SUPERIOR COURT OF WASHINGTON
THURSTON COUNTY

CELIA CASTLE, *et. al.*	)	
	)	
Plaintiffs,	)	No. 04-2-00614-4
	)	
vs.	)	MEMORANDUM OPINION
	)	ON CONSTITUTIONALTIY
STATE OF WASHINGTON	)	RCW 26.02.010 AND
	)	RCW 26.02.020
Defendants.	)	
	)	

INTRODUCTION

The first constitutional principle is that under our form of government the supreme power belongs to the people who are to be governed.[1] This is particularly true in our state where our Legislature, our Executive and our Judiciary are each elected by the people. We elect three branches of one government and submit ourselves to their decisions. No one branch is the people. All branches taken together form one government: the community

[1] Constitution, Art. I, § 1.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

of the state of Washington. This case requires us to focus on who we are, and what we mean by community.

The essential principles that govern us[2] were set out in our Constitution adopted by the people in 1889.[3] Because the supreme power resides in the people they can amend the Constitution and they have done so from time to time.[4] In 1972 our Constitution was amended for the 61st time adding Article XXXI with two sections, providing in section one, "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." This is commonly referred to as *The Equal Rights Amendment*.

The power of the Legislature to pass laws, the power of the Executive to carry out the laws passed and the power of the Judiciary to compare the laws passed and the method of their being carried out to the Constitution, must each be in harmony with the Constitution. Every act of the Legislature is presumed to be constitutional and courts will not declare it invalid unless the constitutional violation is clear. A statute cannot be declared unconstitutional on any general theory of the statute being unjust,

[2] Constitution, Art I, § 2, adopts the Constitution of the United States as the supreme law of the land.
[3] The *Constitution* was preceded by the *Organic Act* in 1853 wherein the federal government organized a temporary government by the name of Territory of Washington. This original Act was itself later revised. The *Organic Act* was then followed by the *Enabling Act* enabling the Territory of Washington to become the state of Washington in 1889 and providing for a constitutional convention. This convention convened through 75 elected delegates who drafted the *Constitution*. Unfortunately most of the proceedings of those deliberations were lost though it is clear that there was a great distrust of the proposed legislature. Lebbeus J. Knapp, *The Origin of the Constitution of the State of Washington*, 4 Wash. Historical Q. 227, 251 (Oct. 1913). The people by general election ratified the *Constitution* on October 1, 1889 and in accordance with the *Enabling Act* Washington was admitted as a state into the union on November 11, 1989.
[4] Constitution, Art. XXIII. As of this writing there have been 94 amendments.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

oppressive, impolitic, or that it conflicts with the spirit of the Constitution. *Smith v. City of Seattle*, 25 Wash. 300, 307-308, 65 P. 612 (1901).

In 1996 the United States Congress passed the *Defense of Marriage Act*,[5] 28 U.S.C. § 1738C; 1 U.S.C. § 7, commonly referred to as the federal DOMA,[6] which provided that no state[7] is required to give effect to the proceedings in another state respecting a relationship between persons of the same sex that is treated as a marriage under the laws of that state.

Specifically referring to the federal DOMA, and adopting its possibilities, Washington, in 1998, adopted our state DOMA, 1998 ses. laws, chapter 1, amending RCW 26.04.010 and 020, and stating particularly that it was their legislative intent to codify *Singer v. Hara*, 11 Wn. App. 247, 522 P.2nd 1187 (Div. I., 1974), review denied, 84 Wn.2nd 1008 (1974), and prohibit civil marriage between same sex couples.

The Legislature's reaching back and incorporating the *Singer* case into their enactment raises more questions then any answer it may offer, since not only is the rationale of that case suspect,[8] but it was handed down at a time, and under facts, where simply the status of being a homosexual was by that fact alone sufficient to be terminated as a public school teacher. Such status alone was found to be sufficiently immoral that, without evidence of any overt or improper conduct whatsoever, merely this

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[5] There is federal legislation pending that would repeal this Act, 2003 Cong. US HR 2677, 108th CONGRESS, 1st Session.
[6] Pub. L. 104-199, Sept. 21, 1996, 110 Stat. 2419.
[7] The actual Act is more broad: "No State, territory, or possession of the United States or Indian Tribe…."
[8] *Baehr v. Lewin*, 74 Haw. 530, 571, 852 P.2nd 44 (1993), described *Singer's* analysis as "tortured and conclusory sophistry." *Baehr* also opined that *Singer's* rationale would have called for a strict scrutiny analysis under Equal Protection analysis.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

admission of being gay was all that was required to be fired. *Gaylord v. Tacoma Sch. Dist*. 10, 88 Wn.2nd 286, 559 P.2nd 1340, cert. denied, 434 U.S. 879 (1977).[9] The uncontroverted declarations filed in this case make it clear that such a status alone does not support such action today.[10] Today homosexuals openly hold many responsible positions in the community, including many that work with children.[11] The community has changed.

Nevertheless one thing is clear. It is clear that there is no question of legislative intent. No interpretation is required of RCW 26.04.010 and 020. The legislature's intent is to prohibit same-sex marriage as contrary to our civil law, regardless of any other basis, religious or societal, that may condone such civil unions.

This matter came before the court on a motion for summary judgment brought by the plaintiffs. The parties are in agreement that there are no

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[9] In the recent case of *Miguel v. Guess*, 112 Wn. App. 536, 51 P.3rd 89 (Div. III., 2002), Ms. Davis, an admitted lesbian, challenged her treatment by Dr. Charles Guess, medical director of Pullman Memorial Hospital. The Miguel court, page 553, cited *Romer v. Evans*, 517 U.S. 620, 633-634, 116 S. Ct. 1620, 134 L. Ed. 2nd 855 (1996), which struck down a Colorado State Constitution amendment which prohibited actions designed to protect person based on sexual orientation as violating the Equal Protection Clause of the United States Constitution, even on a rational basis standard – finding such action "status based" and divorced from legitimate state interests. Although the *Gaylord* case is not mentioned, the result is opposite the result in *Gaylord*.

[10] It must be strange to all those who research this issue that at the same time as *Gaylord,* in *Schuster v. Schuster*, 90 Wn.2nd 626, 585 P.2nd 130 (1978), our Supreme Court found no difficulty with lesbian mothers who wanted to live together after leaving their husbands taking their children with them to set up a same-sex couple home. This fact was not enough to entertain the two fathers' challenge to the custody of the children.

