No. 75934-1

FAIRHURST, J. (dissenting) – In these consolidated cases, 19 gay and lesbian couples petitioned to receive the same right that all heterosexual Washington residents enjoy--the right to marry the person of one's choice. *See* Clerk's Papers (CP) at 93-130 (*Castle v. Washington*, No. 04-02-00614-4, 2004 WL 1985215, Mem. Opinion on Constitutionality RCW 26.02.010 and RCW 26.02.020[1] (unpublished order) (Thurston County Super. Ct. Sept. 7, 2004)) [hereinafter CP (*Castle*)]; CP at 876-901 (*Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, Mem. Opinion and Order on Cross Mots. for Summ. J. (unpublished order) (King County Super. Ct. Aug. 4, 2004)) [hereinafter CP (*Andersen*)]. In each case, the trial court found on multiple grounds that the denial of that right, as codified in RCW 26.04.010(1) and .020(1)(c), was unconstitutional. Yet, Justice Madsen's plurality opinion (plurality) reverses those trial courts based on "[t]he case law" that purportedly "controls our inquiry."

[1] Although the title of the *Castle* court's memorandum opinion refers to RCW 26.02.010 and RCW 26.02.020, no such statutes exist. *See* CP at 93. The opinion later correctly refers to RCW 26.04.010 and RCW 26.04.020, which are the statutes at issue in the case. *See* CP at 95.

Plurality at 59. Neither an objective analysis of relevant law nor any sense of justice allows me to agree with the plurality.

The plurality and concurrence condone blatant discrimination against Washington's gay and lesbian citizens in the name of encouraging procreation, marriage for individuals in relationships that result in children, and the raising of children in homes headed by opposite-sex parents, while ignoring the fact that denying same-sex couples the right to marry has no prospect of furthering any of those interests.[2] With the proper issue in mind--whether denying same-sex couples the right to marry will encourage procreation, marriage for individuals in relationships that result in children, or child rearing in households headed by

[2] Despite the plurality's attempts to distance itself from the concurrence, the plurality itself acknowledges that the concurrence "merely repeats the result and much of the reasoning of the [plurality's] decision on most issues." Plurality at 5. In truth, the concurrence fills the noticeable, and presumably intentional, omissions in the plurality's reasoning. The plurality notably avoids any real discussion of the State's interest in excluding same-sex couples from civil marriage and focuses exclusively on the State's interest in marriage for opposite-sex couples. *See, e.g.,* plurality at 41 ("[R]earing 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 concurrence, on the other hand, more directly addresses the necessarily discriminatory correlative of that argument. *See, e.g.*, concurrence at 40 ("Direct comparisons between opposite-sex homes and same-sex homes further support the former as a better environment for children."). As Justice Antonin Scalia noted in his dissent in *Lawrence v. Texas*, 539 U.S. 558, 601, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." (Scalia, J., dissenting (quoting *id.* at 585 (O'Connor, J., concurring)). As much as the plurality would like to deny the discriminatory impact of its decision to uphold an unconstitutional law, that is the plurality's result.

opposite-sex parents--I would hold that there is no rational basis for denying same-sex couples the right to marry.

I would hold further that the right to marry the person of one's choice is a fundamental right, the denial of which has historically received heightened scrutiny. It is error to artificially limit the inquiry, as the plurality and concurrence do, to whether there is a fundamental right to same-sex marriage.[3] It is equally incorrect to limit the definition of the right to marry to the right to marry a person of the opposite sex. Because the Defense of Marriage Act's (DOMA's) denial of the right to marry to same-sex couples is not rationally related to any asserted state interest, it is also not narrowly tailored to any compelling state interest.

Therefore, for both of these reasons, I would affirm the two trial courts in declaring RCW 26.04.010(1) and .020(1)(c) unconstitutional. The plurality uses the excuse of deference to the legislature to perpetuate the existence of an unconstitutional and unjust law. I dissent.

[3] The plurality and concurrence also incorrectly assert that by analyzing whether the fundamental right to marry extends to a class of individuals to whom it historically has been denied that I am somehow creating a new fundamental right. *See* plurality at 32; concurrence at 23-24. United States Supreme Court precedent has taught us again and again that framing the inquiry into a constitutional right in such a narrow way misunderstands and undermines the value of the right at stake. *See, e.g., Lawrence*, 539 U.S. at 567 (overruling a previous Supreme Court decision that framed the liberty interest in sexual privacy as whether there was a fundamental right to homosexual sodomy, which disclosed that Court's "failure to appreciate the extent of the liberty at stake.").

ANALYSIS

Marriage is a right "older than the Bill of Rights--older than our political parties, older than our school system." *Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). "Without question, civil marriage enhances the 'welfare of the community.' It is a 'social institution of the highest importance.'" *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 322, 798 N.E.2d 941 (2003) (quoting *French v. McAnarney*, 290 Mass. 544, 546, 195 N.E. 714 (1935)).

Civil marriage is a legal status given to individuals who seek the State's recognition of their committed relationships.[4] *See Wash. Statewide Org. of Stepparents v. Smith*, 85 Wn.2d 564, 568-69, 536 P.2d 1202 (1975); *In re Marriage of J.T.*, 77 Wn. App. 361, 363, 891 P.2d 729 (1995). This legal status is accompanied by numerous legal, social, and financial benefits and obligations, many of which cannot be secured outside of marriage.[5] Indeed the *Andersen*

[4] What is at issue here is solely civil marriage defined by RCW 26.04.010(1) as a "civil contract." Granting same-sex couples the right to marry has no effect upon religious recognition of marriage or who is entitled to that recognition.

[5] The trial court opinion in *Andersen* lists "but a few" examples of such rights and responsibilities afforded to married persons and the statutes in which they reside: rights to property and income under the community property laws (chapter 26.16 RCW); the right to inherit property (chapters 11.04 and 11.28 RCW); court oversight into dissolution of the relationship and equitable distribution of assets, as well as protection of the best interests of the children involved (chapter 26.09 RCW); benefits in the employment arena, such as renewing a deceased spouse's commercial fishing license (chapter 77.65 RCW), health care services (chapter 48.44 RCW), retirement benefits (chapter 41.40 RCW), and state taxes (chapter 82.45

respondents reference 423 state statutes that grant rights or impose duties based in part on marital status. Br. of Resp'ts at 26.

