No. 75934-1

J.M. JOHNSON, J. (separate opinion concurring in judgment only)—This is a difficult case only if a court disregards the text and history of the state and federal constitutions and laws in order to write new laws for our State's citizens. Courts are not granted such powers under our constitutional system. Our oath requires us to uphold the constitution and laws, not rewrite them.

Marriage is the union of one man and one woman, and every Washington citizen has a constitutional right to enter into such a marriage, [1] subject only to limited regulation under the police power (for example, restricting underage or close family marriage). This understanding of marriage has been continuously recognized throughout the history of the United States and of the state of Washington, including Washington territorial law. The unique and binary biological nature of marriage and its exclusive link with procreation and responsible child rearing has defined the institution at common law and in statutory codes and express constitutional provisions of many states.[2]

---

[1] As the recent case of *In re Parentage of L.B.*, 121 Wn. App. 460, 464, 89 P.3d 271 (2004), *aff'd in part, rev'd in part on other grounds*, 155 Wn.2d 679, 122 P.3d 161 (2005), illustrates, this right is not restricted to (self-identified) heterosexual couples, both father and mother were identified as "gay."

[2] *See* App. A – other states' laws and/or constitutional provisions.

When the institution of marriage was first challenged in the United States Supreme Court through claims to religiously endorsed polygamy, this historical definition of marriage as the union of one man and one woman was confirmed. The same understanding has been confirmed in every subsequent case in that court when marriage has been considered in many other contexts.

The appellate judges and justices in the highest courts of all the states, and justices of the United States Supreme Court, take an oath to uphold the constitution and laws. The issue presented today has been before many of these courts. The understanding of marriage expressed above and elaborated below has been continuously upheld,[3] with only one notorious exception.[4] A correct understanding of constitutional principles should not be determined by a numerical count of judges, but the fact our conclusion has been shared by all these appellate judges and justices adds to our certainty in the judgment today.

Here, two trial courts held that Washington's historic definition of marriage and the 1998 Defense of Marriage Act (DOMA) are unconstitutional and that Washington must recognize as "marriage" relationships violating that definition.

---

[3] *See* App. B – lists cases from other states' supreme courts understanding marriage as a union between one man and one woman.

[4] The remaining exception: the ruling of the Massachusetts Supreme Judicial Court. *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003) (constitutional amendment pending). A similar decision of the Hawaii Supreme Court was quickly superseded by

King County, the State of Washington, and Intervenors Senator Val Stevens, et al., appealed. The respondents are gay and lesbian plaintiffs in each trial court whose numerous constitutional arguments challenged Washington marriage law. The two trial judges agreed that Washington's marriage law was unconstitutional but on different grounds.

Trial courts may reflect the dominant political ideas of their local community. We have two such decisions before us, and many other state supreme courts have had to correct similar trial court rulings. Both opinions below were transparently result-oriented; the two courts agreed that it was time for marriage in Washington to be redefined but could not agree on a constitutional analysis to support such result. This decision is based on the constitution and laws.

Our opinion goes beyond Justice Madsen's opinion in analyzing and rejecting all constitutional claims to achieve finality. We also apply a different article I, section 12 analysis, which we believe is better supported by precedent. Based on all applicable authority in this court and from the United States Supreme Court, we concur in a judgment reversing both trial courts, upholding Washington marriage law, and dismissing all challenges.

---

constitutional amendment. *See Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44, 56 (1993) (discussed, *infra*, p. 34).

I. Marriage under the Constitution And Procedures Below

For more than 125 years our state laws and our constitution and its amendments have been predicated on the same definition of marriage: the union of one man and one woman. For example, the territorial Code of Washington provides: "Marriage is a civil contract which may be entered into *by males of the age of twenty-one years, and females of the age of eighteen years*, who are otherwise capable." Code of 1881, § 2380 (emphasis added). A similar definition of marriage underlies the United States Constitution and federal laws.

In 1996, several state court decisions threatened to disrupt this understanding. In one response, Congress enacted and President Clinton signed the federal Defense of Marriage Act,[5] which explicitly provides that for purposes of all federal laws, marriage means only a legal union between a man and a woman as husband and wife. The act also reaffirmed that states are not required to recognize same-sex marriages from other states.

In 1998, our state's legislature adopted Washington's DOMA,[6] which simply reaffirms this long-standing view of marriage. To declare the latter statute unconstitutional would declare marriage as Washington citizens have always known it, unconstitutional. It is worthy of note that the courts below could not or

[5] Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7; 28 U.S.C. § 1738C).

did not, fashion a remedy for their extraordinary pronouncements nor even consider the far reaching effects on Washington's family law.

In *Andersen v. King County*, No. 04-2-04964-4, 2004 WL 1738447 (King County Super. Ct. Aug. 12, 2004), 16 individuals 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. They claimed that the prohibition against same-sex marriage violates the state constitution. The court allowed intervention by two state legislators and other individuals and organizations seeking to defend Washington's marriage law.

The trial court granted summary judgment in favor of plaintiffs. The King County court held DOMA unconstitutional, under the privileges and immunities and due process clauses of the state constitution, on the basis that Washington marriage law denies the plaintiffs a fundamental right to marry. The trial court did not include an order directing any remedy. The State, county, and intervenors petitioned for direct review, which this court granted.

In *Castle v. State*, No. 04-2-00614-4 (Thurston County Super. Ct. Sept. 7, 2004), plaintiffs are 22 gay and lesbian individuals who want to marry a person of

---

[6] Laws of 1998, ch. 1 (codified at RCW 26.04.010, .020).

the same sex or who claim they were married in other states.[7] A suit against the State was brought in Thurston County Superior Court seeking a declaratory judgment under the state constitution's privileges and immunities and due process clauses, and the Equal Rights Amendment. That court denied intervention of legislators and supporters of traditional marriage. The Thurston County Superior Court determined under state constitutional analysis that plaintiffs constitute a suspect class, that plaintiffs' fundamental right to same-sex marriage is violated, and that Washington marriage law violates the privileges and immunities clause. The court granted the plaintiffs' motion for summary judgment but stayed the decision before considering any specific remedy. The State sought direct review, which was granted. The two cases were consolidated.

At its core, the claims involve not only the purported right to a "marriage" with a person of the same sex but also a claim of raw judicial power to redefine public institutions such as marriage. The lower courts, and the dissenters, cannot create a new fundamental right to same-sex "marriage" without assuming in the courts the power to redefine marriage and presumably any other right of our citizens under the United States and Washington Constitutions.

[7] These were probably invalidated by constitutional amendments, statutory changes, and court decisions in those states. *See* Apps. A, B.

This court does not possess that power—no court does. Separation of powers is a fundamental constitutional principle. The necessary corollary is the obligation to recognize only the legitimate power of each branch of government.

The weighty record of history, overwhelming societal consensus, and the strong force of legal authorities from Washington courts and its legislature, as well as from the United States Supreme Court, do not allow such a cavalier and arbitrary redefinition of marriage by a court. Though advanced with fervor and supported by special interests loudly advocating the latest political correctness, the arguments (and the dissenters) cannot overcome the plain legal and constitutional principles supporting Washington's definition of marriage.

II. THERE IS NO VIOLATION OF THE PRIVILEGES AND IMMUNITIES CLAUSE

Respondents first claim a right or privilege to marry a person of the same sex under the constitution of Washington. This claim categorically fails an honest independent analysis of article I, section 12 of our state constitution.

The Washington Constitution privileges and immunities clause provides:

> No 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.

WASH. CONST. art. I, § 12. "Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well." *Malyon v. Pierce County*,

131 Wn.2d 779, 799, 935 P.2d 1272 (1997). This text requires a two-part analysis: (1) Does a law grant a citizen, class, or corporation "privileges or immunities," and if so, (2) Are those "privileges or immunities" equally available to all? Of course if no "privilege or immunity" is granted by the challenged law in the first place, the clause has no application and the second question is never reached.

First, note that DOMA does not "grant" any right at all; the right to marriage between a man and a woman long predates DOMA.[8] Secondly, relevant to this analysis, there is no right or "privilege" to same-sex marriage.

The threshold question, therefore, is what entitlement under Washington marriage law is a "privilege or immunity" and whether respondents' claim qualifies. Fortunately, there is a rich and long history for the terms of art "privilege" and/or "immunity," as well as ample precedent, which gives these terms form and substance. Marriage between a man and a woman is a right or privilege, these same-sex claims are not, and history and all case law confirm this.

The term "privileges and immunities" first found its way into American law in the Articles of Confederation of the United States of America, adopted in 1778. Article IV of the articles provided:

---

[8] Such marriage is among the rights or privileges reserved under the United States and Washington Constitutions.

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States . . . .

These terms were firmly ensconced in English law. *See, e.g.,* 2 BLACKSTONE'S COMMENTARIES *129 editor's cmt. 5 (St. George Tucker ed., Rothman Reprints, Inc. 1969) (1803).

