IN THE SUPREME COURT OF THE STATE OF WASHINGTON

HEATHER ANDERSEN and LESLIE CHRISTIAN; PETER ILGENFRITZ and DAVID SHULL; JOHANNA BENDER and SHERRI KOKX; JANET HELSON and BETTY LUNDQUIST; DAVID SERKIN-POOLE and MICHAEL SERKIN-POOLE; VEGAVAHINI SUBRAMANIAM and VAIJAYANTHIMALA NAGARAJAN; ELIZABETH REIS and BARBARA STEELE; and MICHELLE ESGUERRA; and BOO TORRES DE ESGUERRA,	)	No. 75934-1
Respondents,	)	En Banc
v.	)	
KING COUNTY; RON SIMS, King County Executive; and DEAN LOGAN, King County Director of Records, Elections and Licensing Services Division,	)	
Appellants,	)	
STATE OF WASHINGTON,	)	Filed July 26, 2006
Appellant,	)	
SENATOR VAL STEVENS; REPRESENTATIVE GIGI TALCOTT; COALITION FOR COMMUNITY DEVELOPMENT AND RENEWAL; NUWANDA ADAMS; TRACEY ARMSTRONG; GERALD BAKER; RICHARD BLAIR; ED COOK; RICK DANNER, SR.; BILL DEMPS; HARVEY DRAKE; GEORGE FROST; ELVIN GLADNEY; AARON HASKINS; RICK KINGHAM;	)	

SAMUEL K. LAW; JIMMIE W. LEE; DAN MAGALEI; DANA McCLENDON; TONY MORRIS; NATE MULLEN; PAUL OLVER; JOSEPH PHILLIPS; DAVID PIERSON; JOHN PENTON; KENNETH J. RANSFER, SR.; WILLIE C. SEALS, JR.; PAUL STOOT; WASHINGTON TALAGA; DANIEL VILLA; DAVID WALLACE; THOMAS L. WESTBROOK; DOUG WHEELER; EARNEST WILLIAMS; REGGIE WITHERSPOON; NATHANIEL WOLF; GRANT ZWEIGLE; and WASHINGTON EVANGELICALS FOR RESPONSIBLE GOVERNMENT,

Appellants/Intervenors.

CELIA CASTLE and BRENDA BAUER; PAMELA COFFEY and VALERIE TIBBETT; GARY MURELL and MICHAEL GYDE; CHRISTINA GAMACHE and JUDITH FLEISSNER; KEVIN CHESTNUT and CURTIS CRAWFORD; JEFF KINGSBURY and ALAN FULLER; LAURI CONNER and LEJA WRIGHT; ALLAN HENDERSON and JOHN BERQUIST; MARGE BALLACK and DIANE LANTZ; TOM DUKE and PHUOC LAM; and KATHY and KARRIE CUNNINGHAM,

Respondents,

v.

STATE OF WASHINGTON,

Appellant.

No. 75956-1

MADSEN, J. – The trial courts in these consolidated cases held that the provisions of Washington's 1998 Defense of Marriage Act (DOMA) that prohibit same-sex marriages are facially unconstitutional under the privileges and immunities and due process clauses of the Washington State Constitution. King County and the State of Washington have appealed. The plaintiffs-respondents, gay and lesbian couples, renew their constitutional arguments made to the trial courts, including a claim that DOMA violates the Equal Rights Amendment.

The two cases before us require us to decide whether the legislature has the power to limit marriage in Washington State to opposite-sex couples. The state constitution and controlling case law compel us to answer "yes," and we therefore reverse the trial courts.

In reaching this conclusion, we have engaged in an exhaustive constitutional inquiry and have deferred to the legislative branch as required by our tri-partite form of government. Our decision accords with the substantial weight of authority from courts considering similar constitutional claims. We see no reason, however, why the legislature or the people acting through the initiative process would be foreclosed from extending the right to marry to gay and lesbian couples in Washington.

It is important to note that the court's role is limited to determining the constitutionality of DOMA and that our decision is not based on an independent determination of what we believe the law should be. United States Supreme Court

Justice John Paul Stevens talked about the court's role when he described several noteworthy opinions he had written or joined while "convinced that the law compelled a result that [he] would have opposed if [he] were a legislator." John Paul Stevens, United States Supreme Court Justice, Judicial Predilections, Address to the Clark County Bar Association, Las Vegas, Nev. 2 (Aug. 18, 2005). As Justice Stevens explained, a judge's understanding of the law is a separate and distinct matter from his or her personal views about sound policy. *Id*. at 17.

A judge's role when deciding a case, including the present one, is to measure the challenged law against the constitution and the cases that have applied the constitution. Personal views must not interfere with the judge's responsibility to decide cases as a judge and not as a legislator. This, after all, is one of the three legs supporting the rule of law. Here, the solid body of constitutional law disfavors the conclusion that there is a right to marry a person of the same sex. It may be a measure of this fact that Justice Fairhurst's dissent is replete with citation to dissenting and concurring opinions, and that, in the end, it cites very little case law that, without being overstated, supports its conclusions.

Perhaps because of the nature of the issue in this case and the strong feelings it brings to the front, some members of the court have uncharacteristically been led to depart significantly from the court's limited role when deciding constitutional challenges. For example, Justice Fairhurst's dissent declines to apply settled principles for reviewing the legislature's acts and instead decides for

itself what the public policy of this state should be. Justice Bridge's dissent claims that gay marriage will ultimately be on the books and that this court will be criticized for having failed to overturn DOMA. But, while same-sex marriage may be the law at a future time, it will be because the people declare it to be, not because five members of this court have dictated it.[1] Justice J.M. Johnson's concurrence, like Justice Fairhurst's dissent, also ignores the proper standards for reviewing legislation. And readers unfamiliar with appellate court review may not realize the extent to which this concurrence departs from customary procedures because, among other things, it merely repeats the result and much of the reasoning of the court's decision on most issues, thus adding unnecessarily to the length of the opinions.

In brief, unless a law is a grant of positive favoritism to a minority class, we apply the same constitutional analysis under the state constitution's privileges and immunities clause that is applied under the federal constitution's equal protection clause. DOMA does not grant a privilege or immunity to a favored minority class, and we accordingly apply the federal analysis. The plaintiffs have not established that they are members of a suspect class or that they have a fundamental right to marriage that includes the right to marry a person of the same sex. Therefore, we

[1] Faced with a similar dissent in *Hernandez v. Robles*, 2006 N.Y. slip op. 5239, 2006 N.Y. LEXIS 1836 (Ct. App. July 6, 2006), the lead opinion stated: "The dissenters assert confidently that 'future generations' will agree with their view of this case. [2006 N.Y. slip op. 5239 (dissent at *90).] We do not predict what people will think generations from now, but we believe the present generation should have a chance to decide the issue through its elected representatives." *Id.* at *22. (The New York Court of Appeals determined that New York's restriction of marriage to same-sex couples does not violate the New York State Constitution.)

apply the highly deferential rational basis standard of review to the legislature's decision that only opposite-sex couples are entitled to civil marriage in this state. Under this standard, DOMA is constitutional because the legislature was entitled to believe that limiting marriage to opposite-sex couples furthers procreation, essential to survival of the human race, and furthers the well-being of children by encouraging families where children are reared in homes headed by the children's biological parents. Allowing same-sex couples to marry does not, in the legislature's view, further these purposes.[2] Accordingly, there is no violation of the privileges and immunities clause.

There also is no violation of the state due process clause. DOMA bears a reasonable relationship to legitimate state interests—procreation and child-rearing. Nor do we find DOMA invalid as a violation of privacy interests protected by article I, section 7 of the Washington State Constitution. The people of Washington have not had in the past nor, at this time, are they entitled to an expectation that they may choose to marry a person of the same sex.

Finally, DOMA does not violate the state constitution's equal rights amendment because that provision prohibits laws that render benefits to or restrict or deny rights of one sex. DOMA treats both sexes the same; neither a man nor a woman may marry a person of the same sex.

[2] Justice Fairhurst's dissent attempts to shift the focus from whether limiting marriage to opposite-sex couples furthers these interests to whether excluding same-sex couples furthers these interests. By doing so the dissent fails to give the legislature the deference required under the constitution.

FACTS

In 1996, while a state constitutional challenge to same-sex marriage was pending in *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44, *reconsideration granted in part*, 74 Haw. 645, 875 P.2d 225 (1993), Congress enacted the federal Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), which provides that for purposes of all federal laws marriage means only a legal union between a man and a woman as husband and wife. 1 U.S.C. § 7. The act also authorizes states to decline to recognize same-sex marriages that may be valid under the law of another state. 28 U.S.C. § 1738C. In 1998, Washington adopted the state Defense of Marriage Act (DOMA). Laws of 1998, ch. 1. DOMA amended RCW 26.04.010 to describe marriage as a civil contract that is valid only if "between a male and a female" and to provide in RCW 26.04.020(1)(c) that a marriage contract is prohibited for couples "other than a male and a female." In addition, RCW 26.04.020(3) states that "[a] marriage between two persons that is recognized as valid in another jurisdiction is valid in this state only if the marriage is not prohibited or made unlawful under subsection . . . (1)(c) . . . of this section."

