

COURT FILED 2014-05-29

No. 75934-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

HEATHER ANDERSON and LESLIE CHRISTIAN, et al. Respondents,

v.

KING COUNTY, et al, Appellants,

CELIA CASTLE and BRENDA BAUER, et al., Plaintiffs,

v.

STATE OF WASHINGTON, Defendant.

FILED
SUPREME COURT
STATE OF WASHINGTON
2-14-5
JAN 14 A 9 29
BY CLERK
CLERK

BRIEF OF *AMICUS CURIAE*
CONCERNED WOMEN FOR AMERICA

Theresa Schrempp
SONKIN & SCHREMPP, PLLC
2955 80th Avenue, SE, Suite 201
Mercer Island, WA 98040
WSBA # 8763
Telephone: (206) 275-2878
Fax: (206) 275-2845

David DeWolf
Professor of Law
1109 W. Hawthorne Rd.
Spokane, WA 99218
WSBA # 10875
(509) 328-4220

Attorneys for *Amicus* Concerned Women for America

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. Interest of the <i>Amicus</i>	1
II. Statement of the Case	1
III. Argument	1
A. RCW 26.04.010 and RCW 26.04.020 (1) (c) Do Not Violate Art. 1 § 12 of the Washington State Constitution.....	1
B. RCW 26.04.010 and RCW 26.04.020 (1) (c) Do Not Violate Art. 1 § 3 of the Washington State Constitution.....	9
C. The Court Should Affirm Marriage, Not Undermine It...13	
IV. Conclusion	15

TABLE OF AUTHORITIES

CASES

<i>Baker v. Nelson</i> , 191 N. W. 2d 185 (Minn., 1971).....	4, 9, 10
<i>Baker v. Nelson</i> , 409 U. S. 810, 93 S. Ct. 37, 34 L. Ed. 65 (1972).....	4, 9, 10
<i>Goodridge v. Department of Public Health</i> , 780 N. E.2d 941, (Mass. 2003).....	8
<i>Hicks v. Miranda</i> 422 U. S. 332, 344, 95 S. Ct. 2281 (1975).....	4
<i>Lawrence v. Texas</i> , 539 U. S. 557, 123 S. Ct. 2472, 156 L. Ed.2nd 508 (2003).....	5, 6, 12
<i>Loving v. Virginia</i> . 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed 2 nd 1010 (1967).....	3, 4, 5
<i>Morrison v. Sadler</i> , No. 49A02-0305-CV-447, 2005 Ind. App. LEXIS 75 (Ind. Ct. App. Jan 20, 2005).....	7, 8
<i>Reynolds v. U. S.</i> , 98 U. S. 145, 25 L. Ed. 244 (1878).....	11
<i>Singer v. Hara</i> , 11 Wash. App. 247, 522 P.2d 1187 (1974).....	5
<i>Snyder v. Massachusetts</i> , 291 U. S. 97 (1934).....	9
<i>State v. Mamussier</i> , 129 Wn.2d 652, 921 P.2d 473 (1996).....	2
<i>Tigner v. Texas</i> , 310 U. S. 141, 60 S. Ct. 879, 882, 84 L. Ed. 1124, 1128 (1940).....	4
<i>Washington v. Glucksberg</i> , 521 U. S. 702, 117 S. Ct. 2258, 138 L. Ed. (1997).....	9
<i>Wilson v. Ake</i> , No. 8:04-cv-1680-T-30TBM, 2005 U. S. Dist. LEXIS 755 (M. D Fla. Jan. 19, 2005).....	7
<i>Zablocki v. Red Hill</i> , 434 U. S. 374, 98 S. Ct. 673 (1978).....	5

STATUTES AND COURT RULES

RCW 26.04.010.....1, 2
RCW 26.04.020 (1) (c).....1, 2

CONSTITUTIONAL PROVISIONS

Art. 1 § 12 of the Washington State Constitution.....1
Art. 1 § 3 of the Washington State Constitution.....9

OTHER SOURCES

Margaret Somerville “Children’s Rights Should Come First,”
The Calgary Herald, October 5, 2003.....7

I. INTEREST OF THE *AMICUS*

Concerned Women for America (“CWA”) has over 500,000 members in all 50 states and is the largest public policy women’s organization in the United States. CWA supports traditional values, encourages policies that strengthen marriage and families and advocates virtues that are central to America’s cultural health and welfare.

