 3, 2009. Under state rules, the court’s decision took effect on April 27, 2009. On that day, over 200 couples applied for marriage licenses in Iowa, and Polk County witnessed a record turnout for applications. Proponents of same-sex marriage saw the court’s decision as a sign of the changing times; the ruling was viewed as...

51. Id.
52. Id.
53. Id. at 903. The court noted excluding African-Americans, aliens, or red-haired individuals from civil marriage would have the same effect of conserving state resources. Id.
54. Id.
55. Id. at 904.
56. Id.
57. Id. at 907.
58. Id. at 862.
62. Xiong, supra note 5.
as indication of a nation becoming more accepting of homosexuality.  

Those opposed to the Varnum decision voiced their opinions too. Within a week of the ruling, several hundred opponents of same-sex marriage crowded into the Iowa capitol to request a resolution commencing the amendment process. Much of the criticism was religious in nature—particularly the assertion marriage should only exist between a man and woman. Another criticism was that in striking down the legislatively enacted statute, the court had exceeded its limitation as interpreter of the law.

2. Amendment to the Iowa Constitution

Same-sex marriage opponents immediately indicated their intention to amend the state constitution in order to nullify the court’s decision. An amendment to the Iowa Constitution can be proposed in either house of the state legislature. If this proposal passes in both the senate and house of representatives, it will be voted on a second time by the succeeding session’s legislature. In effect, a proposed amendment must receive a majority of the vote from both houses in consecutive legislative sessions. If this occurs, the people of Iowa are then permitted to vote on the measure. The proposed amendment is enacted if it receives a majority of the statewide vote.

Following the Varnum ruling, the Iowa Family Policy Center, a nonprofit organization focused on strengthening the family, announced it would promote a “let us vote” effort to pressure the legislature into agreeing to commence the amendment process.

64. Glover, supra note 10.
65. Eckhoff & Schulte, supra note 3.
66. Id.
67. See id.; Glover, supra note 10.
68. IOWA CONST. art. X, § 1.
69. Id.
70. Id.
71. Id.; see also id. § 3 (explaining procedures to enact an amendment via constitutional convention).
73. Rod Boshart, Pro-Family Group Launches Effort to Undo Iowa Same-Sex Marriage Ruling, CEDAR RAPIDS GAZETTE (Sept. 13, 2009), http://gazetteonline.com/blogs/covering-iowa-politics/2009/09/12/pro-family-group-launches-effort-to-
Additionally, in the months following the court’s decision, Iowa gubernatorial candidates took the opportunity to address the issue. Several candidates for the 2010 Republican nomination for governor discussed measures each would take to ban same-sex marriage. Platform ideas ranged from actively pushing the amendment vote in the legislature to issuing an executive order staying same-sex marriages until a vote could be taken.

These candidates may have been capitalizing on what was seen as moderate support for a constitutional amendment ending same-sex marriage. In a poll taken several months after the court’s decision, hundreds of Iowans were asked their thoughts on the ruling. Forty-one percent of respondents said they would vote for a ban on same-sex marriage, while forty percent said they would vote to uphold same-sex marriage.

Public sentiment against the Varnum ruling became most evident in the judicial retention vote held in November 2010. All three Iowa Supreme Court justices up for retention were not retained. The justices were removed, in large part, because of their role in the unanimous Varnum decision.

Thus, in light of the events that transpired in the months and years immediately following the Varnum decision, it is conceivable an amendment limiting marriage to opposite-sex couples could eventually undo-iowa-same-sex-marriage-ruling.

74. See Clark Kauffman, Candidates Target Same-Sex Unions: Four Republicans Talk About the Issue at a Des Moines Forum, DES MOINES REG., Sept. 13, 2009, at 2B.
75. Id.
76. Id.
78. Id. Eight hundred three Iowans were interviewed in mid-September 2009; a substantial part of that interview dealt with same-sex marriage in Iowa. Id.
79. Id. (margin of error for poll was 3.5 percentage points).
81. See id.
pass two legislative sessions and a statewide vote, effectively reinstating the marriage restriction in Iowa.

