

# Judicial Federalism, Equal Protection, and the Legacy of *Racing Association of Central Iowa*

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*ABSTRACT: Judicial federalism occurs when state supreme courts interpret state constitutional provisions as providing more rights than analogous provisions of the U.S. Constitution. In its 2004 decision of *Racing Ass’n of Central Iowa v. Fitzgerald*, the Iowa Supreme Court engaged in judicial federalism when it struck down a tax law under article I, section 6 of the Iowa Constitution that the U.S. Supreme Court upheld under the U.S. Constitution’s analogous provision, the Equal Protection Clause of the Fourteenth Amendment. Although critics attack the decision as a misapplication of the rational-basis test, this Note takes a closer look at article I, section 6 and concludes that the basic result of *Racing Ass’n*—that article I, section 6 prohibits more economic classifications than the Equal Protection Clause—is likely correct. The bigger problem for the Iowa Supreme Court is providing a distinguishable standard of review of economic classifications to reflect the differences between article I, section 6 and the Equal Protection Clause. Providing a distinguishable standard should be a priority for the Iowa Supreme Court whenever it invokes judicial federalism.*

I. INTRODUCTION.....	1733
II. THE DISAGREEMENT BETWEEN THE IOWA SUPREME COURT AND THE U.S. SUPREME COURT IN <i>RACI</i> .....	1736

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A.	<i>RACI I: IOWA SUPREME COURT STRIKES TAX LAW UNDER STATE AND FEDERAL EQUAL-PROTECTION CLAUSES</i> .....	1736
B.	<i>U.S. SUPREME COURT REVERSES RACI I</i> .....	1737
C.	<i>RACI II: IOWA SUPREME COURT AGAIN STRIKES TAX LAW</i> .....	1738
III.	COMPARING ARTICLE I, SECTION 6 AND THE EQUAL PROTECTION CLAUSE .....	1739
A.	<i>COMPARING THE TEXT AND PURPOSE OF ARTICLE I, SECTION 6 AND THE EQUAL PROTECTION CLAUSE</i> .....	1740
B.	<i>COMPARING THE CASE LAW REVIEWING ECONOMIC CLASSIFICATIONS UNDER ARTICLE I, SECTION 6 AND THE EQUAL PROTECTION CLAUSE</i> .....	1744
1.	Federal Review of Economic Classifications Under the Equal Protection Clause .....	1744
2.	Iowa Supreme Court Review of Economic Classifications Under Article I, Section 6.....	1745
IV.	METHODS OF IMPLEMENTING JUDICIAL FEDERALISM UNDER ARTICLE I, SECTION 6 .....	1748
A.	<i>THE INDEPENDENT-APPLICATION METHOD</i> .....	1748
B.	<i>CREATION OF A NEW TEST</i> .....	1750
V.	PROPRIETY OF REJECTING <i>RACI II</i> 'S JUDICIAL FEDERALISM .....	1754
VI.	CONCLUSION .....	1756

## I. INTRODUCTION

It is a truism of American democracy that laws should treat everyone equally. Regardless, a law may require males to register for the Selective Service (and not females),<sup>1</sup> prohibit judges from working past a certain age (and not other professionals),<sup>2</sup> or require certain employers to pay workers a minimum wage (and not other employers).<sup>3</sup> Indeed, law-making bodies generally possess the power to classify and treat separated groups differently. However, this power is not unbounded. One restraint is the constitutional requirement of equal protection.

Iowa laws that contain classifications treating groups differently must satisfy two constitutional equal-protection provisions: the federal provision from the Fourteenth Amendment (“Equal Protection Clause”) and the state provision from article I, section 6.<sup>4</sup> Historically, Iowa courts have said that the state constitution’s equal-protection provision restricts Iowa laws in the same way as the federal provision.<sup>5</sup> However, at least for economic classifications (e.g., minimum-wage or tax laws),<sup>6</sup> this may be changing.<sup>7</sup>

This Note examines a 2004 Iowa Supreme Court case that suggests that Iowa’s equal-protection provision prohibits more economic classifications than the Federal Equal Protection Clause. In *Racing Ass’n of Central Iowa v. Fitzgerald* (“*RACI I*”), the Iowa Supreme Court held that a law which taxed riverboat casinos at a different rate than land-based, racetrack casinos violated the state and federal equal-protection provisions.<sup>8</sup> After the U.S. Supreme Court unanimously reversed the decision insofar as it rested on the

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1. See 50 U.S.C. app. § 453 (2006) (requiring males to register for the Selective Service, upheld against equal-protection challenge in *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981)).

2. See IOWA CODE § 602.1610 (2009) (setting mandatory retirement age at seventy-two for judges appointed after July 1, 1965).

3. Compare 29 U.S.C. § 206 (2006) (setting minimum-wage requirements), with 29 U.S.C. § 213 (2006) (authorizing exemptions from minimum-wage requirements for employers in certain industries, such as agriculture and entertainment).

4. U.S. CONST. amend. XIV, § 1; IOWA CONST. art. I, § 6.

5. *Racing Ass’n of Cent. Iowa v. Fitzgerald*, 648 N.W.2d 555, 558 (Iowa 2002) [hereinafter *RACI I*] (“We have said Iowa courts are to ‘apply the same analysis in considering the state equal protection claims as . . . in considering the federal equal protection claim.’” (quoting *In re Morrow*, 616 N.W.2d 544, 547 (Iowa 2000))).

6. An “economic classification,” for purposes of this Note, is a classification that affects the financial interests of the parties classified. All of the cases discussed in this Note involve economic classifications. See *infra* Parts II, III (discussing both U.S. and Iowa supreme court cases dealing with commercial advertising, taxation, lending practices, tort recovery, and wage-payment requirements).

7. See *infra* Part II (discussing cases from 2002 to 2004 where the Iowa Supreme Court found article I, section 6 prohibited an economic classification not prohibited by the Equal Protection Clause).

8. *RACI I*, 648 N.W.2d at 559.

Federal Equal Protection Clause,<sup>9</sup> the Iowa Supreme Court reinstated its decision and held the classification at least violated the state provision.<sup>10</sup> By squarely disagreeing with the U.S. Supreme Court, the Iowa Supreme Court made clear that the state equal-protection provision is substantively different than the federal provision.

The *Racing Ass'n* (“*RACI*”) cases illustrate what scholars call “judicial federalism”: the process of state supreme courts interpreting state constitutional provisions as having a different substantive import than analogous federal provisions.<sup>11</sup> When interpreting state constitutional provisions that are analogous to federal provisions, state courts generally have three options: (1) apply federal rules and seek congruency with federal outcomes,<sup>12</sup> (2) independently apply federal rules without being obligated to reach federal outcomes,<sup>13</sup> or (3) apply state-created rules in lieu of federal rules.<sup>14</sup> The latter two types of review exemplify judicial-federalism methods. The result of judicial federalism may mean that a criminal punishment<sup>15</sup> or school-financing scheme<sup>16</sup> may be valid under the U.S. Constitution, but invalid under a state constitution.

The judicial-federalism movement has grown since the 1970s.<sup>17</sup> Leading American judges on both ends of the ideological spectrum have applauded

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9. *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 110 (2003).

10. *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004) [hereinafter *RACI II*].

11. See 1 JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* § 1.01(1), at 1–2 (4th ed. 2006) (stating that judicial federalism occurs “even when state and federal provisions closely resemble one another”).

12. See Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1219 (1985) (noting “a significant number [of state supreme courts] follow federal equal protection doctrine without independent analysis in addressing state equal protection claims”).

13. See *id.* (describing how the California Supreme Court has applied federal equal-protection analysis but has reached different results from federal courts, like finding racial discrimination could exist without proof of intent and that sex is a “suspect” classification).

14. See FRIESEN, *supra* note 11, at 3–11 (discussing states that have adopted independent tests under their state constitutional analogs to the U.S. Constitution’s Equal Protection Clause); Williams, *supra* note 12, at 1220–21 (describing the increasing use of independent tests).

15. Compare *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972) (finding the death penalty to violate the California Constitution for being “cruel and unusual”), with *Roberts v. Louisiana*, 428 U.S. 325, 331 (1976) (rejecting the argument that the death penalty is per se “cruel and unusual” punishment). Voters later amended the California Constitution to overrule *Anderson*. *Murtishaw v. Woodford*, 255 F.3d 926, 959 (9th Cir. 2001).

16. Compare *Robinson v. Cahill*, 303 A.2d 273, 297 (N.J. 1973) (holding a school-financing system which resulted in disproportionate funding per student invalid under the state constitution), with *Sch. Bd. of Parish of Livingston, La. v. La. State Bd. of Elementary & Secondary Educ.*, 830 F.2d 563, 573–74 (5th Cir. 1987) (upholding a school-finance system which resulted in disproportionate funding per student).

17. FRIESEN, *supra* note 11, at 1–2.

the doctrine's emergence.<sup>18</sup> This support, coupled with the fact that many of today's state-supreme-court judges grew up and were educated during the Warren Court era of judicial activism, may help explain why judicial federalism has emerged.<sup>19</sup> Regardless of the reasons for its emergence, however, the rise of judicial federalism has made state constitutional law a relevant and powerful tool for the recognition and vindication of civil rights in the twenty-first century.

