

Nos. 75934-1, 75956-1

**SUPREME COURT OF
THE STATE OF WASHINGTON**

HEATHER ANDERSEN, et al., *Respondents*,

v.

KING COUNTY, et al., *Appellants*,

v.

STATE OF WASHINGTON, *Appellant*,

and

SENATOR VAL STEVENS, et al., *Appellants*.

CECELIA CASTLE, et al., *Respondents*,

v.

STATE OF WASHINGTON, *Appellant*.

**STATE OF WASHINGTON'S
REPLY TO *AMICI CURIAE* BRIEFS**

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1. Introduction

This brief responds to the amici curiae briefs that were filed in support of respondents Andersen and Castle. As a general matter, these briefs repeat arguments made by the parties and there is no need to repeat arguments contained in the State's opening and reply briefs.¹ Accordingly, this response brief will focus on a few key issues in the case.

¹ The Amici Curiae Brief of the Libertarian Party of Washington, et. al. makes three constitutional claims that were not raised or briefed by Andersen or Castle either before the trial courts or in this court. Accordingly, the Court should not consider these arguments. *In the Matter of J.S.*, 124 Wn.2d 689, 702, 880 P.2d 976 (1994) ("The parties, however, have not raised this issue either to the trial court or in their briefs to this court. We do not generally consider issues raised first and only by amicus."). Moreover, these arguments are neither well developed nor well taken. The Libertarian party claims that the ban on same-sex marriage impairs the obligation of contracts under article I, section 10 of the U.S. Constitution. Amici Br. Libertarian at 13. However, it has long been held that the constitutional prohibition against impairing contracts does not apply to marriage contracts. *Maynard v. Hill*, 125 U.S. 190, 210, 8 S. Ct. 723, 31 L. Ed. 654 (1888) ("The only inconsistency suggested is that it impairs the obligation of the contract of marriage. [W]e are clear that marriage is not a contract within the meaning of the prohibition."); *Tipping v. Tipping*, 82 F.2d 828, 830 (1936) ("It has been held by the highest authority that marriage is an institution of society, creating a status which may be regulated and controlled by public law; that legislation affecting the institution or annulling the relation between the parties is not within the prohibition of the Constitution of the United States against the impairment of contracts, or against ex post facto laws."). (Citation omitted). The Libertarians also argue that the ban on same-sex marriage violates article I, section 11 of the Washington Constitution, which guarantees religious freedom. This is based on the contention that the ban is based on religious concerns and that this violates article I, section 11 because it gives religious mores state sanction and favors some religions over others. Amici Br. Libertarian at 10-11. There is no basis for this claim. To support their argument, the Libertarians cite *Edwards v. Aguillard*, 482 U.S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987). *Edwards* involved a law that prohibited "the teaching of the theory of evolution in public schools unless accompanied by instruction in 'creation science.'" *Edwards*, 482 U.S. at 580. The Court struck the law down because there was no secular purpose. In contrast, limiting marriage to a man and a woman does have an important secular purpose. As we explain (infra p. 8-9), the basis for limiting marriage is to provide the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. Finally, the Libertarians argue that the ban on same-sex marriage violates rights of free speech and association guaranteed under the First and Fourteenth

2. Article I, Section 12 Does Not Have An Independent Interpretation From The Federal Equal Protection Clause In This Case

One of the key issues in this case is whether Washington's privileges and immunities clause, article I, section 12, should be interpreted differently from the federal equal protection clause. In our opening and reply briefs we argued that an independent interpretation is only required when a minority of citizens is given a special privilege that is not available to all. Since this case involves a claim of discrimination against a minority, the privileges and immunities clause should have the same interpretation as the federal equal protection clause. St. Br. at 9-18; St. Reply Br. at 2-9. This argument was based on the factors laid out in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

The Amici Curiae Brief of State Legislators sets out a different analytical framework developed by a University of Texas law professor that is based on six approaches: textual, historical, structural, doctrinal, ethical, and prudential. Amici Br. St. Leg. at 2-3. The Legislators appear to argue that this Court has discarded the *Gunwall* analysis. Amici Br. St.

Amendments of the U.S. Constitution. Amici Br. Libertarian at 11-12. Again, there is no basis for this claim. The State does nothing to limit respondents' associations with one another. The declarations filed by the respondents clearly establish this fact. The Libertarians argue that the State has "implicitly conceded that same-sex couples have the right to government recognized unions. Amici Br. Libertarian at 12. The Libertarians are mistaken. The State has consistently argued that respondents have no right to same-sex marriage.