There is no substitute for the legal protections provided by the State to married couples and their families. There is no equally respected social union. Nor is there a comparable public acknowledgment of a couple's decision to commit their lives to each other.

But, in 1996, in response to Hawaii's conclusion in *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993), that denial of marriage licenses to same-sex couples was gender discrimination,[6] the United States Congress passed the Defense of Marriage Act (federal DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996).[7] The federal DOMA defined marriage as being only between a man and a woman and allowed states to refuse to recognize same-sex marriages authorized in other places.[8] *Id.* In

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RCW); the right to bring wrongful death actions on behalf of one's spouse (chapter 4.20 RCW); and the right to assert the spousal testimonial privilege (chapter 5.60.060 RCW). *See* CP (*Andersen*) at 881.

[6] H.R. Rep. No. 104-664, at *2, *4-6 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906, 2908-10.

[7] The federal DOMA, codified at 28 U.S.C. § 1738C, provides that:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

And at 1 U.S.C. § 7, defines "'marriage'" as "a legal union between one man and one woman as husband and wife" and "spouse" as "a person of the opposite sex who is a husband or a wife."

[8] Among other justifications for denying same-sex couples the right to marry was moral disapproval: "Civil laws that permit only heterosexual marriage reflect and honor a collective

1998, Washington followed suit, explicitly referencing the federal DOMA and enacting its own DOMA. LAWS OF 1998, ch. 1.[9] Laws of 1998, chapter 1, section 2(1) states that "[i]t 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." Section 2(2) then recognized *Singer v. Hara*, 11 Wn. App. 247, 522 P.2d 1187 (1974), where the Court of Appeals held that the Washington marriage statute did not allow same-sex marriage and that the 1972 Equal Rights Amendment (ERA) to the Washington Constitution, article XXXI, section 1, did not require it, and stated the legislature's intent to codify *Singer*. Further, that section explicitly "establish[ed] public policy against same-sex marriage in statutory law that clearly and definitively declares same-sex marriages will not be recognized in Washington."[10] LAWS OF 1998 ch. 1, § 2(2).

To that end, DOMA amended RCW 26.04.010(1) to define marriage as "a civil contract *between a male and a female* who have each attained the age of

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moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." H.R. Rep. No. 104-664, at *15-16, *reprinted in* 1996 U.S.C.C.A.N. 2919-20 (footnote omitted).

[9] DOMA was codified in and amended RCW 26.04.010 and .020.

[10] "It is clear that there is no question of legislative intent. . . . The legislature's intent is to prohibit same-sex marriage as contrary to our civil law." CP (*Castle*) at 96.

eighteen years, and who are otherwise capable." (emphasis added). Then, amending RCW 26.04.020, DOMA explicitly *prohibited* marriage between parties "other than a male and a female"--*i.e*., same-sex couples. Thus, DOMA "defends" and "protects" marriage from an entire class of people, homosexuals. RCW 26.04.020(1)(c).

Respondents argue that denial of their right to marry violates several provisions of the Washington Constitution: (1) article I, section 12, the privileges and immunities clause; (2) article I, section 7, the private affairs clause; (3) article I, section 3, the due process clause; and (4) article XXXI, section 1, the ERA. The plurality analyzes each argument in turn and concludes that no independent state constitutional analysis is appropriate, no heightened scrutiny is justified under any of respondents' arguments, and that DOMA's denial of the right to marry to same-sex couples is rationally related to the State's interests in encouraging procreation, marriage for individuals in relationships that result in children, and the raising of children in homes headed by opposite-sex parents.

By doing so, the plurality shirks its responsibility to the people of this state to enforce the rule of law embodied in our constitution and to uphold the fundamental principles of justice. *See* CONST. art. IV, § 1. Although not explicit, our state's constitution establishes a framework for the separation of powers. *See*

CONST. art. II ("Legislative Department"); CONST. art. III ("The Executive"); CONST. art. IV ("The Judiciary"). However, the doctrine of separation of powers is also complemented and modified by the theory of checks and balances. *See In re Salary of the Juvenile Dir.*, 87 Wn.2d 232, 238, 552 P.2d 163 (1976). While it is the legislature's duty to make public policy decisions and enact laws, when the legislature enacts a law violative of our state's constitutional guaranties this court can *and must* invalidate the law.[11] *See State v. Wheeler*, 145 Wn.2d 116, 132, 34 P.3d 799 (2001) (Sanders, J., dissenting) ("'[W]e must never forget that it is a *constitution* we are expounding,' and it is the protection of the constitutional rights of the litigants before us which is our ultimate responsibility. The Constitution speaks the language of principle. And so must we." (quoting *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 407, 4 L. Ed. 579 (1819)).

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[11]The powers of the legislature are defined, and limited ; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . . It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it ; or, that the legislature may alter the constitution by an ordinary act.

. . . .

[A]n act of the legislature, repugnant to the constitution, is void.

Marbury v. Madison, 5 U.S. 137 (1 Cranch), 176-77, 2 L. Ed. 60 (1803); *see also Wash. State Labor Council v. Reed*, 149 Wn.2d 48, 62, 65 P.3d 1203 (2003) (Alexander, C.J.) ("The ultimate power to interpret, construe, and enforce the constitution of this state belongs to the judiciary. . . . This is so even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch.") (citations omitted).

As our nation's history reflects, it is often left to the judicial branch to ensure acts of our legislature or the executive are not violative of the constitutional rights of the people. *See*, *e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (holding that segregation in public schools on the basis of race violated the federal constitution's equal protection guaranty); *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (holding Virginia's antimiscegenation statutes violated federal equal protection and due process guaranties); *Lawrence v. Texas,* 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (holding Texas' sodomy statute violated due process guaranties). This task is not one undertaken lightly, nor easily completed, but it is our task.

A. Denying same-sex couples the right to marry fails rational basis review

The challenged statutes do not rationally relate to nor further any legitimate governmental interest. DOMA creates a class-based distinction which grants opposite-sex couples certain and substantial "privileges" while explicitly denying those same privileges to same-sex couples.[12] *See* CONST. art. I, § 12 ("No law shall be passed granting to any citizen, class of citizens, or corporation other than

[12] For the purposes of the analysis here, I assume, like the plurality, that article I, section 12 of the Washington Constitution does not give greater protection than the federal equal protection clause in this situation. *See Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 806-10, 83 P.3d 419 (2004) (*Grant County* II). Although I would not foreclose the possibility that article I, section 12 provides greater protection, I do not reach the issue because I would hold that DOMA fails even rational basis review.

municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.").[13] The privileges and immunities clause, like the federal constitution's equal protection counterpart, requires that similarly situated persons receive like treatment--a statute may not grant a privilege to one class of persons that is denied to another class.[14] *See State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996). For the purposes of article I, section 12, privileges are "those fundamental rights which belong to the citizens of the state by reason of [their state] citizenship." *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902).