At its core, judicial federalism is the implementation of constitutional autonomy, a cornerstone of state sovereignty. Each state supreme court has the obligation to interpret the meaning of its state constitution.<sup>20</sup> Since state constitutions vary in text, purpose, and historical interpretation from the U.S. Constitution (and from state to state), the natural, logical result is that rights under state constitutions will not always be congruent with the Federal Constitution.<sup>21</sup> But, this Note argues that a state supreme court's duty should go beyond simply identifying substantive differences between state and federal constitutional provisions when appropriate; state supreme courts should also have the duty to provide the legal community with distinguishable legal standards that reflect the substantive differences between state and federal constitutional provisions.

This Note discusses the Iowa Supreme Court's use of judicial federalism in interpreting article I, section 6 of the Iowa Constitution as prohibiting more economic classifications than the Equal Protection Clause of the U.S. Constitution. Part II of this Note discusses the *RACI* cases. Part III analyzes the differences between article I, section 6 and the Equal Protection Clause in text, purpose, and case law to point out the substantive support for the Iowa Supreme Court's judicial-federalist decisions in the *RACI* cases. Part IV considers the two options mentioned above for implementing judicial federalism: the independent-application method and the use of state-created

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18. See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (discussing the legitimacy of judicial federalism). Brennan's 1977 piece is considered one of the more influential law-review articles ever published. See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI-KENT L. REV. 751, 768 (1996) (finding Brennan's 1977 work to be the twenty-sixth most-cited law-review article of all time); see also *Michigan v. Long*, 463 U.S. 1032, 1067 (1983) (Stevens, J., dissenting) (arguing that the Court should defer to state-supreme-court decisions when an adequate basis in state law exists for a decision); WILLIAM REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 172 (1987) (claiming that the meaning of state constitutions is "preeminently a question to be decided by [state supreme courts], and not by some other court").

19. Williams, *supra* note 12, at 1196–97; see Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 214 (2003) (noting that the U.S. Supreme Court's decline in activism occurred at the same time as an increase in state-supreme-court activism).

20. See *RACI II*, 675 N.W.2d 1, 4 (Iowa 2004) (noting that it is the Iowa Supreme Court's obligation to determine what state constitutional provisions mean); Brennan, *supra* note 18, at 502 (arguing that state-court judges should decide state constitutional issues).

21. See FRIESEN, *supra* note 11, at 1–4 (making the legal argument for judicial federalism).

legal rules. Finally, Part V considers whether the Iowa Supreme Court should avoid judicial federalism altogether when reviewing economic classifications and simply adhere to federal rules and outcomes.

## II. THE DISAGREEMENT BETWEEN THE IOWA SUPREME COURT AND THE U.S. SUPREME COURT IN *RACI*

Both the Iowa Constitution and the U.S. Constitution contain provisions that generally guarantee citizens equal protection under the law.<sup>22</sup> Prior to the *RACI* cases, the Iowa Supreme Court often viewed these clauses as placing the same limitation upon Iowa lawmakers.<sup>23</sup> The *RACI* cases from 2002 to 2004, however, are inconsistent with the notion that article I, section 6 restricts Iowa lawmakers in the same way as the Equal Protection Clause. Instead, these cases suggest that article I, section 6 prohibits more economic classifications than its federal counterpart.

### A. *RACI I: IOWA SUPREME COURT STRIKES TAX LAW UNDER STATE AND FEDERAL EQUAL-PROTECTION CLAUSES*

The *RACI* cases involved taxation of casinos, which in Iowa come in two predominant forms: land-based racetracks and water-based riverboats.<sup>24</sup> In 1994, the Iowa Legislature established a different tax rate for these two types of casinos: 20% for riverboats and 22% for racetracks, with the rate for racetracks increasing by 2% each year until it reached 36%.<sup>25</sup> In the 2002 case of *Racing Ass'n of Central Iowa v. Fitzgerald*, a coalition of Iowa racetracks claimed the differential tax rate violated both the state and federal equal-protection laws.<sup>26</sup>

The Iowa Supreme Court used the rational-basis test—which federal courts use when reviewing economic classifications under the Equal Protection Clause—to strike down the differential tax rate.<sup>27</sup> First, the court considered whether the legislature's proffered reason for the phase-in of the differential tax scheme—to provide economic aid to the racetracks—was legitimate. The court found it “impossible to conclude the legislature actually had” this reason in mind due to the harmful effect the tax

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22. U.S. CONST. amend. XIV, § 1; IOWA CONST. art. I, § 6.

23. See *Varnum v. Brien*, 763 N.W.2d 862, 878 n.6 (Iowa 2009) (“Generally, we view the federal and state equal protection clauses as ‘identical in scope, import, and purpose.’”); *Suckow v. NEOWA FS, Inc.*, 445 N.W.2d 776, 777 (Iowa 1989) (noting that article I, section 6 “puts substantially the same limitations on state legislation” as the Equal Protection Clause does (citing *City of Waterloo v. Selden*, 251 N.W.2d 506, 509 (Iowa 1977))); *Stracke v. City of Council Bluffs*, 341 N.W.2d 731, 733 (Iowa 1983) (“We have interpreted these provisions to be substantially similar.”).

24. *RACI I*, 648 N.W.2d 555, 556 (Iowa 2002).

25. *Id.* at 557.

26. *Id.*

27. *Id.* at 559–62. The rational-basis test is a two-part test. To pass it, a classification must have (1) a rational relationship to (2) a legitimate government interest. *Id.* at 559.

eventually had on the profitability of the tracks.<sup>28</sup> Second, the court found that the interest in raising revenue for the State of Iowa was not legitimate because it would authorize any discriminatory tax.<sup>29</sup> Thus, the court held by a 4–3 vote that the tax law failed the rational-basis test.<sup>30</sup>

### B. U.S. SUPREME COURT REVERSES *RACI I*

Perhaps due to the Iowa Supreme Court's mistake of not stating that its decision rested solely on article I, section 6,<sup>31</sup> the U.S. Supreme Court granted review of *RACI I* and reversed the Iowa Supreme Court's holding to the extent that it was decided under the Equal Protection Clause.<sup>32</sup> The Court found by a 9–0 vote that the differential tax scheme satisfied the rational-basis test.<sup>33</sup> First, the Court disagreed with the Iowa Supreme Court and found it "plausible"<sup>34</sup> that the legislature's goal in enacting the 1994 law, when "seen as a whole,"<sup>35</sup> was to aid racetracks. Although the differential tax rate itself hurt racetracks, other parts of the 1994 law allowed tracks to begin operating slot machines, and this authorization provided assistance to the tracks.<sup>36</sup>

Not content with simply reversing *RACI I*, the Court went on to list other goals which would have been legitimate for implementing a differential tax rate: encouraging economic development of river communities, promoting riverboat history, or providing incentives to riverboats to stay in Iowa.<sup>37</sup> These goals would have been legitimate, and the differential tax rate would have rationally furthered them.<sup>38</sup> Thus, not only did the Court reverse *RACI I*, but it went out of its way to underscore how deferential the rational-basis test is for analyzing economic classifications under the Equal Protection Clause.

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28. *Id.* at 561.

29. *RACI I*, 648 N.W.2d at 562.

30. *Id.*

31. *See* Michigan v. Long, 463 U.S. 1032, 1042 (1983) (holding that unless a state supreme court includes a "plain statement" that its decision rests upon "adequate and independent" state-law grounds, a federal court may have jurisdiction to review if it appears the state supreme court made its decision based upon federal law). In *RACI I*, the Iowa Supreme Court collapsed its analysis of the Equal Protection Clause and article I, section 6 into a single discussion, noted the legal standard to be applied for both clauses was the same, and then cited both federal and state precedent in its analysis. *RACI I*, 648 N.W.2d at 558–60.

32. *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 110 (2003).

33. *Id.*

34. *Id.*

35. *Id.* at 108.

36. *Id.*

37. *Fitzgerald*, 539 U.S. at 109.

38. *Id.*

C. RACI II: IOWA SUPREME COURT AGAIN STRIKES TAX LAW

On remand in 2004, the Iowa Supreme Court in *Racing Ass'n of Central Iowa v. Fitzgerald* (“*RACI II*”) held for the second time that Iowa’s discriminatory gambling-tax law violated article I, section 6.<sup>39</sup> In *RACI II*, the court rested its decision solely on article I, section 6.<sup>40</sup> The court noted that it had the “obligation . . . to determine whether the challenged classification violates Iowa’s constitutional equality provision.”<sup>41</sup> Although the court acknowledged it had the right to adopt a test of its own for analyzing claims under article I, section 6, the court found *RACI II* was not the proper case to adopt a test that may be “more compatible with Iowa’s constitutional language” because the parties had not briefed the issue.<sup>42</sup> Instead, the Iowa Supreme Court chose to *independently* apply the rational-basis test.<sup>43</sup> Under this approach, federal decisions only have persuasive value, so “[i]t follows . . . that [the] court’s independent application of the rational basis test might result in a dissimilar outcome from that reached by the Supreme Court.”<sup>44</sup> In other words, despite previous statements to the contrary, article I, section 6 may, in fact, be substantively different from the Equal Protection Clause.