In *Andersen v. King County*, sixteen individuals, eight couples, sought marriage licenses from King County. Their requests were denied because each sought to marry a person of the same sex. They filed suit in King County Superior Court seeking a writ of mandamus requiring issuance of marriage licenses and a declaratory judgment that RCW 26.04.010 and RCW 26.04.020(1)(c) are

unconstitutional. They claimed that the prohibition against same-sex marriage violates article I, section 12 (the privileges and immunities clause of the state constitution), article I, section 3 (the due process clause of the state constitution), and article XXXI, section 1 (the 1972 Equal Rights Amendment (ERA) to the state constitution). The county filed a third party complaint against the State of Washington asking it to defend the state law. The court allowed intervention by two state legislators and other individuals and organizations seeking to defend DOMA (Intervenors). The parties moved for summary judgment. The trial court granted summary judgment in favor of plaintiffs. In light of significant authority to the contrary, the trial court declined to find that plaintiffs constitute a suspect class as claimed. The court also found no ERA violation because in *Singer v. Hara*, 11 Wn. App. 247, 522 P.2d 1187 (1974) the Court of Appeals held that denial of same-sex marriage does not violate the ERA. Relying on federal cases interpreting the federal constitution, the trial court held DOMA unconstitutional under the privileges and immunities and due process clauses of the state constitution on the basis that it denies the plaintiffs the fundamental right to marry. The parties agreed to a stay pending review by this court, and therefore the trial court did not enter an order directing any specific remedy. The court certified the matter under CR 54(b) for immediate appeal. The State, county, and Intervenors petitioned for direct review, which this court granted.

In *Castle v. State*, plaintiffs are 22 individuals, 11 gay and lesbian couples, some who want to marry a person of the same sex and some who were married elsewhere and want to have their marriages recognized in Washington. They filed suit against the State of Washington in Thurston County Superior Court seeking a declaratory judgment that RCW 26.04.010 and RCW 26.04.020(1)(c) are facially unconstitutional under the state constitution's privileges and immunities and due process clauses, and that DOMA violates the ERA. The Thurston County Superior Court concluded it was bound by *Singer* on the ERA claim but determined under an independent state constitutional analysis that plaintiffs constitute a suspect class and that plaintiffs' fundamental right to marry is at stake. Applying heightened scrutiny, the court concluded that DOMA violates the privileges and immunities clause of the state constitution. In light of this holding, the court did not reach substantive due process and right to privacy claims asserted by the plaintiffs, nor did it address any federal constitutional issues. The court granted the plaintiffs' motion for summary judgment. Its order was stayed pending further review. The State sought direct review by this court, which was granted. *Castle* was consolidated with *Andersen*.[3]

[3] As will be explained, the court in *Andersen* erroneously relied on federal constitutional cases involving race and the right to privacy to conclude that the state constitution guarantees a right to same-sex marriage. In the *Castle* case, the court erred in finding that same-sex orientation forms the basis for a suspect class of persons. There is nothing in this state's constitution or case law to support this conclusion. It is this court's duty to review the opinions of the lower courts. The fact that some lower court decisions are reversed is not a negative reflection on the diligence, integrity, or scholarship of the judges involved. The trial judge in each of these cases is a well-respected jurist, and Justice J.M. Johnson's suggestion that the judges' decisions were result-oriented is unwarranted.

ANALYSIS

These cases are here following grants of summary judgment. Review of a grant of summary judgment is de novo. *Bank of Am. v. David W. Hubert, P.C.*, 153 Wn.2d 102, 111, 101 P.3d 409 (2004). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Further, de novo review is proper where, as here, the issues presented are questions of law. *Labriola v. Pollard Gp., Inc.*, 152 Wn.2d 828, 832, 100 P.3d 791 (2004).

The Privileges and Immunities Clause

Article I, section 12 provides that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

The State maintains that the Thurston County Superior Court erroneously formulated and applied an independent constitutional analysis when deciding whether DOMA violates the privileges and immunities clause. Relying on *Grant County Fire Protection District v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) (*Grant County* II), the State argues that the only cases where the privileges and immunities clause provides broader protection than the equal protection clause are cases involving a grant of positive favoritism to minorities. In all other cases, the State urges, the privileges and immunities clause provides

the same protection and should be applied using the same analysis as the equal protection clause.

Until *Grant County* II no recent decision, and none applying *Gunwall*,[4] had applied or described circumstances under which a separate independent state analysis might apply under the state privileges and immunities clause. In *Grant County* II we determined that an independent analysis applies only where the challenged legislation grants a privilege or immunity to a minority class, that is, in the case of a grant of positive favoritism.

As we explained in *Grant County* II, the text of the federal constitution shows concern with "majoritarian threats of invidious discrimination against nonmajorities," while the state provision "protects as well against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens." *Grant County* II, 150 Wn.2d at 806-07. We recognized our framers' "concern with avoiding favoritism" to a select group and that this "clearly differs from the main goal of the equal protection clause, which was primarily concerned with preventing discrimination against former slaves." *Grant County* II, 150 Wn.2d at 808 (citing *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81, 21 L. Ed. 394 (1872)).

We quoted with approval the concurrence in *State v. Smith*, 117 Wn.2d 263, 283, 814 P.2d 652 (1991) (Utter, J., concurring):

[4] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

> "Enacted after the Fourteenth Amendment, state privileges and immunities clauses were intended to prevent people from seeking certain privileges or benefits to the disadvantage of others. The concern was prevention of favoritism and special treatment *for a few*, rather than prevention of discrimination against disfavored individuals or groups."

Grant County II, 150 Wn.2d at 809 (emphasis added). "[T]he historical context as well as the linguistic differences indicates that the Washington State provision requires independent analysis from the federal provision when the issue concerns favoritism." *Grant County* II, 150 Wn.2d at 809.

We also observed in *Grant County* II that early state cases interpreting article I, section 12 "focused on the award of special privileges rather than the denial of equal protection." *Grant County* II, 150 Wn.2d at 810.

> "The aim and purpose of the special privileges and immunities provision of Art. I, § 12, of the state constitution and of the equal protection clause of the fourteenth amendment of the Federal constitution is to secure equality of treatment of all persons, without undue favor on the one hand or hostile discrimination on the other."

Grant County II, 150 Wn.2d at 810 (quoting *State ex rel. Bacich v. Huse*, 187 Wash. 75, 80, 59 P.2d 1101 (1936), *overruled on other grounds by Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 603 P.2d 819 (1979)). Thus, article I, section 12 has been historically viewed as securing equality of treatment by prohibiting undue favor, while the equal protection clause has been viewed as securing equality of treatment by prohibiting hostile discrimination.

We explained in *Grant County* II that the Washington provision was modeled after article I, section 20 of the Oregon State Constitution, which the Oregon Supreme Court has described as "'"the antithesis of the fourteenth amendment in that [the Oregon state constitution] prevent[s] the enlargement of the rights of some in discrimination against the rights of others, while the fourteenth amendment prevents the curtailment of rights."'" *Grant County* II, 150 Wn.2d at 807 n.11 (quoting *State v. Clark*, 291 Or. 231, 236 n.8, 630 P.2d 810 (1981) (quoting *State v. Savage*, 96 Or. 53, 59, 184 P. 567 (1919))).

While derived from Oregon's provision, however, Washington's privileges and immunities clause is not identical to Oregon's. Article I, section 12's reference to corporations is not found in the Oregon provision. This difference in language shows our state's framers' concern with "undue political influence exercised by those with large concentrations of wealth, which they feared more than they feared oppression by the majority." *Grant County* II, 150 Wn.2d at 808 (citing Brian Snure, Comment, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 WASH. L. REV. 669, 671-72 (1992); Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?*, 69 TEMP. L. REV. 1247, 1253 (1996)).

Moreover, Washington's constitution was adopted over two decades after the Oregon State Constitution and in the interim important events occurred. First, the Fourteenth Amendment was adopted, providing federal constitutional protection from discrimination under state laws. Second, legislative abuses were rampant—the territorial legislature reportedly passed few laws in 1862-63 but enacted numerous pieces of special legislation; governors were criticized for abusing patronage power; there was criticism of the judiciary due to "absentee judges, political manipulations, and the lack of local control over appointments"; and the "presence of powerful corporations in Washington was often at the root of the governmental corruption." Snure, 67 WASH. L. REV. at 671. The history underlying our privileges and immunities clause is not the same as Oregon's.

Accordingly, although plaintiffs urge that we apply an independent state analysis under article I, section 12 like Oregon's independent analysis in every context, we decline to do so because our state provision has different language and a different history.

As we concluded in *Grant County* II, the concern underlying the state privileges and immunities clause, unlike that of the equal protection clause, is undue favoritism, not discrimination, and the concern about favoritism arises where a privilege or immunity is granted to a minority class ("a few"). Therefore, an independent state analysis is not appropriate unless the challenged law is a

grant of positive favoritism to a minority class. In other cases, we will apply the same analysis that applies under the federal equal protection clause.

Plaintiffs argue, however, that adoption of the ERA alters the *Gunwall* analysis for article I, section 12. The Thurston County Superior Court agreed. *Gunwall* states that "[e]ven where parallel provisions of the two constitutions do not have meaningful differences, other relevant provisions of the state constitution may require that the state constitution be interpreted differently." *Gunwall*, 106 Wn.2d at 61.

The ERA provides: "Equality of rights and responsibilities under the law shall not be denied or abridged on account of sex." Const. art. XXXI, § 1. Prior to the ERA, this court had held that a statute disqualifying pregnant women from unemployment insurance benefits discriminated against women based on sex. The court concluded that a classification based on sex is inherently suspect and must be subject to strict scrutiny. *Hanson v. Hutt*, 83 Wn.2d 195, 201, 517 P.2d 599 (1973) (superseded by the ERA). Following adoption of the ERA, the court held unconstitutional a statute that prohibited a father of a child born out of wedlock from joining a wrongful death action if he had failed to contribute to the support of the child. *Guard v. Jackson*, 132 Wn.2d 660, 940 P.2d 642 (1997). The court described *Hanson* and the strict scrutiny standard applied there. The court then opined that the voters adopting the ERA presumably intended to do more than repeat existing constitutional provisions. *Guard*, 132 Wn.2d at 663-64.

Accordingly, the court found that the ERA establishes an absolute bar to sex discrimination subject to few exceptions (for actual physical differences and affirmative action programs designed to eliminate past discrimination). *Guard*, 132 Wn.2d at 664.