III. QUESTIONING THE CONSTITUTIONALITY OF CONSTITUTIONAL AMENDMENTS

A. Overview

As noted above, there has been discernible support for an amendment to the Iowa Constitution restoring marriage to the gender-specific state it was pre-

Varnum. Thus, it is imaginable such an amendment could one day be enacted in Iowa. In the event this comes to pass, what, if anything, could be done by supporters of same-sex marriage? Is there anything they could do, in light of this amendment, to get back what Iowa’s highest court deemed a liberty guaranteed by equal protection? In other words, can a constitutional amendment ever be found unconstitutional?

The framework for this analysis can be gleaned by examining the existing views on this particular issue. While discussion regarding the constitutionality of amendments to state constitutions has been sparse,82 the issue has been addressed more frequently on the federal level.83 Thus, this Note applies these federal analyses to the hypothetical Iowa amendment prohibiting same-sex marriage (hereinafter “the Amendment”). The following sections contain arguments proponents of same-sex marriage (hereinafter “Proponents”) could make before the court as to why such an amendment is unconstitutional. The sections also include potential answers to counterarguments put forth by opponents of same-sex marriage (hereinafter “Opponents”).

B. The Inherent Constitutionality of Amendments

In commencing this analysis, it must be noted the only substantive limitation placed on amendments to the United States Constitution regards

82. See Vicki C. Jackson & Mark Tushnet, Comparative Constitutional Law 221 (2d ed. 2006) (singling out the California Supreme Court for once voiding an amendment to its state constitution).

equal state suffrage in the Senate. While one may argue other rights laid out in the Constitution are impliedly "unamendable," the fact only one right has explicitly been given that label should be considered when determining whether a federal amendment really is unconstitutional. Further, in the past the Supreme Court has upheld the validity of amendments in spite of claims the amendments were outside the power to amend. Thus, it appears at first glance that almost any amendment to the United States Constitution will be found constitutional, as long as the procedural requirements of Article V are met.

An additional factor to consider is whether a court even has a basis for judicial review. In Coleman v. Miller, the United States Supreme Court held the validity of an amendment to the Constitution was a political question; therefore, the Court had no authority to rule on the matter. Coleman dealt specifically with Article V of the Constitution and held the amending power regarding that document had been granted to Congress alone.

These facts do not bode well for Proponents looking to have the Iowa Supreme Court overturn the Amendment. Unlike the United States Constitution, the Iowa Constitution has no limitation on the substance of amendments. Thus, theoretically anything in the Iowa Constitution can be amended. The absence of any "limitation" provision must be taken into account by Proponents. Additionally, in light of Coleman, the Iowa court

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86. Leser v. Garnett, 258 U.S. 130, 136–37 (1922) (holding the Nineteenth Amendment was a valid part of the Constitution); Nat’l Prohibition Cases, 253 U.S. 350, 386 (1920) (finding Article V of the Constitution enabled Congress to adopt the Eighteenth Amendment).
87. Procedural requirements include, among others, approval of a proposed amendment by two-thirds of each congressional house and ratification by the legislatures of three-fourths of the states. U.S. CONST. art. V.
89. Id.
90. Linder does note a possible way to counter a constitutional amendment: nullify it with a subsequent amendment. See Linder, supra note 84, at 729.
may decide it cannot even hear the case.

C. Substantive Limitation Theories

Notwithstanding the inherent constitutionality of any amendment that comports with procedural requirements, Proponents are not without argument. Should they get their day in court, Proponents have several arguments available regarding limitations on the substantive content of constitutional amendments. A number of constitutional scholars have made assertions regarding the ability—and duty—of the United States Supreme Court to overturn “unconstitutional” amendments. The following sections examine and apply these federal theories to the hypothetical amendment at issue.

1. The Nature and Purpose of Constitutional Amendments

Political philosopher John Rawls believed the United States Supreme Court had an obligation to overturn unconstitutional amendments. Rawls felt even if the procedures defined in Article V are followed, some amendments may be invalid if they violate the nature and purpose of allowing amendments to the Constitution—namely the adjustment and broadening of constitutional values and the removal of weaknesses and flaws of the original document. He noted many of the later amendments to the Constitution, particularly those enacted post-Civil War, achieved this purpose, helping to align the Constitution with its original promise. For example, the Thirteenth Amendment abolished slavery, moving the Constitution closer in line with the idea of equality set out in the Declaration of Independence. Further, no amendment has ever singled out a specific class of persons and refused its members significant rights that all other persons enjoy. Also, in the adjustment of constitutional values, Rawls noted the overarching objective was aligning the Constitution with changing political and social circumstances.