A statutory classification must have a rational basis. Under rational basis review, the classification "must be rationally related to a legitimate state interest, and will be upheld unless the classification rests on grounds wholly irrelevant to the achievement of a legitimate state objective." *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998); *see also Manussier*, 129 Wn.2d at 673. However, a "reasonable ground must exist for making a distinction between

[13] Respondents also argue that denial of the right to marry arbitrarily violates their substantive due process right to liberty. The same rational basis analysis applies to the same-sex couples' due process claims. Because DOMA fails rational basis review under the privileges and immunities clause, it also fails rational basis review under the due process clause.

[14] "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'" *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S. Ct. 1064, 30 L. Ed. 220 (1886)).

those who fall within the class and those who do not." *State ex rel. Bacich v. Huse*, 187 Wash. 75, 80, 59 P.2d 1101 (1936). "The search for the link between classification and objective gives substance to the Equal Protection Clause." *Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). Finding this link, or rational basis, ensures that "classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id*. at 633.[15]

Despite the deference afforded to the legislature, the rational basis standard is not without teeth--"the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional."[16] *DeYoung*, 136 Wn.2d at 144. Moreover, this court tends to afford more deference to the legislature when considering economic statutes than it does when considering regulations curtailing personal civil liberties. *Yakima County Deputy Sheriff's*

[15] The requirement that a classification have a rational basis dictates that the issue in this case be framed as whether the *exclusion* of same-sex couples from civil marriage is rationally related to a legitimate interest. The privileges and immunities clause of the Washington Constitution and the equal protection clause of the federal Constitution require that this court make this inquiry, otherwise this court would not be able to determine if the classification was drawn for the purpose of disadvantaging Washington's gay and lesbian citizens. This court must determine whether allowing opposite-sex couples *and not same-sex couples* to marry furthers a legitimate interest, not merely whether allowing opposite-sex couples to marry furthers a legitimate interest.

[16] The plurality focuses too greatly on the deference afforded by rational basis review and in doing so, conducts no real analysis at all. "Read the constitution, and read it once again, I find no textual support for the proposition that a usurping legislature may impose an unconstitutional, yet 'doubtful,' legislative act beyond the remedy of judicial review." *Island County v. Washington*, 135 Wn.2d 141, 156, 955 P.2d 377 (1998) (Sanders, J., concurring).

Ass'n v. Bd. of Commr's, 92 Wn.2d 831, 839, 601 P.2d 936 (1979) (Utter, CJ., concurring); *see also Lawrence*, 539 U.S. at 579-80 (O'Connor, J., concurring). However, we have not been afraid to declare even economic statutes unconstitutional under rational basis review.[17]

Especially relevant here is *DeYoung*, where we considered an eight-year statute of repose for medical malpractice actions, which the State opined was rationally related to protecting insurance companies. 136 Wn.2d at 147. We reasoned that although a rational basis can be based on unsupported speculation, "the relationship of a classification to its goal must not be so attenuated as to render the distinction arbitrary or irrational." *Id.* at 149. We then concluded that because the statute could reduce insurance claims by only 0.2 percent, the

[17] *See e.g., Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 741-42, 57 P.3d 611 (2002) (blanketly rejecting every proposed rational basis for a statutory bar to disbursing industrial insurance permanent partial disability benefits to prisoners without statutory beneficiaries who were unlikely to be released from prison); *In re Det. of Brooks*, 145 Wn.2d 275, 292, 36 P.3d 1034 (2001) (holding that preventing the subject of a commitment petition from presenting evidence of less restrictive alternatives to confinement until after commitment trial bears no rational relationship to the state's interest in public safety), *overruled in part by In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003); *DeYoung*, 136 Wn.2d at 147-50 (concluding that an eight-year statute of repose for medical malpractice claims was not rationally related to the State's interest in protecting insurance companies because the statute would only reduce insurance claims by 0.2 percent, a relationship that was "too attenuated"); *Hunter v. N. Mason High Sch.*, 85 Wn.2d 810, 818-19, 539 P.2d 845 (1975) (holding that nonclaim statutes requiring victims of governmental torts to give notice of their claims within a short period after they arise bear no rational relationship to the legislature's goals of ensuring that large governmental institutions are notified of claims or facilitating governmental institution's budget planning); *see also State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501 (1999); *Simpson v. State*, 26 Wn. App. 687, 695, 615 P.2d 1297 (1980).

relationship between the statute and the goal of protecting insurance companies was *too attenuated* and the statute was thus without a rational basis. *Id.* at 149-50.

The plurality here attempts to minimize and distinguish away this court's analysis in *DeYoung* by pointing out that in that case, evidence "affirmatively showed that the challenged legislation could not rationally be thought to have furthered the identified legislative interests." Plurality at 34 n.13. But that conclusion in *DeYoung* is not the basis to *distinguish* it from this case. Rather, it supports holding *similarly* here--that the statutory denial of the right to marry to same-sex couples cannot rationally further the proffered state interests. The relationship between the denial of the right to marry to same-sex couples and the purported state interests is simply *too attenuated* to be rational. Contrary to the plurality's conclusion, *DeYoung* supports and demands that this court declare DOMA, which curtails civil liberties and demands even more scrutiny, unconstitutional.

In a sweeping motion, the plurality accepts as legitimate the interests the State puts forth for denying same-sex couples the right to marry--encouraging procreation, encouraging marriage for individuals in relationships that result in children, and encouraging the raising of children in homes headed by opposite-sex

parents.[18] Plurality at 38-39, 41-42, 48. Even if we accept the proffered interests as legitimate, the plurality and the State fail to address or explain the issue this case raises, that is, how those interests are furthered by *denying* same-sex couples the right that heterosexual couples already enjoy.[19] That failure is in part due to the plurality's incorrect framing of the issue.