Plaintiffs urge, and the trial court agreed, that *Guard* demonstrates that adoption of the ERA supports the view that the constitution as a whole calls for a broader interpretation of individual rights under the privileges and immunities clause than does the equal protection clause, and that a higher level of scrutiny is required. *See Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215, *8 (Thurston County Super. Ct. Sept. 7, 2004).

The argument is flawed, however. First, this court said in *Hanson* that the privileges and immunities clause and the equal protection clause are "substantially identical in their impact upon state legislation." *Hanson*, 83 Wn.2d at 200. Thus, it is obvious that there was no independent state analysis in *Hanson* that could have been modified by *Guard*. Second, and more importantly, *Guard* was decided solely under the ERA and contains no analysis or holding under the privileges and immunities clause. *Guard* simply does not indicate any broader protection for individual rights under the privileges and immunities clause than had existed before adoption of the ERA. Third, as *Guard* indicates, the ERA was intended by the voters to stand independent of other provisions, not simply to repeat

protections of existing provisions. The ERA does not alter protections afforded under the privileges and immunities clause.

We adhere to our holding in *Grant County* II that an independent state analysis applies under article I, section 12 only where the challenged law grants a privilege or immunity to a minority class, i.e., in the event of positive favoritism. DOMA does not involve the grant of a privilege or immunity to a favored minority class. Instead, the article I, section 12 issue is whether plaintiffs are discriminated against as members of a minority class. Accordingly, we apply the same constitutional analysis that applies under the equal protection clause of the United States Constitution.

The level of scrutiny to be applied under an equal protection analysis depends on whether a suspect or semisuspect classification has been drawn or a fundamental right is implicated; if neither is involved, rational basis review is appropriate. *Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996); *State v. Harner*, 153 Wn.2d 228, 236, 103 P.3d 738, 742 (2004). Plaintiffs maintain they are members of a suspect class.[5]

Suspect Class

To qualify as a suspect class for purposes of an equal protection analysis, the class must have suffered a history of discrimination, have as the characteristic defining the class an obvious, immutable trait that frequently bears no relation to

ability to perform or contribute to society, and show that it is a minority or politically powerless class. *Hanson*, 83 Wn.2d at 199; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-41, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990). Race, alienage, and national origin are examples of suspect classifications. *City of Cleburne*, 473 U.S. at 440. Suspect classifications require heightened scrutiny because the defining characteristic of the class is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *Id*. There is no dispute that gay and lesbian persons have been discriminated against in the past.

The parties dispute whether homosexuality is immutable. The State relies on the decision in *High Tech Gays* that homosexuality is behavioral, and thus not immutable. The plaintiffs counter that the Ninth Circuit has since "corrected" *High Tech Gays* and held that gay and lesbian persons constitute a suspect class. They rely on *Hernandez-Montiel v. Immigration & Naturalization Serv.*, 225 F.3d 1084 (9th Cir. 2000), *overruled in part on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005), where the court determined that asylum should be granted to an immigration applicant, reasoning among other things that as a gay

[5] The Thurston County Superior Court agreed but did so by applying an independent state constitutional analysis to determine that the class is inherently suspect. As we have explained, an

man with a female sexual identity the applicant had a well-grounded fear of persecution as a member of a particular social group. The court concluded the applicant was a member of a particular social group because "[s]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them." *Id*. at 1093. This conclusion was drawn from other immigration cases and secondary authority.

Notwithstanding *Hernandez-Montiel*, the Ninth Circuit has since referenced *High Tech Gays* for its holding that gay and lesbian persons do not constitute a suspect class. *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003) (citing *High Tech Gays*).

The plaintiffs do not cite other authority or any secondary authority or studies in support of the conclusion that homosexuality is an immutable characteristic. They focus instead on the lack of any relation between homosexuality and ability to perform or contribute to society. But plaintiffs must make a showing of immutability, and they have not done so in this case.[6]

Finally, with regard to the ability to obtain redress through the legislative process (the political powerless prong), several state statutes and municipal codes provide protection against discrimination based on sexual orientation and also

---

independent state analysis is not appropriate in this case.

[6] We recognize that this question is being researched and debated across the country, and we offer no opinion as to whether such a showing may be made at some later time.

provide economic benefit for same sex couples.[7] Recently, the legislature amended the Washington State Law Against Discrimination to prohibit discrimination on the basis of sexual orientation. Engrossed Substitute H.B. 2661, 59th Leg., Reg. Sess. (Wash. 2006). In addition, the Intervenors point to evidence that a number of openly gay candidates were elected to national, state, and local offices in 2004.

The enactment of provisions providing increased protections to gay and lesbian individuals in Washington shows that as a class gay and lesbian persons are not powerless but, instead, exercise increasing political power. Indeed, the recent passage of the amendments to chapter 49.60 RCW is particularly significant given that, as the plaintiffs point out, the legislature had previously declined on numerous occasions to add sexual orientation to the laws against discrimination. We conclude that plaintiffs have not established that they satisfy the third prong of the suspect classification test.

Our conclusion here, that plaintiffs have not established that they are members of a suspect class, accords with the decisions of the overwhelming majority of courts, which find that gay and lesbian persons do not constitute a suspect class. *See Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358

[7] *E.g.*, Engrossed Substitute H.B. 2661, 59th Leg., Reg. Sess. (Wash. 2006); RCW 9A.36.080; RCW 9A.36.078; RCW 10.95.120(6)(e)-(f); Bothell Mun. Code 8.60.020(G); Bremerton Mun. Code 22.01.260; Everett Mun. Code 2.104.260; Kenmore Mun. Code 9.40.010(H); Kirkland Mun. Code 3.80.020(b); King County Code (KCC) 6.27A.120; KCC 12.16.020; chapter 12.19 KCC; San Juan County Mun. Code 12.08.190; Seattle Municipal Code (SMC) 14.08.020(M), .045, .060, .070, .080; SMC 3.14.931; Yelm Mun. Code 9.08.080.

F.3d 804, 818, 818 n.4 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005) (concluding that gay and lesbian persons are not a suspect class and citing cases from the 4th, 5th, 6th, 7th, 9th, and 10th Circuits that have reached the same conclusion). The Second and Eighth Circuits have reached the same conclusion. *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998); *Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996). The Court of Appeals held in *Singer*, 11 Wn. App. 247, that gay and lesbian persons do not constitute a suspect class. And even two state courts deciding that same-sex couples have a right to a civil union or marriage did not find a suspect class. *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999) (under the state constitution's common benefits clause, plaintiffs seeking same-sex marriage are entitled to benefits and obligations like those accompanying marriage); *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003) (denial of civil marriage to same-sex couples violates state equal protection principles). And, while the plaintiffs cite cases they say hold that gay and lesbian persons constitute a suspect class, most do not support the proposition or are otherwise distinguishable. In *Tanner v. Oregon Health Sciences University*, 157 Or. App. 502, 971 P.2d 435 (1998), the court applied an independent analysis under Oregon's privileges and immunities clause and concluded that gay and lesbian persons constitute a suspect class. The analysis bears little resemblance to the analysis that applies under the equal protection clause. They cite *Li v. State of Oregon*, No. 0403-03057 (Multnomah County

Circuit Ct. 2004). But this trial court decision was reversed by the Oregon Supreme Court. *Li v. State*, 338 Or. 376, 110 P.3d 91 (2005). *Children's Hosp. & Med. Ctr. v. Bonta*, 97 Cal. App. 4th 740, 769, 118 Cal. Rptr. 2d 629 (2002) does not concern any issue involving gay and lesbian persons, and says only in passing, without authority, that the issue before it did not relate to a suspect class "such as race or sexual orientation." *Baehr*, 74 Haw. 530, has a lead opinion signed by two justices who concluded that gay and lesbian persons constitute a sex-based suspect class, a concurring opinion of one justice who concluded that a fact question existed as to whether homosexuality is biologically driven and thus a sex-based class, and a two-justice dissent that disagreed. Before the issue was resolved, the voters in Hawai'i passed a constitutional amendment leaving it to the state legislature to decide whether same-sex marriage would be allowed.[8] *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998) is a trial court decision finding that denial of marriage to same-sex couples violated the Alaska State Constitution. The court engaged in a fundamental rights analysis but said in dicta that it would also find that gay and lesbian persons constitute a suspect class. The court did not engage in any analysis or cite any authority regarding suspect classification, however. Nine months after the decision was filed, the voters in Alaska passed a constitutional amendment defining marriage as opposite-sex marriage.

[8] It is noteworthy that, as amended, the Hawai'i constitution does not foreclose the legislature from amending state marriage laws to extend the right to marry to same-sex couples.

The plaintiffs also suggest that *Miguel v. Guess*, 112 Wn. App. 536, 51 P.3d 89 (2002), *Romer*, 517 U.S. 620, and *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) indicate a trend toward heightened scrutiny where gay and lesbian persons are concerned. *Miguel* and *Romer* are based on another constitutional principle, however. In *Romer*, the Court invalidated on equal protection grounds Colorado's constitutional Amendment 2, which prohibited all legislative, executive, or judicial action designed to protect gay and lesbian persons from discrimination. The Court noted that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer*, 517 U.S. at 631. The Court said that Amendment 2 "fails, indeed defies" this inquiry. *Id*. at 632. The court noted that central to equal protection is the principle that "government and each of its parts remain open . . . to all who seek its assistance," and "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection in the most literal sense." *Id*. at 633. The Court found that there was no legitimate government purpose of Amendment 2 and held the amendment did not satisfy rational relation review.