II. STATEMENT OF THE CASE

RCW 26.04.010 and RCW 26.04.020 (1) (c) were enacted by the Washington State legislature in 1998 and explicitly define marriage as a union between one man and one woman.

Lawsuits were filed in King and Thurston Counties to declare that these statutes are unconstitutional, since they deprive same-sex couples of the right to marry. The trial courts in each county declared that the statutes in question violate the Washington State constitution.

III. ARGUMENT

A. RCW 26.04.010 and RCW 26.04.020 (1) (c) Do Not Violate Art. 1 § 12 of the Washington State Constitution.

Article 1 § 12 of the Washington State Constitution provides: “No law shall be passed granting to any citizen, [or] class of citizens . . . privileges or immunities which upon the same terms shall not equally belong to all citizens.”

Any challenge to a statute based on Art. 1 § 12 must initially demonstrate that the statute in question differentiates between one citizen and another, or between one “class of citizens” and another “class of citizens.” If such differentiation exists, the court must then apply one of three standards of review: Strict scrutiny, intermediate scrutiny, or rational basis. *State v. Manussier*, 129 Wn.2d 652, 921 P.2d 473 (1996).

Here, the statutes in question do not differentiate between citizens or “classes of citizens” and are therefore not subject to any level of scrutiny by the Court. The provisions of RCW 26.04.010 and 26.04.020 are entirely neutral and non-discriminatory. The restriction of the institution of marriage to unions between one man and one woman apply equally to all citizens and classes of citizens. Under Washington’s statutory scheme, any single person meeting the appropriate age requirements may marry another unrelated single person of the opposite gender who likewise meets the statutory age requirements. Heterosexual and homosexual persons are allowed to enter into marriages with persons of the opposite gender. Heterosexual and homosexual persons alike are prohibited from entering into a marriage with a person of the same sex. To be sure, homosexual persons are more likely to seek the legal right to marry a person of the same sex, but a heterosexual who, for example,

might wish to obtain benefits and legal protections for a needy relative or friend of the same sex is equally barred from such a marriage.

Furthermore, two people of the same sex who apply for a marriage license in the state of Washington are not asked by the licensing authority what their sexual orientation is in order to determine whether they qualify for a license. The license is denied because they are the same sex, not because of their sexual orientation. This standard applies equally to two men or two women.

The lower courts attempted to analogize Washington's ban on same-sex marriage to the ban on interracial marriage struck down by the Supreme Court in *Loving v. Virginia*, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2nd 1010 (1967). The analogy is a false one. The Court in *Loving v. Virginia*, did not decide the case on the basis of a broad right to marry. On the contrary, the Court noted that "marriage is a social relation subject to the State's police power." *Loving v. Virginia*, 388 U. S. 1, 7 (1967). The marriage restriction in *Loving* was based on racial classification, which fact alone rendered the statute incompatible with the 14th Amendment to the U. S. Constitution. The Court reasoned:

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to

maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. *Loving v. Virginia*, 388 U. S. 1, 11-12 (1967).

Obviously, since no racial classification is utilized in the statute challenged in this case, *Loving* has no application.

