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DOES SEX MATTER? WASHINGTON'S DEFENSE OF MARRIAGE ACT UNDER THE EQUAL RIGHTS AMENDMENT OF THE WASHINGTON STATE CONSTITUTION

Thomas C. Schroeder

Abstract: Washington State's Defense of Marriage Act (DOMA) defines marriage as a civil contract between a male and a female and explicitly bans marriages between members of the same sex. Yet the Equal Rights Amendment (ERA) to the Washington State Constitution prohibits laws that classify by sex. In the three decades since the enactment of the ERA, the Washington State Supreme Court has recognized only two narrow exceptions to the ERA's ban of sex-based classifications: laws based on anatomical differences between the sexes and laws created to mandate equality between men and women. Whether the DOMA effects a sex-based classification and therefore violates the ERA presents the Washington State Supreme Court with an issue of first impression. When analyzing the DOMA, the Washington State Supreme Court should apply absolute scrutiny, a level of scrutiny which exceeds that applied by other courts that have found laws creating sex classifications to be sex discrimination. In so doing, the court should find that the DOMA results in a sex-based classification that is prohibited by the ERA and conforms to neither of the ERA's two narrow exceptions. As such, the Washington State Supreme Court should hold that Washington State's DOMA effects a sex-based classification expressly prohibited by the Washington State Constitution.

Jim and Chris meet and individually fall in love with identical twin sisters, Mary and Jane.¹ Both couples reside in Washington State and would like to be married in Washington. Each couple—Jim and Mary as well as Chris and Jane—separately applies for a marriage license. Under Washington State's Defense of Marriage Act (DOMA),² a valid marriage can exist between only a male and a female.³ Thus, in considering each couple's application for a marriage license,⁴ the county

1. Hypothetical created by the author.

2. WASH. REV. CODE §§ 26.04.010–.020 (2000); *see also* 28 U.S.C. § 1738C (2000) (granting states the authority to disclaim legal recognition of same-sex marriages performed in other states). While this Comment uses the popular name of the federal statute—DOMA—this Comment discusses only the relevant sections of the Washington State marriage statutes, hereinafter referred to as the DOMA, and their constitutionality under the Washington State Constitution.

3. WASH. REV. CODE § 26.04.010(1).

4. *See, e.g.*, King County Marriage License Application (requiring declaration of sex of each applicant for marriage license), available at <http://www.metrokc.gov/lars/marriage/mlapp.pdf> (last visited Feb. 11, 2005); Thurston County Marriage License Application (requiring declaration of sex of each applicant for marriage license), available at

auditor must look at the sex of each applicant.⁵ As a result, the county auditor will grant Jim and Mary a marriage license because Jim is male and Mary is female. However, the county auditor must deny Chris (Christine) and Jane a marriage license because both are female, and the DOMA explicitly prohibits same-sex marriage in Washington State.⁶

The issue of whether the Washington State DOMA's ban on same-sex marriages is constitutional under the Washington State Constitution has recently come before the state's courts.⁷ In *Andersen v. King County*⁸ and *Castle v. State*,⁹ Washington State superior court judges ruled that the DOMA violates the privileges and immunities and due process clauses of the state's constitution.¹⁰ However, in light of precedent from Division I of the Washington State Court of Appeals,¹¹ both trial courts declined to rule on the issue of whether the DOMA violates the Equal Rights Amendment (ERA) of the Washington State Constitution.¹² In *Singer v. Hara*,¹³ Division I ruled on the issue of sex discrimination under the ERA in the context of same-sex marriage.¹⁴ Because that decision predated the DOMA,¹⁵ the question remains open whether the Washington State DOMA's definition of marriage as a union between a

<http://www.co.thurston.wa.us/auditor/Recording/Forms/Marriage%20Application.pdf> (last visited Feb. 11, 2005).

5. WASH. REV. CODE § 26.04.140 ("Before any persons can be joined in marriage, they shall procure a license from a county auditor . . .").

6. *Id.* § 26.04.020(1)(c) (prohibiting marriages when parties are persons other than a male and a female).

7. See generally *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215 (Super. Ct. Thurston County Sept. 7, 2004) (memorandum opinion on constitutionality); *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Super. Ct. King County Aug. 4, 2004) (memorandum opinion and order on cross motions for summary judgment).

8. No. 04-2-04964-4-SEA, 2004 WL 1738447 (Super. Ct. King County Aug. 4, 2004) (memorandum opinion and order on cross motions for summary judgment).

9. No. 04-2-00614-4, 2004 WL 1985215 (Super. Ct. Thurston County Sept. 7, 2004) (memorandum opinion on constitutionality).

10. See *Castle*, 2004 WL 1985215, at *16 (holding that DOMA violates privileges and immunities clause of state constitution); *Andersen*, 2004 WL 1738447, at *11 (holding that DOMA violates both privileges and immunities and due process clauses of state constitution).

11. See *Singer v. Hara*, 11 Wash. App. 247, 260, 522 P.2d 1187, 1195 (1974) (holding that marriage statutes limiting marriage to opposite-sex couples did not violate ERA).

12. *Castle*, 2004 WL 1985215, at *3; *Andersen*, 2004 WL 1738447, at *11; see also WASH. CONST. art. XXXI, § 1.

13. 11 Wash. App. 247, 522 P.2d 1187 (1974).

14. *Id.* at 260, 522 P.2d at 1195.

15. WASH. REV. CODE §§ 26.04.010-.020 (2000); *Singer*, 11 Wash. App. at 260, 522 P.2d at 1195.

male and a female—and its resulting prohibition of a man marrying a man or a woman marrying a woman—effects a sex classification in violation of the ERA. Thus, the DOMA’s alleged violation of the state constitution, including the ERA, presents an issue of first impression for the Washington State Supreme Court, which has accepted *Andersen* and *Castle* for direct review.¹⁶

This Comment argues that, under the absolutist standard of review mandated by the ERA as it has been interpreted by Washington State courts post-*Singer*,¹⁷ the DOMA violates the ERA. Accordingly, the Washington State Supreme Court should correct the *Singer* court’s incorrect application of the ERA and hold that the DOMA’s prohibition of marriage between members of the same sex denies equality of rights on account of sex. The ERA precludes differential treatment predicated solely on a sex classification.¹⁸ Further, the sex classification inherent to the DOMA conforms to neither of the two narrow exceptions to the ERA drawn by Washington State courts:¹⁹ The DOMA’s differential treatment of the sexes is not based on the anatomical differences between the sexes, nor does it ameliorate the effects of past discrimination.²⁰ Further, federal and state courts examining claims of sex discrimination under standards of review less stringent than the standard required by Washington State’s ERA have found sexually discriminatory laws to be unconstitutional.²¹ When reviewing *Andersen* and *Castle*, the Washington State Supreme Court should consider such decisions to be persuasive authority, particularly those from state courts finding that laws banning same-sex marriage result in sex discrimination.