[11] Without any attempt to exhaust the variations of employment that might be considered, it at least includes a city fire fighter, a director of a division of the administration of the city of Seattle, a state administrative law judge, a professor at Grays Harbor Community College, a former food service manager for a chain of retirement homes, a physicians assistant, a police officer, an artistic director of a local musical company who is president of POSCA and runs the Rotary Club's Kids at Play summer program, a mortgage supervisor at WSECU, a high school teacher, a registered nurse, a Spokesman Review newspaper employee, a licensed mental health counselor, a computer consultant, an auditor for Boeing Employees Credit Union and others.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

genuine disputes of material fact, and that the issue before the court may properly be decided as a matter of law on summary judgment.

ISSUE

Our issue is simple. Do the state or federal Constitutions, as they exist today in amended form, prohibit the Washington Legislature from enacting a valid civil law for all the people of this state that authorizes marriage between adult couples of opposite sex and prohibits marriage between adult couples of the same sex?

APPLICATION OF THE EQUAL RIGHTS AMENDMENT

The first, and most obvious, place to test the constitutionality of the statutes in question, RCW 26.04.010 and .020(1)(c), would be to examine whether they violate Constitution, Article XXXI, § 1, commonly referred to as the *Equal Rights Amendment*. Our Constitution says:

> § 1. Equality Not Denied Because of Sex
>
> Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.

Our State Supreme Court has never addressed the application of this constitutional provision to the issue of same sex marriage.

However, this issue was addressed by Division I of the Court of Appeals thirty years ago in *Singer v. Hara*, 11 Wn. App. 247, 522 P.2nd 1187

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

(1974). The *Singer* court in rejecting an analogy[12] to *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2nd 1010 (1967), where the U.S. Supreme Court struck down Virginia's anti-miscegenation statutes as denying a "fundamental" right to marry based on race, held at page 260, that "the ERA does not require the state to authorize same-sex marriage."

The rationale of *Singer* has been described as "tortured and conclusory sophistry,"[13] and plaintiff's argue that subsequent cases in our state make clear that *Singer* is no longer good law on the issue of the application of our *ERA* to same-sex marriages. But no case specifically overrules *Singer*.

However, *Singer* is a weak reed on which to support this issue. One difficulty is that *Singer* assumes the point that is in contention. They conclude that although one can not discriminate on the basis of sex, that there is no discrimination in forbidding same-sex marriage because there is no such thing as same-sex marriage, so on what basis is there any discrimination? If this kind of reasoning were acceptable then *Loving* would never have struck down Virginia's anti-miscegenation laws since by 'definition' there was no marriage allowed between different races, so as long as each race could marry, what discrimination was there if they could not marry each other?[14] In the 1974 eyes of *Singer,* there is no

[12] *Singer, supra*., p. 253
[13] *Baehr v. Lewin*, 74 HAW 530, 852 P.2nd 44, 63 (1993).
[14] It is a partial version of the 'separate but equal' argument that was accepted in *Plessy v. Furguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) and 58 years later rejected in *Brown v. Board of Educ*., 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). It is only partial because in Washington there is nothing like a state 'registered domestic partnership,' or other form of contract, that same-sex couples, even those with

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

discrimination, since all[15] males can marry and all females can marry, only they just can't marry each other due to their same sex status based on the definition of what counts as marriage. But a conclusion reached in this way begs the analysis. If by 'definition' marriage can only exist between opposite sexes then what further analysis is necessary?

The problem arises because marriage doesn't only involve two parties. It is a civil contract, approved by the government, that qualifies the parties, and any children involved, with real and significant benefits that are denied to those relationships which the government will not approve. One needs government approval to enter into a valid contract of this kind and also needs government approval to end the contract, which we call "divorce." There are obvious benefits in health care, privacy, community property, survivor benefits, legal obligations to each other, and so on, that result to the benefit of adult parties of such a contract. Perhaps more important, however, is that children born or adopted during the duration of such a state approved contract gain significant rights in relationship to all parties to the contract and even the state will not allow the contract to be dissolved without taking into account how the dissolution might affect the children and see, to the extent possible, that they are protected. The state approves same sex couples adopting children. The overall community concern with children is permanency planning on their behalf. Yet, the state does not

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children, can avail themselves. It is now true that several state agencies, such as cities and counties, have these registered domestic relationships that are available to same sex couples.

[15] There are other qualifications such as age and competency. See: RCW 26.04.010 & .020.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

require the permanency of a binding contract between same sex couples the way it requires such a contract with opposite sex couples.

Another recent example, other than child adoption issues, is *State ex. Rel. D.R. M.,* 109 Wn. App. 182, 34 P.2nd 887 (2001). There a long term same sex couple, living together as domestic partners, pooling all their resources, agreed to have one partner artificially inseminated, resulting in pregnancy and birth of a child. When the relationship broke down the non-biological parent was found to have no obligations to the child, even when the state tried to collect child support on the child's behalf. The court ruled, at page 190, that a child need not have two parents.[16]

There are other examples clearly showing that the community, and its values, has substantially changed from the time the *Singer* court offered their rationale. Although the *Singer* case cries out for reexamination by a higher court this trial court is not that higher court. This court has an obligation to respect and follow the *Singer* decision. This obligation is even stronger when the Legislature has specifically adopted this decision in its legislation. If *Singer* is going to be reversed then it must be done by that same court or the Supreme Court. Therefore, the plaintiffs can not be sustained on the argument that the *Equal Rights Amendment* alone calls for striking down these two statutes as unconstitutional. Although *Singer* also discussed the

[16] However, in the recent case of *In re Parentage of L. B.,* 121 Wn. App. 460, 89 P.3rd 271 (2004), the court declined to reach the constitutional issues of a same-sex couple's relationship to a child where one of the partners was impregnated by a sperm donor but at the same time held that this same-sex partner had a common law right to a relationship with the child with whom she may have bonded, also citing *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2nd 49 (2000).

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

Equal Protection clause of the *Fourteenth Amendment* it is silent as to whether other state constitutional provisions might apply.

PRIVELEGES OR IMMUNITIES OR *EQUAL PROTECTION*?

Constitution, Article I, § 12, commonly referred to as the *Privileges or Immunities* clause, like the *ERA*, is also a strong mandate for equality in state treatment of its citizens. It is similar, but not identical, to the *Equal Protection* clause found in the federal Constitution, Fourteenth Amendment. *Singer* found that the Fourteenth Amendment was not violated by denying same sex marriage, using the 'rational relationship' test (*Singer*, 11 Wn. App. at page 262)[17] but did not discuss or consider the *Privileges or Immunities* clause of the state Constitution. Because *Singer* did not mention the state *Privileges or Immunities* clause, they may have assumed that the test would be the same under both constitutions. We do not know because the case is silent on this point.