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92. See id. at 1505.
93. RAWLS, supra note 83, at 238–39.
94. Id. at 238.
95. Kelbley, supra note 91, at 1508.
96. See RAWLS, supra note 83, at 238–39 (citing JUDITH SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION (1991)). The Court also commented on this idea, noting, “As the Constitution endures, persons in every generation can invoke its
Applying this reasoning to the hypothetical amendment, Proponents can argue legislation restricting marriage to opposite-sex couples does not broaden constitutional values. If the right to marriage is considered a fundamental right, as the United States Supreme Court determined it to be,\textsuperscript{97} the Amendment would run counter to the broadening of that constitutional value.\textsuperscript{98} Instead of expanding that right to include another class of persons, the Amendment would make available the right to one class while denying it to another.

In addition, restricting marriage to opposite-sex couples would not move the Iowa Constitution closer to the principles of equality described in the Declaration of Independence. The Declaration of Independence asserts all men are created equal.\textsuperscript{99} Proponents can make the argument the Amendment does nothing to support the supposed equality of men. To actually be equal, marriage must be granted to same-sex couples just as it is to their opposite-sex counterparts; limiting marriage limits equality.

Further, no amendment has ever successfully singled out and excluded a particular class from an important right, and the hypothetical amendment would work to do just that with same-sex couples.\textsuperscript{100} These Iowans would be denied the right to marry—a right available to their heterosexual counterparts.

Proponents can also argue the Amendment would not work to align the Iowa Constitution with changing circumstances in the state. The court in \textit{Varnum} noted gays and lesbians were receiving greater acceptance and decreased discrimination in society.\textsuperscript{101} Thus, an amendment denying principles in their own search for greater freedom.” Lawrence v. Texas, 539 U.S. 558, 579 (2003).

\textsuperscript{97} Loving v. Virginia, 388 U.S. 1, 12 (1967) (citations omitted).

\textsuperscript{98} While Opponents may point out the Court has never labeled same-sex marriage a fundamental right, Proponents can argue the Iowa Supreme Court impliedly has: if marriage is a fundamental right, and the Iowa Supreme Court decided same-sex couples are entitled to marry, then same-sex couples in Iowa are presumably entitled to that fundamental right.

\textsuperscript{99} \textsc{The Declaration of Independence} para. 2 (U.S. 1776).

\textsuperscript{100} Note the United States Supreme Court previously struck down an amendment that specifically denied a right to gay and lesbian persons. In \textit{Romer v. Evans}, the Court held an amendment to the Colorado Constitution excluding gay and lesbian persons from legal protection against injurious discrimination was unconstitutional because it furthered no proper legislative end but instead made a specific class unequal to all others. Romer v. Evans, 517 U.S. 620, 635 (1996).

\textsuperscript{101} Varnum v. Brien, 763 N.W.2d 862, 894 (Iowa 2009); see also supra text accompanying note 79 (illustrating nearly as many survey respondents supported the
marriage to same-sex couples would not be aligning the Iowa Constitution with the current political and social circumstances in Iowa; rather, such an amendment would run counter to that purpose.

2. Natural Rights

Professor Walter Murphy has argued the establishment of justice is a governmental goal set out in the Constitution’s text. Murphy found it reasonable to infer that just as American tradition implants the Declaration of Independence into the Constitution, natural rights impose necessary standards on public officials. These “natural rights” can be found outside the constitutional system; for instance, our nation’s founding document contains several examples. Accordingly, Murphy feels a constitutional interpreter could rely on definite reasoning for both protecting natural rights and applying natural law principles regarding the validity of changes to the Constitution. He bolstered this belief by noting the Constitution’s text recognizes and protects both natural law and natural rights.

Proponents can argue the Amendment will not establish justice in Iowa. Per Murphy’s analysis, it seems reasonable to conclude natural rights impose certain standards on both federal and state officials—natural rights presumably know no federalistic limitations. A natural right on the federal level would logically be given the same recognition on the state level, and if it is necessary for federal officials to consider these rights, it follows state officials must too. It would seem odd for a state to be able to infringe on natural rights when the federal government is barred from doing so. With this in mind, the natural right to pursue happiness logically takes precedence over an amendment that denies that right to an entire class of people. Thus, Proponents can argue the natural right to pursue

right to same-sex marriage as opposed it).