The Articles of Confederation were replaced by the United States Constitution, which provides in part: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." U.S. CONST. art. IV, § 2.[9] Alexander Hamilton even discussed the clauses in *The Federalist No. 80*, at 405 (Alexander Hamilton).

---

[9] The fourteenth amendment to the United States Constitution reiterates,

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This also demonstrates the authors of that amendment recognized a difference between privileges and immunities and equal protection because the clauses are set forth independently. Moreover, "privileges and immunities" are available only to "citizens" whereas due process and equal protection apply to "any person." *See also* Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J. L. & LIBERTY 334, 340-49 (2005).

Justice Bushrod Washington in *Corfield v. Coryell*, 6 F. Cas. 546, 551-52, 4 Wash. C. C. 371 (C.C.E.D. Pa. 1823) provided the classic statement of the law on privileges and immunities under article IV of the United States Constitution:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of the citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities . . . .[10]

[10] *See also Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1873) (Bradley, J., dissenting) (citing *Corfield v. Coryell*, 6 F. Cas. 546).

From early in our nation's history, many individual state constitutions also included privileges and immunities clauses, although the text of these clauses often differs slightly. W. J. Meyers, *The Privileges and Immunities of Citizens in the Several States*, 1 Michigan Law Review 286 (1902) catalogues many state court decisions construing state privileges and immunities clauses in terms of what was, and was not, considered to be a privilege or immunity. Professor Meyers concludes, "Roughly, the 'privileges and immunities' belonging to a *citizen* by virtue of citizenship are 'personal' rights, that is, *private* rights, as distinguished from *public* rights." *Id*. at 290.

We have stated on numerous occasions that "[s]tate cases and statutes from the time of the constitution's ratification, rather than recent case law, are more persuasive in determining" the protections of a constitutional provision. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 120, 937 P.2d 154, 943 P.2d 1358 (1997). An important early decision of the Washington Supreme Court, construing our own privileges and immunities clause, was neither cited by the dissenters nor by Justice Madsen. This decision, *State v. Vance*, 29 Wash. 435, 70 P. 34 (1902), was specifically relied upon and quoted at length in our most recent decision on the issue. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791,

83 P.3d 419 (2004) (*Grant County* II). Indeed, *Vance* served as the primary precedential basis for the holding in that case.

In both *Vance* and *Grant County* II, the court addressed the seminal question of whether the entitlement or right at issue was a "privilege or immunity" as those terms are used in the state constitution, expressly rejecting the idea that any disparity in treatment necessarily falls within the clause. *Grant County* II, 150 Wn.2d at 812-14 (concluding that the statutory authorization allowing landowners to petition for municipal annexation does not involve a fundamental attribute of an individual's state citizenship).

> Thus, there is no privilege, i.e., fundamental right of state citizenship, at issue in this case, and the claim of a violation of article I, section 12 fails for this reason.

Grant County II, 150 Wn.2d at 814.

These cases require us to similarly focus first upon what is a "privilege or immunity." If there is no constitutional privilege or immunity at issue, the case is decided.

As stated in *Vance* and repeated in *Grant County* II, the most apt analogy from the United States Constitution is its privilege and immunities clause, not the equal protection clause. Applying the "equal protection" analysis to a privilege and immunity claim, as reflected in some other opinions, amounts to rewriting

constitutional text.[11] (For this claim, equal protection analysis is separately applied, *infra*, p. 15.)

To apply the constitutional text to the case at bar is not difficult. The privileges and immunities challenge brought against DOMA is that the act confers the "privilege" of marriage to opposite-sex couples while withholding it to same-sex couples. The apparent defect in this argument, however, is that same-sex marriage cannot be argued to be a "privilege" in the sense that term is used in our state constitution to encompass fundamental rights which belong to the citizens of the state.

The same result is reached if we apply the same words as they have been understood in the federal constitution. *See* discussion in *Vance*, 29 Wash. at 458. There is no fundamental right to same-sex marriage under the United States Constitution as the United States Supreme Court cases discussed *infra*, p. 20, further establish.

Many cases in this court, and the United States Supreme Court, do support the conclusion that marriage between one man and one woman is a right or

[11] "We cannot ignore the plain difference in the language and history that exists between the federal equal protection clause and the privileges and immunities language of our own constitution. To do so is to rewrite our constitution without benefit of a constitutional convention and to deprive the people of this state of additional rights, which they adopted in our constitutional convention, without their consent." *State v. Smith*, 117 Wn.2d 263, 282, 814 P.2d 652 (1991) (Utter, J., concurring).

privilege. However, there is no basis whatsoever to conclude that same-sex "marriage" is historically fundamental in the sense that it does "belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose the Union, from the time of their becoming free, independent, and sovereign." *Corfield*, 6 F. Cas. at 551. Even Justice Fairhurst's dissent concludes there is not a shred of historical precedent to satisfy that proposition, concluding rather that the history is precisely the opposite, that of hostility (and that DOMA is "motivated solely by animus"). Dissent (Fairhurst, J.) at 18.

Nor is Justice Madsen's claim that "history and tradition are not static," Madsen, J., op. at 26 coherent, at least outside the context of a George Orwell novel. Our history and tradition are real and ascertainable. This court and the United States Supreme Court have always applied these principles to inform the understanding of the privileges and immunities clause, rather than current political notions. Under our constitutional separation of powers, such issues are for the legislature and/or the people, and here the legislature has clearly spoken.[12] This is not to suggest the constitutional right of marriage may be redefined at will by legislative process; that may be a case for a different day.

---

[12] As have the people in most other states through statutes and constitutional amendments, defining marriage as between one man and one woman, discussed *infra* and App. A.

III. Fourteenth Amendment Equal Protection Analysis

The superior court in *Andersen* purported to rely on cases that apply the United States Constitution's Fourteenth Amendment guarantee of equal protection. Washington marriage law and DOMA easily satisfy this test as well. The level of scrutiny applied depends upon whether the law is drawn using a suspect class or whether a fundamental right is implicated. Where a law involves no such classification and no fundamental right is implicated, rational basis review is applied. Otherwise, strict scrutiny is applied. DOMA satisfies either test as demonstrated, *infra*.

A. <u>Suspect Class</u>

Where a law is challenged because of a legislative classification of persons, suspect class analysis may be applied. At the outset, it is not true that DOMA defines any such class, which is allowed—or not allowed—to marry. Professed homosexuals, like all Washingtonians, are clearly allowed to marry in Washington. *See, e.g., In re Parentage of L.B.,* 121 Wn. App. 460, 464, 89 P.3d 271 (2004), *aff'd in part, rev'd in part on other grounds,* 155 Wn.2d 679, 122 P.3d 161 (2005).

Every Washingtonian may marry subject to reasonable police power restrictions. A person may not marry someone under age 17 (RCW 26.04.010), may not marry if already married (RCW 26.04.020(1)(a)), may not marry a close

relative (RCW 26.04.020(1)(b)), and may not marry if "the parties are persons other than a male and a female" (RCW 26.04.020(1)(c)).

The last prohibition, like the bigamy/polygamy prohibition, is definitional. A "marriage" means a marriage between one man and one woman (and the only marriage of each spouse). There is *no* class favored or disfavored under this statute, thus there can be no "suspect class."

Assuming arguendo the last provision (RCW 26.04.020(1)(c)) could be viewed as excluding a group, the group must also qualify as a "suspect" class in order to require heightened scrutiny, and claimants do not qualify.

"Suspect class" has been limited to "race, alienage, or national origin" because those "factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). Suspect classes that have been recognized have a history of discrimination and exhibit an obvious, immutable trait frequently bearing no relation to the ability to relate to society, and constitute a politically powerless class. *Id.* at 400; *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990).

Conversely, where the distinguishing characteristics of the group impacted by a law are "relevant to interests the State has the authority to implement, the courts have been very reluctant . . . to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Cleburne*, 473 U.S. at 441-42. *See Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) ("[T]he Supreme Court has made clear that 'respect for the separation of powers' should make courts reluctant to establish new suspect classes." (quoting *Cleburne*, 473 U.S. at 441)). Washington follows federal law when determining a suspect class. *Seeley v. State*, 132 Wn.2d 776, 791, 940 P.2d 604 (1997); *State v. Shawn P.*, 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993).

DOMA does not create an inherently suspect legislative class nor is DOMA drawn along the lines of any suspect class. DOMA does not distinguish between persons of heterosexual orientation and homosexual orientation nor does the prohibition on marrying a partner who is already married or who is underage.

DOMA's terms apply to all alike as individuals. Under DOMA every adult has the ability to marry a person of the opposite sex. The married couple in *In re Parentage of L.B.* were both avowedly homosexual at one time but they married—one man and one woman. No inquiry was made into their sexual orientation. It cannot be said that an individual with a homosexual orientation is deprived of the

ability to enter a state-recognized marriage, absent an *a priori* redefinition of marriage.[13]

DOMA did not change the law of marriage in Washington. *See Singer v. Hara*, 11 Wn. App. 247, 262, 522 P.2d 1187 ("to define marriage to exclude homosexual or any other same-sex relationships is not to create an inherently suspect legislative classification requiring strict judicial scrutiny to determine a compelling interest."), *review denied*, 84 Wn.2d 1008 (1974).