Contrary to the plurality's discussion, this case does *not* present the issue of whether allowing *opposite-sex couples* the right to marry is rationally related to the State's supposed interests in encouraging procreation, marriage for relationships that result in children, and traditional child rearing. Undoubtedly, state-sanctioned, opposite-sex marriage has a conceivable rational basis--some opposite-sex couples

[18] It is far from clear that those goals are legitimate state interests to begin with, but because I find that DOMA is not rationally related to any proffered state interest, I do not dissect them.

[19] The *only* rational basis the plurality proposes to support *denying* same-sex couples the right to marry is "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." Plurality at 39. Although the meaning of that statement is unclear, the plurality appears willing to deny same-sex couples the right to marry because there are often third parties involved in conceiving children, which creates conflicting and confusing rights and relationships. But infertile opposite-sex couples also involve third parties in conceiving or adopting children, and yet they are still allowed (and apparently encouraged) to marry. Additionally, this court's recent decision in *In re Parentage of L.B.,* concluding that a lesbian mother who was biologically unrelated to her child could establish *de facto* parent status undercuts this reasoning. 155 Wn.2d 679, 711-12, 122 P.3d 161 (2005).

Furthermore, denying same-sex couples the right to marry does not make resolving individuals' conflicting parental rights and obligations easier. If anything, denying same-sex parents the right to marry would seem to make resolving parental rights and obligations more difficult. This reason certainly is not a rational basis for denying same-sex couples the right to marry.

can procreate, and the State may have a legitimate interest in encouraging procreation and family stability by allowing such couples to marry.

But DOMA in *no way* affects the right of opposite-sex couples to marry--the *only* intent and effect of DOMA was to explicitly deny same-sex couples the right to marry. Therefore, the question we are called upon to ask and answer here, which the plurality fails to do, is how *excluding* committed same-sex couples from the rights of civil marriage furthers any of the interests that the State has put forth.[20] Or, put another way, would giving same-sex couples the same right that opposite-sex couples enjoy injure the State's interest in procreation and healthy child rearing?

These inquiries do not constitute heightened scrutiny, nor do they investigate overinclusiveness and underinclusiveness. This is rational basis review, as this court has conducted before but, for reasons entirely unclear, refuses to do so now. Overinclusiveness and underinclusiveness analysis first presumes that a rational relationship exists between the undeniably discriminatory statute and a legitimate state interest. The State has failed to articulate how the exclusion of same-sex couples from the right to marry is rationally related to any legitimate interests.

[20] The trial court in *Andersen* poignantly defined the issue here as "whether barring committed same-sex couples from the benefits of the civil marriage laws somehow serves the interest of encouraging procreation." CP (*Andersen*) at 894.

Analyzing each proffered state interest in turn, it becomes clear that not one is furthered by denying same-sex couples the right to marry. First, the plurality identifies encouraging procreation as a legitimate state interest. Plurality at 38-39. But there is no logical way that *denying* the right to marry to same-sex couples will *encourage* heterosexual couples to procreate with greater frequency. Second, the plurality points to encouraging marriage for relationships that result in children as a valid state interest. *Id*. But denying same-sex couples the right to marry also will not encourage couples who have children to marry or to stay married for the benefit of their children. Finally, the plurality declares that DOMA may be rationally related to the State's interest in encouraging the raising of children in homes headed by opposite-sex couples. Plurality at 39. Even if such a goal is valid, which seems unlikely, denying same-sex couples the right to marry has no hope of increasing such child rearing. The denial of the right to marry to an entire class of persons is completely unrelated to the proffered state interests. Thus, DOMA is not merely underinclusive and/or overinclusive, it is wholly irrational.

DOMA does not further the asserted interests because, despite DOMA's intent to "defend" marriage, the exclusionary language in RCW 26.04.010(1) does not lend the institution of marriage its power. Rather, marriage draws its strength from the nature of the civil marriage contract itself and the recognition of that

contract by the State. The civil contract and its subsequent recognition are what further the State's asserted interests in procreation, marriage for individuals in relationships that result in children, and child rearing in households headed by opposite-sex parents. The respondents in these cases do not challenge the existence of civil marriage contracts for opposite-sex couples or the recognition of those contracts by the State but, instead, challenge their exclusion from the ability to form those contracts and to have them recognized.

Rather than furthering legitimate interests, denial of the right to marry *will* certainly *harm* children of same-sex couples, couples to whom the State has given its blessing to adopt or beget children through artificial means, but upon whom the State has turned its back once those children are integrated into their families. It is those children who actually do and will continue to suffer by denying their parents the right to marry. *Accord Goodridge*, 440 Mass. at 335 ("Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of 'a stable family structure in which children will be reared, educated, and socialized.'" (quoting *id.* at 381 (Cordy, J., dissenting))); *Baker v. State*, 170 Vt. 194, 744 A.2d 864, 882 (1999) ("If anything, the exclusion of same-sex couples from the legal protections incident

to marriage exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against." (emphasis added)). In that way, DOMA degrades the interests asserted by the State rather than furthers them. That degradation discerns an even greater attenuation between the statute and its goals than was the 0.2 percent relationship in *DeYoung*, which this court concluded was irrational. The relationship is simply *too attenuated*. Thus, DOMA fails rational basis review and violates article I, section 12 of the Washington Constitution.[21]

Having determined there is no rational basis for denying same-sex couples the right to marry, I conclude that DOMA was motivated solely by animus toward homosexuals. When no rational basis supports a discriminatory statute, this court may presume that the statute is motivated by animus. *See Romer*, 517 U.S. at 632-

[21] This reasoning accords with that of other state courts that have found no rational relationship between denial of the right to marry to same-sex couples and any legitimate state interest. *See, e.g., Goodridge*, 440 Mass. at 341 ("The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual."); *Baker*, 744 A.2d at 886 ("[W]e conclude that none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law."); *In re Coordination Proceeding, Special Title [Rule 1550(c)], Marriage Cases*, No. 4365, 2005 WL 583129, at *2 (Cal. Super. Ct. Mar. 14, 2005) (unpublished order) (concluding that state statutes defining marriage to be between a man and a woman violated equal protection under either a rational basis or strict scrutiny analysis); *People v. Greenleaf*, 5 Misc. 3d 337, 780 N.Y.S.2d 899, 901 (Just. Ct. 2004) ("I find that 'tradition' is not a legitimate state interest, and that prohibiting same-sex couples from marrying is not rationally related to furthering the state's legitimate interest in providing a favorable environment for procreation and child-rearing."); *People v. West*, 4 Misc. 3d 605, 780 N.Y.S.2d 723, 725 (2004).