102. See Murphy, supra note 83, at 180.
103. Id.
105. Murphy, supra note 83, at 180–81.
106. Id. at 181.
107. See U.S. CONST. art. VI.
108. An extension of this argument is that almost any unlawful thing can be argued to be a “natural right” so long as it makes that person happy. For example,
happiness via marriage must be protected; the Iowa Supreme Court must hold that any amendment infringing that right is unconstitutional.

3. The Dichotomy Between Religious and Civil Morality

American caselaw recognizes a difference between the imposition of religious and civil morality in substantive law: the former is unconstitutional, whereas the latter is not.109 For example, Justice Anthony Kennedy’s opinion in *Lawrence v. Texas* noted the illegality of statutes based solely on religious morality but upheld the ability of states to enforce laws established on civil morality.110 Professor Stanley Katz has argued true constitutionalism occurs when people commit themselves to a rule of law, specify its basic values, and agree to adhere to a legal structure that guarantees social institutions will respect those values.111 Laws based on religious morality do not necessarily provide this. It is unlikely all citizens will agree to abide by a law based on religious morality, as the values of one religion could potentially be in conflict with those of another. Civil morality, on the other hand, comprises “universal principles common to all cultures and religions.”112 It is these rules of law that are most likely to be supported.

In addition, a religious purpose behind a law necessarily raises concern of a possible violation of the First Amendment’s Establishment Clause.113 Due to the pluralistic nature of religion in the United States, passage of a law based on moral beliefs of a particular religion would give

Opponents may argue illegal drug use can be said to be done in the “pursuit of happiness,” so courts should invalidate laws that prohibit its use. Proponents can respond by noting that, unlike same-sex marriage, the rationales given by lawmakers for prohibiting illegal drug use have not been found insufficient by the Iowa Supreme Court. The justifications for inhibiting illegal drug use are recognized as valid to a government purpose, whereas the justifications for inhibiting same-sex marriage are not.

110. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).
113. *Id.* at 596. The First Amendment states: “Congress shall make no law respecting an establishment of religion. . . .” U.S. CONST. amend. I.
rise to legal questions regarding governmental preference of that religion.

Further, a law is not civilly moral simply because a majority of the populace supports it. These universal maxims are placed beyond the reach of any majority and are considered legal principles courts will apply. Justice Sandra Day O'Connor noted in Employment Division, Department of Human Resources of Oregon v. Smith (Smith II) that fundamental rights cannot be submitted to a vote; these rights are not dependent upon the outcome of any election.

Proponents can make the argument the Amendment is founded on religious morality, thereby making it unconstitutional. For example, some of the most vocal opponents of same-sex marriage in Iowa have been organizations with religious ties. It stands to reason these organizations' arguments advocating a return to the traditional definition of marriage are based on a religious morality that defines marriage as a union between one man and one woman. And, as noted in Lawrence, religious morality alone cannot make a law constitutional. Thus, the Amendment—based on the religious moral of one-man–one-woman marriage—cannot be constitutional.

While Opponents may argue the statute overturned in Varnum was not based solely on religious morals—in fact, the County kept religion out of its argument entirely—the Iowa Supreme Court determined the rationales that were offered were not sufficient to keep the statute from being found unconstitutional. If these rationales could not render the statute constitutional, adding religious morality into the mix—or offering it

116. Id. (citing Barnette, 319 U.S. at 638).
117. See, e.g., Jason Clayworth, Gay Marriage Opponents Launch “LUV” Campaign, DES MOINES REG. (Dec. 28, 2009), http://blogs.desmoinesregister.com/dmr/index.php/tag/iowa-family-policy-center/page/3 (noting the Iowa Family Policy Center commenced a campaign to vote to end same-sex marriage in Iowa); Eckhoff & Schulte, supra note 3 (noting the Des Moines Diocese advocated for an amendment preserving civil marriage).
solely as its own justification—would not produce a different outcome. Opponents would have to provide an additional rationale that could be categorized as a universal principle, and finding a justification for limiting equal rights is not easily accomplished.

Civil morality, on the other hand, recognizes universal values common to all religions and cultures; it would not work to establish a particular definition of marriage. Proponents could argue civil morals include equality, specifically in the realm of marriage. Civil morality would thus call for equality among Iowans—a foundation on which Proponents could constitutionally base their argument supporting same-sex marriage.