Assuming arguendo that DOMA did imply some classification, no Washington appellate court has ever found sexual orientation to be a suspect classification. *See, e.g., Miguel v. Guess*, 112 Wn. App. 536, 552 n.3, 51 P.3d 89 (2002); *Singer*, 11 Wn. App. at 262. Even the trial court in *Andersen* agreed that the "substantial weight of appellate authority runs contrary to" respondents' claim that homosexuals or homosexual orientation constitute a suspect class. *Andersen*, No. 04-2-04964-4, 2004 WL 1738447, at *5. The trial court in *Andersen* applied the traditional test for suspect-class designation and held that "in view of the record herein, this Court is not in a position to announce a potentially far-reaching new

[13] *See Jones v. Hallahan*, 501 S.W.2d 588, 589 (1973) (noting that appellants seeking to marry someone of the same-sex "are prevented from marrying, not by the statutes of Kentucky . . . but rather by their own incapability of entering into a marriage as that term is defined."). *See also Goodridge*, 440 Mass. at 351 (Spina, J., dissenting) ("The marriage statutes do not disqualify individuals on the basis of sexual orientation from entering into marriage. All individuals, with certain exceptions not relevant here, are free to marry.").

rule that homosexuality defines a suspect class for purposes of constitutional analysis. It will decline to do so." *Id*.

Looking to federal law, it is also clear that sexual orientation is not a suspect or quasi-suspect class. No federal court has specifically found sexual orientation to be a suspect classification.[14] After examining the decisions of the different federal judicial circuit courts of appeal, the Eleventh Circuit recently noted that "[A]ll of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class." *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005). *See also Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003) (referencing *High Tech Gays* for the holding that "homosexuals are not a suspect or quasi-suspect class, but are a definable group entitled to rational basis scrutiny for equal protection purposes.").[15]

---

[14] *See, e.g.*, *Thomasson*, 80 F.3d at 928 (rejecting heightened scrutiny of "'don't ask don't tell'" policy); *Equality Found. v. City of Cincinnati*, 128 F.3d 289, 292-93 (6th Cir. 1997) (holding the city charter's amendment concerning sexual orientation was subject to "rational relationship" review); *Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996), *cert. denied,* 522 U.S. 807 (1997) (holding that homosexuality is not a suspect or quasi-suspect class and that the military's "don't ask don't tell" policy is only subject to rational basis review).

[15] *See also Smelt v. County of Orange*, 374 F. Supp. 2d 861, 875, *aff'd in part, vacated in part on other grounds*, 447 F.3d 673 (9th Cir. 2006) ("The U.S. Supreme Court and the Ninth Circuit recognize homosexuals as a constitutionally protected class--although not a suspect or quasi-suspect class--for equal protection purposes." (citing *Romer v. Evans*, 517 U.S. 610, 631-32, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) and *High Tech Gays*, 895 F.2d at 573-74)); *State v. Limon*, 280 Kan. 275, 286, 122 P.3d 22 (2005) (discussing *Lawrence* and concluding that "the United States Supreme Court has not recognized homosexuals as a suspect classification); *Wilson v.*

Justice Madsen's opinion correctly concludes that there is no precedent to support the plaintiff's contention that homosexuality is a suspect class. As indicated above, it is not even a class for the purposes of the DOMA statute.

The logic and underlying constitutional rationale of both state and federal case authority do require the conclusion that sexual orientation is not a suspect class for the purposes of the Washington Constitution.

B. Fundamental Right

Given the claims here, the importance of marriage, and the strong interests in finality of our decision today, it is appropriate to also employ the fundamental rights analysis. These rights deemed "fundamental" for equal protection[16] purposes and qualifying for heightened judicial scrutiny include those liberties that are "objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (plurality opinion)). An inquiry into the understanding of the people further reflects the respect for the people expressed

---

Ake, 354 F. Supp. 2d 1298, 1307 (M.D. Fla. 2005) (citing *Lofton* as authority for rejecting the claim that homosexuality is a suspect class under the equal protection clause of the Fourteenth Amendment); *In re Kandu*, 315 B.R. 123, 144 (Bankr. W.D. Wash. 2004) (noting that *Lawrence* "did not hold that same-sex couples constitute a suspect or semi-suspect class under an equal protection analysis").

in our state constitution's article I, section 1 declaration of rights: "All political power is inherent in the people." *See also, e.g.*, U.S. CONST. preamble and amend. IX; THE DECLARATION OF INDEPENDENCE para. 2 (July 4, 1776).

Rights expressly affirmed in our federal and state constitutions or acknowledged through long-standing public practice rightly receive protection. *Both* constitutions specifically protect rights of the people beyond those enumerated in the text of the Bill of Rights. WASH. CONST. art. I, § 30; U.S. CONST. amend. IX. In order to assure against erosion of these fundamental rights, they may be amended *only* through procedures set forth in each constitution.

Conversely, where courts attempt to mandate novel changes in public policy through judicial decree, they erode the protections of our constitutions and frustrate the constitutional balance, which expressly includes the will of the people who must ratify constitutional amendments. Examination of history and tradition is therefore necessary to identify fundamental rights as the basis for judicial decision-making. This inquiry must not hinge upon the judges' subjective feelings but must be based upon objective consideration of historical understanding.

United States Supreme Court precedent has stressed this deeply rooted historical nature of fundamental rights analysis. Fundamental rights are those

---

[16] What is "fundamental" under the "privileges and immunities" clause is discussed, *supra*, pp. 10-11, 13.

"'implicit in the concept of ordered liberty,'" such that "'neither liberty nor justice would exist if they were sacrificed.'" *Glucksberg*, 521 U.S. at 721 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937)). Fundamental liberty interests reflect a "strong tradition" founded on "[t]he history and culture of Western civilization," which are "now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder,* 406 U.S. 205, 232, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

The creation of new constitutional rights has serious ramifications and, if created by court decree rather than pursuant to constitutional amendment procedures, does not have the legitimacy of public debate and/or legislative action. *Glucksberg*, 521 U.S. at 720. Policy preferences of judges must not be advanced through the guise of newly created rights grounded in fads of political correctness.

Thus, relying upon "[o]ur Nation's history, legal traditions, and practices" as "'guideposts for responsible decisionmaking,'" the United States Supreme Court has recognized marriage between one man and one woman as a fundamental right.[17] *Glucksberg*, 521 U.S. at 721.

[17] Derived from that right are correlative liberty interests that include the right to marital privacy, the right of married persons to have children (or decide not to), and the right to direct the education and upbringing of children. *See Glucksberg*, 521 U.S. at 720; *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Troxel v. Granville,* 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

The fundamental right of a man and woman to marry is linked with the related fundamental right to procreate, as noted in *Skinner*. *Id.* at 541 ("[m]arriage and procreation are fundamental to the very existence and survival of the race"); *Zablocki v. Redhail*, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978).

Every United States Supreme Court decision concerning the right to marry has assumed marriage as the union of one man and one woman. *Every* party in *every* right to marry case that the Supreme Court has *ever* decided included one man in union with one woman. Those decisions do not support any claim other than the right to marry a person of the opposite sex.[18]

In addition to the right to marry cases, other important United States Supreme Court cases have also relied upon the customary definition of marriage as the union of one man and one woman. *See*, *e.g.*, *Murphy v. Ramsey*, 114 U.S. 15, 45, 5 S. Ct. 747, 29 L. Ed. 47 (1885) (discussing "the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman"); *Davis v. Beason*, 133 U.S. 333, 341, 10 S. Ct. 299, 33 L. Ed. 637 (1890).

[18] *See Morrison v. Sadler*, 821 N.E.2d 15, 48 (Ind. Ct. App. 2005) ("This language linking marriage and procreation, particularly when combined with the fact that marriage was undoubtedly viewed as an opposite-sex institution in 1942, indicates that the Court 'was obviously contemplating unions between men and women when it ruled that the right to marry was fundamental.'" (quoting *Baehr*, 852 P.2d at 56)); *Lewis v. Harris*, 378 N.J Super. 168, 191, 875 A.2d 259 (App. Div. 2005) ("Subsequent Supreme Court decisions also indicate that the constitutionally protected right recognized by the Court is the right of members of the opposite-sex to marry.").