A few years after the *Loving* decision, the Supreme Court addressed the issue of same-sex marriage. In *Baker v. Nelson*, 191 N. W. 2d 185, 187 (Minn., 1971), two men were denied a marriage license by the state of Minnesota. They appealed the ruling pursuant to the First, Fourth, Eighth, Ninth and 14th Amendments to the U. S. Constitution. The Minnesota court upheld the denial, concluding: “[T]he constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.” *Baker v. Nelson*, 191 N. W. 2d 185, 187 (Minn. 1971)(quoting *Tigner v. Texas*, 310 U. S. 141, 147, 60 S. Ct. 879, 882, 84 L. Ed. 1124, 1128 (1940)). The U. S. Supreme Court dismissed the subsequent appeal “for want of a substantial federal question.” *Baker v. Nelson*, 409 U. S. 810, 93 S. Ct. 37, 34 L. Ed. 65 (1972). Such a disposition constitutes a decision on the merits. *Hicks v. Miranda* 422 U. S. 332, 344, 95 S. Ct. 2281 (1975). The Court’s summary dismissal of the case demonstrates that the constitutional safeguards noted in *Loving*,

supra, which protect against racially-based classifications, have no application to same-sex marriage.

The Washington Court of Appeals has previously rejected the argument that the holding in *Loving v. Virginia*, 388 U. S. 1 (1966) provided a constitutional basis for same-sex marriage. *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974).

In *Zablocki v. Red Hill*, 434 U. S. 374, 98 S. Ct. 673, 54 L. Ed. 618 (1978), the Supreme Court held that a Wisconsin statute that prohibited a person from marrying if he was behind in his child support obligations violated the fundamental right to marry. Nonetheless, the Court went on to say that states may impose reasonable regulations on marriage that are subject only to rational basis analysis:

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. *Zablocki v. Red Hill*, 434 U. S. 374, at 386-387.

Even if it were assumed, *arguendo*, that the marriage statutes do differentiate between one class of citizens and another, rational basis would be the appropriate level of review rather than strict-scrutiny. In her concurring opinion in *Lawrence v. Texas*, 539 U. S. 557, 123 S. Ct. 2472, 156 L. Ed.2nd 508 (2003), Justice Sandra Day O'Connor noted that there

are legitimate state interests in “preserving the traditional institution of marriage.”

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group. *Lawrence v. Texas*, 539 U. S. 557, 585 (concurring opinion).

Amicus agrees with Justice O’Connor that there are legitimate if not compelling governmental interests that justify limiting marriage to opposite-sex couples. Human history, common sense and extant social science research demonstrate that it is in the best interests of children to be raised in a home with a mother and a father. While it is certainly true that many children are reared in homes lacking either a mother or a father, the state’s refusal to re-write its definition of marriage so as to encourage the procreation and rearing of children under these circumstances cannot be said to lack a rational basis.

Permitting same-sex marriage to become entrenched in law would also erode the state’s ability to regulate the means by which children are conceived and born. If couples are held to have a constitutional right to create children by whatever technology science affords, the concepts of

“mother” and “father” with all the legal rights and responsibilities that attach to such status would become all but irrelevant.¹ It is true that modern technology provides the means to create children outside the context of marital heterosexual intercourse and that such technology may continue to be used in some circumstances with the state’s acquiescence. However, no court decision should impair the legislature’s ability to enact limitations designed to protect children and families.

Two recent court decisions rejected a right to same-sex marriage, recognizing the state’s legitimate interest in the well-being of children. In *Wilson v. Ake*, No. 8:04-cv-1680-T-30TBM, 2005 U. S. Dist. LEXIS 755 (M. D. Fla. Jan. 19, 2005), the court refused to recognize a fundamental constitutional right of same-sex marriage, holding that the federal government has a legitimate interest in allowing states to ban same-sex marriages. The court found that “encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest.” *Id.* at 25.