Our federal and state Constitutions are two separate foundations with structural differences that nevertheless protect many identical citizen rights. If the Constitutions are in conflict, then in areas that are not reserved to the states, the federal Constitution controls.[18] Our own state Constitution clearly instructs at Article I, § 2, that the United States Constitution is the

[17] And because of this, this trial court cannot strike down these laws under the Fourteenth Amendment.
[18] This power in the people has been clear at least since *M'Culloch v. Maryland*, 17 U.S. 316, 403-404, 4 Wheat. 316, 4 L. Ed. 579, (1819), Where Chief Justice Marshall says in part, "…the government of the Union, though limited in its powers, is supreme within its sphere of action." This hierarchy of powers is also made clear by the 10th Amendment. *M'Culloch* contains the famous admonition at page 407, "In considering this question, then, we must never forget that it is a *constitution* we are expounding." [Emphasis in original]. The point being that every detail is not worked out but rather broad principles are stated to later deal with an unknown future.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

supreme law of the land. At the same time, the federal Constitution is a grant of power to the federal government from the states and those powers not expressly granted are reserved to the states. The state Constitution, on the other hand, is a limitation of power on the sovereign, and those powers not given to the state are reserved to the private citizens, *Grant County Fire Protection District v. Moses Lake*, 150 Wn.2nd 791, 811, 83 P.3rd 419 (2004).

Although the two clauses in the two Constitutions are similar they are not identical and, as just discussed, the structure of the Constitutions themselves is different.

Our state Constitution, Art. I, § 12, instructs:

> 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.

The U.S. Constitution, Amendment 14, § 1, instructs:

> 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.

Plaintiffs argue that the state DOMA is in conflict with both the state and federal Constitutions. To reach the state constitutional argument they undertake the analysis required pursuant to *State v. Gunwall*, 106 Wn.2nd 54, 720 .2nd 808 (1986), and conclude that state Constitution Art. I, § 12, commonly called our *Privileges or Immunities* clause should be an independent measure of the Legislature's action apart from an analysis under the federal *Equal Protection* clause. Before determining if an analysis of the

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

federal Constitution in relationship to the facts of our case is appropriate the court must first do a state Constitution analysis, *State v. Smith*, 117 Wn.2nd 263, 288, 814 P.2nd 652 (1991), Justice Utter concurring, citing *State v. Hopson*, 113 Wn.2nd 273, 278, 778 P.2nd 1014 (1989). If the case can be reconciled on the basis of the state Constitution then there is no need to undertake a federal constitutional analysis except to see that the federal Constitution is not violated. Here there is no argument by anyone that the federal Constitution bans same sex marriages so the question reduces to whether the state Constitution requires that same sex marriages be allowed in the same manner as opposite sex marriages.

DOES THE STATE CONSTITUTION APPLY?

The *Grant County* court, *supra*, went through the six *Gunwall* factors (that plaintiffs go through in this case) and found that our Constitution, Art. I, § 12, required an independent constitutional analysis apart from any analysis under the *Equal Protection* clause found in U.S. Constitution, Amendment 14, § 1. *Grant County*, 150 Wn.2nd 811.

The State argues that despite the holding in *Grant County*, that the case is actually fact specific, and does not stand for the proposition that a separate analysis is always required between these two similar clauses. The State also cites *Grant County* and *Gunwall* but argues that *Grant County* stands for the proposition that a separate analysis is only required when a minority is given a privilege not available to all, but that such independent analysis is not required when the claim is that the majority is discriminating

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

against the minority.[19] That is, they argue that the state Constitution was intended to provide more protection then the federal Constitution only when a minority is granted privileges and that it did not grant any protection beyond the federal Constitution when the claim is that the majority is discriminating against a minority.

Although this argument by the State is not entirely incorrect, it is incomplete. There is nothing in *Grant County* about our Constitution, Art. I, § 12, being limited to the relationship between majorities and minorities. Even the word "minority" appears only once in the opinion, at page 807,[20] in discussing the second *Gunwall* factor, and then in a quote from a law review article suggesting an analysis independent of the federal Constitution is appropriate. So, it is a factor, but not a parameter.

In the opinion of the undersigned a useful starting point for understanding the relationship between the federal *Equal Protection* clause and the state *Privileges or Immunities* clause is the often cited concurring opinion of Justice Utter in *Smith*, *supra*, 117 Wn.2nd beginning at page 282. He too walks us through the six *Gunwall* factors.

Gunwall compared the right to privacy and unlawful searches under the federal Constitution, Fourth Amendment, to our state Constitution, Article I, § 7, and concluded in a prospective ruling that Washington citizens had a greater right to privacy than the privacy right protected by the Fourth Amendment. In reaching this rule, *Gunwall* relied upon six nonexclusive, neutral criteria to determine if citizens of Washington had broader rights

[19] Respondent's brief, p. 5.
[20] However, there is also one use of the word "nonmajorities," at the same page.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

than those rights extended under the federal Constitution, *Gunwall*, 106 Wn.2nd 58 *et seq*.:

1. The textual language of our state Constitution;
2. Differences in the text of the two Constitutions;
3. State constitutional and common law history;
4. Preexisting state law;
5. Structural differences in the two Constitutions; and
6. Matters of state or local concern.

Although nonexclusive, meaning other factors may also be considered, these are the factors regularly used in subsequent cases,[21] including *Smith*, *supra*, *Grant County*, *supra*, and *Seeley v. State*, 132 Wn.2nd 7766, 940 P.2nd 604 (1997), *infra*, in comparing federal *Equal Protection* to state *Privileges or Immunities*, which is what our case addresses. In citing an earlier law review article,[22] written by Justice Utter, the *Gunwall* court points out that Washington is one of many states that rely on their own state Constitution to protect civil liberties where citizens are often afforded greater protection under their state Constitution than under the federal Constitution, *Gunwall*, 106 Wn.2nd 59. The *Gunwall* court, *id*., speaks with approval of state (not judicial) activism to adapt our law and

[21] *Grant County* found an independent analysis was required under their facts and *Seeley* found that it was not, under theirs. *Smith*, where the lucid concurring opinion of Justice Utter is found, did not undertake the analysis despite the urging of Justice Utter that the majority should address it and he found that all six factors were present. *Smith*, 117 Wn.2nd 284.

[22] Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L.Rev. 491 (1984).

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

libertarian tradition to our ever changing community.[23] Our Constitution sets out fundamental principles that do not change but in the world the community changes and when it does the same fundamental principles may lead to a new result not because the principles have changed but because the community in which they are applied has changed. The wisdom of the drafters of our Constitution and their sensitivity to this phenomena of community change is memorialized in our Constitution, Article I, § 32 which instructs:

> Fundamental Principles. A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.