Similarly, in *Miguel*, where the plaintiff claimed her civil rights were violated as a result of discrimination based on being a lesbian, the court found that a discriminatory classification based on prejudice or bias is not rationally related

to a legitimate governmental purpose as a matter of law. *See also Cleburne Living Ctr.*, 473 U.S. at 448 (noting that while private biases may be outside the reach the law, the law cannot give them effect). Both *Miguel* and *Romer* rest on the principle that equal protection is denied where the law's purpose is discrimination and it has no legitimate government purpose. Neither case supports the proposition that gay and lesbian persons constitute a suspect class. Indeed, as plaintiffs recognize, neither case addressed suspect classifications; the court in *Miguel* expressly declined to decide whether gay and lesbian persons constitute a suspect class. *Miguel*, 112 Wn. App. at 552 n.3.

In *Lawrence*, the Court held that Texas's sodomy law violated equal protection under a rational basis analysis, thus overruling its decision in *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986). *Lawrence* is widely viewed as reflecting changing societal attitudes toward gay and lesbian persons. The Court emphasized "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Lawrence*, 539 U.S. at 572. However, the Court did not address suspect classification and invalidated the challenged law on the basis that it did not satisfy rational basis review, a standard that would not apply if the court had found an inherently suspect class.

In light of the lack of a sufficient showing of immutability and the overwhelming authority finding that gay and lesbian persons are not a suspect

class for purposes of the equal protection clause, we decline to conclude that gay and lesbian persons constitute an inherently suspect class for purposes of article I, section 12.

Fundamental Right

Strict scrutiny is also required under an equal protection clause analysis where a fundamental right is burdened by the challenged law. *State v. Harner*, 153 Wn.2d 228, 235, 103 P.3d 738 (2004). The fundamental right to marriage "is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause". *Zablocki v. Redhail*, 434 U.S. 374, 384, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978). While the State agrees that marriage is a fundamental right, it says that it does not include same-sex marriage. Plaintiffs maintain they have the fundamental right to marry the person of their choice.

Under a federal constitutional analysis, for a fundamental right to exist it must be "objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (plurality opinion) and *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 2d 288 (1937)). A "'careful description' of the asserted fundamental liberty interest" is required, and the Court has noted that "[b]y extending constitutional protection

to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field . . . .'" *Glucksberg*, 521 U.S. at 721, 720 (quoting *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)). Fundamental liberty interests include the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion. *Glucksberg*, 521 U.S. at 720 (citing cases).

As the plaintiffs argue and the State agrees, history and tradition are not static. For example, in *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), the Court held that Virginia's antimiscegenation statutes prohibiting interracial marriage violated the equal protection and due process clauses. The Court first concluded that the statutes rested solely on distinctions drawn according to race, and because they prohibited only interracial marriages involving white persons, their only justification was to "maintain White Supremacy." *Loving*, 388 U.S. at 11. After the Court found race discrimination in violation of equal protection, the Court then determined that race discrimination was not a legitimate basis for depriving the Lovings of their fundamental right to marry. *Loving*, 388 U.S. at 11-12. The Court stated that the Fourteenth Amendment

requires that "the freedom of choice to marry not be restricted by invidious racial discrimination." *Loving*, 388 U.S. at 12. At the time of the decision, Virginia was one of 16 states prohibiting and punishing marriages on the basis of racial classifications, and during the previous 15 years 14 states had repealed statutes outlawing interracial marriage. *Loving*, 388 U.S. at 6 n.5. As the State says, whatever the history and tradition of interracial marriage had been, by the time *Loving* was decided, it had changed.[9]

Thus, recent history and tradition may also be relevant in deciding whether a fundamental right is at stake.[10]

The State argues, however, that there is no history and tradition of same-sex marriage in this country, and the basic nature of marriage as a relationship between a man and a woman has not changed. With the exception of Massachusetts, no state permits same-sex marriage (though, as noted, the Vermont

[9] In *Lawrence*, 539 U.S. 558, involving the Texas sodomy statute, the Court addressed the validity of the statute by deciding whether the petitioners had a liberty interest under the due process clause of the Fourteenth Amendment. The Court looked to laws and traditions in the past half century showing an emerging awareness of protection to be afforded adults in decision making about their private lives and sex. *Lawrence*, 539 U.S. at 571-72. The Court explained that "early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally." *Lawrence*, 539 U.S. at 568. Not until the 1970s did any state specifically prohibit same-sex relations for criminal prosecution, and only nine states did so. *Lawrence*, 539 U.S. at 570. The Court observed that at the time of its decision only 13 states still prohibited sodomy, 4 of these only in the case of homosexual conduct, and noted a pattern of nonenforcement of most of these laws with respect to consenting adults acting in private. *Lawrence*, 539 U.S. at 573. Although *Lawrence* addressed the place of history and tradition in deciding the nature and extent of the due process liberty interest it recognized, the case was decided under a rational basis scrutiny standard of review.

[10] Justice J.M. Johnson resorts to name-calling in an effort to refute this point. However, it is difficult to explain the United States Supreme Court's decisions in *Loving* and *Lawrence* other than that the Supreme Court has recognized that the concept of fundamental rights is not static, locked in at the time of the founders.

Supreme Court held that gay and lesbian couples "are entitled under Chapter I, Article 7 of the Vermont Constitution to obtain the same benefits and protections afforded by . . . law to married opposite-sex couples." *Baker*, 170 Vt. at 224). At present, the great majority of states have either statutes or constitutional amendments limiting marriage to opposite-sex couples. Courts in other jurisdictions recently faced with the issue have concluded that there is no tradition of same-sex marriage and no fundamental right to marriage that includes same-sex marriage. *E.g.*, *Dean v. Dist. of Columbia*, 653 A.2d 307 (D.C. 1995); *In re Kandu*, 315 B.R. 123, 140 (Bankr. W.D. Wash. 2004); *Standhardt v. Superior Court*, 206 Ariz. 276, 284, 77 P.3d 451 (Ariz. Ct. App. 2003); *Baehr*, 74 Haw. at 556-57 (plurality opinion), 588 (Heen, J., dissenting).

Nor is there a tradition or history of same-sex marriage in this state. Instead, prior to and after statehood, state laws reflected the common law of marriage between a man and woman. *See* Code of 1881 § 2380; former RCW 26.04.010 (Laws of 1963 ch. 230, § 1); RCW 26.04.210 and its antecedents (referring to affidavits required for issuance of marriage licenses and referring to the male and the female). Despite plaintiffs' reference to an 1854 statute that contained no express restriction on marriage other than consanguinity, bigamy, and age of consent, Laws of 1854 (first session), p. 404, there really is no serious claim that the early statutes defined anything but opposite-sex marriage.[11]

[11] In 1970, an amendment to RCW 26.04.010 eliminated the terms "male" and "female" and substituted "persons." Laws of 1970, 1st Ex. Sess., ch. 17, § 2. However, the amendment was

Nearly all United States Supreme Court decisions declaring marriage to be a fundamental right expressly link marriage to fundamental rights of procreation, childbirth, abortion, and child-rearing. In *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942), involving invalidation of a nonconsensual sterilization statute, the Court said "[m]arriage and procreation are fundamental to the very existence and survival of the race." In *Loving*, 388 U.S. at 12, the Court said that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival" (quoting *Skinner*, 316 U.S. at 541). In *Zablocki*, 434 U.S. 374, the Court invalidated on equal protection and due process grounds a statute that prohibited marriage for any resident behind in child support obligations. The Court noted that

> [i]t is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. . . . [I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.

Zablocki, 434 U.S. at 386. The Court also quoted the statements made in *Skinner* and *Loving*. *Zablocki*, 434 U.S. at 383, 384. *See also*, *Maynard v. Hill*, 125 U.S.

---

not intended to alter marriage as between a man and a woman. Instead, the statute was amended to provide the age of consent for both parties to a marriage to be 18 years, rather than 21 years for a male and 18 years for a female as before. Because the same age now applied to both, there was no longer any need to use the terms "male" and "female." In 1972, the ERA was adopted, and gender designations were subsequently eliminated from chapter 26.04 RCW. Again, the change did not involve recognition of same-sex marriage, as we explain below in our discussion of whether DOMA violates the ERA. In 1976, the Court of Appeals held in *Singer*, 11 Wn. App. 247, that state statutes defined opposite-sex marriage and were constitutional. Then, in 1998, DOMA was enacted expressly prohibiting same-sex marriage.

190, 211, 8 S. Ct. 723, 31 L. Ed. 654 (1888) (marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress").

Plaintiffs reason, however, and the King County Superior Court agreed, that *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) demonstrates that the fundamental right to marry is not linked to procreation. In *Turner*, the Court invalidated a regulation that prohibited inmate marriage absent compelling reasons for marriage, holding that the fundamental right to marry was impermissibly burdened. Rejecting the contention that the interest at issue was *inmate* marriage, the Court said that inmate marriages were, like others, expressions of emotional support and public commitment, and may for some inmates be an exercise of religious faith as well as an expression of personal dedication. *Turner*, 482 U.S. at 95-96. In addition, the Court said, most inmates would eventually be released and thus most inmate marriages were formed in the expectation they would be fully consummated. *Turner*, 482 U.S. at 96. Finally, the Court noted marriage often is a precondition to government benefits, property rights, and other benefits such as legitimation of children born out of wedlock.

Like *Skinner*, *Loving*, and *Zablocki*, *Turner* involved burdens on individuals seeking opposite-sex marriage. While the Court did not expressly link marriage to procreation and other rights related to procreation and children as it had in other cases, we also do not find in *Turner* any signal that the case marked a

turning point in the definition of marriage as a fundamental right. We do not agree that the Court in *Turner* intended its analysis to mean that marriage as a fundamental right is no longer anchored in the tradition of marriage as between a man and a woman.[12]

Plaintiffs also rely on *Lawrence*. *Lawrence* did not address same-sex marriage at all but private adult consensual sexual conduct. Further, as noted, the Court did not apply strict scrutiny as would be expected if a fundamental right were at stake. Finally, the Court specifically said the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578.