Part I of this Comment provides an overview of Washington State’s

16. See Letter from Ronald Carpenter, Deputy Clerk, Washington State Supreme Court, to Clerk and Counsel in *Castle v. State and Andersen v. King County 2* (Sept. 29, 2004) (notifying parties of consolidation and accelerated direct review).

17. See *Southwest Wash. Chapter, Nat’l Elec. Contractors Ass’n v. Pierce County*, 100 Wash. 2d 109, 127, 667 P.2d 1092, 1102 (1983) (noting that ERA absolutely prohibits inequality based on sex) [hereinafter *Southwest*]; see also Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 TEMP. L. REV. 907, 911 (1997) (noting that Washington is one of two states to apply an absolutist standard to sex-based classifications).

18. See WASH. CONST. art. XXXI, § 1; *Darrin v. Gould*, 85 Wash. 2d 859, 871, 540 P.2d 882, 889 (1975).

19. See *City of Seattle v. Buchanan*, 90 Wash. 2d 584, 591, 584 P.2d 918, 921 (1978) (holding that laws based on anatomical differences do not violate ERA); *Marchioro v. Chaney*, 90 Wash. 2d 298, 306, 582 P.2d 487, 492 (1978) (holding that laws effecting sex classifications do not violate ERA if they mandate equality between men and women).

20. See *infra* Part IV.C.

21. See *infra* Part III.

ERA, the standard of review employed by courts examining claims of sex discrimination, and the narrow exceptions to the ERA recognized by Washington State courts. Part II offers an overview of the DOMA and an examination of the judicial treatment of marriage between same-sex couples in Washington State. Part III discusses sex-based discrimination in jurisdictions outside Washington, the standard of review used by federal courts examining sex classifications, and how other state courts have evaluated sex discrimination arguments against laws banning same-sex marriage. Part IV argues that Washington State's DOMA violates the ERA because it creates an unconstitutional classification based on sex. Part IV further argues that the DOMA does not satisfy either of the exceptions to the ERA. Finally, after comparing sex discrimination under Washington State's ERA with treatment of sex discrimination in other jurisdictions, Part IV argues that the logic employed by Division I in *Singer* is inapposite and the prohibition of same-sex marriage effected by Washington's DOMA is unconstitutional.

I. THE WASHINGTON STATE CONSTITUTION PROHIBITS SEX DISCRIMINATION

Article XXXI, Section 1 of the Washington State Constitution, commonly known as the ERA, was approved by voters on November 7, 1972, and became effective December 7, 1972.²² The ERA provides that “[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex.”²³ In approving the ERA, voters chose to amend the state's constitution to preclude the state from passing or enforcing any law that would confer a special privilege on one sex but not the other.²⁴ In so doing, voters enacted a law that was meant to “protect the rights of all persons not to have the law discriminate against them solely on the basis of sex.”²⁵ The Washington State Supreme Court has ruled that the ERA absolutely mandates equality in “the strongest of terms.”²⁶ However, the court has created two narrow exceptions to the ERA's absolute prohibition of sex classifications: laws that recognize

22. WASH. CONST. art. XXXI, § 1; *Singer v. Hara*, 11 Wash. App. 247, 250 n.4, 522 P.2d 1187, 1190 n.4 (1974).

23. WASH. CONST. art. XXXI, § 1.

24. *Statement for HJR 61*, in OFFICIAL VOTERS PAMPHLET: GENERAL ELECTION, TUES. NOV. 7TH, 1972 (Wash.).

25. *Id.*

26. *Southwest*, 100 Wash. 2d 109, 127, 667 P.2d 1092, 1102 (1983).

anatomical differences between the sexes²⁷ and laws that ameliorate the effects of past discrimination.²⁸

A. Under the ERA, the Standard of Review Is Absolute Scrutiny

The Washington State Supreme Court has held that the ERA mandates that courts review all sex-based classifications under an absolutist standard of review.²⁹ The court has established that the ERA provides protections against sex discrimination above and beyond the protections afforded by the federal Equal Protection Clause; the ERA thus requires a more stringent standard of review than traditional strict scrutiny.³⁰ The Washington State Supreme Court has noted that “the ERA . . . prohibits the sacrifice of equality for any state interest, no matter how compelling.”³¹ Therefore, the ERA’s absolute protection against sex discrimination obviates the need for a Washington State court to analyze the government’s rationale or justification for a law differentiating on the basis of sex; in other words, a rational justification alone will not save a law that establishes a sex-based classification.³²

Under the ERA, Washington State courts do not employ the intermediate scrutiny that applies to federal equal protection claims;³³ instead, the ERA requires a stricter standard of scrutiny, which presumes invalid any law that results in discrimination based on sex.³⁴ Prior to the

27. See *City of Seattle v. Buchanan*, 90 Wash. 2d 584, 591, 584 P.2d 918, 921 (1978) (holding that laws based on anatomical sex differences do not violate ERA).

28. See *Marchioro v. Chaney*, 90 Wash. 2d 298, 306, 582 P.2d 487, 492 (1978) (holding that laws effecting sex classifications do not violate ERA if they mandate equality between men and women).

29. *Southwest*, 100 Wash. 2d at 127, 667 P.2d at 1102 (noting that ERA absolutely prohibits inequality based on sex); see also *Linton*, *supra* note 17, at 911 (noting that Washington and Pennsylvania are the only states in the United States to apply an absolutist standard to sex-based classifications).

30. *Darrin v. Gould*, 85 Wash. 2d 859, 871, 540 P.2d 882, 889 (1975); *State v. Burch*, 65 Wash. App. 828, 837, 830 P.2d 357, 362 (1992).

31. *Southwest*, 100 Wash. 2d at 127, 667 P.2d at 1102 (emphasis omitted).

32. See *Darrin*, 85 Wash. 2d at 871, 540 P.2d at 889 (reasoning that, by adopting ERA, people of Washington intended to provide protections against sex discrimination beyond those extant in state and federal constitutions, thereby rendering rational relationship test irrelevant).

33. See, e.g., *United States v. Virginia*, 518 U.S. 515, 531 (1996) (noting that courts examine sex-based classifications to determine if such classifications serve important governmental objectives justified by reasons that are “exceedingly persuasive”). This Comment explores the analysis of sex discrimination under the U.S. Constitution’s Equal Protection Clause in greater detail in Part III.A.

34. See *Guard v. Jackson*, 132 Wash. 2d 660, 663–64, 940 P.2d 642, 643–44 (1997) (noting that rational relationship and strict scrutiny tests are not relevant under ERA); see also *In re Welfare of Hauser*, 15 Wash. App. 231, 237, 548 P.2d 333, 337 (1976) (noting that ERA absolutely prohibits

ERA, a law's sex-based classification may have survived the strict scrutiny employed by Washington State courts examining a claim raised under the state constitution's privileges and immunities clause; yet, under the ERA, any sex-based classification is absolutely prohibited.³⁵ As the Washington State Supreme Court ruled in *Southwest Washington Chapter, National Electric Contractors Ass'n v. Pierce County*,³⁶ "[t]he ERA absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional strict scrutiny."³⁷ Consequently, in examining a claim that a law violates the ERA, a court's sole question is whether equality is restricted or denied on the basis of sex.³⁸

B. The ERA Requires Equal Access and Treatment Under the Law Regardless of Sex

In *Darrin v. Gould*,³⁹ the Washington State Supreme Court held that a public high school rule forbidding girls from playing on a high school football team violated the ERA.⁴⁰ The court relied on the ERA's prohibition of sex discrimination to determine that the rule forbidding girls from playing football amounted to discrimination based solely on sex and was, therefore, unconstitutional.⁴¹ The court reasoned that, because the *Darrin* girls did not have access to interscholastic sports equal to that provided to boys, the rule at issue contravened the ERA.⁴²

discrimination based on sex).