Further, having a religious purpose behind the Amendment could raise concerns regarding the establishment of an official religion of the state. If the State enacted an amendment arguably based on traditional Christian morality, one might feel the State, by supporting certain Christian ideologies, was supporting that particular faction of Christianity over other religions present in Iowa.120

Also, because equality is considered a universal principle, it is beyond the reach of any majority; hence, no matter how much support the Amendment would receive in a statewide vote, it would be unconstitutional because it would have the effect of violating a protected right. Not even an overwhelming majority has the power to establish a law that would work to infringe a right the Iowa Supreme Court determined to be of fundamental importance. As noted above, the United States Supreme Court determined marriage is a fundamental right, and Iowa—to whom this amendment would apply—has recognized same-sex couples have the right to marry. Consequently, Proponents can argue no amendment can infringe on the right of people in Iowa to marry.

4. The Countermajoritarian Role of Courts

Similar to the belief that no amount of support can legitimize a law that violates civil morality is the theory of the “countermajoritarian” duty

of the judicial branch. The countermajoritarian function of courts refers to the judiciary’s responsibility to protect “discrete and insular minorities” from laws based on majoritarian principles. In essence, this theory holds courts have the responsibility to invalidate laws that, while perhaps supported by a majority of the population, infringe on constitutional rights of a smaller societal class. For the countermajoritarian theorist, when the constitutional rights of a minority class are violated, judicial intervention is necessary despite the apparent breach of democratic principle. According to countermajoritarian theory, rights trump democracy—provided, of course, they are the right rights.

Proponents can argue the countermajoritarian duty of judges requires the court to find the Amendment unconstitutional. If courts have a duty to protect “discrete and insular minorities,” they must protect the rights of same-sex couples who are decidedly within that category. The Varnum opinion recognized gay and lesbian persons—while seemingly gaining greater acceptance in society—still lack the political strength held by heterosexuals. Therefore, the Amendment must be found unconstitutional by the Iowa Supreme Court.

Opponents may argue the court cannot strike down an amendment supported by the people of Iowa. In the spirit of democracy, a law receiving more votes in favor of than opposed to must undeniably be

121. Whereas civil morality is concerned with the underlying rationality for a law, the countermajoritarian theory looks to whom that law affects. Both provide protection against majoritarian rule.


124. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 11–12 (1991). The breach referred to here is the overturning of a law democratically enacted via the support of a majority of the voting population.

125. Id. at 12. Determining these rights is a point of contention for supporters and dissidents of the countermajoritarian theory. The former believe judges should consider principles laid out by philosophers, such as Kant and Locke, while the latter look for a more concrete categorization. See id.

upheld. To specify, in order for the Amendment to have passed, it must have received a majority of the votes in the statewide referendum. Thus, Opponents will argue the core principle of democracy requires the court to uphold the Amendment. Proponents, though, can make a countermajoritarian argument that, in this case, rights trump democracy. They can note the right to marriage mandates the court to overturn the Amendment. Courts need not look to philosophical teachings of the past to determine whether this right is justified. There are more concrete, definite confirmations available in contemporary canons. For example, as presented above, marriage is a fundamental right, equality is universal to all cultures and religions, and the pursuit of happiness is a natural right available to all Iowans. Proponents can therefore argue the right of gay and lesbian persons to choose whom they wish to marry is a right that trumps the democratic method administered to deny it.

5. The Proper Exercise of Constituent Power

Professor Samuel Freeman, in paraphrasing Rawls’s analysis of valid amendments, set out three possible ways to legitimately enact a constitutional amendment:

To be a valid amendment, constituent power must be exercised in a way that either (1) adapts basic institutions to remove weaknesses revealed by constitutional practice (as is the case of the many amendments that concern the institutional design of government, such as the Twenty-second Amendment limiting the president to two terms); or (2) adjusts basic constitutional values to changing circumstances; or (3) incorporates into the constitution a more inclusive understanding of those values (as in the case of the Thirteenth-Fifteenth Amendments, the Nineteenth . . . .127

Seemingly, one of these three methods must be utilized in order for an amendment to pass judicial analysis. Under Rawls's theory, if none of the three requirements are met, such an amendment cannot stand.