The United States Supreme Court has directly rejected the argument that a fundamental right to marry extends to same-sex unions. In *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972), the Supreme Court dismissed for lack of a substantial federal question an appeal of a Minnesota State Supreme Court decision that rejected the claim made here that "the right to marry without regard to the sex of the parties is a fundamental right of all persons." *Baker*, 291 Minn. at 312-15. The Minnesota Supreme Court reversed and held the state's marriage statute did not violate the due process clause or the equal protection clause. The Supreme Court *dismissed* the appeal. Thus, the same-sex union as a constitutional right argument was so frivolous as to merit dismissal without further argument by the Supreme Court. A similar result is required today. [19]

In all later cases, the United States Supreme Court made clear it was *not* establishing a fundamental right to recognition of homosexual relationships—let alone same-sex marriage. When invalidating a criminal statute prohibiting homosexual sodomy, the court stated, "[This case] does not involve whether the government must give formal recognition to any relationship that homosexual

[19] Courts have specifically held that *Baker* is binding precedent in challenges to state marriage statutes. *See*, *e.g.*, *Sadler*, 821 N.E.2d at 19 (describing *Baker* as "binding United States Supreme Court precedent indicating state bans on same-sex marriage do not violate the United

persons seek to enter." *Lawrence v. Texas,* 539 U.S. 558, 578, 604, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

Justice Sandra Day O'Connor further stated that "preserving the traditional institution of marriage" is a "legitimate state interest" and "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Id.* at 585 (O'Connor, J., concurring).[20]

Indeed, the Supreme Court disclaimed that fundamental rights analysis extends to same-sex couples. *Id.* at 593 (Scalia, J., dissenting) ("[w]e have held repeatedly, in cases the Court today does not overrule, that *only* fundamental rights qualify for this so-called 'heightened scrutiny' protection—that is, rights which are 'deeply rooted in this Nation's history and tradition'" (quoting *Glucksberg*, 521 U.S. at 721)). Other authorities have reiterated the conclusion that *Lawrence* did not create or even suggest a right to marry a person of the same sex.[21]

States Constitution"). *See also, e.g., Hernandez v. Robles*, 2006 N.Y. slip op. 5239, at *15 n.4, 2006 N.Y. LEXIS 1836, at *36 n.4 (Ct. App. July 6, 2006) (Graffeo, J., concurring).

[20] *See Lofton*, 358 F.3d at 815-16 (noting that "[t]he effect of [*Lawrence*] was to establish a greater respect than previously existed in the law for the right of consenting adults to engage in private sexual conduct. Nowhere, however, did the Court characterize this right as 'fundamental.'"(citation omitted)).

[21] *See*, *e.g.*, *Lofton*, 358 F.3d at 817 ("We conclude that it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right."); *Sadler*, 821 N.E.2d at 20 ("The five justices of the *Lawrence* majority, as well as Justice O'Connor in her concurring opinion, do not appear to be prepared to extend the logic of their reasoning to the recognition of same-sex marriage"); *Kandu*, 315 B.R. at 140 ("[N]either the majority nor concurring opinions in *Lawrence* conclude that the fundamental right to marry includes the right to marry someone of the same sex. This Court views the Supreme Court's decision in *Lawrence* as appropriately

Thus, the body of credible appellate authority in this nation stands against the asserted equal protection right to marry a person of the same sex, and the effort to redefine marriage has been overwhelmingly rejected by courts in other jurisdictions.[22] Even the *Goodridge* plurality in Massachusetts declined to create such a new fundamental right.[23]

The commitment to marriage as a union of one man and one woman has been emphatically reiterated in states. In the few years these cases were pending,

---

acknowledging that all people, no matter what their sexual preferences, are entitled to respect for their private lives."); *Wilson,* 354 F. Supp. 2d at 1306 ("[T]he majority in *Lawrence* was explicitly clear that its holding did not extend to the issue of same-sex marriage . . . .").

[22] The cases are now so numerous, they are cited in App. B. Recent examples are *Hernandez*, 2006 N.Y. slip op. 5239, 2006 N.Y. LEXIS 1836 (holding same-sex "marriage" is not a fundamental right and that article I, sections 6 and 11 of the New York Constitution do not compel state recognition of marriages between persons of the same-sex); *Standhardt v. Superior Court ex rel. Maricopa*, 206 Ariz. 276, 290, 77 P.3d 451, (Ct. App. 2003) ("we hold that the fundamental right to marry protected by our federal and state constitutions does not encompass the right to marry a same-sex partner"), *review denied* 2004 Ariz. LEXIS 62; *Kandu*, 315 B.R. at 140 ("Based on the specific directives provided by the Supreme Court for fundamental rights analysis, and in the absence of binding precedent holding same-sex marriages to be a fundamental right, this Court declines to hold that there is a fundamental right to marry someone of the same-sex"); *Wilson*, 354 F. Supp. 2d at 1306 ("no federal court has recognized that this [fundamental] right includes the right to marry a person of the same sex."); *Sadler*, 821 N.E.2d at 32 ("most courts have not looked favorably upon finding a 'fundamental right' to marry a person of the same-sex"); *Smelt,* 374 F. Supp. 2d at 878 ("The history and tradition of the last fifty years have not shown the definition of marriage to include a union of two people regardless of their sex."); *Lewis*, 378 N.J. Super. at 183 ("Marriage between members of the same-sex is clearly not a 'fundamental right[ ] . . . deeply rooted in our legal tradition.'" (quoting *Glucksberg*, 521 U.S. at 722)).

[23] Similarly, the trial court in *Andersen* concluded that "no case stands for the proposition that that narrowly defined right [to marry someone of the same-sex], standing by itself, constitutes a fundamental right." *Andersen v. King County*, No. 04-2-049-64-4, 2004 WL 1738447, at *5 (King County Super. Ct. Aug. 12, 2004).

11 states considered constitutional amendments to confirm the understanding of marriage as between one man and one woman. All 11 measures were passed by the people of their states. At least one more state has since added a similar amendment to its constitution. (A complete listing of state constitutional amendments and statutes is attached as Appendix A.)

Supreme Court precedent does prohibit imposing obstacles to marriage of one man and one woman where those restrictions are based solely upon invidious discrimination and not related to any legitimate governmental interests. In *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), an antimiscegenation law barring marriage between white and other races was based upon racial discriminatory purposes bearing no relationship to governmental interests in fostering stable marriages of one man and one woman.[24]

We vigorously reject any attempt to link the discriminatory antimiscegenation laws in *Loving* with this State's DOMA. The Washington Court of Appeals in *Singer* correctly noted:

> The *Loving* and *Perez* courts [*Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17 (1948)] did not change the basic definition of marriage as the legal union of one man and one woman; rather, they merely held that the race of the man or woman desiring to enter that relationship could not be considered by the state in granting a marriage license.

[24] *See Loving*, 388 U.S. at 11 ("[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.").

11 Wn. App. at 255 n.8. Numerous other courts have all rejected the claim that the decision in *Loving* somehow challenged state laws reaffirming marriage as the union of one man and one woman.[25]

Careful review of the historical context of *Loving* further undermines the dissents' disturbing attempt to link constitutionally void, racist laws with a historical definition of marriage as between a man and woman. Antimiscegenation laws were anathema to the "color-blind" constitution articulated in Justice John Marshall Harlan's dissent in *Plessy v. Ferguson.*[26] Antimiscegenation laws *infringed* upon the union of one man and one woman by injecting racial status as a qualification. Such laws contradicted the fact that a man and a woman of any race have the natural right to marry and have children. This right is protected by the United States and Washington State Constitutions.

Racially discriminatory antimiscegenation laws also violate the right to marriage between a man and a woman. Here, in contrast, the State's DOMA simply confirms the common law understanding of marriage as a union of a man

---

[25] *See* note 22, *supra*.

[26] 163 U.S. 537, 559, 16 S. Ct. 1138, 41 L. Ed. 256 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.").

and woman. It is the dissent that would abrogate the common law understanding through judicial fiat.

Justice Fairhurst's dissent would reframe the issue as whether marriage should be construed "broadly" or "narrowly." Dissent (Fairhurst, J.) at 23. Inclusion of same-sex couples within the definition of "marriage" by redefining the right "broadly" has no support in case law. Indeed, the polygamy claims were better supported since those claims were also founded in a claim of a right to practice an established religion, which allowed polygamy. The free exercise of religion is protected by the first amendment to the United States Constitution. There is no similar claim for same-sex marriage.

The fundamental right to enter into a marriage union of one man and one woman, like other fundamental rights, needs no further ("broader") definition. Below we shall briefly show that the legislative recodification of this definition of marriage in DOMA is constitutionally justified by a record establishing a rational basis, or alternatively, by compelling state interests.

C. Rational Basis

Rational basis scrutiny is the most deferential analysis for equal protection purposes, but rational basis scrutiny does not preclude judicial review. *See Island County v. State*, 135 Wn.2d 141, 156, 955 P.2d 377 (1998) (Sanders, J.,

concurring). Laws solely based on animus toward a particular group and wholly lacking a legitimate governmental purpose would not meet the rational basis test. *See*, *e.g.*, *Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).