Leg. at 4. (The Court “has moved away from using *Gunwall* as a key to unlocking the state constitution, and it no longer considers *Gunwall* as a talisman.”) There is no basis for the claim that the Court has discarded *Gunwall*. It is true that where “this court has already determined *in a particular context* the appropriate state constitutional analysis under a provision of the Washington State Constitution, no *Gunwall* analysis . . . is necessary.” *State v. Reichenbach*, 153 Wn.2d 126, 132 n.1, 101 P.3d 80 (2004) (emphasis added) (citation omitted). “In such circumstances, the court will apply the already determined independent state constitutional analysis in deciding whether a state constitutional violation has occurred, provided the issue is otherwise properly raised.” *Id.* Thus, in the context of a challenge to a law that grants special privileges to a minority, the Court ruled in *Grant County Fire Protection District 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) (*Grant II*) that an independent constitutional analysis of article I, section 12 applies. In subsequent cases involving challenges to laws that grant special privileges to a minority, it will not be necessary to repeat the *Gunwall* analysis.

However, if the challenge arises in a different context, a *Gunwall* analysis is still required. According to the Court, “if there has been no prior determination of an appropriate independent state constitutional analysis *in a particular context*, and no argument is made that a different

analysis applies under the state constitution than applies under the federal constitution, then we will apply the federal analysis.” *Reichenbach*, 153 Wn.2d 126, 132 n.1. (emphasis added). This case involves a different context—a claim that the majority is discriminating against a minority. In that situation, a *Gunwall* analysis is required. There is no reason to abandon the *Gunwall* analysis in favor of a Texas law professor’s analytical framework.

Moreover, the analytical framework suggested by the State Legislators does not answer the key issue. All of the approaches discussed by the State Legislators go to the question of whether the privileges and immunities clause applies to claims that a law discriminates against individuals. But there is no dispute about this point. This Court has long held that article I, section 12, and the due process clause of the federal constitution protect individuals from discriminatory laws. *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992) (“Under the equal protection clause of the Washington State Constitution, article 1, section 12, and the Fourteenth Amendment to the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment.”) (citation omitted). The key issue is whether article I, section 12 should be interpreted differently than the equal protection clause when the claim is discrimination against a minority. The

law professor's factors do not address this question. Under application of the *Gunwall* factors, the answer is no.

3. Same-Sex Marriage Is Not A Fundamental Right

Another key issue is whether there is a fundamental right to same-sex marriage. In our opening and reply briefs we argued that there is no fundamental right to same-sex marriage because it is not deeply rooted in the Nation's history and traditions. St. Br. at 18-28; St. Reply Br. at 11-16. The Amici Curiae Brief of Loren Miller Bar Association, et. al. argues that the State's emphasis on history and tradition is incorrect based on the history of interracial marriage. Amici Br. Loren Miller Bar Ass'n at 13-14. The Association argues that the prohibition of interracial marriage was deeply rooted in the Nation's history and tradition. Amici Br. Loren Miller Bar Ass'n at 2-7. Despite this fact, the Supreme Court struck down the ban on interracial marriage in *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). Amici Br. Loren Miller Bar Ass'n at 11.

This argument misses the point. We do not argue that the Nation's history and traditions are frozen in time—they can evolve. By the time of *Loving*, the ban on interracial marriage was no longer a part of the history and tradition of the country. This cannot be said for same-sex marriage. One way to illustrate this difference is the reaction to the state court

decisions striking down the bans on interracial marriage and same-sex marriage. In 1948 the California Supreme Court struck down that state's ban on interracial marriage. *Perez v. Lippold*, 32 Cal.2d 711, 198 P.2d 17 (1948). When *Perez* was decided, 30 states (including California) banned interracial marriage. Note Constitutionality of Anti-Miscegenation Statutes, 58 Yale L. J. 473, 480-81 (1948-49). In the aftermath of *Perez*, fourteen states repealed their ban on interracial marriage, so by the time *Loving* was decided only 16 states imposed such a ban. *Loving*, 388 U.S. at 6.

In contrast, when the Hawaii Supreme Court opened the door to same-sex marriage in *Baehr v. Lewin*, 74 Haw. 530, 74 Haw. 645, 852 P.2d 44, 57 (1993) (as clarified on reconsideration) and the Massachusetts Supreme Court struck down the ban on same-sex marriage in *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003), no state law authorized same-sex marriage. In the aftermath of *Baehr* and *Goodridge*, seventeen states have adopted constitutional amendments limiting same-sex marriage, three other states have constitutional amendments pending, and 39 states have adopted laws banning same-sex marriage. St. Reply Br. at 14-15. No state has adopted a law authorizing same-sex marriage.