35. See *Darrin*, 85 Wash. 2d at 871, 540 P.2d at 889 (noting that, but for ERA, sex-based classifications may be permissible if they survive strict scrutiny test of privileges and immunities provision of state constitution); see also WASH. CONST. art. I, § 12. (Privileges and Immunities Clause). While Washington State courts have construed the Privileges and Immunities Clause of the Washington State Constitution in a manner similar to the Equal Protection Clause of the Fourteenth Amendment, these courts have held that the state constitution may "provide greater protection to individual rights than that provided by the equal protection clause." *Darrin*, 85 Wash. 2d at 868, 540 P.2d at 887-88 (citing *Carter v. Univ. of Wash.*, 85 Wash. 2d 391, 402, 536 P.2d 618, 625 (1975)); see also *Guard*, 132 Wash. 2d at 663-64, 940 P.2d at 643-44 (concluding that ERA provides more stringent standard than rational relationship or strict scrutiny test); *Hanson v. Hutt*, 83 Wash. 2d 195, 201, 517 P.2d 599, 603 (1973) (finding, pre-ERA, that sex classifications are subject to strict judicial scrutiny).

36. 100 Wash. 2d 109, 667 P.2d 1092 (1983).

37. *Id.* at 127, 667 P.2d at 1102.

38. See *State v. Burch*, 65 Wash. App. 828, 837, 830 P.2d 357, 362-63 (1992).

39. 85 Wash. 2d 859, 540 P.2d 882 (1975).

40. *Id.* at 877, 540 P.2d at 893.

41. *Id.* at 861, 540 P.2d at 883-84.

42. See *id.* at 876, 540 P.2d at 892 (noting that, despite similar abilities to participate, girls were

The *Darrin* court noted that any compelling interest or rational basis asserted by the state to justify differential treatment, including protecting girls from the harm of playing with boys, was irrelevant when viewed in light of the “overriding compelling state interest” of the ERA to guarantee equality between the sexes.⁴³ The court interpreted the absolute language of the ERA to supersede any other standard of review—even strict scrutiny.⁴⁴

The Washington State Supreme Court has further established that any law that classifies individuals on the basis of sex violates the ERA.⁴⁵ This is true regardless of whether a law results in discrimination against women or men, or whether the discrimination occurs at the individual or the group level.⁴⁶ In *Guard v. Jackson*,⁴⁷ the Washington State Supreme Court considered the constitutionality of a law that required a father of an illegitimate child to have provided financial support to his child in order to join in a wrongful death action following the death of that child.⁴⁸ The court held that the law discriminated on account of sex in violation of the ERA because it placed this support requirement solely on fathers, but not mothers, of illegitimate children.⁴⁹ In addition, the court explained that the law was unconstitutional notwithstanding the state legislature’s ability to place conditions on legislatively created rights because the sex classification effected by the law expressly violated the ERA.⁵⁰

C. *The Washington State Supreme Court Has Recognized Two Narrow Exceptions to the ERA*

While the ERA absolutely prohibits any law that differentiates based

excluded from playing football solely because of their sex).

43. *See id.* at 877, 540 P.2d at 893.

44. *See id.* at 871, 540 P.2d at 889 (noting that mandatory language of ERA was intended to go beyond what was otherwise accomplished under rational relationship and strict scrutiny tests).

45. *See id.*

46. *See Guard v. Jackson*, 132 Wash. 2d 660, 666, 940 P.2d 642, 645 (1997) (noting that, as applied, wrongful death statute discriminated against individual because it discriminated against males as class).

47. 132 Wash. 2d 660, 940 P.2d 642 (1997).

48. *Id.* at 661–62, 940 P.2d at 642–43.

49. *Id.* at 666, 940 P.2d at 645.

50. *See id.* at 665, 940 P.2d at 644 (finding that improperly delineated classes cannot be justified under legislative prerogative).

on a sex classification,⁵¹ the Washington State Supreme Court has interpreted the ERA to allow for two narrow exceptions.⁵² In *City of Seattle v. Buchanan*,⁵³ the Washington State Supreme Court created an exception to the ERA's absolute prohibition against laws effecting sex-based classifications when it held that laws based on the anatomical sex differences between women and men do not violate the ERA.⁵⁴ The *Buchanan* court examined whether a Seattle ordinance that prohibited women from exposing their breasts in public denied "equality of rights or impose[d] unequal responsibilities on women."⁵⁵ The court reasoned that the law did not result in sex discrimination because it required both men and women to conceal certain body parts from public exposure.⁵⁶

Moreover, the court held that the Seattle ordinance did not violate the ERA because the ordinance's different treatment of men and women was reasonably related to the actual physical difference between the sexes.⁵⁷ In other words, because the ordinance's prohibition of exposure of female breasts was based solely on the anatomical difference between men and women—the fact that women's breasts are anatomically different from men's and constitute an erogenous zone that men's breasts do not—the law did not violate the ERA.⁵⁸ To reach this holding, the court primarily relied on the rationale that the ordinance's requirement that women cover their breasts in public constituted only an "inconsequential sacrifice" on the part of women and did not preclude the women from expressing a fundamental right.⁵⁹

The Washington State Supreme Court created a second exception to the ERA's absolute prohibition of laws that differentiate based on sex classifications when it held that laws that serve to mandate equality between women and men do not violate the ERA.⁶⁰ In *Marchioro v.*

51. See *Southwest*, 100 Wash. 2d 109, 127, 667 P.2d 1092, 1102 (1983) (noting absolutist standard of ERA).

52. See *City of Seattle v. Buchanan*, 90 Wash. 2d 584, 591, 584 P.2d 918, 921 (1978) (holding that laws based on anatomical differences do not violate ERA); *Marchioro v. Chaney*, 90 Wash. 2d 298, 306, 582 P.2d 487, 492 (1978) (holding that laws effecting sex classifications do not violate ERA if they mandate equality between men and women).

53. 90 Wash. 2d 584, 584 P.2d 918 (1978).

54. *Id.* at 591, 584 P.2d at 921.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 590–91, 584 P.2d at 921.

60. *Marchioro v. Chaney*, 90 Wash. 2d 298, 306, 582 P.2d 487, 492 (1978).