After independently applying the rational-basis test, the court again held that the differential tax rate violated article I, section 6.<sup>45</sup> The government primarily asserted that this law would help promote riverboat communities, but the court held that this goal did not satisfy the rational-basis test.<sup>46</sup> Since some land-based casinos were located in river communities, the differential tax rate was an underinclusive way of promoting river communities because assisting land-based casinos would also encourage economic development in these communities.<sup>47</sup> And, since some riverboats were located on inland bodies of water, the law was an overinclusive way of promoting river communities as some “river boats” could essentially be on a pond in the middle of the state.<sup>48</sup> The court then looked at legislative committee reports and provisions of the 1994 law to

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39. *RACI II*, 675 N.W.2d 1, 3 (Iowa 2004).

40. *Id.*

41. *Id.* at 4.

42. *Id.* at 6.

43. *Id.* For an interesting discussion of the Iowa Supreme Court’s independent application of the rational-basis test in *RACI II*, see Kevin D. Sherlock, Note, *Clearing the Air: Analyzing the Constitutionality of the Iowa Smokefree Air Act’s Gaming-Floor Exemption*, 95 IOWA L. REV. 347, 374–78 (2009) (describing the searching scrutiny that the Iowa Supreme Court gave to the differential tax law under the rational-basis test).

44. *RACI II*, 675 N.W.2d at 6.

45. *Id.* at 16.

46. *Id.* at 9–11.

47. *Id.* For a definition of “underinclusive,” see *infra* note 131.

48. *RACI II*, 675 N.W.2d at 9–11. For a definition of “overinclusive,” see *infra* note 132.

determine that the legislature, when passing the law, did not actually hope to provide economic assistance to riverboats or incentives for them to stay in Iowa waters.<sup>49</sup>

The *RACI* cases exemplify judicial federalism. The divergent opinions of the U.S. and Iowa supreme courts establish that article I, section 6 prohibits more economic classifications than its federal counterpart. However, the Iowa Supreme Court's independent application of the federal rules may appear poorly reasoned or even illegitimate since the court reached a different result from the U.S. Supreme Court despite using the same legal rules (i.e., the rational-basis test). This analytical defect may be why the court announced in *RACI II* and in more recent cases that it may adopt the alternative method of judicial federalism: application of a new test in lieu of the federal standard.<sup>50</sup> However, before considering *how* the Iowa Supreme Court should implement judicial federalism, the initial issue is whether judicial federalism was substantively warranted in *RACI II* based upon differences between article I, section 6 and the Equal Protection Clause. The Iowa Supreme Court failed to give a meaningful comparison of these provisions in *RACI II*, but the next Part does just that.

### III. COMPARING ARTICLE I, SECTION 6 AND THE EQUAL PROTECTION CLAUSE

The Iowa Supreme Court has routinely stated that it reads article I, section 6 as coextensive with the Equal Protection Clause.<sup>51</sup> While critics have disparaged *RACI I* and *RACI II* for improperly applying the federal standard used for reviewing economic classifications,<sup>52</sup> critics could also attack the *RACI* court for failing to provide a meaningful analysis and comparison of article I, section 6 and the Equal Protection Clause to support its judicial-federalist decision. This Part does what these critics failed to do by comparing the text, purpose, and case law of these constitutional provisions to determine whether the Iowa Supreme Court's decision in *RACI I* and *RACI II*—that article I, section 6 prohibits more economic classifications than the Equal Protection Clause—has substantive merit.

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49. *RACI II*, 675 N.W.2d at 14–15.

50. *Id.* at 5 (“[T]his court has always reserved to itself the ability to employ a different analytical framework under state constitutional provisions.”); see also *City of Coralville v. Iowa Utils. Bd.*, 750 N.W.2d 523, 530 (Iowa 2008) (citing *RACI II* for the proposition that the court has the right to fashion its own test when reviewing claims under article I, section 6); *In re Det. of Hennings*, 744 N.W.2d 333, 338 (Iowa 2008) (same).

51. See cases cited *supra* note 23 (discussing how the Iowa Supreme Court has historically viewed article I, section 6 as similar in import to the Equal Protection Clause).

52. See *RACI II*, 675 N.W.2d at 23–25 (Cady, J., dissenting) (analyzing the law under the rational-basis test and reaching a different conclusion from the majority); Hillary Schlueter, Note, *The Return of Lochnerizing: The Iowa Supreme Court's Invalidation of Gambling Taxes*, 9 J. GENDER RACE & JUST. 713, 718–27 (2006) (arguing that the Iowa Supreme Court improperly applied the federal rational-basis test).

A. *COMPARING THE TEXT AND PURPOSE OF ARTICLE I, SECTION 6  
AND THE EQUAL PROTECTION CLAUSE*

The textual differences between the Equal Protection Clause and article I, section 6 are clear. Article I, section 6 is titled “Laws uniform” and states: “All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.”<sup>53</sup> In contrast, the Equal Protection Clause reads: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>54</sup> Thus, whereas the federal clause’s text is concerned with government *denying* rights to a minority, article I, section 6 is concerned with government *granting* rights to a minority.

Whether discrimination *against* a minority is any different than discrimination *in favor of* a minority is debatable. These two purposes may be merely two sides of the same coin. For example, a law that grants a benefit exclusively to a minority also, by implication, denies that benefit to the majority. Conversely, a law that denies a right exclusively to a minority also, by implication, grants that right to those in the majority. In both situations, the law treats two groups differently with respect to a similar right or benefit.

Other state supreme courts reject the view that these provisions are worded as merely two ways of stating the same purpose. The wording of article I, section 6 is different from the Equal Protection Clause, but it is similar to the constitutional equality provisions in fourteen other states.<sup>55</sup> Indiana and Oregon are two states that have similar provisions to the one that Iowa included in its 1857 constitution.<sup>56</sup> Oregon adopted its equality provision in 1859,<sup>57</sup> and Indiana adopted its clause in 1851.<sup>58</sup> Since Indiana and Oregon worded their provisions similarly and adopted their provisions

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53. IOWA CONST. art. I, § 6.

54. U.S. CONST. amend. XIV, § 1.

55. ARIZ. CONST. art. II, § 13; ARK. CONST. art. II, § 18; CAL. CONST. art. I, § 7(b); IND. CONST. art. I, § 23; N.D. CONST. art. I, § 21; OR. CONST. art. I, § 20; S.D. CONST. art. VI, § 18; WASH. CONST. art. I, § 12. Other state constitutions express a similar purpose but are generally worded as “[N]o man or set of men are entitled to exclusive public emoluments or privileges from the community.” CONN. CONST. art. I, § 1; KY. BILL OF RIGHTS § 3; N.C. CONST. art. I, § 32; TEX. CONST. art. I, § 3; VT. CONST. ch. I, art. VII; VA. CONST. art. I, § 4.

56. *Compare* IND. CONST. art. I, § 23 (“The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.”), *and* OR. CONST. art. I, § 20 (“No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.”), *with* IOWA CONST. art. I, § 6 (“All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.”).

57. *Hewitt v. State Accident Ins. Fund Corp.*, 653 P.2d 970, 975 (Or. 1982).

58. *Collins v. Day*, 644 N.E.2d 72, 77 (Ind. 1994).

at roughly the same time Iowa did, the meanings that the supreme courts of these states have attached to these provisions could help interpret article I, section 6.

Oregon and Indiana courts have recognized that the way in which their equality provisions are worded suggests that these clauses are the “antithesis” of the Equal Protection Clause.<sup>59</sup> The Oregon Supreme Court has explained the antithetical nature of its equality provision in the following way:

While the fourteenth amendment forbids curtailment of rights belonging to a particular group or individual, [Oregon’s equality provision] prevents the enlargement of rights. [The drafters of the Equal Protection Clause were] concerned with discrimination against disfavored groups or individuals, specifically, former slaves. [T]he concern of [the drafters of Oregon’s equality provision] was with favoritism and the granting of special privileges for a select few.<sup>60</sup>

Similarly, the Indiana Supreme Court has held that “the principal purpose [of its equality provision] was to prohibit the state legislature from affirmatively granting any exclusive privilege or immunity.”<sup>61</sup> The purpose was not “to prevent abridgement of any existing privileges or immunities” or “to assure citizens the equal protection of the laws.”<sup>62</sup>

Scholars support the analyses offered by the Indiana and Oregon supreme courts. One commentator terms equality provisions like Oregon’s, Indiana’s, and Iowa’s as “Jacksonian,” after the populist U.S. President Andrew Jackson.<sup>63</sup> Under this view, such clauses do “not seek equal protection of the laws at all”; instead, they prohibit “discrimination in favor of a minority.”<sup>64</sup> This analysis suggests that the wording of equality provisions like Iowa’s is not just an inarticulate way of expressing the same purpose as the Equal Protection Clause, but rather a deliberate choice to meet a different purpose.

The antithetical interpretation given to the Oregon and Indiana equality provisions is transferrable to Iowa’s article I, section 6. Not only was article I, section 6 adopted at the same time and worded similarly to Oregon’s and Indiana’s equality provisions, but records from Iowa’s 1857 Constitutional Convention suggest a similar Jacksonian purpose. Delegate

59. See *Hammer v. State*, 89 N.E. 850, 852 (Ind. 1909) (calling the state’s equality provision the “antithesis” of the Equal Protection Clause); *Hewitt*, 653 P.2d at 975 (same).

60. *Hewitt*, 653 P.2d at 975 (citations omitted).