This is an accurate echo of the understanding of Chief Justice John Marshall in *M'Culloch v. Maryland*, 17 U.S. 316, 384-385, 4 Wheat. 316, 4 L.Ed. 579 (1819), that the fundamental immutable principles have to deal with an unknown future in a changing community.

APPLICATION OF THE SIX *GUNWALL* FACTORS

In our case the State concedes that factors five and six have been established and this court agrees and finds it is so. The state relies on *Seeley, supra,* for conceding that factor five, structural differences, will always

[23] *Gunwall*, 106 Wn.2nd 59 cites *The Role of a Bill of Rights in a Modern State Constitution*, 45 Wash. L.Rev. 453 (1970)

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

support an independent analysis, 132 Wn.2nd 789-790,[24] and concede factor six, that 'marriage' is a matter of state or local concern.[25]

Although the State has not conceded the point, it is clear that factor one, the textual language, is significantly different in the two clauses under examination and set out in full above,[26] *Smith, supra*, 117 Wn.2nd 285. It is interesting that under *Seeley*, *supra*, analysis the Supreme Court finds that the language is substantially similar, 132 Wn.2nd 788, while under the later *Grant County*, *supra,* analysis the Supreme Court finds, as does Justice Utter in *Smith*, that " the text of the clause in each constitution varies significantly," 150 Wn.2nd 806. This difference alone, namely that at one time the Supreme Court says the language is substantially similar and then a short time later says the language varies significantly, underscores the difficulty of undertaking a Constitutional analysis pursuant to *Gunwall*.

Factor two is often intertwined with factor one. *Gunwall* instructs that, even if the parallel language of the two Constitutions does not have meaningful differences, other relevant provisions of the state Constitution may require that the state Constitution be interpreted differently than the federal, *Gunwall*, 106 Wn.2nd 61. This is an important principle for consideration. Our Supreme Court is instructing that, even if there is not a meaningful difference in the language between two provisions, one in the state Constitution and the other in the federal Constitution, the state Constitution may still require a different interpretation. This court

[24] Respondent's brief, p. 8.
[25] Respondent's brief, p. 8.
[26] Page 10 *supra*.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

understands, then, that the whole of the state Constitution must be considered when reasoning about a part – the part being the particular state clause being compared to the particular parallel federal clause. One must first be clear about the whole Constitution and then reason down to the part under investigation. In this regard we must first be clear about the context of the concept and then look for similarities by analysis and uncover differences by drawing distinctions.[27]

Smith, supra, instructs that if there is a difference in language then it suggests that the drafters meant something different than the federal provision, *Smith*, 117 Wn.2nd 285. *Smith*, informs us that this is what allowed *Gunwall* to give a more expansive interpretation to the state provisions in that case, *id*. *Seeley, supra*, states, on the other hand, the proposition that even if there are differences one should be able to explain how the meaning of our state Constitution differs from the federal, *Seeley*, 132 Wn.2nd 788.

In *Grant County, supra*, we find that distinction which the state brings to our attention in this case that the federal Constitution is concerned with invidious discrimination against "nonmajorities," "whereas the state Constitution protects as well against laws serving the interests of special classes of citizens to the detriment of the interests of all citizens," *Grant County*, 150 Wn.2nd 806-807. [Emphasis supplied.] It is here that the *Grant County* court reaches back with approval to Justice Utter's analysis in *Smith,* wherein the Oregon Constitution, which served as a model (at least in part)

[27] K. T. Fann, *Wittgenstein's Conception of Philosophy*, p. 51 (1969)

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

for the Washington Constitution, was analyzed along with the reasoning in *State v. Clark*, 291 Or. 231, 630 P.2nd 810 (1981).

One meaning, then, of the difference between the federal *Equal Protection* clause and our state *Privileges or Immunities* clause is not just to protect the majority from discriminating against the minority but to also protect the majority from any particular minority obtaining special privileges. That is a sensible distinction, as argued by the State, but is it the only distinction?

It appears to this court that when one recent Supreme Court decision, *Seeley, supra*, describes the language in the constitution clauses under consideration as "substantially similar," while an even more recent Supreme Court decision, *Grant County, supra*, describes the identical language in the two clauses as "varies significantly," so that in *Seeley* no separate analysis of our *Constitution* is required while in *Grant County* a separate state constitutional analysis is called for, that the only rational approach is to examine the principles at issue and see if there is not a more inclusive examination that respects both decisions of the same[28] Supreme Court. That more inclusive analysis is also called for as instructed by the *Gunwall,* case holding that even when the language in the two clauses do not have meaningful differences that the state Constitution as a whole may require

[28] *Seeley* was written by Justice Madsen in 1997 and agreed with by Justices Durham, Dolliver, Smith, Guy, Johnson, Alexander and Talmadge while Justice Sanders filed a dissent. *Grant County* was written by Justice Bridge in 2004, and agreed with by Justices Alexander, Madsen, Johnson, Ireland, Chambers, Owens, and Schultheis (pro-tem) and Justice Sanders wrote a concurring opinion. Justices Alexander, Madsen, Johnson are the only three that signed both opinions, Justice Sanders dissenting from *Seeley* but concurring in *Grant County*.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

that the particular state Constitution clause still be interpreted differently than the federal Constitution, *Gunwall*, 106 Wn.2nd 61.

In *State v. Burch*, 65 Wn. App. 828, 837, 830 P.2nd 357 (Div. I, 1992), status discrimination among the races is compared to status discrimination between the sexes (a comparison rejected by the same court in *Singer* twenty years earlier). *Burch* held that when making preemptory challenges in jury selection, and relying on *Darrin v. Gould*, 85 Wn.2nd 859, 540 P.2nd 882 (1975), that the protections under our state Constitution, Article XXXI, (The *ERA*) go beyond those protections of the equal protection guaranty under the federal Constitution. Our court instructs that under our state Constitution if equality is restricted or denied on the basis of gender the classification is discriminatory and violates the state Constitution. This supports the view that our Constitution as a whole calls for a more broad interpretation of individual rights under the *Privileges or Immunities* clause than does a federal *Equal Protection* analysis. But there is a clearer statement of this principle.