Here, there are numerous rational bases supporting the legislature's reaffirmation of marriage as the union of one man and one woman. The complementary nature of the sexes and the unique procreative capacity of one man and one woman as a reproductive unit provide one obvious and nonarbitrary basis for recognizing such marriage. The binary character of marriage exists first because there are two sexes.[27] A society mindful of the biologically unique nature of the marital relationship and its special capacity for procreation has ample justification for safeguarding this institution to promote procreation and a stable environment for raising children. Less stable homes equate to higher welfare and other burdens on the State.

---

[27] "Heterosexual couples are the only couples who can produce biological offspring of the couple." Madsen, J., op. at 40. *See Lewis*, 378 N.J. Super. at 199 (Parrillo, J.A.D., concurring) ("a core feature of marriage is its binary, opposite-sex nature. . . . [T]he binary idea of marriage arose precisely because there are two sexes."); *Goodridge*, 440 Mass. at 357 n.1 (Sosman, J., dissenting) ("the reasons justifying the civil marriage laws are inextricably linked to the fact that human sexual intercourse between a man and a woman frequently results in pregnancy and childbirth . . . that fact lies at the core of why society fashioned the institution of marriage in the first place."); *Hernandez*, 2006 N.Y. slip op. 5239, at *5, 2006 N.Y. LEXIS 1836, at *6 (Observing that "the vast majority of children are born as a result of a sexual relationship between man and a woman" and noting "the undisputed assumption that marriage is important to the welfare of children.").

Only opposite-sex couples are capable of intentional, unassisted procreation, unlike same-sex couples. Unlike same-sex couples, only opposite-sex couples may experience unintentional or unplanned procreation. State sanctioned marriage as a union of one man and one woman encourages couples to enter into a stable relationship prior to having children and to remain committed to one another in the relationship for the raising of children, planned or otherwise.[28]

Although society's continuing existence depends upon children, marriage has never been considered as solely a mechanism to increase the number of births. Modern circumstances confirm that marriage is needed in today's society more than ever. As amicus notes:

> widespread contraceptive and abortion rights may actually make more salient, not less, the traditional role of marriage in encouraging men and women to make the next generation that society needs. The more legal, cultural, and technological choice individuals have about whether or not to have children, the more need there is for a social institution that encourages men and women to have babies together, and creates the conditions under which those children are likely to get the best care.

Amicus of Families Northwest at 14-15.

It was reasonable for the Washington Legislature to conclude that the biological nature of one man and one woman as a reproductive unit provides an

[28] *See Lewis*, 378 N.J. Super. at 197 (Parrillo, J.A.D., concurring) ("Marriage's vital purpose is not to mandate procreation but to control or ameliorate its consequences—the so-called 'private welfare' purpose. To maintain otherwise is to ignore procreation's centrality to marriage.").

objective and nonarbitrary basis for defining marriage. The State's interests in support of marriage would be undermined if marriage were so malleable in meaning as to include any consensual relationship claimed to be "'exclusive and permanent.'" Dissent (Fairhurst, J.) at 29 (quoting *Goodridge*, 440 Mass. at 332).

Marriage redefined to mean any "permanent"[29] intimate personal relationship between two consenting persons has no firmer basis than a similar relationship between three or more persons, which has been long rejected. The stakes were clear to the Supreme Court in facing the challenges to marriage presented in the polygamy cases. As Chief Justice Morrison R. Waite stated:

> Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests.

Reynolds v. United States, 98 U.S. (8 Otto) 145, 165-66, 25 L. Ed. 244 (1878). Several later United States Supreme Court decisions vigorously rejected suggested alteration to the fundamental definition of marriage.[30]

---

[29] Sociological studies undermine the suggestion these relationships are "permanent" as contrasted with traditional marriage. *See infra*, note 44.

[30] *See, e.g.*, *Murphy v. Ramsey*, 114 U.S. 15, 45, 5 S. Ct. 747, 29 L. Ed. 47 (1885) ("no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman");

The legislature enacted DOMA as a reasonable declaration of state marriage policy and an acknowledgment of the federal DOMA's framework for the recognition of marriage in the United States. The State's DOMA follows the federal DOMA, passed by Congress and signed by President Clinton in 1996.[31] The federal DOMA was enacted pursuant to the full faith and credit clause of the United States Constitution and has been upheld as constitutional in the face of challenges in federal courts. *See Wilson*, 354 F. Supp. 2d 1298; *Kandu*, 315 B.R. 123. *See also Smelt*, 447 F.3d 673.

The federal DOMA does two things. First, it expressly defines marriage as the union of one man and one woman for federal purposes. Second, it gives express federal law approval to states to define marriage and determine what marriages they recognize pursuant to the full faith and credit clause. States are not required to recognize "marriages" not consisting of one man and one woman even if permitted in other states. Although the federal statute clarifies the states' powers in defining and recognizing marriage, the statute does not dictate what particular marriage policies states should adopt.

Beason, 133 U.S. at 341 ("[Bigamy and polygamy] tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man.").

[31] 1 U.S.C. § 7; 28 U.S.C. § 1738C (1997).

The legislative history for Washington's DOMA reflects that it was contemplated in the context of the federal DOMA. Washington's DOMA reasonably reiterates this State's understanding of marriage in light of constitutional federalism principles recognized in the federal DOMA.

Another rational basis requiring us to uphold DOMA is that the statute was found as necessary to ensure that decisions about marriage remain with the people of Washington. Legislators swear an oath to uphold and defend the constitution and laws of the State. Consistent with that oath, the legislators ensured that the people of Washington retain control over their institutions rather than permit foreign state judges to become de facto determinants of marriage policy.

The legislative history of our State's DOMA also shows consideration of the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993), *superseded by constitutional amendment.* Haw. Const. art. I, § 23 (amended 1998).

Legislators were concerned that without DOMA, such other states' court decisions might be enforced in Washington. The Hawaii court had expressly criticized the Washington decision in *Singer*.[32] Our legislature rationally concluded that explicitly reaffirming this State's understanding of marriage would

[32] *Baehr*, 74 Haw. at 570.

both reflect the consensus of the people and keep the issue of marriage within the control of Washingtonians. Washington marriage should remain a decision for citizens of this State, not any other state or its courts.[33]

Legislators found the interests so strong as to require express definition of marriage as the union of one man and one woman in order to remove any possible legal uncertainties. Despite or because of the long-standing understanding of marriage as between one man and one woman, our statutes did not explicitly say marriage is the union of one man and one woman.[34]

Legislators concluded that DOMA would reinforce the understanding of marriage in any potential court contest.[35] The legislative record indicates concern

---

[33] *See, e.g.*, Clerk's Papers (CP) at 465 (Floor Remarks of Rep. Sheehan on Engrossed Substitute House Bill (ESHB) 1130, Feb. 4, 1998):

> this bill is about who decides if there's going to be a change in that institution. Should the decision be made by an unelected judge in another state, for example Hawaii or Vermont? Or should the decision be made by those of us here in this state?

See also CP at 477 (Floor Remarks of Rep. Pennington on ESHB 1130, Feb. 4, 1998):

> we feel, many of us in the state of Washington and here in this chamber, that we need to assert our right as a state to make this decision, that we don't want it to be done by a judge in either Vermont or Hawaii, that we are the elected body and we should make that decision as much as possible.

[34] The legislative history clearly indicates that legislators supporting and opposing DOMA all understood that preexisting Washington statutes were premised upon marriage as the union of one man and one woman. *See, e.g.*, CP at 444 (Floor Remarks of Rep. Constantine on SHB 1130, Mar. 18, 1997): "the law of the state of Washington, our own revised code of Washington, makes it clear that marriage is between a man and a woman. And our courts have interpreted our statutes that way."

[35] *See*, *e.g.*, CP at 442 (Floor Remarks of Rep. Sheehan on SHB 1130, Mar. 18, 1997):

that the Court of Appeals decision in *Singer* would be argued as limited authority because of the court which ruled.[36] The record also shows express concern that this court would be cited authority from other states argued to overrule the *Singer* holding.[37]

DOMA provides certainty, which is particularly important since this state has generally followed the rule that the jurisdiction where the contract is executed is controlling in most adjudications involving the validity of marriage. *Willey v. Willey*, 22 Wash. 115, 117, 60 P. 145 (1900); *In re Estate of Wilbur*, 8 Wash. 35, 37, 35 P. 407 (1894). This State does not recognize common-law marriages, but we have recognized the validity of such marriages between a man and a woman if contracted in other states. *Peffley-Warner v. Bowen*, 113 Wn.2d 243, 249, 778 P.2d 1022 (1989); *In re Estate of Gallagher*, 35 Wn.2d 512, 514-15, 213 P.2d 621 (1950). Legislators specifically referred to this recognition of foreign-state

---

> And if a court case were to come to the supreme court, they would look to our law, they would look to our statutes to say, how has the legislature spoken on this issue? They can override an appellate court decision. So it is important that it's in our code. It's important that it's in our statute to give that guidance to the court if a case comes before us.