61. *Collins*, 644 N.E.2d at 77.

62. *Id.*

63. See Williams, *supra* note 12, at 1207–08 (noting that state constitutional provisions restricting “special’ or ‘exclusive’ privileges” closely “reflect the Jacksonian opposition to favoritism and special treatment for the powerful”).

64. *Id.* at 1208.

John Edwards proposed article I, section 6.<sup>65</sup> When asked what the purpose of the provision was, Edwards answered:

[I]ts object is contained in a nut shell, and is merely this: It is to prevent the General Assembly from *granting* any privileges or immunities to any citizen or class of citizens, that it would not be willing to grant to any other citizen or class of citizens upon the same terms. It is to prevent the Legislature from *granting* exclusive privileges to any class of citizens.<sup>66</sup>

Edwards' characterization of the 1857 provision supports a Jacksonian reading of article I, section 6. Edwards' explanation of the provision did not suggest the law was intended to prevent *denials* of civil rights. Instead, both Edwards' characterization of article I, section 6 and the provision itself preclude *grants* of special rights—a clear Jacksonian purpose. Further, a constitutional provision proposed prior to 1857 also supports the conclusion that the drafters of article I, section 6 were motivated by a Jacksonian purpose. A provision of the proposed Iowa Constitution of 1844 would have read: “No hereditary emoluments, privileges, or honors, shall ever be granted or conferred in this State, neither shall any law be passed granting exclusive privileges to any class of community.”<sup>67</sup> In light of this provision, it seems like the drafters of article I, section 6 were more concerned with the grants of special rights and benefits than denials of civil rights.

The difference between the Equal Protection Clause and Jacksonian equality provisions is illustrated in the types of harm these constitutional laws attempted to remedy. Following the Civil War, many Southern states passed “Black Codes” that restricted the civil rights of African-Americans that were otherwise commonly held (such as the rights to own property and to testify in court).<sup>68</sup> Congress and the states ratified the Fourteenth Amendment in 1868 and intended its Equal Protection Clause to benefit newly emancipated African-Americans by prohibiting Black Codes.<sup>69</sup> Thus, the Equal Protection Clause's original purpose was to prevent governments

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65. THE DEBATES OF THE CONSTITUTIONAL CONVENTION 200 (Davenport, Luse, Lane & Co. 1857).

66. *Id.* at 200–01 (emphasis added).

67. JOURNAL OF THE CONVENTION FOR THE FORMATION OF A CONSTITUTION FOR THE STATE OF IOWA 174–75 (1845). Iowa voters later rejected the 1844 constitution, JACK STARK, THE IOWA STATE CONSTITUTION: A REFERENCE GUIDE 3 (1998), but the substance of the proposed amendment—along with Edwards' 1857 statement—supports the view that article I, section 6 reflects more of a distaste for the legislature granting special rights to a few than denying civil rights to a minority.

68. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70 (1872) (describing types of restrictions placed upon African-Americans in the South following the Civil War).

69. See CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 237–40 (1997) (discussing statements made by congressional leaders indicating that they intended the Equal Protection Clause to benefit African-Americans).

from depriving African-Americans of the civil rights that others generally held.

States did not adopt Jacksonian equality provisions to eliminate Black Codes.<sup>70</sup> States adopted these provisions ten to fifteen years *before* the ratification of the Fourteenth Amendment “after a series of abuses by the relatively unfettered state legislatures [in response] to powerful *economic* interests.”<sup>71</sup> States adopting Jacksonian equality provisions were suspicious that business interests were using “fraud and corruption” to receive favorable “public-land dealings . . . franchises, subsidies” and other special kick-backs from legislators.<sup>72</sup> This suspicion of business interests helps explain why these clauses are termed “Jacksonian.” President Andrew Jackson’s efforts to dismantle the National Bank (which, like state government, could have a dynamic economic impact) were also driven in large part by a mistrust of powerful business interests.<sup>73</sup> Thus, it is likely that states adopting clauses like article I, section 6 were principally concerned with preventing government leaders from using their political power to favor special economic interests.

A comparison of article I, section 6 and the Equal Protection Clause thus supports *RACI*’s basic premise that article I, section 6 prohibits more economic classifications than the Equal Protection Clause. Nothing in article I, section 6’s wording or history suggests that the drafters intended the clause to prevent Black Codes like the Fourteenth Amendment. In fact, the 1857 Iowa Constitution expressly barred African-Americans from voting.<sup>74</sup> Similarly, while records of the 1868 adoption of the Equal Protection Clause abound, nothing suggests this clause was intended to counter favoritism to business interests. Rather than viewing the clauses as coextensive, as the Iowa Supreme Court has sometimes done, the more logical conclusion is that these clauses are the antithesis of each other. Therefore, the text and purposes of the two equal-protection laws support the Iowa Supreme Court’s judgment in the *RACI* cases that article I, section 6 may provide for a more stringent review of economic classifications than the Equal Protection Clause.

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70. Southern states adopted Black Codes following the Civil War. *The Slaughter-House Cases*, 83 U.S. at 70. By contrast, states adopted Jacksonian equality provisions as part of their state constitutions prior to the Civil War. See *supra* text accompanying notes 56–58 (noting that states adopted the provisions in the late 1850s).

71. Williams, *supra* note 12, at 1207 (emphasis added).

72. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 242 (1950).

73. MARVIN MEYERS, *THE JACKSONIAN PERSUASION: POLITICS AND BELIEF* 8–9 (1957).

74. STARK, *supra* note 67, at 5.

B. *COMPARING THE CASE LAW REVIEWING ECONOMIC CLASSIFICATIONS UNDER ARTICLE I, SECTION 6 AND THE EQUAL PROTECTION CLAUSE*

Article I, section 6 differs from the Equal Protection Clause in text and historical purpose, but there are also differences in how the U.S. and Iowa supreme courts have applied the respective provisions over the past fifty years when reviewing economic classifications. Even though Iowa courts have stated that article I, section 6 is coextensive with the Equal Protection Clause and have ostensibly applied the federal rational-basis test, the Iowa Supreme Court has struck down more economic classifications than the U.S. Supreme Court. Thus, the Iowa Supreme Court's historical application of article I, section 6 supports the court's conclusion in the *RACI* cases that article I, section 6 prohibits more economic classifications than the Equal Protection Clause.

1. Federal Review of Economic Classifications  
Under the Equal Protection Clause

Federal courts use the two-part rational-basis test for reviewing the validity of economic classifications under the Equal Protection Clause.<sup>75</sup> First, the court considers whether it is "plausible" that the government had a legitimate reason for the classification.<sup>76</sup> Second, the classification must rationally further the plausible policy goal.<sup>77</sup>

The court's requirement that a reason be plausible means there does not have to be evidence that the legislative body actually had the goal in mind when it adopted the law.<sup>78</sup> "Plausible" simply means the offered reason may "conceivably or 'may reasonably have been'" the legislature's actual reason.<sup>79</sup> In the context of economic classifications, only *Allegheny Pittsburgh Coal Co. v. County Commission* seems to have failed this prong.<sup>80</sup> However, the Court in *Nordlinger v. Hahn* upheld a law similar to the one at issue in *Allegheny Pittsburgh* under rational-basis review.<sup>81</sup> Thus, the inference that arises from comparing these cases is that there may have been a sufficiently

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75. *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992).

76. *Id.* at 11.

77. *Id.*

78. *See* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("[T]his Court has never insisted that a legislative body articulate its reasons for enacting a statute.").

79. *Nordlinger*, 505 U.S. at 15 (quoting *Allied Stores, Inc. v. Bowers*, 358 U.S. 522, 528–29 (1959)).

80. *See* *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 343–44 (1989) (finding it implausible that a property-tax scheme based upon "acquisition value" was enacted to tax properties based upon their "true value," because the acquisition-value scheme resulted in some homeowners paying between eight and thirty-five times as much property tax as neighbors).

81. *See* *Nordlinger*, 505 U.S. at 12 (finding that discouraging rapid turnover in residential properties and preserving the continuity of neighborhoods were plausible legitimate interests for enacting an acquisition-value property-tax scheme).

plausible reason for the law even in *Allegheny Pittsburgh*, but the government's failure to offer such a reason resulted in the law's failure to pass the rational-basis test.

The requirement that the chosen classification rationally furthers a plausible policy goal does not require a perfectly congruent relationship between the chosen classification and its objective. In *Railway Express Agency v. New York*, New York City banned placing advertisements on vehicles unless the advertisement promoted the vehicle owner's business.<sup>82</sup> The ordinance's objective was to make traffic safer by reducing distractions to other drivers.<sup>83</sup> The petitioner complained that the classification was arbitrary because it was too underinclusive: vehicles that advertised for their own business posed the same risk as vehicles that advertised for other businesses, but the law did not affect them.<sup>84</sup> The Court rejected the argument that the ordinance's underinclusiveness violated the Equal Protection Clause, finding that the clause does not require lawmakers to eradicate "all evils of the same genus . . . or none at all" when making economic classifications.<sup>85</sup>

These cases show that the rational-basis test is extraordinarily deferential to the validity of government classifications. The Court's reversal of *RACI I* by a unanimous vote illustrates just how easy it is for laws with economic classifications to survive this standard of review. Indeed, unless there has been a suspicion of underlying animus toward a group of people,<sup>86</sup> the Court simply has not had a history of striking laws under the rational-basis test.<sup>87</sup> As Justice Stevens pointed out, the standard is "tantamount to no review at all."<sup>88</sup>

## 2. Iowa Supreme Court Review of Economic Classifications Under Article I, Section 6

The Iowa Supreme Court has a history of invalidating economic classifications under article I, section 6. In some cases, the court has struck down classifications that the U.S. Supreme Court has expressly upheld. In other cases, the U.S. Supreme Court has not reviewed the particular

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82. *Ry. Express Agency v. New York*, 336 U.S. 106, 107–08 (1949).