In *Guard v. Jackson*, 132 Wn.2nd 660, 940 P.2nd 642 (1997), our Supreme Court affirmed that classifications based on sex call for strict scrutiny, citing *Hanson v. Hutt*, 83 Wn.2nd 195, 201, 517 P.2nd 599 (1973). The scrutiny is certainly not less after the adoption of the *ERA*.[29] In fact it is arguably even higher than heightened scrutiny. In *Guard,* the court instructs that our state Constitution, Article I, § 12 (*Privileges or Immunities* clause) has a stronger distaste for sex discrimination than that evidenced by the

[29] The *ERA* was adopted November 7, 1972.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

federal courts. So, this is an example of our state Constitution, article I, § 12, being interpreted more broadly in favor of individual rights than the federal Constitution, Fourteenth Amendment. Importantly this interpretation is not based on the same distinction found in *Grant County* of being more interpreted (only) when there is a special minority given privileges that the majority does not enjoy. This independent interpretation given to our state Constitution*, Privileges or Immunities* clause is not based on the relationship of minorities and majorities, and yet it is found to be different than the federal Constitution, Fourteenth Amendment. This demonstrates that our state Constitution calls for a higher level of scrutiny than does the federal Constitution in relationship to our *Privileges or Immunities* clause even where the federal courts might be satisfied with an analysis based on either rationale relationship or intermediate scrutiny.

Guard, quoting *Darrin v. Gould*, 85 Wn.2nd 859, 871, 540 P.2nd 882 (1975), instructs at pages 663-664: "Presumably the people in adopting Const. Art. 31[30] intended to do more than repeat what was already contained in the otherwise governing constitutional provisions…" So, following the instruction of *Gunwall*, that we need look at the whole Constitution in relationship to the part under investigation, and particularly since the *ERA*, our *Privileges or Immunities* clause should be interpreted independently of the federal Constituition, Fourteenth Amendment. The *Guard* court explains that the *ERA* demonstrates that the state *Privileges or Immunities* clause calls for a broader interpretation than has been given the *Equal Protection* clause

[30] The *ERA*.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

of the federal Constitution because it added something to the prevailing interpretations of both clauses and eliminated a possible permissible sex discrimination that might be supported by a rational relationship as might be used under the federal test.

This also meets the *Seeley* test of being able to say how the meaning differs, since it shows clearly that the more meaningful interpretation is more strict regarding protecting fundamental rights than might be protected under the federal Constitution. *Guard* struck down part of RCW 4.24.010 that did not allow a father of an illegitimate child to recover for damages for the death of the child unless he has regularly contributed to the child's support, while there was not a similar obligation on the part of the mother.

The above cases make it clear, that under factor two, an independent analysis is called for under our state Constitution, not just when looking at whether a minority is given privileges not enjoyed by the majority, a trigger for independent analysis as conceded by the state, but also when the issue is sex discrimination without regard to majorities and minorities.

Factor three, constitutional and common law history, reveals that Washington's Constitution Article I, § 12, was modeled after the Oregon Constitution, Article I, § 20. *Grant County*, 150 Wn.2nd 807 and cites within n. 11, *supra*. Oregon also interprets its *Privileges or Immunities* clause independently from the federal *Equal Protection* clause. Both Constitutions were adopted after the Civil War and although one of their concerns was favoritism of a minority at the expense of the majority, at the same time, as just shown above, that one factor is not a parameter. That factor does not

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

circumscribe the reasons that support an independent analysis while at the same time it does support that an independent analysis was certainly in the mind of the framers. This point is made equally clear in Oregon under their *Privileges or Immunities* clause in *State v. Freeland*, 295 Or. 367, 667 P.2nd 509 (1983). Oregon's Supreme Court analyzing their parallel clause, Article I, § 20 at page 370, stated that the clause guarantees equal privileges to each individual citizen as well as classes of citizens, an interpretation that is in harmony with how the clause is interpreted in Washington - that is, an interpretation independent of federal analysis, though not contrary to it. There the issue was different procedures on how criminal cases were charged. Again, this is not a majority versus minority distinction. So tracing our constitutional history back to our roots, and following the development of the parallel *Privileges or Immunities* clause in our sister state, supports the position, both in this state and Oregon, for an analysis independent of federal equal protection analysis.

Even closer to our issue is *Tanner v. OHSU*, 157 Or. App. 502, 971 P.2nd 435 (1998), which did not need to reach the issue of the constitutionality of prohibiting same-sex marriage (page 516, n. 3) but struck down as violating the *Privileges or Immunities* clause (Oregon Constitution Article I, § 20) Oregon's practice of denying insurance benefits to unmarried same-sex couples while at the same time allowing benefits to married opposite-sex couples. *Tanner*, 157 Or. App., p. 525. The state insurance agency argued that the basis for the distinction was whether a couple was married or not and did not turn on their sexual orientation. The court found

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

this facially neutral explanation insufficient to support the discrimination because same-sex couples could not marry and cure the distinction whereas opposite sex couples could marry and gain the benefits. In reaching this result the Oregon court found that same-sex couples constituted a suspect class for purposes of constitutional discrimination analysis. *Tanner*, 157 Or. App., p. 524. It is apparent that not only do these Oregon cases support a historical and harmonious state constitutional analysis independent of federal equal protection analysis, but also present a legitimate seventh factor, not necessarily ruled out by *Gunwall*, namely how the Oregon Constitution which served as the model for our state Constitution, is interpreted by Oregon's courts of the identical or substantially similar clause that we have under view.

The fourth *Gunwall* factor directs the court to examine pre-existing state law and consider the degree of protection that Washington has historically given in similar situations. Perhaps there is no greater proof of the degree of protection that Washington grants individual rights than Washington amending its Constitution and adopting *The Equal Rights Amendment* in November of 1972. But there is more. Washington repealed its miscegenation statute in 1888[31], prior to statehood, and 79 years before the U.S. Supreme Court declared such statutes unconstitutional in *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2nd 1010 (1967). Our state repealed its laws against sodomy in 1975[32] twenty-eight years before the

[31] *Wash. Terr. Laws* of 1888 § 2380, et. seq.; *Wash Terr. Laws* of 1866, p. 81.
[32] *Ses. Laws* 1975, ch. 260.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

U.S. Supreme Court declared such laws unconstitutional in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 2475, 156 L.Ed.2nd 508 (2003).

Washington has a long history of protecting individual rights that supports an independent analysis of our state Constitution apart from the equal protection guarantees of the federal Constitution. As shown above, all six *Gunwall* factors support this conclusion. It is clear that Washington's Constitution's *Privileges or Immunities* clause should be given an interpretation independent from that of the federal Constitution *Equal Protection* clause. Washington's *Privileges and Immunities* clause provides greater respect for individual rights than the federal *Equal Protection* clause. Washington grants to its citizens, in its libertarian tradition, greater individual rights than the federal government grants. Our sovereign state must respect these rights and treat each citizen in an even-handed manner.