35 (holding that a constitutional amendment to the Colorado Constitution that made antidiscrimination laws protecting homosexuals unconstitutional raised "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected" and was a "status-based enactment divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests."). Animus is per se irrational and cannot support a statutory classification. *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973) (holding that a statutory classification limiting participation in the Food Stamp Act to households composed of related individuals could not be sustained by legislative history indicating that the classification was intended to prevent "hippies" from participating); *Miguel v. Guess*, 112 Wn. App. 536, 553, 51 P.3d 89 (2002) ("A discriminatory classification that is based on prejudice or bias is not rational as a matter of law."), *review denied,* 148 Wn.2d 1019, 64 P.3d 650 (2003).

Therefore, I would hold that DOMA's arbitrary denial of privileges associated with the right to marry to same-sex couples as a class violates article I, section 12 of the Washington Constitution and affirm the two trial courts.

B. DOMA also fails the heightened scrutiny associated with interference with the fundamental right to marry

If a statutory classification interferes with a fundamental right, then the statutory classification must be narrowly tailored to effectuate a compelling state interest. *Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978); *Manussier*, 129 Wn.2d at 672-73. Fundamental rights are those deeply rooted in history and tradition and implicit in the concept of ordered liberty.[22] *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

> Due process has not been reduced to any formula ; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.

Poe v. Ullman, 367 U.S. 497, 542, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961) (Harlan, J., dissenting).

[22] "[T]he concept is a living one, that it guarantees basic rights, not because they have become petrified as of any one time, but because due process follows the advancing standards of a free society as to what is deemed reasonable and right." *Poe v. Ullman*, 367 U.S. 497, 518 n.9, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961) (Douglas, J., dissenting).

It is indisputable that marriage is a fundamental right. "Marriage is . . . something more than a civil contract subject to regulation by the state ; it is a fundamental right of *free men*." *Perez v. Sharp*, 32 Cal. 2d 711, 714, 198 P.2d 17 (1948) (emphasis added). The right to marry has been recognized as fundamental by both state and federal courts. *See, e.g., Turner v. Safley*, 482 U.S. 78, 94-99, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); *Boddie v. Connecticut,* 401 U.S. 371, 383, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971) (describing marriage as a fundamental *human* relationship); *Zablocki*, 434 U.S. at 384 ("[T]he right to marry is of fundamental importance *for all individuals.*" (emphasis added)); *Loving,* 388 U.S. at 12 ("The Fourteenth Amendment requires that the *freedom of choice to marry* not be restricted by invidious racial discriminations." (emphasis added)); *Griswold*, 381 U.S. at 485-86; *Maynard v. Hill*, 125 U.S. 190, 205, 211, 8 S. Ct. 723, 31 L. Ed. 654 (1888) (characterizing marriage as "the most important relation in life" and the "foundation of the family and of society, without which there would be neither civilization nor progress."); *Davis v. Dep't of Employment Sec.*, 108 Wn.2d 272, 280, 737 P.2d 1262 (1987) ("The right to marry is fundamental."); *Levinson v. Wash. Horse Racing Comm'n*, 48 Wn. App. 822, 824, 740 P.2d 898 (1987) ("The right to marry is a fundamental constitutional right.").

The plurality admits that courts have historically recognized a fundamental right to marry, but holds that that right extends only to individuals wishing to marry a partner of the opposite sex. Plurality at 30-31.[23] In its analysis, the plurality asks whether history and tradition support a fundamental right to "same-sex marriage," and concludes that it does not--"[t]he 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." Plurality at 32. The circularity of this reasoning reveals its fatal flaw: our history necessarily cannot include a right to same-sex marriage when that right historically has been denied.[24]

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[23] The concurrence takes this argument one step further and argues that the "United States Supreme Court has directly rejected the argument that a fundamental right to marry extends to same-sex unions" by citing *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). Concurrence at 24. It goes without saying that the Supreme Court's dismissal "for want of substantial federal question" does not settle the substantive issues of a case and does not stand for the proposition that the concurrence asserts. *Baker*, 409 U.S. 810.

Additionally, the concurrence implies that the Court also settled the issue in *Lawrence*. Concurrence at 24-25. However, the *Lawrence* majority only acknowledged that that case did not present the issue of "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578. Similarly, Justice Sandra Day O'Connor's statement in her concurrence that "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group" was mere dicta and did not address whether those interests were rationally related to any law. *Id*. at 585 (O'Connor, J., concurring). Thus, neither of the cases cited by the concurrence guides this court's determination.

[24] An Alaska superior court declaring that the fundamental right to marry extends to same-sex couples discussed the error of too narrowly defining the right at stake:

> When the Supreme Court of Hawaii in Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (Hawaii 1993), addressed same-sex marriage, it noted that:

By defining the right at issue so narrowly, the plurality departs from the Supreme Court's analysis of governmental intrusions on fundamental rights where it has been careful to broadly define the right at hand. For example, in *Meyer v. Nebraska*, 262 U.S. 390, 399-403, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), and *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), the Court considered whether there was a fundamental right to decisions in educating one's children, *not* whether there was a fundamental right to have your children learn German or attend a private school. Likewise, in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 536, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942), the Court asked whether there was a fundamental right to be free from unwarranted government intrusion into decisions whether to have children, *not* whether a convicted criminal had a fundamental right to reproduce. In *Zablocki*, 434 U.S. at 383, and *Turner*, 482 U.S. at 95-96, the Court considered whether there was a fundamental right to be free from unwarranted governmental intrusion in decisions

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> "[W]e do not believe that a right to same sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . 852 P.2d at 57."
> The Hawaii court could reach such a conclusion because of the question it chose to ask. It is self-evident that same-sex marriage is not "accepted" or "rooted in the traditions and collective conscience" of the people. Were this not the case, Brause and Dugan and the plaintiffs in Baehr would not have had to file complaints seeking precisely this right.

Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *4 (unpublished order) (Alaska Super. Ct. Feb. 27, 1998).

to marry, *not* whether delinquent fathers or inmates had a fundamental right to marry. Perhaps most relevant and important here, in *Loving*, the Court asked whether there was a fundamental right to marry, *not* whether there was a fundamental right to interracial marriage. *Loving*, 388 U.S. at 12.