[36] *See* CP at 460 (Floor Remarks of Rep. Thompson on ESHB 1130, Feb. 4, 1998):

> The current law is not a supreme court law and in affect actually does not cover the whole state as law. It is an appellate court decision in the first division. . . .

[37] *See* CP at 442, Floor Remarks of Rep. Sheehan, quoted *supra,* note 35.

marriages.[38] A strong conviction was expressed that this precedent should not extend to same-sex "marriages" from other states.[39]

Where foreign law clearly violates our State's strong public policy, there is an important and well-established exception to the rule for recognizing foreign law. This exception probably requires that Washington courts would not recognize same-sex "marriage" even in the absence of DOMA.[40] Still, enactment of DOMA

---

[38] *See*, *e.g.*, CP at 443 (Floor Remarks of Rep. Thompson on SHB 1130, Mar. 18, 1997):

> We already have one exception, on one type of marriage that we don't allow, on common-law marriages. We don't give common-law marriages in Washington state. But we do accept them from other states. We already have one precedence [sic]. It would be very difficult, unless we have a specific law against it, for us to say, well we're going to accept this one but we're not going to accept that one. And that's where we run into the situation with full faith and credits. But our legal opinions tell us very clearly that if we show a strong position of the people in statute, either from the legislature, an initiative, a referendum, then we have ourselves covered. We have a very strong position. It doesn't mean it can never be overturned. But it does show the best possible condition that we can, under the situation.

[39] *See*, *e.g.*, CP at 461 (Floor Remarks of Rep. Thompson on ESHB 1130, Feb. 4, 1998):

> We already have a precedence [sic] in this case where we have common-law marriage. You can't get a common-law marriage in Washington state, but we accept it from other states. We currently accept all marriages from all other states. This is something that now we have to clarify. This bill gives us that clear statutory policy. It does basically two things: it says, number one, we define marriage as a contract between one man and one woman. That is basically it. But then, two, it says we will not honor any marriages from other states even though they might be legal in other states if they don't meet this requirement of one man and one woman.

[40] Even the Supreme Judicial Court of Massachusetts upheld its state law prohibiting issuance of Massachusetts marriage licenses to nonresident same-sex couples. *Cote-Whitacre v. Dep't of Pub. Health*, 446 Mass. 350, 844 N.E.2d 623 (Mass. 2006). *See especially id.* at 352-382 (Spina, J., concurring) (citing principles of comity and rejecting plaintiffs' contrary claims based on the Massachusetts Declaration of Rights' guarantees of equal protection and due process and the federal constitution's article IV, section 2 privileges and immunities clause.)

was based upon a rational concern about precedent recognizing some marriages from foreign jurisdictions which Washington did not allow.

Hawaii voters subsequently enacted a constitutional amendment reaffirming marriage as a union of one man and one woman, as have all other states where voters or the legislature have been allowed to decide. *See* App. A. The Massachusetts decision, however, has not yet been reversed, and confirms that our legislature did not engage in speculative concerns by enacting DOMA.

Similar concerns were evidenced by the United States Congress (and President Clinton) and by other states when enacting DOMA statutes or constitutional amendments reaffirming marriage as a union of one man and one woman.[41] The aberrant plurality opinion of the Massachusetts court and the decisions by trial courts here confirm the validity of these concerns.

The record also establishes that Washington's marriage definition confirmed in DOMA was rationally supported. Studies presented to the legislature support marriage as a union of one man and one woman. The legislature was offered evidence that children tend to thrive best in families consisting of mothers, fathers, and their biological children.[42]

---

[41] *See* App. A

[42] Testimony to the legislature underscored the importance of marriage to civil society, citing several studies in support of the principle that children benefit from being raised in families

The current state of scientific findings was further illuminated by intervenor's expert, Dr. Jeffrey B. Satinover. *See* Clerk's Papers (CP) at 531. For the purposes of scientific study, no simple dichotomy can be drawn between opposite-sex couples and same-sex couples. Since same-sex pairing takes place *along* sexual lines rather than *across* sexual lines, and because of the nonfungible differences between men and women, serious scientific inquiry should take into account *three* distinct communities with "starkly unequal demographics, differential impact on children, and different multigenerational capacity." *See* CP at 533.

Before redefining a social institution, the legislature should consider ramifications flowing from all three of these couple communities and the resulting impact on the social fabric and on children.

The first obvious and relevant fact is that female couple households are *necessarily* fatherless and male couple households are *necessarily* motherless. Each of these differences from the optimum mother/father setting for stable family life may offer distinctive disadvantages.

---

consisting of married mothers and fathers. *See* CP at 372 (Hearing on HB 1130 Before the House Law and Justice Comm., Feb. 4, 1998 Agenda at 36-37). Documentation provided to the committee, which also is in the legislative record, summarized studies establishing that children do not fare as well in households where there is an adult male who is not the married, biological father of the children. CP at 358.

Studies summarized in the record before one trial court demonstrated that an absent father "is associated with quantifiable deficits in children at every stage of the lifecycle, persisting not only in the adulthood of the child, but even into the next generation." CP at 539.[43] A similar problem has been indicated of families without a mother, although the number of male unions with children is far smaller. CP at 539.[44]

Direct comparisons between opposite-sex homes and same-sex homes further support the former as a better environment for children. For example, studies show an average shorter term commitment and more sexual partners for same-sex couples.[45]

---

[43] The assessment summarized:

> With respect to fatherlessness, quantifiable deficits occur in literally every area of development—social, psychological, intellectual, educational, emotional, relational, medical, even with respect to longevity, as well as with respect to sexuality, likelihood of cigarette use, drug and alcohol abuse, age of onset of sexual activity and likelihood of teen or earlier pregnancy.

CP at 540 (Decl. of Satinover).

[44] As Dr. Satinover observed:

> only recently has it occurred to anyone to question whether children actually need mothers, so that the research confirming they indeed do, convincing as it is, is smaller than that for fathers, whose necessity was first questioned some forty years ago.

CP at 539-40 (Decl. of Satinover).

[45] Studies cited find that the average same-sex female union lasted an average of only 4.9 years, same-sex male couples 6.9 years, and the average heterosexual couple 20 years. *See* CP at 535 (Decl. of Satinover).

The United States Supreme Court has addressed the proposition that one man and one woman are the optimal setting for raising a family.[46] The relationship between behavioral problems and the absence of fathers in the home have been addressed by other courts.[47]

The Washington Legislature could rationally reject outright or conclude that further study is required before engaging in a dramatic alteration of our society's social fabric with profound negative or unforeseeable consequences.

Our constitutional system mandates separation of powers. It is for the legislature to weigh the evidence and relative merits of social science and statistics,

---

[46] *See, e.g., Reno v. Flores,* 507 U.S. 292, 310, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) (describing a state's express preference for custody of children to reside with their biological parents "whom our society and this court's jurisprudence have always presumed to be the preferred and primary custodians of their minor children."); *Bowen v. Gilliard*, 483 U.S. 587, 614, 107 S. Ct. 3008 (1987) (Brennan, J., dissenting) ("'[t]he optimal situation for the child is to have both an involved mother and an involved father.'" (quoting Henry B. Biller, *Paternal Deprivation* 10 (1974))).

[47] *Goodridge*, 440 Mass at 386 n.23 (Cordy, J., dissenting) cites:

> [H. Elaine] Rodney [& Robert Mupier], Behavioral Differences between African American Male Adolescents with Biological Fathers and Those Without Biological Fathers in the Home, 30 J. Black Stud. 45, 53 (1999) (African-American juveniles who lived with their biological fathers displayed fewer behavioral problems); [Roland J.] Chilton [& Gerald E. Markle], Family Disruption, Delinquent Conduct and the Effect of Subclassification, 37 Am. Soc. Rev. 93, 95 (1972) (higher proportion of youth charged with juvenile offenses when not living in husband-wife family); [John P.] Hoffmann [& Robert A. Johnson], A National Portrait of Family Structure and Adolescent Drug Use, 60 J. Marriage & Fam. 633 (1998) (children from households with both mother and father reported relatively low use of drugs).

taking into account the public interests. We recognize that competing interpretations of the studies have been offered to this court.

For purposes of legitimate judicial review, it is sufficient to note that the legislature held hearings with testimony supplemented by documentation, including studies that support the conclusion that mother-father households are the optimal setting for family and children.

More fundamentally, it is rational that our legislature insists upon compelling evidence before making a sweeping alteration in marriage.[48] Obviously, those who would overturn the prevailing definition of marriage did not present compelling evidence to the legislature to support such change.

This court must uphold the legislature's determination, which is both rational and based on legitimate interests (and does not destroy or redefine existing rights).