We agree, as plaintiffs maintain, that marriage is an evolving institution. They point, for example, to changes regarding recognition of common law marriages and departure from the historical denial of the right for slaves to marry. They point out other changes related to marriage and personal privacy, for example, decriminalization of extramarital sex, abandonment of tort actions for interference by third parties, and elimination of stigma and legal barriers relating to illegitimate children.

However, although marriage has evolved, it has not included a history and tradition of same-sex marriage in this nation or in Washington State.

[12] Contrary to the view expressed in Justice Fairhurst's dissent, the right to marry is not grounded in the State's interest in promoting loving, committed relationships. While desirable, nowhere in any marriage statute of this state has the legislature expressed this goal.

The vast majority of states historically and traditionally have contemplated marriage only as opposite-sex marriage, and the majority of states, including Washington, have recently reaffirmed this understanding and tradition. Federal decisions have found the fundamental right to marry at issue only where opposite-sex marriage was involved. *Loving*, *Zablocki*, and *Skinner* tie the right to procreation and survival of the race. Plaintiffs have not established that at this time the fundamental right to marry includes the right to marry a person of the same sex. As we have noted, however, several state statutes and municipal codes provide protection to gay and lesbian persons. That some laws provide such protections show change is occurring in our society, but community standards at this time do not show a societal commitment to inclusion of same-sex marriage as part of the fundamental right to marry.

Justice Fairhurst's dissent proposes, nevertheless, that there is a fundamental right to marry a person of the same sex. This is an astonishing conclusion, given the lack of any authority supporting it; *no* appellate court applying a federal constitutional analysis has reached this result. Moreover, the only cases Justice Fairhurst's dissent cites that actually say there is a fundamental right to marry a person of the same sex is *Goodridge, supra*, and a trial court decision, i.e., *Brause, supra*, an unpublished Alaska trial court order. Dissent (Fairhurst, J.) at 22-23 n.24, 26, 36 n.29. Both cases were decided on state constitutional grounds, and in *Goodridge* the court explained that the state due

process constitutional analysis that it applied differs from the federal due process analysis. *Goodridge*, 440 Mass. at 328-29, 328 n.18.

Rational Basis Review

Plaintiffs have not established that gay and lesbian persons constitute a suspect class or that the fundamental right to marry includes the right to same-sex marriage. Accordingly, applying an analysis under article I, section 12 that is coextensive with that under the equal protection clause, the appropriate standard of review is rational basis review.

Under rational basis review plaintiffs have the burden of proving that the classification drawn by the law is not rationally related to a legitimate state interest. *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998). The statute is presumed constitutional. *Heller v. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993); *State v. Shawn P.*, 122 Wn.2d 553, 561, 859 P.2d 1220 (1993). Under the rational basis standard, the court may assume the existence of any conceivable state of facts that could provide a rational basis for the classification. *Bd. of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 367, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001); *Heller*, 509 U.S. at 320; *Seeley v. State*, 132 Wn.2d 776, 795, 940 P.2d 604 (1997). Production of empirical evidence is not required to sustain the rationality of a classification. *Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 979-80, 948 P.2d 1264 (1997) (citing *Heller*, 509 U.S. at 320). In fact, "the rational basis standard

may be satisfied where the 'legislative choice . . . [is] based on rational speculation unsupported by evidence or empirical data.'" *DeYoung*, 136 Wn.2d at 148 (alteration in original) (quoting *Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)).[13] In addition, within limits, a statute generally does not fail rational basis review on the grounds of over- or under-inclusiveness; "[a] classification does not fail rational-basis review because 'it is not made with mathematical nicety or because in practice it results in some inequity.'" *Heller*, 509 U.S. at 321 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970)); *Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 901, 83 P.3d 999 (2004); *Gossett*, 133 Wn.2d at 979-80.

Plaintiffs first contend that Washington's DOMA, like Colorado's Amendment 2 at issue in *Romer*, was enacted for the purpose of discriminating against gay and lesbian persons—that DOMA arises from class-based animus. This is, they maintain, per se unreasonable, citing *Romer*, 517 U.S. at 633-34, *Cleburne*, 473 U.S. at 448, and *Miguel*, 112 Wn. App. at 553. Plaintiffs rely on legislative history, which they say is rife with evidence of DOMA's prejudicial underpinnings. They say that the act's prime sponsor distributed an article on the House floor saying that gays and lesbians are not normal, House Floor Debate at 23 (Wash. Mar. 18, 1997) (CP at 467), and told the legislature's only openly gay

[13] In a rare case where the rational basis standard was found not to have been satisfied, legislative materials affirmatively showed that the challenged legislation could not rationally be thought to

member that homosexuals should be put on a boat and shipped out of the country, House Floor Debate at 40 (Wash. Feb. 4, 1998), and that another legislator said that when individuals engage in homosexual activity they confirm a "disordered sexual inclination" that is "essentially self-indulgent," House Floor Debate at 44 (Wash. Feb. 4, 1998) (CP at 471). They also point to antigay sentiments expressed during legislative committee meetings.

In connection with the argument that DOMA was enacted to discriminate, plaintiffs also contend that when there is evidence of some discriminatory intent, a presumption of invalidity arises and the burden shifts to the government to show that the same decision would have been made absent the discriminatory purpose. They say that *Romer* and *Lawrence* make clear that a burden is placed on the State where discrimination against gays and lesbians is concerned, even under a rational relationship analysis.

Turning first to the plaintiffs' claim that DOMA was motivated by animus, we cannot agree that the only reason the legislation was enacted was because of anti-gay sentiment. It is unfortunate that the dissents accept this argument, dissent (Fairhurst, J.) at 18-19, dissent (Bridge, J.) at 18, 22, because it is demonstrably incorrect. A substantial number—15—of the legislators who voted for DOMA in 1998 also voted to add sexual orientation to the laws against discrimination in

---

have furthered the identified legislative interests. *DeYoung,* 136 Wn.2d at 148-50.

2006.[14] Even if some of these legislators may have had a "change of heart," the far more likely explanation for the majority, if not all, is that they were not motivated by antigay sentiment in 1998 but instead were convinced for other reasons that marriage should not be extended to same-sex couples.[15] In assuming that everyone who voted for DOMA is a bigot, Justice Fairhurst's dissent is not only wrong, it sadly oversteps the bounds of judicial review.

Turning next to the plaintiffs' proposed analytical framework, we conclude that it does not apply. Plaintiffs rely on cases that address burden shifting and a heightened level of scrutiny in the context of a law claimed to discriminate against members of a suspect or semisuspect class. *E.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (race); *Cook v. Babbitt*, 819 F. Supp. 1 (D.D.C. 1993) (gender). But to come within this framework, plaintiffs must show that they are members of a suspect class. Discrimination against a class, in and of itself, does not make the class a suspect class. And a law that affirmatively discriminates does not, for that reason alone, require heightened scrutiny or that the government bear the burden of

[14] *See* 2 House Journal, 55th Leg., Reg. Sess., at 343-44 (Wash. 2006); Senate Journal, 55th Leg., Reg. Sess., at 229-30 (Wash. 2006); http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2661&year=2006 (search hyperlinks under "View roll calls" (last visited July 12, 2006)).

[15] Justice Fairhurst's dissent also fails to consider that traditional and generational attitudes toward marriage may have contributed to the vote by any individual legislator as well as the possibility that legislators who were favorably disposed toward same-sex marriage were nevertheless concerned with developments in other states, including the amendments to state constitutions.

establishing the validity of the challenged law. For example, discrimination against classes of persons based on age or disability does not implicate either a heightened standard of review or burden shifting. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312-14, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976) (age); *Garrett*, 531 U.S. at 365-68 (disability). As we have concluded, the plaintiffs have not shown they are members of a suspect class.

Plaintiffs also rely on *Lawrence* and *Romer*. Both of these cases were decided on rational basis grounds, and neither mentions any burden-shifting framework. Moreover, while in *Romer* Colorado's Amendment 2 was found to be motivated by animus and invalidated, the Court determined both that it was motivated *solely* by animus *and* that it lacked *any* legitimate governmental purpose. *Romer*, 517 U.S. at 634-35. *Romer* exemplifies the principle that where legislation is subject to rational basis review, it will not be found unconstitutional on the basis that it was motivated by animus unless it also lacks any rational relationship to a legitimate governmental purpose.

This principle was explained in *Garrett*, where the Court, addressing a claim premised on *Cleburne*, said that *Cleburne* does not "stand[] for the broad proposition that state decisionmaking reflecting 'negative attitudes' or 'fear' necessarily runs afoul of the Fourteenth Amendment." *Garrett*, 531 U.S. at 367 (quoting *Garrett*, 531 U.S. at 382 (Breyer, J., dissenting)). Instead, "[a]though such biases may often accompany *irrational* (and therefore unconstitutional)

discrimination, their presence alone does not a constitutional violation make." *Id*. (emphasis added). The court emphasized: "'[M]ere negative attitudes, or fear, *unsubstantiated by factors which are properly cognizable* in [the context], are not permissible bases" for differing treatment. *Id*. (quoting *Cleburne*, 473 U.S. at 448). Thus, as the Court explained, under rational basis review, *even if* animus in part motivates legislative decision making, unconstitutionality does not follow if the law is otherwise rationally related to legitimate state interests. *Garrett*, 531 U.S. at 367.

Further, as the State points out, we view with caution comments of individual legislators said to show improper legislative intent in passing legislation, and "a court may not strike down *an otherwise constitutional statute* on the basis of an alleged illicit legislative motive." *State v. Brayman*, 110 Wn.2d 183, 204, 751 P.2d 294 (1988) (emphasis added).

Whether some legislators voted for DOMA out of prejudice against gay and lesbian persons does not alone determine the constitutionality of DOMA under a rational basis equal protection analysis. If the law otherwise defines classifications rationally related to legitimate state interests, it does not violate the equal protection clause. Accordingly, the same is true applying an equal protection analysis under article I, section 12.