In *Morrison v. Sadler*, No. 49A02-0305-CV-447, 2005 Ind. App. LEXIS 75 (Ind. Ct. App. Jan 20, 2005), the court recognized the well-

¹ Margaret Somerville, Director of the Centre for Ethics, Medicine and Law at McGill University, observed in her article “Children’s Rights Should Come First,” published in *The Calgary Herald*, October 5, 2003, that “including same-sex families within the norm means that children do not have a basic right to know and be brought up by their biological parents.”

being of children as a “paramount” reason to limit marriage to opposite-sex couples:

Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized. Admittedly, heterosexual intercourse, procreation, and child care are not necessarily conjoined . . . , but an orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism. . . . The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed. Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic. *Id.* at 25-26 (quoting *Goodridge v. Department of Public Health*, 780 N. E.2d 941, 995-96 (Mass. 2003) (Cordy, J., dissenting) (internal citations omitted)).

B. RCW 26.04.010 and RCW 26.04.020 (1) (c) Do Not Violate Art. 1 § 3 of the Washington State Constitution.

Article I § 3 of the Washington State Constitution provides: “No person shall be deprived of life, liberty, or property, without due process of law.” The lower court in King County found that the statutes in question violated substantive due process rights because same-sex couples have a fundamental right to marry.

“Fundamental rights” are those “which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’” *Washington v. Glucksberg*, 521 U. S. 702, 720-721, 117 S.Ct. 2258, 138 L. Ed. (1997), quoting *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934). The court should use a restrained methodology when defining a fundamental right lest the judiciary “place the matter outside the arena of public debate and legislative action in favor of public policy preferences of the court.” *Washington v. Glucksberg*, 521 U. S. 702, 720 (1997).

There is virtually no history, legal tradition or practice which would support a contention that “marriage” between persons of the same sex is a fundamental right. The applicants in *Baker v. Nelson*, *supra*, also argued that the Minnesota marriage statute was unconstitutional because the right to marry was a “fundamental right” of all persons and that restricting marriage to only couples of the opposite sex was irrational and

invidiously discriminatory. The Minnesota Supreme Court rejected the challenge:

These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory. We are not independently persuaded by these contentions and do not find support for them in any decisions of the United States Supreme Court.

Baker v. Nelson, 191 N. W. 2d 185, 186. (1971); *Baker v. Nelson*, 409 U. S. 810 (1972) (appeal dismissed for want of a substantial federal issue).

Another case analogous to the case before the court was decided over a century ago when the Supreme Court rejected a constitutional challenge to a statute that outlawed polygamy by prohibiting a married person from marrying another. In 1843 Joseph Smith received the “Revelation on Celestial Marriage” which proclaimed that marriage by a man to more than one woman was justified by the example of Abraham, and that the heirs of Abraham – the Mormons – were called upon to take additional wives in the interests of procreation.

George Reynolds was indicted for bigamy under a federal statute which provided that “every person having a husband or wife living, who marries another, whether married or single . . . is guilty of bigamy. . . .” Reynolds, a devout Mormon, testified that it was an accepted doctrine of the Mormon Church that it was the duty of male members of the church,

circumstances permitting, to practice polygamy and that he had received permission from recognized authorities in the church. The second marriage ceremony was performed by an authorized church official. *Reynolds v. U. S.*, 98 U. S. 145, 25 L. Ed. 244 (1878).

In challenging his conviction, Reynolds argued that the prohibition against polygamy violated his religious liberties by prohibiting a union which he believed to be his religious duty. The Supreme Court rejected Reynolds' argument, noting:

In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. *Reynolds v. U. S.*, 98 U. S. 145, 165.

Reynolds' desire to enter into a polygamous union was not borne of mere personal choice or preference. The practice of polygamy was mandated by his religion and thus prohibiting the practice clearly interfered with the free exercise of his religion. Notwithstanding the compelling basis of Reynolds' constitutional argument - the First Amendment's Free Exercise Clause - the court determined that the statute

in question was within “the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.”