83. *Id.* at 109–10.

84. *Id.*

85. *Id.* at 110.

86. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (striking down, under rational-basis review, a city ordinance requiring a group home for persons with mental disabilities to obtain a permit). In *Cleburne*, the Court was less deferential to the underinclusiveness of the ordinance than the Court in *Railway Express*. *See id.* (arguing that the goals sought through the permit requirement would have applied equally as well to "apartment houses, fraternity and sorority houses, hospitals and the like").

87. *See* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 15.4(e) (4th ed. 2007) (discussing the Court's "almost total abandonment" of review of economic classifications).

88. *FCC v. Beach Commc'ns*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring).

classification, but one can infer from the highly deferential nature of the rational-basis test that the Court would have upheld the law. Thus, there is ample Iowa case law illustrating how the Iowa Supreme Court has applied article I, section 6 differently than the U.S. Supreme Court has applied the Equal Protection Clause.

The Iowa Supreme Court has struck down some tort-immunity classifications. In *Bierkamp v. Rogers*, the court struck down a “guest motorist” statute that prohibited passengers from suing the driver of the vehicle for tortious conduct unless the driver was intoxicated.<sup>89</sup> The law’s purposes were to encourage the hospitality of drivers and to discourage collusive lawsuits.<sup>90</sup> The court struck the first rationale because even if tort immunity produced more offerors of gratuitous car rides, it would also result in fewer acceptors.<sup>91</sup> The court struck the second rationale because it was both overinclusive (the law barred all suits by passengers regardless of collusion) and underinclusive (the law allowed a suit if the driver was intoxicated regardless of collusion).<sup>92</sup> In striking down the guest statute, the court reversed its own precedent<sup>93</sup> and directly parted with the U.S. Supreme Court.<sup>94</sup>

The Iowa Supreme Court has not limited its invalidation of economic classifications to tax and tort-immunity laws. In *Federal Land Bank of Omaha v. Arnold*, the court considered a state law that established different redemption-period lengths for buyers at a foreclosure sale of agricultural homesteads.<sup>95</sup> If the buyer at the foreclosure sale was a “member institution,” which included certain federally insured lenders,<sup>96</sup> then the mortgagor had one year from the date of the sale to redeem the property.<sup>97</sup> In all other circumstances, however, the mortgagor had two years from the date of the sale to redeem the property.<sup>98</sup> The court agreed that the government had legitimate interests in providing shorter redemption periods to member institutions because they had a “stake” in the community and had an obligation to dispose of the homesteads.<sup>99</sup> However, the member-institution classification was underinclusive as to the stake-in-the-

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89. *Bierkamp v. Rogers*, 293 N.W.2d 577, 578 n.1 (Iowa 1980).

90. *Id.* at 582, 584.

91. *Id.* at 583.

92. *Id.* at 584.

93. *See* *Keasling v. Thompson*, 217 N.W.2d 687, 692 (Iowa 1974) (holding that a guest-motorist statute did not violate article I, section 6), *overruled by Bierkamp*, 293 N.W.2d 577.

94. *See Silver v. Silver*, 280 U.S. 117, 123 (1929) (holding that a guest-motorist statute did not violate the Equal Protection Clause).

95. *Fed. Land Bank of Omaha v. Arnold*, 426 N.W.2d 153, 155 (Iowa 1988).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 156.

community objective because some of the nonmember buyers were Iowa business firms with significant community ties.<sup>100</sup> Further, the classification was overinclusive with respect to the obligation to dispose of homesteads because not all of the member institutions faced such obligations.<sup>101</sup> The U.S. Supreme Court did not review this classification, but it likely would have upheld the law since *Railway Express* held that the over- and underinclusiveness of classifications are irrelevant.<sup>102</sup>

As a final illustration, the Iowa Supreme Court in *Chicago & Northwestern Railway Co. v. Fachman* invalidated a law requiring railroad companies to pay their employees at least every eighteen days.<sup>103</sup> The law violated article I, section 6 because it did not place similar payroll requirements on other businesses in the transportation industry.<sup>104</sup> The court found article I, section 6 prohibited underinclusiveness and that classifications violated article I, section 6 “[w]here the evil to be remedied, or the economic benefits to be realized, relates to members of one class quite as well as to another.”<sup>105</sup> The court held that since the harm to society is the same whether railroad or trucking companies delay salary payments, the law was invalid.<sup>106</sup> Again, as *Railway Express* makes clear, the U.S. Supreme Court would not have invalidated the payroll requirement for its underinclusiveness.

There are more examples of the Iowa Supreme Court striking economic classifications under article I, section 6.<sup>107</sup> However, the previous cases sufficiently illustrate that the Iowa Supreme Court has a history of striking down classifications under article I, section 6 that the U.S. Supreme Court would not have struck down under the Equal Protection Clause, particularly when the court has perceived a law as an over- or underinclusive means of achieving an asserted goal. Certainly, the Iowa Supreme Court has

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100. *Arnold*, 426 N.W.2d at 157.

101. *Id.*

102. *See supra* text accompanying notes 83–85 (discussing the argument of underinclusiveness in *Railway Express*).

103. *Chi. & Nw. Ry. Co. v. Fachman*, 125 N.W.2d 210, 214 (Iowa 1963).

104. *Id.*

105. *Id.* at 215.

106. *Id.*

107. *See Miller v. Boone County Hosp.*, 394 N.W.2d 776, 780 (Iowa 1986) (striking down a sixty-day notice requirement placed on tort victims of government bodies but not victims of private tortfeasors); *Gleason v. City of Davenport*, 275 N.W.2d 431, 436 (Iowa 1979) (striking down a law that placed a thirty-day notice requirement on tort victims of “charter cities” but a sixty-day notice requirement on tort victims of other municipalities); *Sperry & Hutchinson Co. v. Hoegh*, 65 N.W.2d 410, 419 (Iowa 1954) (invalidating a law that prohibited merchants from using coupon books redeemable by a customer to a third party, but which allowed coupon books redeemable by a customer to the merchant); *Dunahoo v. Hubler*, 171 N.W. 123, 124 (Iowa 1919) (striking a law that prohibited employees of public accommodations like barber shops—but not the proprietors of the accommodations—from accepting tips).

not struck down every economic classification,<sup>108</sup> but the preceding examples are proof that *RACI II* is not an anomaly and that case law may support the judicial-federalist outcome of the *RACI* cases.

#### IV. METHODS OF IMPLEMENTING JUDICIAL FEDERALISM UNDER ARTICLE I, SECTION 6

State supreme courts have three options when analyzing claims under a state constitutional provision that is analogous to a federal provision: (1) the court can apply federal rules and seek congruency with federal outcomes; (2) the court can independently apply federal rules without being obligated to reach federal outcomes; or (3) the court can apply state-created rules in lieu of federal rules.<sup>109</sup> The latter two options are methods of judicial federalism, with the Iowa Supreme Court expressly having chosen the second option in *RACI II*.<sup>110</sup> This Part compares these two methods of judicial federalism.

##### A. THE INDEPENDENT-APPLICATION METHOD

The Iowa Supreme Court in *RACI II* expressly stated that it was applying the federal rational-basis test while retaining the right to reach a different result than what a federal court might reach on identical facts.<sup>111</sup> In other words, the court used the independent-application method of judicial federalism in *RACI II*. Although the court had not expressly adopted this approach in previous decisions, in hindsight it is clear that the court used the independent-application approach in cases like *Bierkamp*, *Federal Land Bank*, and *Fachman*, since federal courts would not have reached the same outcomes in their application of the rational-basis test.<sup>112</sup> In cases since *RACI*

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108. See *Sperflage v. Ames City Bd. of Review*, 480 N.W.2d 47, 49 (Iowa 1992) (holding a law that taxed property with three or more dwelling units at a higher rate than property with two or fewer dwelling units did not violate article I, section 6); *Motor Club of Iowa v. Dep't of Transp.*, 265 N.W.2d 151, 154–55 (Iowa 1978) (holding a law that charged registration fees for cars based upon value and for trucks based upon weight did not violate article I, section 6).

109. See *supra* notes 12–14 and accompanying text (describing different methods that state supreme courts have used for reviewing claims under state constitutional provisions that have analogs in the Federal Constitution).

110. *RACI II*, 675 N.W.2d 1, 7 (Iowa 2004). The Iowa Supreme Court has expressly recognized these two forms of judicial federalism. See *Varnum v. Brien*, 763 N.W.2d 862, 878 n.6 (Iowa 2009) (“[W]e have jealously guarded our right to ‘employ a different analytical framework’ under the state equal protection clause as well as to independently apply the federally formulated principles.”).

111. See *RACI II*, 675 N.W.2d. at 6 (describing how the court was independently applying the federal rational-basis test).