A stated purpose of DOMA is to reaffirm the State's historical commitment to the institution of marriage between a man and woman. Laws of 1998, ch. 1, §

1. The State contends that procreation is a legitimate government interest justifying the limitation of marriage to opposite-sex couples. The State reasons that partners in a marriage are expected to engage in exclusive sexual relations with children the probable result and paternity presumed. *See*, *e.g.*, *Singer*, 11 Wn. App. at 259; *Standhardt*, 206 Ariz. at 287; *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971). The State reasons that no other relationship has the potential to create, without third party involvement, a child biologically related to both parents, and the legislature rationally could decide to limit legal rights and obligations of marriage to opposite-sex couples. The legislature could also have found that encouraging marriage for opposite-sex couples who may have relationships that result in children is preferable to having children raised by unmarried parents. *See Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005) (the "institution of opposite-sex marriage both encourages such couples to enter into a stable relationship before having children and to remain in such a relationship if children arrive during the marriage unexpectedly"); *Hernandez*, 2006 N.Y. slip op. 5239, at *6-7. In addition, the need to resolve the sometimes conflicting rights and obligations of the same-sex couple and the necessary third party in relation to a child also provides a rational basis for limiting traditional marriage to opposite-sex couples.

Plaintiffs maintain, however, that the right to procreate does not hinge on marital status. Individuals may marry regardless of fertility or intent to procreate.

The sterile and elderly are allowed to marry, and married couples are not required to have children. *See Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (right of married couples to use contraception). Washington law does not restrict sex to marriage. Moreover, plaintiffs correctly say, same-sex couples can and do legally procreate through assisted reproduction and adoption. *See* RCW 26.33.140 (adoption not limited to married couples). And unfit biological parents may lose custody of children. In addition, nonbiological bonding with children has been recognized. *See*, *e.g.*, *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005), *cert. denied*, 126 S. Ct. 2021 (2006).

Plaintiffs also rely on *Goodridge*, where the Massachusetts court rejected the argument that procreation justified limitation of marriage to opposite-sex couples. The court said that "[t]he 'marriage is procreation' argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage." *Goodridge*, 440 Mass. at 333. The court held that "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." *Goodridge*, 440 Mass. at 332.

But as *Skinner*, *Loving*, and *Zablocki* indicate, marriage is traditionally linked to procreation and survival of the human race. Heterosexual couples are the only couples who can produce biological offspring of the couple. And the link between opposite-sex marriage and procreation is not defeated by the fact that the

law allows opposite-sex marriage regardless of a couple's willingness or ability to procreate. The facts that all opposite-sex couples do not have children and that single-sex couples raise children and have children with third party assistance or through adoption do not mean that limiting marriage to opposite-sex couples lacks a rational basis. Such over- or under-inclusiveness does not defeat finding a rational basis.

The rational basis standard of review is "highly deferential to the legislature." *In re Det. of Thorell*, 149 Wn.2d 724, 749, 72 P.3d 708 (2003). As noted, under this standard any conceivable set of facts may be considered that support the classification drawn, and over-and under-inclusiveness generally does not foreclose finding a rational basis for legislation. Under the highly deferential rational basis inquiry, encouraging procreation between opposite-sex individuals within the framework of marriage is a legitimate government interest furthered by limiting marriage to opposite-sex couples.

The State also argues that rearing children in a home headed by their opposite-sex parents is a legitimate state interest furthered by limiting marriage to opposite-sex couples because children tend to thrive in families consisting of a father, mother, and their biological children. The State cites testimony before the House Law and Justice Committee on February 4, 1998, during the hearing on HB 1130, some of which cited studies said to support this proposition.

Plaintiffs maintain, however, that the argument discounts all same-sex couples who bear and raise children. They urge that while protecting children is a "paramount" state concern, "[r]estricting marriage to opposite-sex couples . . . cannot plausibly further this policy." *Goodridge*, 440 Mass. at 333-34. The Massachusetts court in *Goodridge* reasoned that "'[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.'" *Goodridge*, 440 Mass. at 334 (quoting *Troxel v. Granville*, 530 U.S. 57, 63, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)). The court in *Goodridge* also noted that the State had responded to the changes by moving to strengthen families in its many variations, for example, through paternity statutes, grandparent visitation statutes, and repudiating common law disadvantages attending illegitimacy. *Goodridge*, 440 Mass. at 334.

But given the rational relationship standard and that the legislature was provided with testimony that children thrive in opposite-sex marriage environments, the legislature acted within its power to limit the status of marriage. That is, the legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a "traditional" nuclear family where children tend to thrive. We reiterate that the rational basis standard is a highly deferential standard. This deference is based on the separation of powers doctrine. *See Cleburne*, 473 U.S. at 441-42 (where rational basis

review is the applicable standard "the courts have been very reluctant . . . with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent [legitimate state] interests should be pursued"). It cannot be overemphasized that our state constitution provides for a representative democracy and that the people, who have consented to be governed, speak through their elected representatives. When no fundamental right or suspect class exists, the public consensus, as evidenced by legislation adopted after robust debate, must be given great deference. *See Glucksberg*, 521 U.S. at 720.

We emphasize that it is not the province of this court to pass on the merits of the arguments and studies presented to the legislature as it considered whether to enact DOMA, contrary to the apparent belief reflected in Justice J.M. Johnson's concurrence. We note, nonetheless, that the studies and arguments that the concurrence recites as if embodying unassailable truths are in fact assailed by the petitioners. It is particularly inappropriate for this court to accept as true (or untrue) the arguments made and conclusions drawn by those advocating passage of DOMA, or to make its own inquiry into the validity or reliability of any studies presented to the legislature. The court's responsibility, instead, is to assure that DOMA was enacted in accord with constitutional constraints and that the legislature properly exercised its power. In short, while the legislature was entitled to rely on the arguments and studies presented to the legislature, this court

can and must do no more than assure itself that the rational basis standard is satisfied.

And at the risk of sounding monotonous, we repeat that the rational basis standard is extremely deferential. There are many examples of laws upheld on rational basis grounds where strong policy arguments opposing such laws have been advanced. But legislative bodies, not courts, hold the power to make public policy determinations, and where no suspect classification or fundamental right is at stake, that power is nearly limitless. The United States Supreme Court explained in *Garrett*, 531 U.S. at 367-68, for example, that since the disabled do not constitute a suspect class (and there is no fundamental right to special accommodations), there is no *constitutional* requirement that states must make special accommodations for the disabled "so long as their actions toward such individuals are rational. They could quite hardheadedly—and perhaps hardheartedly—hold to job-qualifications requirements which do not make allowance for the disabled."[16] The Court has also upheld laws providing for mandatory retirement at a certain age on rational basis grounds even where some individuals are unquestionably of sufficient health and ability to continue the particular employment. *E.g.*, *Murgia*, 427 U.S. at 315-17 (mandatory retirement at age 50 for Massachusetts State Police). The Court explained that it is not up to a court to determine whether such a statute is wise, whether it best fulfills the

[16] The Court explained that "[i]f special accommodations for the disabled are to be required, they have to come from positive law." *Garrett*, 531 U.S. at 368.

relevant social and economic objectives, or whether a more just and humane system might be developed. *Murgia*, 427 U.S. at 317 (citing *Dandridge v. Williams*, 397 U.S. 471, 487, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970)).

Our own case law is in accord. For example, in a case brought by a terminally ill man challenging the unavailability of marijuana for medical uses, this court declined, when applying rational basis review, to second-guess the legislature's classification of marijuana as a schedule I controlled substance where it involved legislative conclusions concerning complicated and controversial scientific and moral issues. *Seeley*, 132 Wn.2d at 796-808. Nor do we second-guess the legislature in cases where the wisdom of its acts seems questionable. In *In re License Revocation of Kindschi*, 52 Wn.2d 8, 12, 319 P.2d 824 (1958), the court concluded on rational basis review that the legislature is entitled to enact a law making income tax fraud a ground for revoking or suspending a doctor's license because there is a rational basis between such fraudulent conduct and one's trustworthiness to practice medicine.

Finally, Justice Fairhurst's dissent incorrectly asserts that we have engaged in an incorrect analysis because, the dissent believes, the question is not whether allowing opposite-sex couples the right to marry furthers governmental interests in procreation and raising children in a healthy environment but, rather, whether those interests are furthered by denying same-sex couples the right to marry. Initially, the dissent's rewording of the issue fails to acknowledge that over- and

under-inclusiveness do not invalidate an enactment under rational basis review. Moreover, the correct inquiry under rational basis review is whether allowing opposite-sex couples to marry furthers legitimate governmental interests. As the United States Supreme Court has explained: "In the ordinary case, a law will be sustained *if it can be said to advance a legitimate government interest*, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer*, 517 U.S. at 632 (emphasis added). Granting the right to marry to opposite-sex couples clearly furthers the governmental interests advanced by the State. We add that the constitutional inquiry means little if the entire focus, and perhaps outcome, may be so easily altered by simply rewording the question.

We do not dispute that same-sex couples raise children or that the demographics of "family" have changed significantly over the past decades. We recognize that same-sex couples enter significant, committed relationships that include children, whether adopted, conceived through assisted reproduction, or brought within the family of the same-sex couple after the end of a heterosexual relationship. We do not doubt that times have changed and are changing, and that courts and legislatures are increasingly faced with the need to answer significant legal questions regarding the families and property of same-sex couples. *See*, *e.g.*, *In re Parentage of L.B.*, 155 Wn.2d 679 (after end of same-sex relationship, one of former partners sought parental rights); *Vasquez v. Hawthorne*, 145 Wn.2d 103, 33

P.3d 735 (2001) (claim to estate of decedent brought by decedent's alleged gay life-partner); *Gormley v. Robertson*, 120 Wn. App. 31, 83 P.3d 1042 (2004) (property distribution following end of same-sex meretricious relationship); *In re Dependency of G.C.B.*, 73 Wn. App. 708, 870 P.2d 1037 (1994) (noting placement of a child in foster care with a same-sex couple); RCW 26.33.140(2) (providing that any person may be an adoptive parent).