D. No Improper Motives Prompted DOMA

Justice Fairhurst's dissent also insists DOMA was enacted through improper motives of "animus." Dissent (Fairhurst, J.) at 18. Presumably, this conclusion

---

[48] *See also Lofton*, 358 F.3d at 825:

> we must ask not whether the latest in social science research and professional opinion *support* the decision of the Florida legislature, but whether that evidence is so well established and so far beyond dispute that it would be irrational for the Florida legislature to believe that the interests of its children are best served by not permitting homosexual adoption.

extends to the United States Congress and President Clinton who enacted and signed the federal DOMA, as well as to other state legislatures who have enacted DOMA versions. To state this paranoid proposition is to rebut it.

Courts must not indulge in speculation about illicit and subjective motives of legislators. Not only is this a separation of powers constraint but it involves the recognition that subjective motives are far more difficult to discern than the objective public purposes in legislation. "'It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'" *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986) (quoting *United States v. O'Brien*, 391 U.S. 367, 383, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)). The legislative record here offers overwhelming evidence that DOMA was enacted in accord with proper public purposes, *not* the argued supposedly improper motives.

It is disturbing that the dissenters would make this conclusion about the Washington Legislature, particularly where expansive, objective evidence supports the opposite conclusion. Legislative proponents of DOMA extensively cited the rational bases for DOMA discussed *supra*, pp. 29-42. Proponents of the bill expressly opposed discrimination against persons with homosexual orientation and

indeed such legislation to that effect was passed while this case was pending.[49] It is beyond the province of the judiciary to take one side in a legislative dispute. It is sufficient here to recognize the objective evidence available in the record only supports the conclusion that DOMA was enacted pursuant to proper public purposes.[50]

E. Compelling State Interests Support Washington Marriage Law

DOMA's reaffirmation of marriage as the union of one man and one woman also furthers compelling state interests. The legislature formally declared that compelling governmental interests support DOMA.

> (1) It is a compelling interest of the state of Washington to reaffirm its historical commitment to the institution of marriage as a union between a man and a woman as husband and wife and to protect that institution. [51]

This determination is amply supported by the record and by the historic understanding of marriage's role in society.

If a statute did classify according to a suspect class or infringe on a fundamental right, the statute will be subjected to strict scrutiny. *Cleburne*, 473

[49] *See*, *e.g.*, CP at 465 (Floor Remarks of Rep. Sheehan on ESHB 1130, Feb. 4, 1998): "This bill is not about an assault on a group of people or of a lifestyle, this group, this bill is about upholding that institution of marriage." *See also, e.g.*, CP at 477 (Floor Remarks of Rep. Pennington on ESHB 1130, Feb. 4, 1998).

[50] We have before us only the Washington legislative record, but comity and precedent requires we extend the same presumption of legitimacy to the United States Congress and President Clinton in adopting the federal DOMA.

U.S. at 440; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973). Under strict scrutiny a state must prove the classification or infringement of a right is narrowly tailored to advance a compelling governmental interest; otherwise, the statute is invalid. *Cleburne*, 473 U.S. at 440; *Rodriguez*, 411 U.S. at 16-17.

Although we cannot find that DOMA was drawn according to a suspect class or infringes upon a fundamental right, the trial court's holding in *Andersen*, the briefing of the parties, and the importance of the case warrant further analysis of DOMA under strict scrutiny. Washington marriage law and DOMA must be upheld because the legislature expressly found it furthers compelling state interests, and that determination is correct.

The Supreme Court discussed the importance of marriage in rebutting challenges to marriage posed by polygamy. These cases prompted the Supreme Court to identify the compelling state interests in marriage between one man and one woman. *See, e.g.*, *Reynolds*, 98 U.S. at 165-66, *quoted supra,* p. 32; *Murphy*, 114 U.S. at 45, *quoted supra,* p. 32; *Beason*, 133 U.S. 344-45. *See also Wilbur*, 8 Wash. at 37.

Marriage is a particularly *public* institution:

---

[51] Laws of 1998, ch. 1, § 2.

> "it [civil marriage] is not so much the result of private agreement, as of public ordination. In every enlightened government it is preeminently the basis of civil institutions in every enlightened government, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity."

Maynard v. Hill, 125 U.S. 190, 213, 8 S. Ct. 723, 31 L. Ed. 2d 654 (1888) (quoting *Noel v. Ewing*, 9 Ind. 37, 48 (1857)). As the bedrock institution of society, marriage serves compelling state interests, many of which were already discussed, *supra*, p. 30, in context of the legislative record herein.

The State's compelling interest in marriage has also been reaffirmed in recent decisions rejecting another proposed redefinition of marriage.

> Monogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built. In light of these fundamental values, the State is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship.

Potter v. Murray City, 760 F.2d 1065, 1070 (10th Cir. 1985), *cert. denied*, 474 U.S. 849 (citations omitted). *See Bronson v. Swensen*, 394 F. Supp. 2d 1329 (D. Utah 2005) (holding "precedent in *Potter* dictates the finding that there is a compelling state interest in the protection of monogamous marriage."). *See also State v. Green*, 2004 UT 76, 99 P.3d 820. "First and foremost, the State has a compelling interest in regulating and preserving the institution of marriage as that

institution has been defined by the State." *Id*. at 836 (Durrant, J., concurring). Marriage in each of these cases was between one man and one woman.

Other recent authorities have recognized the State's compelling interest in marriage as the union of one man and one woman, particularly in light of its exclusive link to procreation and child rearing.[52] As one court noted, "it seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised. This has always been one of society's paramount goals." *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (rejecting the claim that homosexual unions should be recognized as marriages for immigration purposes), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982).

The legislature correctly held the State has compelling governmental interests to promote marriage as the union of one man and one woman. Those compelling interests include interests considered in the "rational basis" discussion, *supra*, pp. 29-42, and were summarized by the legislature itself (Laws of 1998, ch. 1, § 2). These compelling interests are well identified in United States Supreme Court decisions considering marriage, which are compelling and properly

[52] *Goodridge*, 440 Mass. at 385 (Cordy, J., dissenting) ("It is difficult to imagine a State purpose more important and legitimate than ensuring, promoting, and supporting an optimal social structure within which to bear and raise children. At the very least, the marriage statute continues to serve this important State purpose.").

binding on this court. Washington marriage law and DOMA pass even a strict scrutiny test.

IV. Due Process, Privacy, and Fundamental Rights (Article I, sections 3, 7, and 32)

Neither article I, section 3 nor article I, section 7 creates a right to redefine marriage to include same-sex couples. Even the dissenters do not disagree with this conclusion, but the claims of respondents will also be briefly rebutted in interests of finality.

A. Article I, Section 3

Article I, section 3 provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." There is no fundamental "liberty" interest implicated here, much less any "deprived" interest. Each Washingtonian enjoys the same right to marry one person of the opposite sex. There is no right to redefine "marriage," and the State has both legitimate and compelling interests in adopting laws defining marriage as the union of one man and one woman. Thus, Washington marriage and DOMA do not violate this provision.

B. Article I, Section 7

Article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." The right protected

by that provision is the right to be free from unreasonable intrusion into one's private affairs. *See State v. Ferrier*, 136 Wn.2d 103, 112, 960 P.2d 927 (1998). Disturbance of one's private affairs occurs when the government intrudes upon those "privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass." *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984).

There is no unreasonable government trespass in DOMA. Indeed, there is no trespass of any kind. Same-sex couples are not prevented from having any sort of *private* relationship that they choose. What respondents seek here is *official* and *public* recognition of their same-sex relationships. Article I, section 7 is not a device for creating such rights of *public* recognition.

An article I, section 7 inquiry considers "'those privacy interests which citizens of [Washington] have held, and should be entitled to hold, safe from governmental trespass.'" *State v. McKinney*, 148 Wn.2d 20, 27, 60 P.3d 46 (2002) (alteration in original) (quoting *Myrick*, 102 Wn.2d at 511). Claims for a right to same-sex "marriage" unequivocally fail both steps. There is clearly no history of "marriage" that includes persons of the same-sex. DOMA does not intrude upon *private* relationships but instead concerns the *public* recognition of marriage. DOMA is constitutional under article I, section 7.

C. Article I, Section 32

Respondent's argument based upon article I, section 32 is also unsupportable. Article I, section 32 actually supports the State's continued ability to define marriage as it has historically: the union of one man and one woman.

Article I, section 32 declares that "[a] frequent recurrence to fundamental principles is essential to the security of individual rights." The legislative finding in DOMA confirms the intent to remain consistent with "historical commitment to the institution of marriage as a union between a man and a woman as husband and wife . . . ." Laws of 1998, ch. 1, § 2(1).

The fundamental rights analysis, *supra*, pp. 20-29, also reflects the mandate of this section of our constitution and demonstrates overwhelming justification for the recognition of marriage as the union of one man and one woman.[53] Only a judicial rewriting of "fundamental principles" would result in marriage finding definition in the shifting sands of political correctness. The claim for same-sex "marriage" is not consistent with the mandate of article I, section 32.