Chaney,⁶¹ the Washington State Supreme Court upheld a law requiring a state political party's governing body to elect equal numbers of male and female members and chairpersons.⁶² The court held that while the law at issue classified according to sex, the classification did not violate the ERA because it "mandate[d] an equality of responsibility" between women and men.⁶³ In holding that the statutes at issue did not violate the ERA, the *Marchioro* court implied that the law at issue was similar to the marriage statutes addressed in *Singer v. Hara*, in that "while there is certainly a [sex-based] classification, there is equality of treatment [of the sexes] and this is sufficient to meet the requirements of the equal rights amendment."⁶⁴

The Washington State Supreme Court has subsequently construed the narrow *Marchioro* exception to mean that the "[ERA's] absolute mandate of equality does not . . . bar affirmative governmental efforts to create equality in fact."⁶⁵ In *Southwest Washington Chapter, National Electrical Contractors Ass'n v. Pierce County*, the court held that a county ordinance requiring affirmative action in public works contracting did not violate the ERA because the law was intended to "ameliorate the effects of past discrimination."⁶⁶ Thus, despite the ordinance's favorable treatment of women over men, its proven intention to ameliorate past discrimination against women in the construction industry saved it from violating the ERA.⁶⁷

In sum, Washington State's ERA absolutely prohibits discrimination on the basis of sex and is not subject to the exceptions permitted under traditional intermediate or strict scrutiny. In addition, Washington State's ERA is one of only two laws in the country that hold potentially sex-discriminatory laws to an absolutist standard.⁶⁸ Further, the ERA prevents the legislature from limiting the rights of a class where the

61. 90 Wash. 2d 298, 582 P.2d 487 (1978).

62. *Id.* at 308, 582 P.2d at 493.

63. *Id.*

64. *See id.* at 307, 582 P.2d at 492 (implying that statutes mandating equal numbers of men and women on state political party committees are similar to marriage statutes that limit parties in marriage to male and female because both treat sexes equally) (citing *Singer v. Hara*, 11 Wash. App. 247, 253, 522 P.2d 1187, 1191 (1974)).

65. *Southwest*, 100 Wash. 2d 109, 129, 667 P.2d 1092, 1102 (1983).

66. *Id.* at 128–29, 667 P.2d at 1102.

67. *See id.* at 129, 667 P.2d at 1103 (excepting statute from ERA based on its purpose to address underrepresentation of and discrimination against women in construction industry).

68. *See Linton*, *supra* note 17, at 911.

classification is solely based on sex.⁶⁹ Notwithstanding the absolute standard of the ERA, Washington State courts permit differentiation by sex in two narrowly drawn instances:⁷⁰ laws that are based on the anatomical differences between women and men⁷¹ and laws that affirmatively seek to redress past discrimination.⁷²

II. WASHINGTON STATE'S DOMA BANS SAME-SEX MARRIAGE, BUT STATE TRIAL COURTS HAVE FOUND THE BAN UNCONSTITUTIONAL

As of March 2005, Washington is one of forty-two states that legally limit marriage to opposite-sex couples; seventeen of these states have amended their constitutions to this effect.⁷³ Enacted in 1998, Washington State's DOMA defines marriage as the union of one man and one woman,⁷⁴ and thereby prohibits a man from marrying a man and a woman from marrying a woman. In enacting the DOMA, the Washington State Legislature expressly codified an opinion reached by Division I of the Washington State Court of Appeals some twenty-four years earlier.⁷⁵ Recently, two cases before the state's trial courts have challenged the constitutionality of the DOMA.⁷⁶ The Washington State Supreme Court has granted a request for consolidated and direct review of these decisions.⁷⁷

69. See *Guard v. Jackson*, 132 Wash. 2d 660, 665, 940 P.2d 642 (1997) (finding that improperly delineated classes cannot be justified under legislative prerogative).

70. See *id.* at 664, 940 P.2d at 644 (noting that Washington State Supreme Court has found only two specific exceptions to ERA).

71. See *City of Seattle v. Buchanan*, 90 Wash. 2d 584, 491, 584 P.2d 918, 921 (1978).

72. See *Marchioro v. Chaney*, 90 Wash. 2d 298, 306, 582 P.2d 487, 492 (1978).

73. See Same Sex Marriage License Laws, at <http://marriage.about.com/cs/marriagelicense/a/samesexcomp.htm> (last visited Mar. 28, 2005).

74. WASH. REV. CODE §§ 26.04.010–.020 (2004).

75. See *Marriages*, ch. 1, § 2, 1998 Wash. Laws 1 (“It is the intent of the legislature by this act to codify the *Singer* opinion . . .”); see also *Singer v. Hara*, 11 Wash. App. 247, 260, 522 P.2d 1187, 1195 (1974) (holding that sex classification effected by marriage statutes’ definition of marriage was based on unique physical characteristics of sexes and did not discriminate on basis of sex).

76. See *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215, at *2 (Super. Ct. Thurston County Sept. 7, 2004) (memorandum opinion on constitutionality); *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *3-4 (Super. Ct. King County Aug. 4, 2004) (memorandum opinion and order on cross motions for summary judgment).

77. See Letter from Ronald Carpenter, Deputy Clerk, Washington State Supreme Court, to Clerk and Counsel in *Castle v. State* and *Andersen v. King County* 2 (Sept. 29, 2004) (notifying parties of consolidation and accelerated direct review).

A. *Washington State's DOMA Limits Marriage to Opposite-Sex Couples*

In 1998, the Washington State Legislature enacted Washington State's DOMA.⁷⁸ By enacting the DOMA, the legislature revised Washington State's marriage statutes to define marriage expressly as a "civil contract between a male and a female."⁷⁹ In addition, through references to "husband" and "wife," the DOMA implicitly suggests that valid marriages exist only between members of the opposite sex.⁸⁰ Finally, the last section of the DOMA expressly disallows same-sex marriage by prohibiting marriages "[w]hen the parties are persons other than a male and a female."⁸¹

B. *Prior to the DOMA, Division I of the Washington State Court of Appeals Held that Marriage Exists Only Between a Man and a Woman*

As enacted by the state legislature, Washington State's DOMA represents an explicit codification of the decision reached by Division I of the Washington State Court of Appeals in *Singer v. Hara*.⁸² In *Singer*, the court noted that Washington State's pre-DOMA statutory definition of marriage, through reference to the different sexes, provided for a valid marriage only between a man and a woman.⁸³ The *Singer* court held that this limitation of marriage did not violate the ERA's constitutional prohibition against differential treatment of the sexes.⁸⁴

In *Singer*, two men, John Singer and Paul Barwick, brought suit against King County Auditor Lloyd Hara, claiming that the government's denial of their application for a marriage license violated

78. WASH. REV. CODE §§ 26.04.010–.020 (2004).

79. *Id.* § 26.04.010(1).

80. *See, e.g., id.* § 26.040.010(2) ("Every marriage entered into in which either the husband or the wife . . .").

81. *Id.* § 26.04.020(1)(c).

82. *Singer v. Hara*, 11 Wash. App. 247, 260, 522 P.2d 1187, 1195 (1974); *see also* Marriages, ch. 1, § 2, 1998 Wash. Laws 1 ("It is the intent of the legislature by this act to codify the *Singer* opinion . . .").