In applying Rawls’s three methods, the first possibility he identified would not apply to the Amendment. The hypothetical amendment limiting marriage to opposite-sex couples would not concern the institutional design of government. It would address substantive marriage law, not any structural aspect of Iowa’s government. Opponents, however, may argue

marriage is often classified as an “institution.” Per Rawls, however, if one assumes marriage can be defined as a “basic institution,” Opponents would still need to show marriage needs to be adapted to remove a weakness that has arisen through constitutional practice. Yet there does not appear to be a strong argument that the recognition of same-sex marriage as a constitutional right qualifies as that weakness. This recognition is not the defect Rawls envisioned amendments correcting. Rawls was referring to structural deficiencies as noted by his reference to the Twenty-Second Amendment and its limit on terms of office for the president.

The second possibility put forth by Rawls would also not be satisfied. If the Amendment was meant to adjust a constitutional value to changing circumstances in society, it would not limit the rights of same-sex couples. As noted above, the changing circumstances in both Iowa and the nation illustrate a greater acceptance of gay and lesbian persons. The Amendment would not be reflective of this acceptance but would instead have the opposite effect of singling out a particular class and excluding it from a judicially recognized right.

The Amendment would also fail to be categorized under Rawls’s third permissible purpose for amending—the Amendment does not appear to incorporate an inclusive understanding of constitutional values. The constitutional value of the right to marry would not be incorporated into the Iowa Constitution. The Amendment would actually have an exclusionary effect regarding basic constitutional values—it would work to deny these values to a particular segment of the population. The Iowa Constitution was found by the Iowa Supreme Court to protect the right of same-sex couples to marry, and the Amendment would have the effect of removing that protection.

IV. CONCLUSION

In light of this analysis, it appears an amendment to the Iowa Constitution limiting marriage to the traditional, one-man–one-woman

128. “Institution” can be defined as a relationship accepted “as a fundamental part of a culture.” RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 988 (2d ed. 2001). One definition of the word includes marriage as a specific example of an institution. Id.

129. In fact, every rationale advanced by the County in Varnum was found to lack the effect necessary to justify excluding same-sex couples from marriage. See Varnum, 763 N.W.2d at 904.

130. See id. at 894; see also Clayworth & Beaumont, supra note 77.
concept would likely be found constitutional. The Iowa Constitution contains no restrictions on the substantive content of amendments; the only requirement is that the procedural provisions be satisfied. There is also a possibility the court will not even hear a challenge to the Amendment; such a legislative measure could understandably be considered a political question.

Yet there is a distinct difference between having an argument with an improbable chance of success and not having an argument at all. Proponents of same-sex marriage have the former. They have an argument. In fact, they have several. Given the chance to be heard, they could deliver a barrage of arguments from their constitutional quiver.

Proponents could attack the Amendment for not being in line with the nature and purpose of constitutional amendments. If the proper nature of amendments designed to apply to a particular class is to extend to that class a right recognized by others, the Amendment would fail to be of the appropriate nature. If the purpose of amendments is to broaden constitutional values to better reflect changing circumstances in society, the Amendment would not be of the proper purpose.

Proponents could attack the Amendment for infringing on the natural rights of a particular societal class. The Amendment impedes the pursuit of happiness for the thousands of persons potentially affected by its restraints.

Proponents could attack the religious undercurrent that flows through the Amendment. The morality inherent in universal principles mandates the Amendment be found unconstitutional. The essence of constitutionalism provides for the acceptance of laws based on equality, while simultaneously inhibiting those founded on less recognized principles.

Proponents could call the court to their side to fight the ideologies of the majority. When a minority beckons for aid, it is the duty of the court to answer. The court’s role is of protector, and no one needs a shield more than the discrete, insular minority.

Proponents could argue the Amendment fails to satisfy any of the possible ways an amendment can correct a constitutional defect. With no legitimate avenue of enactment, the Amendment cannot leave the capitol’s steps.

With these arguments, Proponents are poised to counter the Amendment and the justifications advanced by Opponents. The court
holds the key to the courthouse door, beyond which lies the opportunity to take back a right previously recognized.

If the door is cracked—if the court acknowledges there may be valid questions on the constitutionality of constitutional amendments—then Proponents, armed with their arguments for equality, are prepared to break on through.

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