THE STATE CONSTITUTIONAL TEST

As just discussed above the state Constitution, *Privileges or Immunities* clause protects and respects more individual rights than those afforded by the *Equal Protection* clause. With this in mind it is possible that a statute could pass a federal *Equal Protection* test and fail a state *Privileges or Immunities* test. However, both clauses guarantee that persons similarly situated with respect to the legitimate purpose of the law must receive like treatment, *State v. Manussier*, 129 Wn.2nd 652, 921 P.2nd 473 (1996). *Manussier,* pages 672-673*,* instructs on the degree of review to be applied:

> One of three standards of review has been employed when analyzing equal protection claims. *Strict scrutiny* applies when a classification

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

> affects a suspect class or threatens a fundamental right. *Intermediate or heightened scrutiny,* used by this court in limited circumstances, applies when important rights or semisuspect classifications are affected. The most relaxed level of scrutiny, commonly referred to as the *rational basis or rational relationship test,* applies when a statutory classification does not involve a suspect or semisuspect class and does not threaten a fundamental right. [footnotes omitted]

Which test should be applied here? The courts in Oregon, when ruling on their *Privileges or Immunities* clause (Oregon Constitution Article I, § 20), the source clause for our own clause, hold that homosexuals are a true class with well defined characteristics beyond those drawn by the statute in question and that homosexuals are a suspect class of socially recognized citizens subject to adverse social and political stereotyping. Meeting the tests described therein, they ruled that homosexuals constitute a suspect class. *Tanner v. OHSU*, 157 Or. App. 502, 520-524, 971 P.2nd 435 (1998). In the recent Washington case of *Miguel v. Guess*, 112 Wn. App. 536, 51 P.3rd 89 (2002), the court remarked in footnote three, at page 552, that they did not have to reach the question whether classifications based upon sexual orientation merited heightened scrutiny.[33] They then went on to rule, at page 554, that when an employer treats a homosexual employee differently than it

[33] Judge Downing, at page 10 of *Anderson v. King Cty*, No. 04-2-04964-4 SEA (2004), declined to find homosexuals constitute a suspect class on the basis that older federal cases had ruled homosexuals were not a suspect class, *High Tech Gays v. DISCO*, 895 F.2nd 563, 573, (1990), but the reasoning in that case is highly suspect, being based on homosexuality being only behavioral and not an immutable characteristic and later cases have declined to follow *High Tech Gays*. See: *Buttino v. FBI*, 801 F. Supp. 298 (1992). Even more damaging to the validity of the *High Tech Gays* case is their discussion that homosexuals have no fundamental right to engage in sodomy (p. 571) in light of *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2nd 508 (2003). Judge Downing went on to find, at page 14, that the right to marry is a fundamental right, requiring the same scrutiny of requiring a compelling state interest, and not just a rational basis, the same compelling interest as would a suspect class require.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

treats heterosexual employees then it is a violation of the federal *Equal Protection* clause using only the less strict rational basis test.

A few weeks ago Judge Downing in *Anderson v. King Cty*, No. 04-2-04964-4 SEA (2004), declined to find homosexuals were a federal suspect class based on early federal law using an *Equal Protection* analysis. His hesitancy must be respected since such a far reaching ruling extending federal analysis is best made by our appellate courts or a federal appeals court. However, Judge Downing was applying federal *Equal Protection* standards and did not do a *Gunwall* analysis and thus a state constitutional *Privileges or Immunities* analysis, nor did he discuss the *Tanner* case in Oregon, nor, the cases subsequent to *High Tech Gays v. DISCO*, 895 F.2nd 563, 573, (1990), which he cited for his holding. He didn't need to do this for his line of analysis. Of course, he also found the statutes in question unconstitutional, as limiting a fundamental right without furthering a compelling state interest.

Nevertheless, based on the above *Gunwall* analysis our state *Privileges or Immunities* clause gives greater protection to individuals, limiting government intrusion into their affairs, than does the *Equal Protection* clause of the federal constitution. In addition is the *Tanner* reasoning regarding what constitutes a true class and that based on immutable characteristics, together with a long history of discrimination, that homosexuals are indeed a suspect class. Finally, all this is then corroborated by the recent *Miguel* court that such different treatment by a state actor is unconstitutional, even under a rational basis test, so that this

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

court now finds that homosexuals in the context of state action, in authorizing civil contracts between adult citizens, constitutes a suspect class under the state constitution calling for a higher level of scrutiny than merely finding a rational basis to justify the action.

But the pot is not yet full. Prior to examining the level of scrutiny that should properly apply the court should first determine if marriage is a fundamental right. If marriage is a fundamental right, then that too would justify the same heightened level of state constitutional scrutiny as would the determination of homosexuals being a suspect class.

There seems little, if any, disagreement that the right to marry is a fundamental right. *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed. 2010 (1967); *Levinson v. Washington Horse Racing Commission*, 48 Wn. App. 822, 824, 740 P.2nd 898 (1987). At the time of *Loving* 16 states prohibited and punished inter-race marriage, *Loving*, 388 U.S. at page 6, and 15 years earlier, 31 states had outlawed inter-race race marriage, *Loving, fn. 5, id*. There was no fundamental right to inter-race marriage at the time of *Loving* but there was a fundamental right to marry. The same is true of inmate marriage. There was no fundamental right for inmates to marry at the time of *Turner v. Safley*, 482 U.S. 78, 95-97, 107 S.Ct. 2254, 96 L.Ed.2nd 64 (1987), particularly in light of security and rehabilitation issues, but marriage was still found to be a fundamental right. It is the same in this case. There is no same sex marriage that is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-721, 117 S.Ct. 2258, 138

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

L.Ed.2nd 772 (1997), but marriage is a fundamental right. Persons in a homosexual relationship may seek the same personal dignity and liberty to make personal choices as heterosexual persons do, *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 2481-2481, 156 L.Ed.2nd 508 (2003), citing *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2nd 674 (1992).

The question, then, is not whether marriage is a fundamental right – it is. The question is whether inter-race marriages can be banned, or, whether inmate marriages can be banned, or, whether same sex marriages can be banned? The answer to that question depends on the rationale for the state action. As instructed in *Levinson, supra*, at page 824-825:

> The right to marry is a fundamental constitutional right [cites omitted]. The state may interfere with that right, but as the Supreme Court stated in *Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S.Ct. 673, 682, 54 L.Ed.2nd 618 (1978), "[w]hen a statutory classification significantly interferes with the exercise of [the right to marry], it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."