112. See *supra* Part III.B.2 (discussing Iowa cases and predicting how the U.S. Supreme Court would decide them differently).

*II*, the Iowa Supreme Court has again endorsed this independent-application approach to judicial federalism.<sup>113</sup>

There are some advantages to the independent-application approach. First, the approach is somewhat defensible on *stare decisis* grounds. The court stated in *RACI II* that the independent-application method “is nothing new” because of the case-law examples like those noted in Part III.<sup>114</sup> This *stare decisis* argument is only somewhat persuasive, however, because it conflicts with another body of Iowa case law that has found article I, section 6 and the Equal Protection Clause to be equivalents.<sup>115</sup> However, as *RACI II* and other cases in Part III illustrate, the court has not always treated these equality provisions as equivalent—at least in the context of the review of economic classifications.<sup>116</sup>

A second advantage of the independent-application approach is that it allows for judicial-federalist outcomes. By making such outcomes possible, the approach empowers the court to recognize the substantive differences between article I, section 6 and the Equal Protection Clause when the differences exist. Thus, the independent-application approach is consistent with the court’s obligation to provide a meaningful interpretation of the Iowa Constitution. At the same time, however, maintaining the basic rational-basis framework for analyzing economic classifications provides lawyers and judges with a familiar, manageable test and a host of state and federal case law to continue relying on.<sup>117</sup> In using the rational-basis test, the Iowa Supreme Court implicitly claims article I, section 6 places the same limitation upon laws as the Equal Protection Clause. But, when the court reaches results that diverge from the federal courts’ application of the

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113. See *Ames Rental Prop. Ass’n v. City of Ames*, 736 N.W.2d 255, 258–59 (Iowa 2007) (holding a zoning ordinance valid under article I, section 6, but analyzing the law under article I, section 6 and the Equal Protection Clause separately); *In re S.A.J.B.*, 679 N.W.2d 645, 648 (Iowa 2004) (citing *RACI II*, 675 N.W.2d at 6) (stating the court independently applies federal principles). *But see* *City of Coralville v. Iowa Utils. Bd.*, 750 N.W.2d 523, 530 (Iowa 2008) (stating that article I, section 6 is “similar in scope, import, and purpose” to the Equal Protection Clause); *In re Det. of Hennings*, 744 N.W.2d 333, 338–39 (Iowa 2008) (reserving the right to adopt a new test for reviewing claims brought under article I, section 6, but then seemingly analyzing the Equal Protection Clause and article I, section 6 as if they were the same). The Iowa Supreme Court has also endorsed the independent-application approach outside the context of article I, section 6. See *State v. Bruegger*, 773 N.W.2d 862, 883 (Iowa 2009) (applying independently the federal courts’ “gross disproportionality” test for cruel-and-unusual-punishment claims under the Eighth Amendment in the course of reviewing such a claim under the Iowa Constitution).

114. *RACI II*, 675 N.W.2d at 6.

115. See *supra* notes 23, 108 (discussing cases in which the Iowa Supreme Court has either stated that article I, section 6 is the equivalent of the Equal Protection Clause or in which the court has reached a result that the U.S. Supreme Court would have reached in applying the Equal Protection Clause).

116. See *supra* Part III.B (examining cases in which the U.S. and Iowa supreme courts have considered equality provisions in the context of economic classifications).

117. *RACI II*, 675 N.W.2d at 6.

rational-basis test, the Iowa Supreme Court is simultaneously stating that article I, section 6 is substantively different than the Equal Protection Clause.<sup>118</sup> An apt cliché is that the independent-application method is the court's attempt to have its cake and eat it too. This surely results in confusion for the legal community—most notably, lower-court judges and lawyers who must resolve cases under article I, section 6.

The independent-application approach also produces legitimacy concerns. When the Iowa Supreme Court applies the rational-basis test and reaches an opinion that diverges from a federal-court opinion, the lack of any difference in the rules applied makes the Iowa Supreme Court's outcome appear result-oriented rather than principled.<sup>119</sup> This appearance exists even though the text, history, and case-law precedent behind article I, section 6 support the divergence. Similarly, the independent-application approach provides little guidance to lawyers about when the Iowa Supreme Court may reach a divergent outcome.<sup>120</sup> When the Iowa Supreme Court reaches a divergent result, it is unlikely the decision will be more persuasive than a federal-court opinion when compared with the historical application of the rational-basis test, since the legal community knows this test amounts to nearly no review at all.<sup>121</sup> Thus, when the court uses the independent-application method, the decision is destined to appear poorly reasoned, result-oriented, or both.

#### B. CREATION OF A NEW TEST

In *RACI II*, the court reserved the right to fashion its own analysis for reviewing economic classifications under article I, section 6 that “[may] be more compatible with Iowa’s constitutional language.”<sup>122</sup> This method

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118. See *id.* at 19, 28 (Cady, J., dissenting) (discussing how “it is difficult for two courts to reach different conclusions if each court conscientiously follows the same governing principles” and calling the majority’s outcome “intellectually inconsistent”).

119. Scholars have noted that “legitimacy questions” have challenged the development of judicial federalism as much as the “substantive” questions of when state constitutional provisions should diverge from their analogous federal provisions. G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 853 (1991); see Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1021–26 (1997) (discussing methods state supreme courts have adopted for justifying a departure under their state constitutions from analogous federal provisions).

120. See *RACI II*, 675 N.W.2d at 28 (Cady, J., dissenting) (lamenting the effect that the independent-application method has on the “essential reliability of legal principles” and on “judicial economy”).

121. See *id.* at 19 (pointing out that when there is disagreement between the Iowa Supreme Court and the U.S. Supreme Court on the application of the rational-basis test, “one of the courts is failing to follow the proper analysis”); Schlueter, *supra* note 52, at 718–27 (arguing that the U.S. Supreme Court correctly applied the rational-basis test but that the Iowa Supreme Court did not).

122. *RACI II*, 675 N.W.2d at 6.

would be the second form of judicial federalism: application of a state-created test in lieu of the federal standard. In 2008 and 2009, the court repeated that this method of judicial federalism is an option, but the court has not yet implemented it.<sup>123</sup>

There are compelling reasons to adopt a new test for reviewing economic classifications, but there are clear challenges, too. Most notably, such a departure raises legitimacy concerns in light of the court's historical holding that article I, section 6 is similar in "scope, import, and purpose" to the Equal Protection Clause.<sup>124</sup> Of course, even though this departure would come 150 years after constitutional delegates adopted article I, section 6, Iowa case law from the past fifty years has long hinted that there are differences between the provisions, and a new test may simply help reconcile the already-existing discrepancies between state and federal case law.<sup>125</sup>

Providing a new interpretation of a 150-year-old provision is also an intellectually daunting task. No jurisdiction appears to have created a test for providing a heightened standard of review for economic classifications that Iowa courts could adopt in whole.<sup>126</sup> Thus, if Iowa courts adopt a new test, lawyers, judges, and scholars must do significant research into the history of article I, section 6. Such scholarship on the Fourteenth Amendment is pervasive, but it is nearly non-existent for article I, section 6. So far, the Iowa Supreme Court has placed the burden of crafting a new test upon litigants, but one may argue that this is just a dereliction of duty.<sup>127</sup> The Iowa

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123. See *Varnum v. Brien*, 763 N.W.2d 862, 896 n.23 (Iowa 2009) (considering, but refusing to adopt, a balancing test for analyzing equal-protection claims outside of the traditional three-part framework—strict scrutiny, intermediate scrutiny, or rational-basis review—used by federal courts); *City of Coralville v. Iowa Utils. Bd.*, 750 N.W.2d 523, 530 (Iowa 2008) (citing *RACI II* for the proposition that the court has the right to fashion its own test when reviewing claims under article I, section 6); *In re Det. of Hennings*, 744 N.W.2d 333, 338–39 (Iowa 2008) (same).

124. *City of Coralville*, 750 N.W.2d at 530; see also *RACI I*, 648 N.W.2d 555, 558 (Iowa 2002) ("We have said Iowa courts are to 'apply the same analysis in considering the state equal protection claims as . . . in considering the federal equal protection claim.'" (quoting *In re Morrow*, 616 N.W.2d 544, 547 (Iowa 2000))).

125. Williams points out that state supreme courts may look to past case law interpreting state and analogous federal constitutional provisions to determine whether they should interpret their state constitutional provisions differently from analogous federal provisions. See Williams, *supra* note 119, at 1023 (noting the New Jersey Supreme Court looks for "textual, decisional, or historical" differences).

126. Indiana and Oregon—the two states with equality provisions similar to Iowa's—have not established a heightened standard of review for economic classifications. See *Collins v. Day*, 644 N.E.2d 72, 79 (Ind. 1994) (crafting a new standard for claims brought under the state constitution's equal protection clause, but requiring a classification to be only "reasonably related" to the "inherent characteristics" that define the classes); *In re Marriage of McGinley*, 19 P.3d 954, 958–59 (Or. 2001) (noting that heightened review is typically limited to groups with immutable characteristics that governments have historically discriminated against).