83. *Singer*, 11 Wash. App. at 253, 522 P.2d at 1191.

84. *Id.* at 249, 522 P.2d at 1189. While the *Singer* court's decision predates the DOMA by approximately twenty-four years, its decision became central to the codification of DOMA. *See* Marriages, ch. 1, § 2, 1998 Wash. Laws 1.

their constitutional rights.⁸⁵ Specifically, Singer and Barwick claimed that the state marriage statutes, which allowed a man to marry a woman, but prohibited a man from marrying a man, constituted a sex-based classification forbidden by the ERA.⁸⁶ The *Singer* court construed the ERA narrowly to hold that the statutory definition of marriage did not discriminate on the basis of sex.⁸⁷ The court reasoned that the same-sex couple was not prohibited from marrying because of their sex; rather, the two men, like two similarly situated women, had equal access to marry a member of the opposite sex.⁸⁸ As such, the men were prohibited from marrying not by virtue of their sex but solely because marriage was limited, by implicit statutory definition, to unions between members of the opposite sex.⁸⁹

In upholding a statutory definition of marriage that limited marriage to opposite-sex couples, the *Singer* court refuted Singer and Barwick's argument that the sexual classifications imposed by the Washington State marriage statutes were analogous to racial classifications inherent in anti-miscegenation statutes overturned by the United States Supreme Court.⁹⁰ In *Loving v. Virginia*,⁹¹ the United States Supreme Court held that laws forbidding interracial marriage unconstitutionally classified according to race, regardless of the state's contention that the laws applied equally to all races.⁹² Virginia argued that its statutory prohibition of interracial marriage applied equally to Caucasians and African Americans because it equally forbade both races from marrying members of another race.⁹³ However, the Court rejected this argument and held that anti-miscegenation statutes violated the U.S. Constitution.⁹⁴ In interpreting *Loving*, the *Singer* court reasoned that the definition of marriage at issue in Washington—the legal union of one

85. *Singer*, 11 Wash. App. at 248, 522 P.2d at 1188.

86. *Id.* at 250–52, 522 P.2d at 1190–91.

87. *See id.* at 254–55, 522 P.2d at 1192.

88. *Id.* at 255, 522 P.2d at 1192.

89. *See id.* at 253, 522 P.2d at 1191 (defining marriage as legal union of one man and one woman).

90. *See id.*

91. 388 U.S. 1 (1967).

92. *Id.* at 11 (holding that Virginia's miscegenation statutes, which limited marriage to members of same race, rested solely on distinctions of race in violation of the Equal Protection Clause of Fourteenth Amendment).

93. *See id.* at 8 (noting party's contention that, by punishing both parties in unlawful marriage, anti-miscegenation statutes applied equally to both races).

94. *Id.* at 11.

man and one woman—was impliedly operative and upheld by the U.S. Supreme Court in *Loving*.⁹⁵ Further, the *Singer* court reasoned that, far from relying on an unconstitutional classification such as race, Washington State’s marriage laws precluded same-sex marriage solely by virtue of marriage’s definition.⁹⁶ The court stated, “[*Singer* and *Barwick*] are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship”⁹⁷

C. *In Andersen and Castle, Washington State Trial Courts Declined to Address Whether the DOMA Violates the ERA*

The constitutionality of Washington State’s DOMA, which codifies the *Singer* holding, has only recently come before the state’s trial courts.⁹⁸ In *Andersen v. King County*, eight same-sex couples wishing to marry brought suit against the county. They claimed the DOMA violated various clauses of the state constitution, including the ERA.⁹⁹ Similarly, in *Castle v. State*, the plaintiffs alleged that the DOMA’s preclusion of marriage between adult couples of the same sex violated the state constitution.¹⁰⁰ The *Andersen* and *Castle* courts found that the DOMA violated the state constitution,¹⁰¹ but decided the cases on different grounds and relied on different interpretations of state and federal law.¹⁰² However, both courts declined to decide whether the DOMA violated the ERA’s prohibition against unequal application of the laws on account of sex.¹⁰³

95. See *Singer*, 11 Wash. App. at 253, 522 P.2d at 1192 (noting that *Loving* court did not change basic definition of marriage as legal union of one man and one woman).

96. *Id.* at 254–55, 522 P.2d at 1192.

97. *Id.*

98. See generally *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215 (Super. Ct. Thurston County Sept. 7, 2004) (memorandum opinion on constitutionality); *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Super. Ct. King County Aug. 4, 2004) (memorandum opinion and order on cross motions for summary judgment).

99. See *Andersen*, 2004 WL 1738447, at *2–4.

100. *Castle*, 2004 WL 1985215, at *2.

101. *Id.*, at *16; *Andersen*, 2004 WL 1738447, at *11.

102. See *Castle*, 2004 WL 1985215, at *16 (holding DOMA violated privileges and immunities clause of state constitution); *Andersen*, 2004 WL 1738447, at *11 (holding DOMA violated both privileges and immunities and due process provisions of state constitution).

103. See *Castle*, 2004 WL 1985215, at *3 (noting that only higher court can examine DOMA under ERA and applicability of *Singer*); *Andersen*, 2004 WL 1738447, at *11 (deferring to

In *Andersen*, the court based its constitutional assessment of the DOMA largely on whether the law's prohibition of same-sex marriage violated the Privileges and Immunities Clause of the Washington State Constitution.¹⁰⁴ After determining that the right to marry is a fundamental right, the court employed what it termed heightened scrutiny, utilizing standards from federal equal protection analyses to examine the DOMA.¹⁰⁵ Pursuant to this analysis, the court found that the DOMA's limitation of marriage to opposite-sex couples was not substantiated by, nor rationally related to, a compelling state interest, and neither was it narrowly tailored to any such interest.¹⁰⁶ As such, the court held the DOMA violates the Washington State Constitution because the fundamental right to marry is "not being made equally available to all citizens."¹⁰⁷ However, the *Andersen* court did not consider whether the DOMA's prohibition of same-sex marriage constitutes discrimination on account of sex, in violation of the ERA.¹⁰⁸ The trial court explained its refusal to examine the DOMA's potential violation of the ERA by deferring to the controlling precedent of *Singer*.¹⁰⁹ It noted that only a higher court, such as the Washington State Supreme Court, could overrule a decision of the Washington State Court of Appeals.¹¹⁰

Like the court in *Andersen*, the *Castle* court noted that it was, by virtue of its "obligation to respect and follow the *Singer* decision,"

Washington State Supreme Court on constitutionality of DOMA under ERA).

104. WASH. CONST. art. I, § 12 ("No law shall be passed granting to any citizen, [or] class of citizens . . . privileges or immunities which on the same terms shall not equally belong to all citizens."); see *Andersen*, 2004 WL 1738447, at *3-7.

105. See *Andersen*, 2004 WL 1738447, at *7 ("The court concludes that [the DOMA] must be scrutinized as statutes negatively impacting the plaintiffs' fundamental right to marry."); see also *Castle*, 2004 WL 1985215, at *11 (noting *Andersen* court employed federal equal protection analysis rather than state constitutional privileges and immunities analysis).