Under an *Equal Protection* clause analysis *Loving* held that marriage being a fundamental right and race being a suspect classification that banning inter-race marriages should be subject to the most rigid scrutiny. *Loving*, 388 U.S. at page 11; *Turner* held a prison regulation need be only reasonably related to state objectives, *Turner*, 107 S.Ct. at pages 2260-2261, but that marriage, being a fundamental right, was not reasonably related to any penological interests, *Turner*, 107 S.Ct. at page 2266, and struck down

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

the ban on inmate marriage. But has any court ruled on same sex marriage? Yes.[34]

In 1999, in *Baker v. Vermont*, 170 Vt. 194, 744 A.2nd 864 (1999), the Supreme Court of Vermont construing their own state Constitution, Chapter I, article 7 (*Common Benefits Clause*), held that government is for the common benefit of the community and not to the advantage of a set of persons who are only part of that community and ruled that same sex couples are entitled to the same benefits and protections as afforded to married opposite sex couples, *Baker*, 744 A.2nd at page 886. The court opined that plaintiffs (same sex couples) seek nothing more than legal protection and security for their avowed commitment to an intimate and lasting human relationship in recognition of our common humanity, *Baker*, 744 A.2nd at page 889. In response to this recognition of common benefit for all, Vermont enacted civil union laws allowing same sex couples the same benefits and protections of opposite sex couples.[35]

Then, last year in *Goodridge v. Dept. of Public Health*, 440 Mass. 309, 798 N.E.2nd 941 (2003), the Supreme Court of Massachusetts held that the Massachusetts Constitution affirms the dignity and equality of all individuals and forbids the creation of second-class citizens, *Goodridge*, 798 N.E.2nd at page 948. Citing *Lawrence*, *supra*, they instructed, "Our obligation is to define the liberty of all, not mandate our own moral code," *Goodridge*, *id*. That state Supreme Court found, at page 959, that their

[34] Obviously, closest to home, Judge Downing ruled on this issue in *Anderson v. King County*, No. 04-2-04964-4, SEA, August 4, 2004 and ruled these same statutes as in our case unconstitutional.
[35] See: Vt. Stat. An. Tit. 15 §§ 1201-1207 (Supp. 2001)

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

constitution was more protective of individual liberty then the federal constitution, just as this court has found in relationship to our state Constitution. *Goodridge* acknowledged at page 953:

> We have recognized the long-standing statutory understanding, derived from the common law, that "marriage" means the lawful union of a woman and man. But that history cannot and does not foreclose the constitutional question.

The point that must be addressed is that the government itself creates a civil marriage, and the government is a partner in all civil marriages. Based on their research and reasoning the Massachusetts Supreme Court, reviewing many of the same cases reviewed here, concluded that the ban on same sex marriage did not meet the "rational basis" test for either due process or equal protection. They found that the same sex marriage ban "works a deep and scarring hardship on a very real segment of the community for no rational reason," *Goodridge*, 798 N.E.2nd at 968. They construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others, *Goodridge*, 798 N.E.2nd at 969. They held Massachusetts' ban on same sex marriage was unconstitutional based on their own state constitution.[36]

The recent state courts that have had to address this have found that the ban on same sex marriage is not rationally related to any legitimate state interest, either using a federal equal protection analysis, or, a similar analysis

[36] The concurring opinion would have reached the same result using traditional equal protection analysis. *Goodridge*, Greaney, concurring, 798 N.E.2nd at page 970.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

under their own state constitutions.[37] The "rational basis" test, is the easy test by which to measure the ban, and if it fails to even meet that test, then it must be obvious to all that it can not meet a stricter test of heightened scrutiny. This court holds that homosexuals are a suspect class, that marriage is a fundamental right and that our state constitution guarantees more protection to citizen's rights than what is protected under the *Equal Protection* clause. The test that applies here is one of strict scrutiny and the government must show more than a rational relation between the statutory limitation and legitimate government objectives. These statutes must be looked at with strict scrutiny. The question becomes, what compelling state interest does this ban advance?

IS THERE A COMPELLING STATE INTEREST?

The State argues that partners in a marriage are expected to engage in exclusive sexual relations with children the probable result and paternity presumed.[38] Amicus also relies[39] on this oft-cited reason that the state has an interest in limiting marriage to opposite sex couples to encourage procreation and child-rearing within stable environments.[40] This Lilliputian[41] view of our present community does not reflect our common reality. As shown above, same-sex couples bear children by artificial

[37] There is not unanimity on this passion igniting issue. The Arizona case of *Standhardt v. Maricopa*, 206 Ariz. 276, 77 P.3rd 451 (2003), found that though marriage may be a fundamental right that same sex marriage was not a fundamental right and thereby avoided a strict scrutiny analysis.
[38] Defendant's brief, page 28.
[39] Amicus brief pp. 6-12.
[40] See the citations in *Standhardt, supra*, 77 P. 3rd at page 461-463.
[41] The author of this opinion encourages the reader to re-read the remarkable work of Jonathon Swift, *Gulliver's Travels*. An allegorical work that is as important today as when it was written.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

insemination,[42] same-sex couples adopt children with the state's approval,[43] if lesbian mothers, once in a 'marriage,' divorce their husbands and set up a home as same-sex couple the Supreme Court does not find the change so radical as to revisit the children's custody.[44] No one argues that heterosexual couples must have children, even if they are able, or that divorce is not a common experience for children of heterosexual marriages.[45]

The Legislature stated that the rationale for the state DOMA is, "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." Laws of 1998, ch. 1, § 1. But if a historical commitment is the protected thing then such a bald justification would always prevent any change in any state law. The Legislature could always say that this law can not be compared to the Constitution because the Legislature has a compelling interest in maintaining the *status quo* on any subject. It is a conclusory statement that is devoid of any meaningful content. The shell is described but the almond is missing. This is no more than saying that the intent of the Legislature is that marriage be limited to opposite-sex couples. That intent is clear. The question must be, is that intent valid when compared to the more fundamental intent of the Constitution? How is their clear intent related to either a rational basis for

[42] *State, ex. Rel. D.R.M.*, 109 Wn. App. 182, 34 P.2nd 887 (2001).
[43] See: RCW 26.33.140 and *State, ex. Rel. D.R.M*, 109 Wn. App. 182, 189-191, 34 P.3rd 887 (2001)
[44] *Schuster v. Schuster*, 90 Wn.2nd 626, 585 P.2nd 130 (1978).
[45] There are records that 50% or more of heterosexual marriages end in divorce. See: *Divorce Magazine* at http://www.divorcemag.com/statistics/statsUS.shtml.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

the benefit of the entire community, or, what compelling interest to our community does such a historical commitment further when compared to the fundamental intent of equality? The constitutional intent always trumps any statutory intent.