In *Lawrence* the Supreme Court recently again recognized the importance of broadly defining the right at issue. 539 U.S. at 566-67. The *Lawrence* Court corrected the error that it made in *Bowers v. Hardwick*, of too narrowly defining the implicated right. *Bowers v. Hardwick,* 478 U.S. 186, 190, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), *overruled by Lawrence,* 539 U.S. at 558 (2003). The plurality here makes the same error as the *Bowers* Court of too narrowly defining the implicated right.

In *Bowers*, the Court asked "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." 478 U.S. at 190. In its analysis of that issue, the Court scorned the Eleventh Circuit Court of Appeals for construing the Constitution "to confer a right of privacy that extends to homosexual sodomy." *Id.* The Court reasoned that none of the privacy cases, which dealt with decisions in child rearing and education, family relationships, procreation, marriage, contraception, and abortion, concerned rights resembling a right to homosexual sodomy. *Id.* at 190-91. The Court went on to explain that the

right to homosexual sodomy was neither "'implicit in the concept of ordered liberty'" nor "'deeply rooted in this Nation's history and tradition.'" *Id.* at 191-92 (quoting *Moore v. East Cleveland,* 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977)).

But in *Lawrence*, the Supreme Court recognized that its contrived framing of the issue in *Bowers* was a "failure to appreciate the extent of the liberty at stake."[25] *Lawrence*, 539 U.S. at 566-67. "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Id.* at 567. Thus, the Court reframed its look at history and tradition and concluded there was "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 572.

Rather than learning from the embarrassments of history, the plurality instead repeats the same transgressions. By narrowly redefining the right at stake,

[25] The dissenting opinions in *Bowers* foreshadowed that conclusion. *See, e.g., Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) ("This case is no more about 'a fundamental right to engage in homosexual sodomy,' as the Court purports to declare, . . . than *Stanley v. Georgia*, 394 U.S. 557[, 89 S. Ct. 1243, 22 L. Ed. 2d 542] (1969), was about a fundamental right to watch obscene movies, or *Katz v. United States*, 389 U.S. 347[, 88 S. Ct. 507, 19 L. Ed. 2d 576] (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'" (quoting *Olmstead v. United States*, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting)).

the plurality makes the same analytical error that the Supreme Court repeatedly has declared incorrect. Instead of considering government intrusion on the fundamental right to marry, the plurality considers the existence of a fundamental right to same-sex marriage, which necessarily is unsupported by our history and tradition. *See Lawrence*, 539 U.S. at 574; plurality at 26-29, 31-32. But this case is no more about the fundamental right to same-sex marriage than *Bowers* was about the fundamental right to homosexual sodomy. *See Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting).

> Clearly, the right to choose one's life partner is quintessentially the kind of decision which our culture recognizes as personal and important. . . .
>
> The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions.

Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *4 (unpublished order) (Alaska Super. Ct. Feb. 27, 1998). By asking whether there is a fundamental right to same-sex marriage, the plurality fails "to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567.

The plurality's conclusion that there is only a right to marry a person of the opposite sex also contradicts the broad application of the right to marry by the Supreme Court as well as other courts. Contrary to the plurality's interpretation

here, those cases support a broad right to marry *the person of one's choice*. Over 50 years ago, long before the Supreme Court declared bans on interracial marriage unconstitutional in *Loving*, the Supreme Court of California held that "the right to marry is the right to join in marriage with the person of one's choice . . . restrict[ing] the scope of his choice . . . thereby restricts his right to marry." *Perez*, 32 Cal. 2d at 715 (holding that an antimiscegenation statute unjustifiably impaired the fundamental right to marry, not the fundamental right to interracial marriage).

In *Loving*, decided in 1967, the Supreme Court made it clear that the right to marry included the right to marry the person of one's choice, not the person of one's choice *within a class of people that society thought should intermarry* or even who had historically done so. *Loving*, 388 U.S. at 12. The Court did not analyze the right to interracial marriage, but instead discussed marriage generally, as "one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.* (quoting *Skinner*, 316 U.S. at 541). The Court concluded that "the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Id.* Notably, this court has itself characterized *Loving* as protecting individuals' "ability to marry the *person of their*

choosing." *Bremerton v. Widell*, 146 Wn.2d 561, 580, 51 P.3d 733 (2002) (Madsen, J.) (emphasis added).[26]

The Supreme Court later noted that its opinion in *Loving* "could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause. But the Court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry." *Zablocki*, 434 U.S. at 383 (citing *Loving*, 388 U.S. at 11-12). The *Zablocki* Court restated the *Loving* Court's depiction of the right at issue--"'one of the '"basic civil rights of man"'" (quoting *Loving,* 388 U.S. at 12 (quoting *Skinner,* 316 U.S. at 514))--and declared the right to marry to be "of fundamental importance for all individuals." *Zablocki,* 434 U.S. at 383-84.

In *Turner*, decided in 1987, the Supreme Court expanded the right to marry the person of one's choice by making clear that marriage is not solely about procreation and therefore should not be limited to couples that can procreate.[27] Its

[26] Despite the plurality's and concurrence's suggestions to the contrary, neither this court nor the United States Supreme Court has ever described this right as the right to choose to marry a person of the opposite sex. Plurality at 32 ("Federal decisions have found the fundamental right to marry at issue only where opposite-sex marriage was involved."); concurrence at 23 ("Every United States Supreme Court decision concerning the right to marry has assumed marriage as the union of one man and one woman.").

[27] Even if the right to marry is somehow linked to fundamental rights of procreation, childbirth, and child rearing, as the plurality espouses, that link cannot be a basis to deny the right to marry to same-sex couples because we allow them to adopt and rear children. The same liberty and privacy interests historically recognized in decision making pertaining to the family is at stake here.

reasoning is particularly instructive here. In declaring that the fundamental right to marry extended to inmates, the Court reasoned that "inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship." *Turner*, 482 U.S. at 95-96. Moreover, "marital status often is a pre-condition to the receipt of government benefits . . . . These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement" or by inability to independently procreate. *Id.* at 96. Thus, the Court focused on the support, commitment, and spirituality behind marriage, as well as the government benefits and property rights associated therewith, rather than a capacity to procreate in concluding that the right to marry extended to inmates. Likewise, the Massachusetts Supreme Judicial Court recently declared 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.