127. See *In re Det. of Hennings*, 744 N.W.2d at 339 (refusing to adopt a new test for reviewing claims under article I, section 6 because the plaintiff did not argue for a different test). In *Varnum v. Brien*, the plaintiffs asked the court to adopt a new standard for analyzing equal-protection claims, but the court refused to adopt a new test. See *Varnum*, 763 N.W.2d at 896 n.23

Constitution requires the Iowa Supreme Court, not litigants, to interpret the constitution. So, why should litigants be responsible for providing a workable standard of review for Iowa judges to apply when reviewing economic classifications?<sup>128</sup>

Despite the difficulty of formulating a new test after 150 years, the task is not impossible since the court is not exactly writing on a blank slate.<sup>129</sup> In comparing *RACI II* with the other Iowa Supreme Court decisions outlined in Part III, the common theme in each of these holdings is that when the Iowa Supreme Court has held a classification in violation of article I, section 6, the court has found fault with the relationship between the classification drawn and its purpose.<sup>130</sup> Specifically, in each of the decisions the court found that the classification was either underinclusive,<sup>131</sup> overinclusive,<sup>132</sup> or both with respect to the stated goal. On this point, there is a clear distinction between how the U.S. Supreme Court and the Iowa Supreme Court review economic classifications. As *Railway Express* demonstrates, the over- and underinclusiveness of an economic classification is immaterial to whether the law satisfies rational-basis review under the Equal Protection Clause.<sup>133</sup> Thus, if the Iowa Supreme Court adopts a new test to implement a judicial-federalist review of economic classifications under article I, section 6, scrutinizing how congruent the classification is to its intended purpose may be a proper starting point.

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(rejecting a new balancing test). Even outside the context of article I, section 6, the Iowa Supreme Court has placed the burden of creating new tests for analyzing claims under the Iowa Constitution on the plaintiff. *See* *State v. Bruegger*, 773 N.W.2d 862, 883 (Iowa 2009) (refusing to adopt a standard for analyzing claims under the Iowa Constitution’s “cruel and unusual” punishment prohibition that differed from the test used to interpret the U.S. Constitution’s identical prohibition because the plaintiff had failed to argue for a new standard).

128. *See RACI II*, 675 N.W.2d 1, 4 (Iowa 2004) (noting it is the Iowa Supreme Court’s “obligation” to determine what state constitutional provisions mean).

129. When litigants ask the Iowa Supreme Court to adopt a new framework for analyzing claims under the Iowa Constitution and depart from federal analysis, the litigants should make arguments from “a dissenting opinion of the [U.S.] Supreme Court, . . . an alternate approach utilized by other state supreme courts under state constitutional provisions similar to Iowa’s, . . . [an] analysis of law found in the academic literature, or . . . [from] our collective constitutional common sense distilled from law, logic, and experience.” *State v. Effler*, 769 N.W.2d 880, 895 (Iowa 2009) (Appel, J., concurring).

130. *See supra* Part III.B.2 (discussing cases in which the Iowa Supreme Court has found a classification to be an under- or overinclusive means of achieving some goal).

131. A classification is “underinclusive” when the objective behind the classification could be met by applying the classification to a broader set of actors. *See* 2 CHESTER JAMES ANTIEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 30.01, at 211 (2d ed. 1997) (noting that a classification is underinclusive when it only partially meets a governmental objective).

132. A classification is “overinclusive” when the objective behind the classification could still be met even if the classification was applied only to a subset (rather than all) of the classified actors. *See id.* (noting that a classification is overinclusive when “the government catches within its net individuals who don’t really belong there”).

133. *See supra* notes 82–85 and accompanying text (noting that the U.S. Supreme Court does not strike a classification under rational-basis review for being underinclusive).

“Means focused” review may be more consistent with the Iowa Supreme Court’s interpretation of article I, section 6 than the rational-basis test. According to one scholar, courts use this form of review when they ostensibly apply the rational-basis test, but then give more scrutiny to the means–ends relationship than the Court did in *Railway Express*.<sup>134</sup> Under means-focused review, judges remain deferential on whether the classification’s goal is plausible.<sup>135</sup> Instead, the validity of a classification depends upon the means used to achieve the end.<sup>136</sup> Classifications held invalid under this form of review typically present problems of under- and overinclusion.<sup>137</sup> Idaho is the only state which has expressly adopted means scrutiny (although it does not apply this standard when reviewing economic classifications).<sup>138</sup> Some commentators have suspected, however, that the Iowa Supreme Court has already implicitly applied means scrutiny in past cases, including in *RACI II*.<sup>139</sup>

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134. See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21–24 (1972) (discussing U.S. Supreme Court cases of the 1971 term in which the Court claimed to apply rational-basis review, but invalidated laws).

135. See *id.* at 21 (stating that a judge’s “value perceptions” of the legislature’s desired goal is irrelevant in means-scrutiny, unlike in strict scrutiny). This feature of means-focused review distinguishes it from intermediate scrutiny. Under intermediate scrutiny, courts must inquire into whether the government interest for a classification is sufficiently “important.” Clark v. Jeter, 486 U.S. 456, 461 (1988).

136. Gunther, *supra* note 134, at 20–21.

137. See *id.* at 20 (remarking that “[j]udicial tolerance of overinclusive and underinclusive classifications [was] notably reduced” during the 1971 term). Gunther cited *Reed v. Reed*, 404 U.S. 71 (1971), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), as illustrative of means-focused review. Gunther, *supra* note 134, at 29. It should be noted that *Reed* involved a discriminatory gender classification, *Reed*, 404 U.S. at 73, and *Eisenstadt* involved infringement with the fundamental right of privacy rather than discriminatory economic classifications, *Eisenstadt*, 405 U.S. at 438. Both would expressly trigger a heightened form of review (i.e., not rational-basis review) under the U.S. Supreme Court’s modern Equal Protection Clause jurisprudence. See *United States v. Virginia*, 518 U.S. 515, 531 (1996) (gender classifications must have an “exceedingly persuasive justification”) (internal quotations omitted); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding classifications affecting fundamental rights subject to strict scrutiny).

138. *Jones v. State Bd. of Med.*, 555 P.2d 399, 407 (Idaho 1976) (incorporating “means scrutiny” level of review between strict scrutiny and rational-basis review) (internal quotations omitted). Idaho courts limit means-scrutiny review to laws which may have been motivated out of some animus toward a disadvantaged group. See *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 308 (Idaho 1999) (finding that a lack of animus prevented the application of means-scrutiny review). Idaho courts appear to still give discriminatory economic classifications rational-basis review. See *Bon Appetit Gourmet Foods, Inc. v. Dep’t of Employment*, 793 P.2d 675, 677 (Idaho 1989) (applying rational-basis review to a tax statute).

139. See FRIESEN, *supra* note 11, § 3.02[1], at 3-15 n.61 (citing *RACI II*, 675 N.W.2d 1 (Iowa 2004), as an example of means-focused scrutiny); Anthony Reeves, Note, *Rational Basis Revised: Iowa Equal Protection After Gleason, Bierkamp, and Rudolph*, 67 IOWA L. REV. 309, 322–26 (1982) (arguing that the Iowa Supreme Court applied a means-scrutiny approach in *Bierkamp v. Rogers*, 293 N.W.2d 577 (Iowa 1980)). At least one commentator suspects that the Iowa

If the Iowa Supreme Court implements judicial federalism for its review of economic classifications under article I, section 6, an official adoption of means-focused scrutiny might make the most sense. A means-focused test is consistent with pre-existing case law,<sup>140</sup> and the test will certainly result in judges giving more scrutiny to economic classifications than what the rational-basis test is intended to provide.<sup>141</sup> The Iowa Supreme Court's outcomes under means-focused scrutiny may be similar to those already achievable under the independent-application method, but an express adoption of means scrutiny may produce procedural clarity and make outcomes more principled.<sup>142</sup>

## V. PROPRIETY OF REJECTING *RACII*'S JUDICIAL FEDERALISM

The fear that the Iowa Supreme Court will become a super-legislature is the most salient argument against judicial federalism in the context of review of economic classifications.<sup>143</sup> This concern is encapsulated in the U.S. Supreme Court case of *Lochner v. New York*. In *Lochner*, the Court held

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Supreme Court used a “rational basis with bite” test in *RACI II*. Steven P. Wieland, Note, *Gambling, Greyhounds, and Gay Marriage: How the Iowa Supreme Court Can Use the Rational-Basis Test to Address Varnum v. Brien*, 94 IOWA L. REV. 413, 416 (2008). The rational-basis-with-bite test essentially consists of the rational-basis test with an additional threshold question of whether the lawmaking body that drew the classification was motivated by an animus toward a particular group of people. If such an animus is present, the court may strike down the classification. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 442, 450 (1985) (applying rational-basis review while striking down a law that required a permit for a home for persons with mental disabilities because the law was based on “irrational prejudice against the mentally retarded”); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533–34 (1973) (applying rational-basis review while striking down a law targeted at “hippies” because “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest”); *Levy v. Louisiana*, 391 U.S. 68, 71–72 (1968) (applying rational-basis review while striking down an “invidious” classification that prevented illegitimate children from bringing a claim that legitimate children could have brought); *see also* Wieland, *supra*, at 420–22 (referring to the analysis used in *Cleburne*, *Moreno*, and *Levy* as “rational basis with bite”).