106. See *Andersen*, 2004 WL 1738447, at *9-11 (barring same-sex couples from marrying does not serve interest of encouraging procreation nor is such ban rationally related to goal of nurturing and providing for emotional well-being of children).

107. *Id.* at *11. The court also held that the DOMA violates the substantive due process clause of the state constitution, yet relied on its analysis of the privileges and immunities clause violation to support this conclusion. See *id.* (concluding denial of right to marry constitutes denial of substantive due process).

108. *Id.*

109. See *id.* (noting court was bound by *Singer* court's decision); see also *supra* Part II.B (summarizing *Singer* court's pre-DOMA ruling that statutory ban on same-sex marriage did not violate ERA).

110. *Andersen*, 2004 WL 1738447, at *11 ("Although the Washington State Supreme Court may freely do so, this [c]ourt does not find itself in a position to overrule the *Singer* decision.").

precluded from examining whether the DOMA's prohibition of same-sex marriage constituted a violation of the ERA.¹¹¹ Rather, the court restricted its analysis of the DOMA to determine only whether the statute violated the state constitution's privileges and immunities clause.¹¹² However, in analyzing the level of protection afforded by that clause, the court invoked the ERA.¹¹³ Specifically, the *Castle* judge concluded that, because the protections afforded by Washington State's ERA go beyond similar protections afforded by the Equal Protection Clause of the federal Constitution, the individual protections afforded by Washington State's Privileges and Immunities Clause call for a stricter analysis than would be applied under federal equal protection analysis.¹¹⁴

The *Castle* court held, as did the *Andersen* court, that marriage is a fundamental right but went on to find that homosexuals are a suspect class—a socially-recognized class of citizens subject to adverse social and political stereotyping.¹¹⁵ Referring to the additional protections the Washington State Constitution affords to its citizens, the court relied on marriage's existence as a fundamental right and homosexuals' status as a suspect class to apply strict scrutiny to the DOMA.¹¹⁶ The court concluded that the statute did not further the state's purported interest in procreation and stable environments for children, nor was the DOMA narrowly tailored to that interest.¹¹⁷

In sum, the question of whether the DOMA violates the ERA presents an issue of first impression for the Washington State Supreme Court. Although Division I examined the issue of same-sex marriage in relation to the ERA in 1974,¹¹⁸ courts have yet to address specifically whether the DOMA violates the ERA. Washington State trial courts that have addressed the constitutionality of the DOMA have deferred to *Singer* as binding precedent to justify their refusal to address claims that the

111. *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215, at *3 (Super. Ct. Thurston Cty. Sept. 7, 2004) (memorandum opinion on constitutionality).

112. *Id.* at *16 (noting that decision based on privileges and immunities grounds obviated need to examine other constitutional claims).

113. *Id.* at *8.

114. *Id.*

115. *Id.* at *11, *13.

116. *Id.*

117. *Id.* at *16.

118. *Singer v. Hara*, 11 Wash. App. 247, 249, 522 P.2d 1187, 1189 (1974).

DOMA violates the ERA.¹¹⁹ Thus, the question of whether the DOMA denies or abridges equal rights under the law on account of sex can be determined by only the Washington State Supreme Court.

III. OTHER JURISDICTIONS APPLY A LESS STRINGENT STANDARD OF REVIEW TO SEX CLASSIFICATIONS

As interpreted by the Washington State Supreme Court, Washington State's ERA mandates that courts examine laws that classify according to sex with absolute scrutiny.¹²⁰ It follows that any law premised upon a sex-based classification is presumed unconstitutional unless it meets one of two narrowly drawn exceptions.¹²¹ Such scrutiny exceeds the intermediate scrutiny used by federal courts examining sex classifications under an equal protection analysis.¹²² Similarly, state courts examining the constitutionality of state laws banning same-sex marriage have employed standards of review less stringent than the standard imposed by Washington State's ERA.¹²³ However, under these lesser standards of review, federal and state courts have found that sex classifications may result in unlawful sex discrimination.¹²⁴ Finally, where state courts have determined that laws limiting marriage to opposite-sex couples effect sex classifications, they have ruled that such classifications constitute unconstitutional sex discrimination.¹²⁵

119. See *id.* at *3; *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *11 (Super. Ct. King County Aug. 4, 2004) (memorandum opinion and order on cross motions for summary judgment).

120. See *Southwest*, 100 Wash. 2d 109, 127, 667 P.2d 1092, 1102 (1983).

121. See *City of Seattle v. Buchanan*, 90 Wash. 2d 584, 491, 584 P.2d 918, 921 (1978) (holding that laws based on actual sex differences do not violate ERA); *Marchioro v. Chaney*, 90 Wash. 2d 298, 306, 582 P.2d 487, 492 (1978) (holding that laws effecting sex classifications do not violate ERA if they mandate equality between men and women).

122. See *United States v. Virginia*, 518 U.S. 515, 531-33 (1996) (noting that sex classifications are subject to standard of heightened review).

123. See *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 972 (Mass. 2003) (Greaney, J., concurring); see also *Linton*, *supra* note 17, at 911 (noting that Washington is one of two states to apply absolutist standard to sex-based classifications).

124. See *Virginia*, 518 U.S. at 534; *Baehr*, 852 P.2d at 64-66; *Goodridge*, 798 N.E.2d at 971-72 (Greaney, J., concurring).

125. *Baehr*, 852 P.2d at 67-68; *Goodridge*, 798 N.E.2d at 972 (Greaney, J., concurring).

A. *Federal Courts Apply Intermediate Scrutiny to Classifications Based on Sex*

Using what is known as intermediate scrutiny, federal courts have determined that classifications based on sex are discriminatory unless the government can demonstrate that its justification for the classification is genuine, the classification does not rely on overbroad generalizations of the sexes, and the discriminatory means used are substantially related to the state's objectives.¹²⁶ In *United States v. Virginia*,¹²⁷ the U.S. Supreme Court held that Virginia's exclusion of women from the all-male Virginia Military Institute (VMI) resulted in sex discrimination in violation of the Equal Protection Clause of the federal Constitution.¹²⁸ The Court engaged in a detailed examination of the state's justifications for the exclusion of women, which included the importance of single sex education and the uniqueness of VMI's method of character development and leadership training.¹²⁹ The Court determined that those justifications were facially tenable, but not exceedingly persuasive under the heightened review required by intermediate scrutiny¹³⁰—a level of review it termed “skeptical scrutiny” or “heightened review.”¹³¹ As a result, the Court ultimately ruled that the state's justifications did not proffer the “solid base” necessary to maintain a sex classification that categorically excluded women.¹³²

B. *Other State Courts Find Sex Discrimination in State Laws Limiting Marriage to Same-Sex Couples*

Judges interpreting equal protection clauses of state constitutions have concluded that laws limiting marriage to opposite-sex couples establish sex-based classifications.¹³³ In *Baehr v. Lewin*,¹³⁴ the Supreme Court of

126. *Virginia*, 518 U.S. at 533 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

127. 518 U.S. 515 (1996).