The Washington statutes in question, which define marriage as between one man and one woman, also prohibit a number of other non-traditional unions including polygamy, bigamy and consanguinity. Unless this court constructs a constitutional right so broad that it would encompass the right to engage in *any* union, governed only by the individual’s “own concept of existence, or meaning, of the universe, and of the mystery of human life” (*Lawrence v. Texas*, 123 S. Ct. at 2481), then the “right to marry” cannot include the right asserted by the trial courts. If the state no longer possesses the authority to limit marriage to one man and one woman, and in other meaningful ways that protect the right of the children of such unions and of society as a whole, then the state will be hard pressed to enforce laws against bigamy, polygamy and consanguinity. The state will be required to recognize “marriage” between/among every conceivable combination of individuals who, like the Plaintiffs, assert that marriage is a fundamental right which should not be restricted by “out-dated” assertions of public policy no matter how firmly established or how broadly shared.

C. The Court Should Affirm Marriage, Not Undermine It.

The institution of marriage forms the basic unit of human society. Plaintiffs' effort to redefine marriage by encompassing relationships for which there is neither legal precedent nor social approbation would inevitably weaken one of society's most important institutions. Once this genie is out of the bottle, it will be impossible to restrict the institution of marriage in any way that would "discriminate" against polygamists, bigamists, related persons or any other group who demand to avail themselves of the "fundamental right" to marry. Under the guise of "expanding" the institution of marriage to be more "inclusive," the holding of the trial courts would eviscerate society's ability to encourage the formation of stable families. Given the enormous stakes involved, it would be well that society proceed with caution.

The Washington statutes which Plaintiffs seek to overturn were enacted by duly elected legislators. Thirty-nine states have passed similar legislation which prohibits same-sex couples from marrying. In 1996, Congress enacted the federal Defense of Marriage Act, which permits states to refuse to give full faith and credit to same-sex "marriages" performed in other states.

The traditional definition of marriage as between one man and one woman is overwhelmingly supported by Americans nationwide. In the

2004 election, voters in eleven states approved constitutional amendments which defined marriage as an exclusive heterosexual institution.²

In Oregon, 57 percent of voters favored that state's defense of marriage initiative. No state legislature has adopted legislation which would expand the definition of marriage to same-sex couples, and no ballot initiative preserving traditional marriage (one man/one woman) has ever been rejected by popular vote.

Homosexuals and others have an equal right to try to persuade the American people and their elected representatives to enact legislation permitting same-sex couples to marry. For the most part, however, they have abandoned the democratic process because they recognize the breadth and depth of the American people's commitment to the institution of marriage by reserving the union to one man and one woman. It is far too early to determine the longterm societal impact resulting from same-sex unions. Plaintiffs and both lower courts relied on certain public policy considerations favoring same-sex marriage. However, public policy considerations are reserved for the arenas of public debate and legislative action. The separation of powers demands that the democratic process not

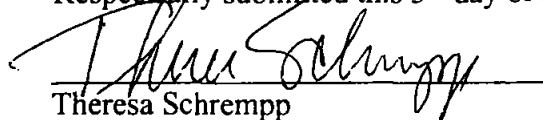
² States approving such amendments were: Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon and Utah.

be thwarted or shortchanged under the guise of a judicial determination
that a newly-discovered "fundamental right" is being violated.

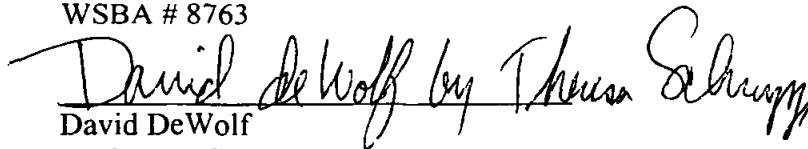
IV. CONCLUSION

The decisions of the lower courts should be reversed.

Respectfully submitted this 3rd day of February, 2005,



Theresa Schrempp
SONKIN & SCHREMPP, PLLC
2955 80th Avenue, SE, Suite 201
Mercer Island, WA 98040
WSBA # 8763



David DeWolf
Professor of Law
1109 W. Hawthorne Rd.
Spokane, WA 99218
WSBA # 10875

Attorneys for Amicus Curiae
Concerned Women for America