The Brief Amici Curiae of History Scholars also argues that reliance on history and tradition is misplaced because the concept of marriage has evolved over the years. Amici Br. History Scholars at 2-3. We do not take issue with the fact that the law governing marriage has evolved over the years. But, as the History Scholars' brief demonstrates, this evolution has come mainly through the legislative process. State statutes in Washington declared that marriage is a civil contract (Amici Br. History Scholars at 8); states passed statutes declaring that wives owned the property they brought to or were deeded during marriage (*id.* at 11); community property laws were enacted (*id.* at 13-14); and the Equal Rights Amendment was enacted (*id.* at 14). Other laws were enacted governing the relationship between husband and wife and abolishing all laws which imposed or perpetrated civil disabilities of a wife which did not exist as to the husband (*id.* at 15). And Washington and some other states have adopted no fault divorce (*id.* at 18-19). There is no doubt that the law governing marriage has evolved through the years, but it has been through the political process. The courts have not undertaken the job of redefining marriage. This Court should not do so here.

4. RCW 26.04.010(1) and .020(1)(c) Meet The Rational Basis Standard

In our opening and reply briefs, we argued that limiting marriage to the relationship between a man and a woman meets the rational basis standard, citing a number of decisions that support this conclusion. St. Br. at 34-38; St. Reply Br. at 21-26. The Brief of Amici Curiae Pride Foundation, et al argues that there is no reasonable basis for treating same-sex couples differently from opposite sex couples because both kinds of couples are similarly situated. Amici Br. Pride Foundation at 22-29.

However, the Indiana Court of Appeals recognized a significant difference between same-sex and opposite sex couples when it upheld Indiana's ban on same-sex marriage in *Morrison v. Sadler*, 821 N.E.2d 15 (2005). The "key difference" is that "most opposite-sex couples become parents, through sexual intercourse, and how all same-sex couples must become parents, through adoption or assisted reproduction." *Morrison*, 821 N.E.2d at 24. This difference relates directly to the state's interest in supporting opposite sex marriage. Through marriage the state "encourages opposite-sex couples who, by definition, are the only type of couples that can reproduce on their own by engaging in sex with little or no contemplation of the consequences that might result, i.e. a child, to procreate responsibly." *Id.* at 25. The "institution of opposite-sex

marriage both encourages such couples to enter into a stable relationship before having children and to remain in such a relationship if children arrive during the marriage unexpectedly.” The recognition of same-sex marriage would not further this interest in heterosexual “responsible procreation.” *Id.* According to the court “the legislative classification of extending marriage benefits to opposite-sex couples but not same-sex couples is reasonably related to a clearly identifiable, inherent characteristic that distinguishes the two classes: the ability or inability to procreate by ‘natural’ means.” *Id.* The court concluded by observing that “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.” *Id.* at 25-26.

Morrison also distinguished *Baker v. Vermont*, 170 Vt. 194, 744 A.2d 864 (1999) and *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). With regard to *Baker*, the court reasoned that the “‘Common Benefits Clause’ of the Vermont Constitution appears to be significantly less deferential to legislative discretion than is . . . the test for the Equal Privileges and Immunities Clause of the

Indiana Constitution.” *Morrison*, 821 N.E.2d at 28. Under the Vermont Constitution, “there was a ‘core presumption’ of inclusion, which seems to place the burden on the state to justify an exclusion, and that it would consider and balance the significance of the benefits and protections of the challenged law, whether the omission of one group from those benefits promotes the government’s stated goals for the law, and whether the classification ‘is significantly underinclusive or overinclusive.’” *Id.* Indiana—like Washington—does not impose this kind of heightened scrutiny under the rational basis test. The court also disagreed with the *Baker* court’s analysis. According to the Indiana Court of Appeals, the “*Baker* court apparently was concerned with whether the recognition of same-sex unions would undermine the state’s interests in encouraging responsible procreation by opposite-sex couples.” *Morrison*, 821 N.E.2d at 28. The Indiana Court concluded that the proper analysis “is whether recognizing same-sex marriage would further the State of Indiana’s interest in responsible procreation, not whether such recognition would harm that interest.” *Id.* Thus, the “*Baker* court’s emphasis on the fact that many same-sex couples are having children through adoption and assisted reproduction . . . fails to take into account the highly significant difference in the way in which opposite-sex couples and same-sex couples become parents. *Id.* The court concluded that this “difference, inherent to each

class, forms the rational basis for distinguishing between opposite-sex and same-sex couples under the Indiana Constitution. *Id.*

The Indiana Court of Appeals distinguished *Goodridge* based on misapplication of the rational basis test. According to the Indiana Court, although “the majority [in *Goodridge*] purports to apply a rational basis test to Massachusetts’ limitation of marriage to opposite-sex couples only, it frequently uses language suggesting that some stricter standard of review was being employed that was less deferential to legislative discretion.” *Morrison*, 821 N.E.2d at 28-29.

In sum, there is a rational basis for limiting marriage to the relationship between a man and a woman.

RESPECTFULLY SUBMITTED this 23rd day of February, 2005.

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