128. *Id.* at 534.

129. *See id.* at 535–41.

130. *Id.* at 534 (“Measuring the record in this case against the review standard . . . we conclude that Virginia has shown no ‘exceedingly persuasive justification’ for excluding all women [from VMI] . . .”).

131. *Id.* at 531–33.

132. *Id.* at 546.

133. *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 971–72 (Mass. 2003) (Greaney, J., concurring).

Hawaii considered whether the Hawaii marriage statutes implicitly violated the equal protection clause of the Hawaii State Constitution¹³⁵ by requiring two people applying for a marriage license to be of the opposite sex.¹³⁶ Construing Hawaii's marriage statutes according to their plain language, the court concluded that the state regulated "access to [marriage] on the basis of the applicants' sex."¹³⁷ Obligated by its state constitution to examine such sex-based classifications with strict scrutiny, the *Baehr* court held that the marriage statutes denied same-sex couples access to marriage and were thus presumptively unconstitutional.¹³⁸

In addition, the *Baehr* court noted that it would be illogical to rely on the statutory definition of marriage as a union between a man and a woman when ruling on a case challenging that very definition.¹³⁹ In so doing, the court distinguished the logic employed by the *Singer* court in Washington as "tortured and conclusory sophistry."¹⁴⁰ The *Baehr* court held that the sex-based classifications used by Hawaii's marriage statute were presumptively unconstitutional because they denied same-sex couples the right to marry solely on the basis of sex.¹⁴¹

Other state courts that have struck down laws prohibiting same-sex marriage have based their holdings on grounds other than unlawful sex

134. 852 P.2d 44 (Haw. 1993).

135. HAW. CONST. art. I, § 5 ("No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."); see *Baehr*, 852 P.2d at 54 (concluding that factual question existed regarding marriage statutes' violation of equal protection clause of Hawaii's constitution). The analysis under the equal protection clause of the Hawaii constitution was one of two grounds on which the *Baehr* court ruled. *Id.* at 50. The court also considered whether the marriage statutes violated the right to privacy guaranteed by the Hawaii State Constitution. See *id.* at 55–64.

136. *Baehr*, 852 P.2d at 48–50 (observing that through numerous direct and indirect references to gender, Hawaii marriage statutes imply that applicant couples must be composed of members of opposite sex).

137. *Id.* at 60 (concluding that numerous references to brother and sister, wife and husband, and man and woman limited marriage to members of opposite sex).

138. *Id.* at 67. On remand, the trial court invalidated the state law. See *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235, at *21–22 (Haw. Cir. Ct. Dec. 3, 1996). However, Hawaii voters ultimately amended their state's constitution to allow the legislature to limit marriage to same-sex couples. See HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

139. See *Baehr*, 852 P.2d at 61 (noting that argument that same-sex couples do not have right to marry because definition of marriage precludes such right is "circular and unpersuasive").

140. *Id.* at 63.

141. *Id.* at 67.

discrimination.¹⁴² Yet the issue of whether laws banning same-sex marriage are based on sex classifications in violation of state constitutions continues to inform these decisions.¹⁴³ In a concurring opinion to *Goodridge v. Department of Public Health*,¹⁴⁴ Justice John M. Greaney of the Supreme Judicial Court of Massachusetts concluded that the ban on same-sex marriage effected by the state's marriage statutes violated the state constitution.¹⁴⁵ Specifically, he noted that the limited statutory definition of those eligible for marriage resulted in an unconstitutional classification based on sex.¹⁴⁶ Noting that the statutes constrained an individual's choice of marital partner on the basis of his or her sex, the concurrence employed strict scrutiny to conclude that the state presented no compelling interest to justify this sex-based classification.¹⁴⁷

Massachusetts contended that its marriage law was constitutional because it applied uniformly to both sexes.¹⁴⁸ Justice Greaney noted, however, that uniform application did not preclude the court from finding a sex-based classification because the sex classification operated on an individual level—preventing an individual from marrying his or her chosen partner solely because of the chosen partner's sex.¹⁴⁹ Similar

142. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) (holding Massachusetts marriage licensing statutes limiting marriage to opposite-sex couples denied same-sex couples freedom to partake in benefits guaranteed by state constitution); *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999) (holding Vermont marriage statutes categorically excluded same-sex couples from rights and benefits guaranteed by state constitution's common benefits clause).

143. See *Goodridge*, 798 N.E. 2d at 971–72 (Greaney, J., concurring) (stating that marriage statutes create unjustified statutory sex classification); *Baker*, 744 A.2d at 906 (Johnson, J., concurring and dissenting) (concluding that, under Vermont law, individual's right to marry person of same sex is constrained solely on basis of sex).

144. 798 N.E. 2d 941 (Mass. 2003).

145. *Id.* at 970 (Greaney, J., concurring) (concluding that, under traditional equal protection analysis, marriage statutes violated Massachusetts constitution).

146. See *id.* at 971 (Greaney, J., concurring) (“The marriage statutes prohibit some applicants . . . from obtaining a marriage license . . . based solely on the applicants' gender.”). Justice Greaney also concluded that the state's marriage statutes denied same-sex couples the fundamental right to marry. See *id.* at 970 (“The right to marry is . . . a fundamental right that is protected against unwarranted State interference.”).

147. See *id.* at 972 (Greaney, J., concurring) (defining standard of review as strict scrutiny).

148. See *id.* at 971 (Greaney, J., concurring).

149. See *id.* Specifically, Justice Greaney stated that:

A classification may be gender based whether or not the challenged government action apportions benefits or burdens uniformly along gender lines [It is] disingenuous, at best, to suggest that such an individual's right to marry has not been burdened at all, because he or she remains free to chose [sic] another partner, who is of the opposite sex.

Id.

to the court in *Baehr*, the *Goodridge* concurrence noted that relying upon the definition of marriage as the legal union of a man and a woman to justify the exclusion of same-sex couples from having access to marriage is “conclusory and bypasses the core question [the court was] asked to decide.”¹⁵⁰

In conclusion, under the intermediate scrutiny employed by federal courts, laws effecting a sex-based classification may pass constitutional muster if the state can demonstrate that the classification serves important governmental objectives and that the discriminatory means are substantially related to the achievement of those objectives. Likewise, even under the higher standard of strict scrutiny employed by certain state courts when examining sex-based classifications, such classifications may be constitutional. However, in the area of same-sex marriage, state courts have found that sex-based classifications effected by laws limiting marriage to opposite-sex couples do not survive strict scrutiny and, thus, are unconstitutional.