We are also acutely aware, from the records in these cases and the briefing by the plaintiffs and the amici supporting them, that many day-to-day decisions that are routine for married couples are more complex, more agonizing, and more costly for same-sex couples. A married person may be entitled to health care and other benefits through a spouse.[17] A married person's property may pass to the other upon death through intestacy laws or under community property laws or agreements. Married couples may execute community property agreements and durable powers of attorney for medical emergencies without fear they will not be honored on the basis the couple is of the same sex and unmarried. Unlike heterosexual couples who automatically have the advantages of such laws upon marriage, whether they have children or not, same-sex couples do not have the same rights with regard to their life partners that facilitate practical day-to-day

[17] Many employers have recognized the need to provide their gay and lesbian employees with equivalent benefits policies. *See* Howard Paster, *The Federal Marriage Amendment is Bad for Business*, Wall St. J., Oct. 5, 2004, at B2 ("American businesses have been changing their workplace policies, adding domestic partner benefits and rethinking their corporate cultures since the early 1980s." Forty percent of the Fortune 500 companies, including "oil giants Shell Oil and BP, the Big Three auto makers, Lockheed Martin, General Electric, and Coca Cola", provide

living, involving such things as medical conditions and emergencies (which may become of more concern with aging), basic property transactions, and devolution of property upon death.

But plaintiffs have affirmatively asked that we not consider any claim regarding statutory benefits and obligations separate from the status of marriage. We thus have no cause for considering whether denial of statutory rights and obligations to same-sex couples, apart from the status of marriage, violates the state or federal constitution.

We conclude that limiting marriage to opposite-sex couples furthers the State's interests in procreation and encouraging families with a mother and father and children biologically related to both.

The plaintiffs have not established that DOMA is unconstitutional under article I, section 12 of the Washington State Constitution.

Due Process and Privacy; Article I, Sections 3 and 7

Plaintiffs maintain that the right to due process under article I, section 3, and the right to privacy under article I, section 7 together protect an individual's liberty interest to structure his or her life in the most intimate and defining ways without interference by the State. Thus, they contend, DOMA violates the right of personal autonomy protected by the privacy and due process clauses of the state constitution.

---

equivalent benefits because "[b]ottom-line, business decision-making explains it: Respected employees perform better and stay longer.")

The state constitution's due process clause provides "[n]o person shall be deprived of life, liberty, or property, without due process of law." Const. art. I, § 3. Article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Initially, plaintiffs do not propose a constitutional analytical framework under article I, section 3 and article I, section 7, together, that differs from an analysis under each of the provisions separately. They also do not make a *Gunwall* argument in an attempt to show that an independent state analysis is appropriate under the due process clause, article I, section 3.[18] We therefore rely on our conclusion above under a federal constitutional analysis that the fundamental right to marriage does not include the right to same-sex marriage. In the absence of a fundamental right at stake, the due process inquiry is whether the law bears a reasonable relationship to a legitimate state interest. *Glucksberg*, 521 U.S. at 722; *In re Pers. Restraint of Metcalf*, 92 Wn. App. 165, 176-77, 963 P.2d 911 (1998). As we concluded in connection with our inquiry under article I, section 12, where we applied a federal equal protection analysis, DOMA satisfies rational basis review. Thus, we conclude that DOMA does not violate article I, section 3.

Turning to article I, section 7, we have said in the context of search and seizure cases that there is no need to consider whether to apply an independent

state constitutional analysis in a new context. *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002). The only relevant question is whether article I, section 7 affords enhanced protection in the particular context. *McKinney* 148 Wn.2d at 26.

We conclude that the same is true in the context of privacy interests and that *McKinney* provides guidance for deciding whether a protected privacy right exists. There, we reasoned that whether there had been an unconstitutional search of drivers' records in violation of article I, section 7 depended upon whether there had been an intrusion into private affairs. We resolved this question through a two-step analysis driven by the often noted principle that privacy interests protected under article I, section 7 are "'those privacy interests which citizens of [Washington] have held, and should be entitled to hold, safe from governmental trespass.'" *McKinney*, 148 Wn.2d at 27 (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). Thus, a court should first examine the historical protection afforded, i.e., the inquiry into what interests citizens have held, and then ask whether the expectation of privacy is one that citizens should be entitled to hold. *McKinney*, 148 Wn.2d at 27-32.

As we explained earlier in this opinion, there is no history of marriage in this state that includes same-sex marriage. Thus, the citizens of Washington have not held a privacy interest in marriage that includes a right to marry a person of the same sex.

---

[18] The *Andersen* plaintiffs reason that no *Gunwall* analysis is necessary because there is no dispositive federal law. Whether a *Gunwall* analysis is required does not depend on whether

Turning to whether the right to marry the person of choice who is of the same sex is an expectation that citizens are entitled to hold, plaintiffs argue that citizens of this State should expect that the State will not interfere with the way they structure their lives in its most intimate and defining way, including the choice of a spouse. Except for search and seizure cases, nearly every state case they cite regarding privacy rights rests on federal constitutional analysis or an analysis coextensive with a federal analysis. *See*, *e.g.*, *In re Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 (1998), *aff'd sub nom. Troxel*, 530 U.S. 57 (third party visitation rights; federal constitutional analysis); *Bedford v. Sugarman*, 112 Wn.2d 500, 507-12, 772 P.2d 486 (1989) (constitutionality of law providing for in-kind assistance to indigent alcohol and drug addicts; court generally described the constitutional right of privacy under the United States Constitution and specifically declined to apply article I, section 7 in the absence of a *Gunwall* argument); *In re Welfare of Colyer*, 99 Wn.2d 114, 120, 660 P.2d 738 (1983) (court adds in a single sentence that "[s]upport for th[e court's] holding is also found in our state constitution," citing article I, section 7); *State v. Koome*, 84 Wn.2d 901, 530 P.2d 260 (1975) (statute requiring parental consent for abortion unconstitutional; decided under federal law); *Voris v. Wash. State Human Rights Comm'n*, 41 Wn. App. 283, 290, 704 P.2d 632 (1985) (claim that anti-discrimination statute pertaining to renting property violated privacy rights of

---

there is dispositive federal law.

association in the home; court cited United States Supreme Court and state decisions, with no mention of article I, section 7).

In *O'Hartigan v. Department of Personnel*, 118 Wn.2d 111, 117-18, 821 P.2d 44 (1991), also cited by the plaintiffs, the court held that a rational basis standard applied in resolving a claim that the applicant's privacy rights were violated by a requirement that she submit to a polygraph exam as part of her application for a law enforcement position. The court also observed that the right to privacy under the federal constitution includes the right to autonomous decision making, recognized as a fundamental right. *O'Hartigan*, 118 Wn.2d at 117. "This right involves issues related to marriage, procreation, family relationships, child rearing and education." *Id*. (citing *Whalen v. Roe*, 429 U.S. 589, 600 n.26, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977)); *see also State v. Farmer*, 116 Wn.2d 414, 429, 805 P.2d 200 (1991) (observing that "[t]he United States Supreme Court recognizes such a fundamental right of privacy to exist in matters relating to freedom of choice regarding one's personal life"; recognizing a "similar" right of privacy under article I, section 7). Plaintiffs also rely heavily, if not primarily, on federal cases, including *Lawrence*, *Loving*, *Zablocki*, and *Turner*.

State law has always been, however, that marriage is between a man and a woman. DOMA reaffirms what has historically been the law of Washington and the historical and continuing understanding of its citizens that marriage is between a man and woman. Although we recognize a right of privacy in personal

autonomy, we are not persuaded that it includes the right to marry a person of the same sex. And, as explained earlier in this opinion, the federal cases upon which plaintiffs rely do not support their claim of a right to marry the person of their choice who is of the same sex. There is evidence that times are changing, but we cannot conclude that at this time the people of Washington are entitled to hold an expectation that they may marry a person of the same sex.

Plaintiffs have not established that a right to marry the person of their choice who is of the same sex is a right that citizens of this State have held or are entitled to hold.

Plaintiffs suggest, though, that article I, section 32 also supports their claim of a privacy interest. Article I, section 32 provides that "[a] frequent recurrence to fundamental principles is essential to the security of individual rights . . . ." Plaintiffs urge that this provision "has been cited as a reason for analyzing principles supporting a right to privacy," *Seeley*, 132 Wn.2d at 811, but do not develop the argument to any significant degree. Further, their reference to *Seeley* is a bit misleading. In *Seeley* we noted that "Washington jurisprudence has yet to see a consistent approach to art. I, § 32" and disclosed that the opinions that had cited the provision as a reason for analyzing principles supporting a right to privacy were dissenting and concurring opinions. *Seeley*, 132 Wn.2d at 811, 812 (citing opinions). Plaintiffs do not provide a convincing argument that article I, section 32 leads to a different result in this case.

We conclude that plaintiffs have not established that they have a privacy right under article I, section 3 and article I, section 7 to marry the person of their choice who is of the same sex. Because plaintiffs have not shown that they have a cognizable privacy interest in the decision to marry the person of their choice who is of the same sex, DOMA is not facially unconstitutional under article I, section 3 and article I, section 7.

ERA; Article XXXI, Section 1 of the Washington State Constitution

The ERA states: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." Const. art. XXXI, § 1.