The defendants and Amicus articulate more clearly what seems to be the core justification of limiting marriage to opposite-sex couples. They argue that marriage partners "are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed."[46] The Amicus adds: "the state evolves out of and depends for its stability upon stable families,"[47] and that, "new generations must be produced for society to perpetuate itself."[48]

On the issue of the need to produce children let us leave aside the relationship between unbridled growth of the world's population in relation to the world's resources to sustain the population and let us look narrowly only at home. Strange as it seems, today the biological father and biological mother need never meet. One may need a government license to get married but no license is required to father or birth children. The traditional stable heterosexual union for the purpose of having a child does not need government approval and never has. But if the government is going to require that the government approve a civil contract, and approve several benefits that flow from such approval, then it must take care to treat all its citizens in an equal way. Even more important, just as the government is a

[46] Defendants Brief, p. 28.
[47] Amicus Brief, p. 7.
[48] Amicus Brief, p. 9.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

real, but not named, party to the contract, any children that result are real, but not named, parties to the contract. Same-sex couples can have children through artificial insemination and same-sex couples can adopt children all with the government's approval. Where is the protection for these children?

Do we really need a study to understand that children thrive better in a stable family? When children lose family stability we go to great lengths through the use of foster families and adoption to bring them back into a stable family situation. When married parents divorce we take great care to do what we can to provide for the children's loss of stability in the 'broken' family that results. On another level, even without children, surely stable couples as well as families are the foundation for a democratic stable society. If these observations of family are correct, and if the defendants are correct that stable families are the foundation of a stable state, then the question becomes, not what counts as "marriage," but rather what counts as "family." If the reason to protect marriage is the need for stable families then we need be clear as to what counts as a family upon which this stability rests. It seems to this court that stable families are a legitimate and compelling state interest for the benefit of the entire community.

We, the community, need to come to know ourselves. We need to have the fortitude to see who we are and accept ourselves as we are. If we look at ourselves, and at our neighbors, what do we see that counts as a "family?"

For at least two generations we have understood "family" as something more than a man mating with a woman to have a child. A single

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

parent is a family. Grandparents raising grandchildren without the help of the parents is a family. Adults giving foster children a home are a family. Same sex couples who adopt children are a family. Opposite sex couples who adopt children are a family. Single parents with children who marry each other bring into being a new family. A childless couple, same sex or opposite sex, can be a family. An older child raising his or her siblings is a family. There are other examples. Clearly, it seems to this court, a same sex couple, especially a same sex couple with adopted children, is a family. Is this the kind of family that the government has an interest in making more stable? If an opposite sex couple without children is a family then on what basis is a same sex couple without children not a family? The community support that provides additional stability to the private vows of commitment of any couple comes into being because the community understands that this is in the best interest of the entire community. The community support for the private vow is to allow the creation of a civil contract. That is what marriage is. It is a civil contract approved by the community that carries with it many obligations, many benefits, and many burdens.

When we talk about historical perspectives, the government approved civil contract is rather recent. Marriage has always been a spiritual or religious relationship. Samuel Johnson, the compiler of the first dictionary of the English language in 1755, disapproved of the Royal Marriage Bill that brought in government approval of what was once a religious relationship with the comment: "I would not have the people think that the validity of

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

marriage depends on the will of man."[49] But that is what has resulted. Marriage has become a government approved civil contract.

If the compelling state interest is to encourage procreation and stable environments for children then these statutes under scrutiny sweep too broadly and are not narrowly tailored for that purpose. They work to invalidate forms of family that the community recognizes and supports. Especially they weaken forms of family that provide stability for children. Surely these broad forms of family merit support of the community.

The children of same sex couples, a form of family already approved by the community which approves of same sex couples adopting, or otherwise having children, should not carry the stigma of coming from less than a family – a government approved family. The private vows of an opposite sex couple that can be crystallized into a government approved contract are not less stable if the private vows of a same sex couple can be crystallized into a government approved contract. In both cases there is more stability in the community.

Although encouraging more family stability is a compelling state interest these statutes do not further that interest and are not narrowly tailored to do so. They do not even bear a rational relationship to that interest. It is more likely that they weaken family stability when we consider what a family really is.

[49] James Boswell, *The Life of Samuel Johnson*, Signet Classics, c. 1968 by Frank Brady, Library of Congress Catalog Card Number 68-18400.

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

CONCLUSION

Having decided this case on the basis of the *Privileges or Immunities* clause, Constitution, Article 1, § 12, there is not a need to address either the due process or privacy issues under Constitution, Article 1, § 3, or the federal constitutional issues.

During oral argument the state requested that this court look at the constitutionality of these statutes from two directions, and if equality required the statues to be struck down, that the court still issue an advisory opinion regarding the Legislature considering some curative legislation that would establish a domestic partner registry for same-sex couples. In this way, it was argued, the concept of marriage could still be limited to opposite sex couples as long as same sex couple were given the same privileges or immunities as were opposite sex couples. However, trial courts should not give advisory opinions, *State v. Maloney*, 1 Wn. App. 1007, 1009, 465 P.2nd 692 (1970), even though on rare occasions the Supreme Court might. The question of creating different kinds of domestic unions or partnerships is one for the Legislature. Inherent in a serious question of this nature is that it must be adequately developed, and that hasn't happened in this case, and there are vital questions regarding this dual approach that have not been briefed or argued. This court will decline to give an advisory opinion.

The clear intent of the Legislature to limit government approved contracts of marriage to opposite sex couples is in direct conflict with the constitutional intent to not allow a privilege to one class of the community

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

that is not allowed to the entire community. To the extent RCW 26.04.010 and RCW 26.04.020 effect this they are contrary to the state Constitution.

Who are we as a community? Our fundamental principle is that we share the freedom to live with and respect each other and share the same privileges or immunities. We need each other. Are we not all children of a common parent?

When the government is involved, one part of the community can not be given a privilege that is not given to other members of the community unless the government can demonstrate how that discrimination furthers the benefit of the entire community.

When we divide the community into classes and categories the division must at least bear some rational relation to a legitimate government purpose. If this division is based on 'suspect' lines, such as immutable characteristics that a person can't change such as race, sex, age and so on, or, involves a fundamental right, such as marriage or to bear children, then the discriminatory division is looked at closely and must be narrowly tailored to advance the particular government interest.

For the government this is not a moral issue. It is a legal issue. Though these issues are often the same, they are also quite different. The conscience of the community is not the same as the morality of any particular class. Conscience is what we feel together as one community. Conscience makes us one people. What fails strict scrutiny here is a government approved civil contract for one class of the community not given to another class of the community. Democracy means people with

Hon. Richard D. Hicks
Thurston County Superior Court
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

different values living together as one people. What can reconcile our differences is the feeling that with these differences we are still one people. This is the democracy of conscience.[50]

Dated: September 7, 2004

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Richard D. Hicks, Judge
Superior Court of Washington

[50] Jacob Needleman, *The American Soul*, pp. 171, *et. seq*. Jeremy P. Tarcher/Putnam 2002.

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