V. EQUAL RIGHTS AMENDMENT (ARTICLE XXXI, SECTION 1)

Finally, respondents' argument under article XXXI, section 1—the "Equal Rights Amendment" (ERA)—also fails. That amendment did not create a right to

---

[53] *See especially, Reynolds*, 98 U.S. at 165-66, *quoted supra*, p. 32; *Murphy*, 114 U.S. at 45, *quoted supra*, p. 32 note 30; *Maynard*, 125 U.S. at 213, *quoted supra*, p. 46).

redefine marriage to include same-sex couples, and the legislative history confirms that was not the intent of the voters who ratified the ERA nor the intent of that amendment.

The nearly contemporaneous decision in *Singer* concluded correctly that marriage as the union of one man and one woman did not violate the ERA. The legislative history supports this conclusion. Particularly important is the voters pamphlet explanation by proponents of the amendment. Statements are required by our Washington Constitution article II, section 1(e). In the 1972 official voters pamphlet, the "Statement for" House Joint Resolution 61 states that "the Basic Principle of the Era . . . is that both sexes be treated equally under the law. . . . Laws which restrict and deny rights to one sex would be eliminated." STATE OF WASH., VOTERS PAMPHLET, *General Election* 52 (Nov. 7, 1972).

DOMA is constitutional under the ERA because it applies to both sexes equally. The ERA plainly prohibits legislation that favors one sex at the expense of the other or that discriminates against one sex to the advantage of the other. *See, e.g., Marchioro v. Chaney*, 90 Wn.2d 298, 305, 582 P.2d 487 (1978) ("Under the equal rights amendment, the equal protection/suspect classification test is replaced by the single criterion: Is the classification by sex discriminatory?"), *aff'd,* 442 U.S. 191, 99 S. Ct. 2243, 60 L. Ed. 2d 816 (1979); *Darrin v. Gould*, 85 Wn.2d

859, 877, 540 P.2d 882 (1975) ("under our ERA *discrimination* on account of sex is forbidden" (emphasis added)).

Neither trial court here found a violation of the ERA, nor can we. Washington's marriage law and DOMA neither favor nor discriminate against men or women, and do not violate the ERA.

VI. CONCLUSION

Washington's long-standing definition of marriage as the union of one man and one woman and DOMA are both constitutional. Respondents' numerous challenges under the state and federal constitutions all fail.

We conclude that the legislature was justified in enacting DOMA to clarify and reaffirm Washington marriage law by a compelling governmental interest in preserving the institution of marriage, as well as the healthy families and children it promotes. This conclusion may not be changed by mere passage of time or currents of public favor and surely not changed by courts.

Finally, we conclude that neither the due process or right to privacy clauses in article I, section 3 and section 7 nor the equal rights amendment to our state constitution creates a right to marry a person of the same sex. Indeed, these claims are even less persuasive when viewed correctly through the eyes and understanding of those who authored and ratified our constitution (and the ERA amendment).

We add the important conclusion that this decision is required by the relevant constitutional provisions, the history of our laws and precedent in this court, and the United States Supreme Court. This decision is final.[54] The decisions of both trial courts are reversed and these actions dismissed.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Justice Richard B. Sanders

[54] Justice Sanders and I dissented from this court's decision in *In re Election Contest filed by Coday,* 156 Wn.2d 485, 130 P.3d 809 (2006) that later challenges to the problematic 2004 gubernatorial election were controlled by one trial court decision that was not appealed. The underlying issue preclusion theory applies to these cases since *all* claims have now been considered and disposed of by *this* court.

APPENDIX A

(* indicates states with constitutional amendments)

Alabama: Const. amend. 761 (2006)
*Alaska: Const. art. I §, 25
Arizona: Ariz. Rev. Stat. § 25-101 (West Group 2000)
*Arkansas: Const. amend. 83, § 1
California: Cal. Fam. Code § 308.5 (Thomson/West 2004)
Colorado: Colo. Rev. Stat. § 14-2-104 (LexisNexis 2005)
Connecticut: no law or constitutional amendment restricting marriage to one man and one woman
Delaware: Del. Code Ann. title 13, § 101 (Michie 1999)
Florida: Fla. Stat. § 741.212 (2005)
*Georgia: Const. art. I, § IV, para. I
*Hawaii: Const. art. I, § 23
Idaho: Idaho Code Ann. § 32-202 (Michie 2006)
Illinois: 750 Ill. Comp. Stat. Ann. 5/201 (Thomson/West 2004)
Indiana: Ind. Code Ann. § 31-11-1-1 (2005)
Iowa: Iowa Code Ann. § 595.2 (West Group 2001)
*Kansas: Const. art. XV, § 15
*Kentucky: Const. § 233a
*Louisiana: Const. art. XII, § 15
Maine: Me. Rev. Stat. Ann. title 19A, § 701 (West 1998)
Maryland: Md. Code Ann., Family Law § 2-201 (LexisNexis 2004)
Massachusetts: no law or constitutional amendment restricting marriage to one man and one woman
*Michigan: Const. art. I, § 1.I(25) (LexisNexis 2006)
Minnesota: Minn. Stat. Ann. § 517.03 (Thomson/West 2006)
*Mississippi: Const. art. 14, § 263A
*Missouri: Const. art. I, § 33
*Montana: Const. art. XIII, § 7
*Nebraska: Const. art. I, § 29
*Nevada: Const. art. I, § 21
New Hampshire: N.H. Rev. Stat. Ann. § 457:1-:2 (Thomson/West 2004)
New Jersey: no law or constitutional amendment restricting marriage to one man and one woman

New Mexico: no law or constitutional amendment restricting marriage to one man and one woman
New York: no law or constitutional amendment restricting marriage to one man and one woman
North Carolina: N.C. Gen. Stat. Ann. § 51-1.2 (LexisNexis 2005)
*North Dakota: Const. art. XI, § 28
*Ohio: Const. art. XV, § 11
*Oklahoma: Const. art. II, § 35
*Oregon: Const. Art. XV, § 5a
Pennsylvania: 23 Pa. Cons. Stat. Ann. § 1704 (West Group 2001)
Rhode Island: no law or constitutional amendment restricting marriage to one man and one woman
South Carolina: S.C. Code Ann. § 20-1-15 (Thomson/West 2005)
South Dakota: S.D. Codified Laws § 25-1-1 (2004)
Tennessee: Tenn. Code Ann. § 36-3-113 (2005)
*Texas: Const. art. I, § 32
*Utah: Const. art. I, § 29
Vermont: Vt. Stat. Ann. title 15, § 8 (LexisNexis 2002)
Virginia: Va. Code Ann. § 20-45.2 (LexisNexis 2004)
Washington: RCW 26.04.010
West Virginia: W. Va. Code 48-2-104 (LexisNexis 2004)
Wisconsin: no law or constitutional amendment restricting marriage to one man and one woman
Wyoming: Wyo. Stat. Ann. § 20-1-101 (LexisNexis 2005)

States with constitutional amendments pending for election in 2006:
Idaho
South Carolina
South Dakota
Tennessee
Virginia
Wisconsin

APPENDIX B

Arizona: *Standhardt v. Superior Court of Ariz.*, 206 Ariz. 276, 77 P.3d 451 (Ct. App. 2003), *review denied*, 2004 Ariz. LEXIS 62 (2004)
Arkansas: *Hatcher v. Hatcher*, 265 Ark. 681, 580 S.W.2d 475 (1979)
California: *Lockyer v. City and County of S.F.*, 33 Cal. 4th 1055, 19 Cal. Rptr. 225, 95 P.3d 459 (2004)
Florida: *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004), *review denied*, 898 So. 2d 80 (2005)
Illinois: *In re Marriage of Simmons*, 355 Ill. App. 3d 942, 292 Ill. Dec. 47, 825 N.E.2d 303 (2005)
Indiana: *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005)
Kentucky: *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973)
Minnesota: *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971)
New Jersey: *Lewis v. Harris*, 378 N.J. Super. 168, 875 A.2d 259 (App. Div. 2005)
New York: *Hernandez v. Robles*, 2006 N.Y. slip. op. 5239, 2006 N.Y. LEXIS 1836 (Ct. App. July 6, 2006)
Ohio: *Irwin v. Lupardus*, No. 41379, 1980 Ohio App. LEXIS 12106 (June 26, 1980) (unpublished)
Oregon: *Li v. State*, 338 Or. 376, 110 P.3d 91 (2005)
Pennsylvania: *De Santo v. Barnsley*, 328 Pa. Super. 181, 476 A.2d 952 (1984)
Texas: *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999)
Vermont: *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999)

But see
Hawaii: *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44, *reconsideration granted in part*, 74 Haw. 645, 875 P.2d 225 (1993), *superseded by constitutional amendment*. Haw. Const. art. I, § 23 (amended 1998)
Massachusetts: *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003); *c.f. Cote-Whitacre v. Dep’t of Pub. Health*, 446 Mass. 350, 844 N.E.2d 623 (2006)