140. *See* *Johnson v. Univ. of Iowa*, 408 F. Supp. 2d 728, 750 (S.D. Iowa 2004) (analyzing Iowa case law and noting that the Iowa Supreme Court’s review “is more searching than federal equal protection analysis in evaluating the relationship between the proposed purpose and the legislation as a means to achieve that purpose”); *supra* Part III (discussing cases in which the Iowa Supreme Court struck down laws for being over- or underinclusive).

141. *See supra* Part III.B (providing examples of how a court applying the rational-basis test may reach different results than a court applying a test akin to a means-focused review).

142. In *Rudolph v. Iowa Methodist Medical Center*, the Iowa Supreme Court perfunctorily rejected means-scrutiny review. *Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W.2d 550, 557 (Iowa 1980). The court gave little discussion to the issue in *Rudolph*, and in light of the apparent applicability of the test to Iowa’s historical interpretation of article I, section 6, the short statement in *Rudolph* nearly thirty years ago should not bar the modern court from adopting means scrutiny.

143. *See* O. Kay Henderson, *Legislators Outraged by Iowa Supreme Court Gambling Tax Ruling*, RADIO IOWA, Feb. 3, 2004, <http://www.radioiowa.com/2004/02/03/legislators-outraged-by-iowa-supreme-court-gambling-tax-ruling/> (discussing how Iowa legislators feared that the *RACI II* decision was a power grab by the Iowa Supreme Court).

that a New York law that prohibited bakers from working over sixty hours a week violated the Fourteenth Amendment's "right to contract."<sup>144</sup> After *Lochner*, the Court continued striking down economic regulations until roughly the 1940s, when it adopted the more deferential rational-basis review for such laws which it continues to use today.<sup>145</sup>

Critics have suggested *RACI II* is too *Lochner*-esque because the legislature should have the prerogative to craft economic classifications.<sup>146</sup> Indeed, *RACI II*—like *Lochner*—and implementation of judicial federalism will place tighter boundaries on the legislature's ability to draw economic classifications. However, the reasons *Lochner* was a poor decision for the U.S. Supreme Court do not make *RACI II*—and adoption of judicial federalism generally—a poor decision for the Iowa Supreme Court.

Critics considered *Lochner* and its contemporary decisions to be unwise because such decisions usurped state power.<sup>147</sup> Since the United States operates under a federalist form of government, it may be proper for the national government to defer to state governments in certain circumstances. But this concern, although certainly apparent in *Lochner*, was completely inapplicable in *RACI II*. From a federalist perspective, it is one thing for the U.S. Supreme Court in Washington, D.C., to enter the New York State Capitol and invalidate a law because a baker in Utica wants to work over sixty hours a week, and it is quite another for the Iowa Supreme Court justices to walk across Grand Avenue and tell the legislature that all the casinos in the state should be taxed the same. In this hypothetical, *Lochner*-ization concerns do not apply to the Iowa Supreme Court ruling (although they may apply to the U.S. Supreme Court ruling), because deference to an independent sovereign is not a concern when the Iowa Supreme Court reviews laws passed by its constitutional counterparts—the Iowa Legislature and the Iowa Governor.<sup>148</sup> *Lochner* was also more troubling from a political-representation standpoint. When *Lochner* struck down an economic regulation that the New York Legislature thought prudent, the only way the legislators—or Utica

144. *Lochner v. New York*, 198 U.S. 45, 53 (1905).

145. See ROTUNDA & NOWAK, *supra* note 87, § 15.4(e) (discussing the Court's review of economic classifications before 1937).

146. See *RACI II*, 675 N.W.2d 1, 18–19 (Iowa 2004) (Cady, J., dissenting) (discussing the legislature's broad power to form tax classifications and analogizing the decision to the U.S. Supreme Court's *Lochner*-era jurisprudence); Schlueter, *supra* note 52, at 729 (same).

147. See *United States v. Lopez*, 514 U.S. 549, 605–06 (1995) (Souter, J., dissenting) (pointing out that several discredited cases in the *Lochner* era represented a second-guessing of state legislative decisions).

148. See *Keasling v. Thompson*, 217 N.W.2d 687, 700 (Iowa 1974) (McCormick, J., dissenting) (remarking that even if article I, section 6 is interpreted the same way as the Equal Protection Clause, "deference to state laws based on the concept of federalism is not involved in applying the state constitutional standard"). But see *Graham v. Worthington*, 146 N.W.2d 626, 631 (Iowa 1966) ("[W]e ought not to be swift to adopt such a technical or strained construction of the Constitution as would unduly impair the efficiency of the Legislature to meet its unavoidable responsibilities." (citation omitted)).

bakers—could revive the law was by amending the U.S. Constitution. Citizens outside New York may have been sympathetic to the ill of overworked bakers in Utica, but they were unlikely to call for constitutional conventions to change the decision. On the other hand, when state supreme courts exercise judicial federalism, those adversely affected are much more empowered to change the state's constitution or those serving as the court's justices.<sup>149</sup> In Iowa, citizens of the state can amend the state constitution<sup>150</sup> or replace members of the Iowa Supreme Court through “retention” elections.<sup>151</sup>

Finally, analogizing *RACI II* with *Lochner* is improper because it ignores the substantive differences between article I, section 6 and the Equal Protection Clause. As this Note has pointed out, article I, section 6 differs in text, purpose, and case-law interpretation from the Equal Protection Clause.<sup>152</sup> If article I, section 6 mandates a review of economic classifications that differs from the Equal Protection Clause, Iowa courts should not disregard the legal import of the provision in favor of legislative deference. Certainly, legislatures would be able to pass more laws without citizens having constitutional rights like freedom of speech and due process, but it would be outrageous to suggest courts should ignore the legal import of *those* provisions simply to ensure legislatures can generate a high volume of laws. Even if judicial federalism will result in some limitations upon the Iowa Legislature's ability to draw economic classifications, calling *RACI II* and judicial federalism “Lochnerization” is really a fear tactic that belittles the Iowa Supreme Court's obligation to provide a meaningful interpretation of the state's constitution.

## VI. CONCLUSION

The Iowa Supreme Court clearly engaged in judicial federalism in *RACI II* by striking down a law under article I, section 6 that the U.S. Supreme Court had upheld under the Equal Protection Clause. Although *RACI II* received criticism, a closer comparison of article I, section 6 and the Equal Protection Clause suggests there are actually few similarities between their texts and historical purposes. Further, the Iowa Supreme Court has had a track record over the past fifty years of striking down economic classifications under article I, section 6 that federal courts would not have struck down under the Equal Protection Clause. Thus, there is support for the basic judicial-federalist notion underpinning *RACI II* that article I,

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149. See Williams, *supra* note 19, at 216–17 (discussing how citizens in some states overturned judicial-federalist decisions by constitutional amendment).

150. IOWA CONST. art. X.

151. *Id.* art. V, § 17.

152. See *supra* Part III (comparing the text and intended purposes of article I, section 6 with those of the Equal Protection Clause).

section 6 prohibits more economic classifications than the Equal Protection Clause.

But the holding of *RACI II* will not be the case's legacy. Although this Note has spent significant time analyzing constitutional provisions and case law, the *RACI* cases are about more than just the validity of an Iowa law which provided a differential tax rate for different forms of casino gambling. The *RACI* cases are as much about state sovereignty as they are about the proper standard of review for economic classifications. Iowans should cherish their state's sovereignty, but as a result of *RACI II*, the Iowa Supreme Court's attempt to exercise state sovereignty resulted only in criticism of the independent-application method of judicial federalism, not a celebration of Iowa's constitutional independence.

Judicial federalism holds great promise for the civil rights of Iowans, but citizens need leadership from Iowa's Supreme Court justices.<sup>153</sup> The Iowa Supreme Court missed an opportunity in *RACI II* to provide a meaningful interpretation of the Iowa Constitution. The court could have concluded that article I, section 6 provided a more stringent review of economic classifications than the Equal Protection Clause because of differences in their year of adoption, wording, purpose, and historical application, but the court failed to make these observations. Thus, if anything, *RACI II* demonstrates that the independent-application method is nothing more than a way for the Iowa Supreme Court to exercise its power of state sovereignty without actually providing any meaningful examination and interpretation of the constitutional provision it is applying. The court should not exercise the power of state sovereignty so casually. Iowans deserve implementation of judicial federalism when appropriate, but to ensure legitimate, principled decisions, the Iowa Supreme Court must root its use of the doctrine in substantive differences between the state and federal constitutions. This is the true flaw of *RACI II*.

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153. *RACI II* may signal the beginning of a new era of judicial federalism for the Iowa Supreme Court. In 2009, the court held that the Iowa Constitution's prohibition on cruel and unusual punishment prohibited more sentences than the U.S. Constitution's analogous provision in the Eighth Amendment. *See* *State v. Bruegger*, 773 N.W.2d 862, 883 (Iowa 2009) (noting that "[a]s in *RACI* . . . review of criminal sentences for 'gross disproportionality' under the Iowa Constitution [is] not . . . a 'toothless' review" and then adopting "a more stringent review than would be available under the Federal Constitution"). Also in 2009, the court struck down the state's prohibition on same-sex marriage in the landmark decision of *Varnum v. Brien*. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009). It is important to note, however, that since the U.S. Supreme Court has not yet decided the question of whether state prohibitions on same-sex marriage offend the Equal Protection Clause, it may be too early to deem the Iowa Supreme Court's decision in *Varnum* as an instance of judicial federalism.