It is at least erroneous, if not disingenuous, for the plurality to read the Supreme Court's repeated recognition of the fundamental right to marry as only a means to further the fundamental right to procreate. Plurality at 29-31. Rather, the Court has established that "the right to marry is part of the fundamental 'right of

privacy' implicit in the Fourteenth Amendment's Due Process Clause." *Zablocki*, 434 U.S. at 384. In *Skinner*, another case cited by the plurality, the court stated that "[m]arriage and procreation are fundamental to the very existence and survival of the race," but did not necessarily link one to the other. 316 U.S. at 541. In *Loving*, the third case cited by the plurality, it is less than clear that the Court was only referring to procreation when it noted that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." 388 U.S. at 12 (quoting *Skinner,* 316 U.S. at 541). Any reference to procreation is also glaringly absent in the court's earlier observation that, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id*.

Moreover, one of the Supreme Court's most noted opinions for describing the importance of the right to marry held that the right of marital privacy included the right *not* to conceive children and overturned a state's ban on contraceptives. *Griswold*, 381 U.S. at 486. In acknowledging the unique qualities that render marriage a fundamental right worth protecting, the *Griswold* court omitted any reference to procreation or even the gender of the spouses. "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a

harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Id*. As a result, I conclude that there is nothing inherent in the fundamental right to marry that would justify a law that excludes same-sex couples from also enjoying that right.

In addition to implicating the fundamental right to marry, Supreme Court precedent reveals that the liberty to construct and define one's own family is also at issue in this case. The Supreme Court has held that:

> Our law affords constitutional protection to personal *decisions* relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the *most intimate and personal choices* a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (emphasis added). Our Washington Constitution is *at least* as protective of our citizens' due process rights as the Fourteenth Amendment in this context.

This court cannot ignore that "freedom of personal choice in matters of marriage and family life is one of the liberties protected" by due process. *Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 639-40, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974). The Fourteenth Amendment precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and the

choice of one's intimate partner. *Lawrence,* 539 U.S. at 577-78. These most personal and intimate choices are at the heart of the right to privacy.

The Constitution protects individual privacy in personal decisions relating to marriage. *Lawrence,* 539 U.S. at 574; *see also Griswold,* 381 U.S. at 484-85 (whether or not to procreate); *Roe v. Wade,* 410 U.S. 113, 153, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (whether to bear a child); *Lawrence,* 539 U.S. at 578 (among consenting adults, with whom to engage in sexual conduct); *Cruzan v. Dir., Mo. Dep't of Health,* 497 U.S. 261, 278-79, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990) (whether to refuse medical treatment). No choice could be more private, and indeed fundamental, than the choice of marital partner. As a result, this case falls at the intersection between the fundamental right to marry and the fundamental liberty interest in making one's own personal decisions relating to intimate partners. Therefore, this court must consider both the individual's liberty interest in choosing a marital partner as well as his or her right to marry.

Furthermore, "history and tradition" should not control us where that history and tradition merely reflect that a popular majority is willing to denigrate the rights of a minority group. The plurality repeatedly declares that the history and traditions of the United States and of the state of Washington do not support acceptance of same-sex marriage justifying a fundamental right to same-sex

marriage. *See, e.g.,* plurality at 27-28, 31-32. "'[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'" *Lawrence*, 539 U.S. at 572 (alteration in original) (quoting *County of Sacramento v. Lewis,* 523 U.S. 833, 857, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (Kennedy, J., concurring)). Although, as the plurality states, history and tradition might change, we need not wait for a popular majority to change its view. *See* plurality at 32. Those involved in writing the Fifth and Fourteenth Amendments "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence*, 539 U.S. at 579.

The plurality claims that the Supreme Court's consideration in *Loving* of bans on interracial marriage is distinct from our consideration of bans on same-sex marriage because "whatever the history and tradition of interracial marriage had been, by the time *Loving* was decided, it had changed." Plurality at 27. But how much had history and tradition really changed? In 1958, just nine years before *Loving*, a Gallop Poll showed that 96 percent of white Americans opposed interracial marriage between blacks and whites. Nicholas D. Kristof, *Marriage: Mix and Match*, N.Y. TIMES, Mar. 3, 2004, at A23. At the time the Supreme Court

held antimiscegenation statutes unconstitutional, 16 states still had them. *Loving*, 388 U.S. at 6 n.5. Even five years after *Loving*, in 1972, another Gallop Poll reported that 75 percent of all white Americans opposed interracial marriage between blacks and whites. Charlotte Astor, *Gallup Poll: Progress in Black/White Relations, But Race is Still an Issue*, Electronic J. U.S. Info. Agency, Aug. 1997, http://usinfo.state.gov/journals/itsv/0897/ijse/gallup.htm. Yet today we understand antimiscegenation laws to be pure ignorance, discrimination, and hate.

We should not have to go through the same painful process of waiting for popular opinion to catch up with the constitution to declare denial of the right to marry unconstitutional. It was not the change in popular perception that created a fundamental right to marry the person of one's choice or caused the Supreme Court to recognize that right in *Loving*. *See Perez*, 32 Cal. 2d at 736 (Carter, J., concurring) ("[T]he statutes now before us never were constitutional."). The fact that many states had repealed their antimiscegenation statutes at the time of *Loving* may have made the Court's decision less controversial, but the number of states with laws against interracial marriage was not the basis for the decision. If anything, antimiscegenation statutes and their demise in *Loving* should tell us that we should *not* rely solely on history to determine the extent of a fundamental right where historically that right has been denied. *See Goodridge*, 440 Mass. at 328

("As it did in *Perez* and *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination.").

Historical ignorance and discrimination cannot be used, as the plurality does, as an excuse for continued denial of the fundamental right to marry and the liberty interest in choosing an intimate partner. *See* plurality at 27 ("[T]here 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."). The plurality refuses to extend the fundamental right to marry to same-sex couples because "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."[28] Plurality at 32. But popular opinion cannot dictate our interpretation of the constitution--"[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736, 84 S. Ct. 1459, 12 L. Ed. 2d 632 (1964), *aff'd in part and vacated in part on other grounds,* 379 U.S. 693, 85 S. Ct. 715, 13 L. Ed. 2d 699 (1965). As

[28] Although I do not believe that this court's determination of whether DOMA is unconstitutional is dependent on whether there is a "societal commitment" to same-sex marriage (plurality at 32), there is evidence that attitudes toward same-sex marriage are shifting. Recent polls indicate that only a slim majority of Americans (51 percent) now oppose legalizing same-sex marriage, down from 63 percent in February 2004. Survey Report, *Less Opposition to Gay Marriage, Adoption and Military Service,* THE PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, Mar. 22, 2006, at 1, *available at* http://www.people-press.org.

the *Goodridge* court noted, "history cannot and does not foreclose the constitutional question." 440 Mass. at 320. "If the question whether a particular act or choice is protected as a fundamental right were answered only with reference to the past, liberty would be a prisoner of history." Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2689 (2004).