The plaintiffs contend that DOMA violates Washington State Constitution's ERA. Both trial courts declined to find a violation of the ERA, citing *Singer*, 11 Wn. App. 247, as precedent. In *Singer*, the Court of Appeals reasoned that the purpose of the ERA is to overcome discriminatory treatment of men and women on account of sex. *Singer*, 11 Wn. App. at 257. The court explained that the ERA

> insures that existing rights and responsibilities, or such rights and responsibilities as may be created in the future, which previously might have been wholly or partially denied to one sex or to the other, will be equally available to members of either sex. The form of discrimination or difference in legal treatment which comes within the prohibition of the ERA necessarily is of an invidious character because it is discrimination based upon the fortuitous circumstance of one's membership in a particular sex per se.

Singer, 11 Wn. App. at 259. The court concluded that denial of a marriage license to the two appellants, who were both male, was not based on their sex but upon the fact they were both of the same sex. *Singer*, 11 Wn. App. at 259.

Plaintiffs contend that DOMA discriminates against them because while a man may marry a woman who is his choice to be his spouse, a woman, on account of her sex, cannot marry a woman who is her choice to be her spouse. The State responds that the ERA treats men and women the same.

The purpose of the ERA "is to end special treatment for or discrimination against *either sex*." *Marchioro v. Chaney*, 90 Wn.2d 298, 305, 582 P.2d 487 (1978) (emphasis added); *accord*, *e.g.*, *Guard*, 132 Wn.2d at 664; *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 565, 740 P.2d 1379 (1987). The single inquiry under the ERA is whether "classification by sex" is "discriminatory," or stated in the "language of the amendment, Has equality been denied or abridged on account of sex?" *Marchioro*, 90 Wn.2d at 305. "[I]f equality is restricted or denied on the basis of sex, the classification is discriminatory." *Brayman*, 110 Wn.2d at 201.

Men and women are treated identically under DOMA; neither may marry a person of the same sex. DOMA therefore does not make any "classification by sex," and it does not discriminate on account of sex. *Singer*, 11 Wn. App. at 259; *see Baker*, 170 Vt. at 215 n.13; *Dean*, 653 A.2d at 363 n.2 (Steadman, J., concurring) (concluding it "stretch[es] the concept of gender discrimination to

assert that it applies to treatment of same-sex couples differently from opposite-sex couples").

The ERA is clear that the prohibited discrimination/favoritism must be according to classifications based on sex. But even if the ERA were not clear, there is specific legislative history relating to HJR No. 61, which became the ERA when passed by the voters, regarding whether the legislature intended that the amendment permit same-sex marriage. In a colloquy on the Senate floor, Senator Pete Francis, the principal Senate sponsor of the measure, was asked whether under the ERA same-sex couples could marry. Senate Journal, 42nd Leg., 2nd Ex. Sess., at 347 (Wash. 1972). Senator Francis replied, "I do not see that this would get at that at all." *Id*. In response to another question, Senator Francis said that the ERA was concerned with sex discrimination, "not to a person's sexual activities or orientation or interests." *Id*. This history indicates that the legislature did not intend that the ERA would require granting same-sex couples the right to marry. Moreover, following the legislature's approval of HJR 61, the Washington State Legislative Council prepared a report studying the impact of the ERA on state laws. The report listed hundreds of statutes that would or could violate the ERA but did not identify statutory recognition of marriage as between a man and a woman as violative of the ERA. Wash. State Leg. Council, The Potential Impact of House Joint Resolution No. 61—the Equal Rights Amendment—on the Laws of the State of Washington (Oct. 16, 1972).

There is also history regarding the voters' passage of the ERA. We have previously considered statements in favor of ballot measures in determining the effect of the measure and have specifically done so with regard to the ERA. *Marchioro*, 90 Wn.2d at 305. In the State of Washington Voters Pamphlet, General Election 52 (Nov. 7, 1972), the "Statement for" HJR 61 states that "the Basic Principle of the Era . . . is that both sexes be treated equally under the law. . . . Laws which render benefits to one sex could in most cases be retained, and extended to everyone. Laws which restrict and deny rights to one sex would be eliminated." Thus, the ERA was described as preventing favoritism of or discrimination against sex-based classes. DOMA does not draw any classifications based on sex. It does not render benefits to just one sex, nor does it restrict or deny rights of one sex.[19]

Plaintiffs maintain, however, that *Loving* supports their argument that DOMA violates the ERA. Plaintiffs reason that in *Loving* the Court held Virginia's antimiscegenation statute invalid even though the law treated the races equally. A black person could not marry a white person, and a white person could not marry a black person. Plaintiffs say that the Court nonetheless held that the statute impermissibly based the right to marry on distinctions drawn according to

[19] While opponents of the measure said in their "Statement against" HJR 61 in the Voters Pamphlet at 53 that homosexual and lesbian marriage would be legalized, the Attorney General's statement of the "Effect of HJR No. 61 if approved into Law" includes no such information. And, in any event, a statement in opposition to a ballot measure does not carry weight in construing an enacted measure. *Lynch v. Dep't of Labor & Indus.*, 19 Wn.2d 802, 811-13, 145 P.2d 265 (1944).

race. Plaintiffs reasons that just as *Loving* directs that race is always an impermissible ground for denying marriage, so is sex.

Loving is not analogous. In *Loving* the Court determined that the purpose of the antimiscegenation statute was racial discrimination, "and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Loving*, 388 U.S. at 9. The Court also said that the Lovings fundamental freedom of choice to marry may "not be restricted by invidious racial discriminations." *Loving*, 388 U.S. at 12. If plaintiffs' case were truly analogous to *Loving*, we would first have to find that DOMA discriminates on the basis of sex and then conclude that the right to marriage is violated because of the restriction due to sex discrimination. However, as the State urges, DOMA treats men and women the same.

Other courts have also rejected the argument that *Loving* is analogous. *E.g.*, *Baker*, 291 Minn. at 314 (Virginia's antimiscegenation statute was invalidated on the grounds of patent racial discrimination); *Hernandez*, 2006 N.Y. slip op. 5239, at *17-18 (*Loving* addressed a racially discriminatory statute; in contrast, with regard to the plaintiffs' challenge to the law limiting marriage to opposite-sex couples: "[p]laintiffs do not argue here that the legislation they challenge is designed to subordinate either men to women or women to men as a class"); *Baker*, 170 Vt. at 215 n.13.

The plaintiffs also contend, however, that DOMA is embedded in sexism just as much as miscegenation laws were based on racism. Plaintiffs urge that keeping marriage as an exclusively heterosexual institution is based on gender-role stereotypes and exclusion of those who do not conform to them. This argument is unpersuasive. First, there is nothing in DOMA that speaks to gender stereotyping within marriage. Such stereotyping as exists does so apart from DOMA. Second, plaintiffs fail to show that gay and lesbian persons are excluded from marriage on account of or in order to perpetuate gender stereotyping. *See Baker*, 170 Vt. at 880 n.13 (noting that it is one thing to show that repealed marriage statutes subordinated women to men within the marital relationship, but quite another to show that same-sex couples are excluded from marriage laws because of incorrect and discriminatory assumptions about gender roles).

Plaintiffs have not established sex-based discrimination in violation of the ERA.

CONCLUSION

The question we resolve today is whether the legislature may limit the definition of marriage to include only heterosexual unions. The case law that controls our inquiry compels our conclusions.

The issue of same-sex marriage has been the subject of intense debate throughout the nation. Although times are changing, the plaintiffs have not established that as of today sexual orientation is a suspect classification or that a

person has a fundamental right to a same-sex marriage. Thus, the State is required to demonstrate only a rational basis to justify the legislation. Under this highly deferential standard, any conceivable state of facts providing a rational basis for the classification may be considered. The legislature was entitled to believe that limiting marriage to opposite-sex couples furthers the State's legitimate interests in procreation and the well-being of children.

The cases on which the plaintiffs primarily rely, involving race and privacy, do not support the result they urge. As discussed above, *Loving* involved Virginia criminal laws which prohibited and punished interracial marriage and *Lawrence* involved a Texas criminal sodomy law. In both cases, the United States Supreme Court found the laws unconstitutional because there was no justification for the racial distinctions or the intrusion into private sexual behavior. In contrast, in this case the State has established that DOMA was enacted to codify the common law, to promote procreation, and to encourage stable families.

All parties agree that the legislature has the authority to define marriage within constitutional limits. However, we note that the record is replete with examples as to how the definition of marriage negatively impacts gay and lesbian couples and their children. The plaintiffs and their amici have clearly demonstrated that many day-to-day decisions that are routine for married couples are more complex, more agonizing, and more costly for same-sex couples, unlike married couples who automatically have the advantages and rights provided to

them in a myriad of laws and policies such as those surrounding medical conditions (e.g., the right to be present in the hospital and to help make difficult decisions), probate (e.g., the right to inherit property), and health insurance (e.g., the ability to obtain coverage for a spouse through employment policies). Many local governments and businesses have recognized the difficulties facing same-sex couples and, nationally, many leading companies provide for equivalent work benefit packages for gay and lesbian employees. As discussed above, however, the plaintiffs expressly requested that this court not consider whether denial of statutory rights and obligations to same-sex couples that apply to married couples violates the state or federal constitution. Thus, our opinion does not address those issues. There may be "more just and humane" ways to further the State's interests, *Murgia*, 427 U.S. at 317, but the State has met its burden in demonstrating that DOMA meets the minimum scrutiny required by the constitution. However, given the clear hardship faced by same sex couples evidenced in this lawsuit, the legislature may want to reexamine the impact of the marriage laws on all citizens of this state.

Applying the current case law that governs our decision and the narrow issues on which the plaintiffs requested we rule, we hold that the plaintiffs have not established that the Washington State Defense of Marriage Act is unconstitutional under the state privileges and immunities clause, article I, section 12, the state due process clause, article I, section 3, the state constitution's privacy

provision, article I, section 7, or the state's Equal Rights Amendment, article XXXI, section 1. We reverse the decision of the King County Superior Court in *Andersen* and the decision of the Thurston County Superior Court in *Castle*.

AUTHOR:

Justice Barbara A. Madsen

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Charles W. Johnson