Based upon the historical recognition of the fundamental right to marry and the Supreme Court's continued broad protection of that right, I would hold that the fundamental right to marry extends to same-sex couples.[29] Indeed, "the right to marry means little if it does not include the right to marry the person of one's

[29] As this opinion clearly states, I reach this conclusion based on my reading of the United States Supreme Court's recognition of marriage as a fundamental right and the Washington Constitution's protection of that right through the privilege and immunities and due process clauses. Suggestions by the plurality and the concurrence that I reach this determination by "judicial fiat" or based on "personal views" are unsuccessful attempts to deflect attention from the discriminatory impact of unconstitutional statutes. Concurrence at 29; plurality at 3.

In so concluding, I join the other state courts that have held that the fundamental right to marry includes the right to choose a marriage partner of the same sex. *See, e.g., Goodridge*, 440 Mass. at 327-28; *Brause*, 1998 WL 88743, at *4-5 (asking whether freedom to choose one's life partner is so rooted in our history and traditions that it is a fundamental right, and concluding that "choice of a life partner is personal, intimate, and subject to the protection of the right to privacy" such that government intrusion into that right is subject to strict scrutiny). The plurality points to other courts that have come to the opposite conclusion. *See* plurality at 28. The plurality is correct that some jurisdictions have refused to extend the fundamental right to marry to same-sex couples, but they incorrectly imply that all courts recently considering the issue have done so--courts across the country and even within the same states are coming to different conclusions on these related issues. *See, e.g., Deane v. Conaway*, 2006 WL 148145 (Md. Cir. Ct. 2006) (holding that Maryland's marriage statute unconstitutionally discriminated on the basis of sex and was void) (unpublished opinion).

choice." *Goodridge*, 440 Mass. at 327-28. Because DOMA's denial of same-sex couples' right to marry is not rationally related to any legitimate state interest, it also necessarily cannot be narrowly tailored to effectuate a compelling state interest. Therefore, DOMA's denial of these 19 couples' fundamental right to marry arbitrarily denies them privileges associated with that right in violation of article I, section 12 of the Washington Constitution. Furthermore, DOMA's denial of their fundamental right to marry deprives them of liberty without due process in violation of article I, section 3 of the Washington Constitution.

Many individuals and organizations have prophesized the downfall of society as we know it if and when Washington recognizes that the fundamental right to marry extends to same-sex couples. *See, e.g.,* concurrence at 4 ("To declare [DOMA] unconstitutional would declare marriage as Washington citizens have always known it, unconstitutional."). If this court were to conclude that DOMA is unconstitutional, that decision would not declare the institution of civil marriage unconstitutional. Even without DOMA, opposite-sex couples would continue to marry, procreate, and parent, if they so choose, and continue to further the interests identified by the State. This fact alone underscores the lack of a rational relationship between DOMA and those identified interests.

Rather than altering marriage for opposite-sex couples, the changes that will transpire when this court deems DOMA unconstitutional will occur in the lives of the same-sex couples who seek legal recognition of their relationship through civil marriage. Same-sex couples will be allowed to marry and to partake of the more than 423 legal, social, and financial benefits and obligations that are currently denied to them because they cannot marry. By determining that DOMA wrongfully excludes these couples from enjoying the fundamental right of marriage, this court would only be performing its proper function of judicial review. "The history of constitutional law 'is the story of the extension of constitutional rights and protections to people once ignored or excluded.'" *Goodridge*, 440 Mass. at 339 (quoting *United States v. Virginia*, 518 U.S. 515, 557, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996)).

Debate has also ensued over what remedy this court should employ if it were to void DOMA. Both the *Andersen* and *Castle* plaintiffs request a declaratory judgment that RCW 26.04.010 and RCW 26.04.020(1)(c) are unconstitutional. Additionally, the *Andersen* plaintiffs specifically request that this court order King County to issue marriage licenses to the couples and affirm the trial court grant of this relief. CP (*Andersen*) at 907. If this court were to determine that DOMA is unconstitutional, that determination would not alter the status of marriage as a

fundamental right in the state of Washington unless the United States Supreme Court overrules itself. The mere fact that DOMA both codifies the right to marry and simultaneously restricts access to that fundamental right is not a sufficient reason to continue to uphold those statutes. *See*, *e.g.*, *Dunn v Blumstein*, 405 U.S. 330, 333, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972) (decision finding a section of the Tennessee Constitution and two Tennessee statutes unconstitutional because they granted the fundamental right to vote only to individuals residing in Tennessee for more than 12 months).

Although this court's determination that DOMA is unconstitutional would be a permissible check on the authority of the legislature, this court lacks the authority to rewrite this state's marriage statutes. *See* WASH. CONST. art. II, § 1; *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 69, 109 P.3d 405 (2005) ("We show greater respect for the legislature by preserving the legislature's fundamental role to rewrite the statute rather than undertaking that legislative task ourselves."). Therefore, this court should hold that DOMA is unconstitutional because the fundamental right to marry extends to same-sex couples but leave remedying the marriage statutes to the legislature.

CONCLUSION

Because DOMA unjustifiably denies the fundamental right to marry to Washington's gay and lesbian citizens, I would hold that it violates article I, section 12 and article I, section 3 of the Washington Constitution and affirm the

two trial courts.[30] Unfortunately, the plurality and concurrence are willing to turn a blind eye to DOMA's discrimination because a popular majority still favors that discrimination. "[W]e must be ever on our guard, lest we erect our prejudices into legal principles." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S. Ct. 371, 76 L. Ed. 747 (1932) (Brandeis, J., dissenting). I dissent.

AUTHOR:

Justice Mary E. Fairhurst

WE CONCUR:

Justice Tom Chambers

Justice Susan Owens

Justice Bobbe J. Bridge

[30] Because I would find DOMA unconstitutional on those two, independent bases, I do not address the applicability of article I, section 7 or the ERA, nor do I consider whether strict scrutiny is appropriate under article I, section 12 because respondents constitute a suspect class.