IV. THE WASHINGTON STATE SUPREME COURT SHOULD HOLD THAT THE DOMA VIOLATES THE ERA

Washington State’s DOMA effects a sex-based classification that permits or denies access to marriage solely on account of sex. As it has been interpreted by Washington State courts since *Singer v. Hara*, the ERA mandates that courts examine sex-based classifications with absolute scrutiny,¹⁵¹ a level of review that exceeds the standards employed by other jurisdictions examining the constitutionality of sex-based classifications.¹⁵² Under absolute scrutiny, the Washington State Supreme Court should apply its post-*Singer* ERA precedent to hold that the DOMA’s sex classification denies or restricts equality on the basis of sex. Further, the DOMA satisfies neither of the two narrowly drawn exceptions to the ERA established by courts since Division I’s ruling in *Singer*.¹⁵³ Accordingly, the Washington State Supreme Court should rule that the DOMA’s prohibition of same-sex marriage effects an

150. *Id.* at 972–73 (Greaney, J., concurring).

151. *See supra* Part I.A.

152. *See supra* Part III.

153. *See City of Seattle v. Buchanan*, 90 Wash. 2d 584, 591, 584 P.2d 918, 921 (1978) (holding that laws based on anatomical differences between men and women do not violate ERA); *Marchioro v. Chaney*, 90 Wash. 2d 298, 306, 582 P.2d 487, 492 (1978) (holding that laws effecting sex classifications do not violate ERA if they mandate equality between men and women).

unconstitutional sex classification in violation of the ERA.

A. Washington State's DOMA Effects a Sex-Based Classification

In examining the DOMA under the ERA, the Washington State Supreme Court should look first to the text of the statute in light of the ERA. The DOMA defines marriage as “a civil contract between a male and a female.”¹⁵⁴ Further, it specifically prohibits marriage “[w]hen the parties are persons other than a male and a female.”¹⁵⁵ Washington State’s DOMA effects a sex classification because its statutory definition of marriage explicitly refers to sex to define marriage as well as who legally has a right to it.¹⁵⁶

The fact that sex is critical to the application of the DOMA further substantiates the conclusion that the DOMA effects a sex-based classification. Marriage license applications are designed to allow only opposite-sex couples to apply to have their marriages legally recognized in Washington State.¹⁵⁷ Because of the DOMA, the sex of each applicant is essential to the county auditor’s determination of whether to issue or deny the marriage license.¹⁵⁸

B. The DOMA's Sex Classification Violates the ERA's Absolute Prohibition of Sex Discrimination

As the Washington State Supreme Court held in *Darrin v. Gould*, laws that bar or limit equal access solely on the basis of sex classifications constitute sex discrimination prohibited by the ERA, regardless of any justification or interest asserted by the state.¹⁵⁹ Under the absolute scrutiny required by the ERA, a court must examine the DOMA’s sex-based classification with a level of scrutiny beyond that

154. WASH. REV. CODE § 26.04.010(1) (2004).

155. *Id.* § 26.04.020(1)(c).

156. *See id.* § 26.04.010.

157. *See, e.g.*, King County Marriage License Application (requiring declaration of sex of each applicant for marriage license), available at <http://www.metrokc.gov/lars/marriage/mlapp.pdf> (last visited Feb. 11, 2005); Thurston Country Marriage License Application (requiring declaration of sex of each applicant for marriage license), available at <http://www.co.thurston.wa.us/auditor/Recording/Forms/Marriage%20Application.pdf> (last visited Feb. 11, 2005).

158. *See* WASH. REV. CODE § 26.04.140 (“Before any persons can be joined in marriage, they shall procure a license from a county auditor . . .”).

159. *Darrin v. Gould*, 85 Wash. 2d 859, 876–77, 540 P.2d 882, 892–93 (1975).

employed by courts in other jurisdictions.¹⁶⁰ While the DOMA's sex-based classification might survive intermediate scrutiny under federal law,¹⁶¹ it does not satisfy the ERA's mandatory absolute scrutiny. Similarly, even if Washington State's DOMA might survive judicial scrutiny in other state jurisdictions, its sex classification should, by virtue of the ERA's absolutist standard, be held to a stricter standard by the Washington State Supreme Court.¹⁶²

The DOMA denies equal rights on account of sex. Akin to the situation in *Darrin*, where girls were denied equal access to play football solely because of their sex,¹⁶³ same-sex couples in Washington are, under the DOMA, denied equal access to marriage solely because of the sex of one of the partners in the couple. Courts since *Singer* have interpreted the ERA to absolutely prohibit discrimination based on sex,¹⁶⁴ which mandates a level of scrutiny beyond that required in other jurisdictions.¹⁶⁵ Therefore, the Washington State Supreme Court should apply absolute scrutiny to hold that the DOMA's limitation on access to marriage—one based solely on sex—violates the ERA.

In *Darrin*, the court noted that but for their sex girls were otherwise eligible to play football.¹⁶⁶ Similarly, under the DOMA, but for the sex of one partner in a couple, same-sex couples who are otherwise eligible to marry are prohibited from doing so.¹⁶⁷ For example, suppose that two individuals—A, a male, and B, a female—would both like to marry C, a female. Under Washington State's DOMA, A will be allowed to marry C, but B will be prohibited from marrying C. The differential treatment

160. See *Southwest*, 100 Wash. 2d 109, 127, 667 P.2d 1092, 1102 (1983) (noting that ERA absolutely prohibits inequality based on sex); see also Linton, *supra* note 17, at 911 (1997) (noting that Washington is one of two states to apply absolutist standard to sex-based classifications); *supra* Part I.A, III.

161. See *United States v. Virginia*, 518 U.S. 515, 531–33 (1996) (noting that sex classifications are subject to intermediate scrutiny); see also *supra* Part III.A (summarizing standard of review employed by federal courts examining claims of sex discrimination).

162. See *Guard v. Jackson*, 132 Wash. 2d 660, 663–64, 940 P.2d 642, 643–44 (1997) (noting that rational relationship and strict scrutiny tests for sex classifications are not relevant under ERA).

163. See *Darrin*, 85 Wash. 2d at 876, 540 P.2d at 892 (determining that solely because of sex, girls were not provided access to interscholastic sports equal to that provided to boys).

164. See *In re Welfare of Hauser*, 15 Wash. App. 231, 237, 548 P.2d 333, 337 (1976); *supra* Part III.

165. See *Southwest*, 100 Wash. 2d at 127, 667 P.2d at 1102 (noting that ERA absolutely prohibits inequality based on sex).

166. *Darrin*, 85 Wash. 2d at 861, 540 P.2d at 884.

167. See WASH. REV. CODE § 26.04.020(1)(c) (2004) (prohibiting marriages when parties are persons other than one male and one female).

of A and B under the DOMA is based on their sex. Under the absolute scrutiny required by the ERA, such differential treatment is unconstitutional sex discrimination.¹⁶⁸ The Washington State Supreme Court should rule that the DOMA effects unconstitutional sex discrimination.

The Washington State Supreme Court's decision in *Guard* provides further guidance as to the kinds of laws courts will invalidate under the ERA. Notwithstanding the state legislature's ability to place conditions on the legal right of marriage,¹⁶⁹ the sex classification effected by the DOMA violates the state constitution. Similar to the law at issue in *Guard*, which limited the right to bring a claim of wrongful death on account of the sex of the plaintiff,¹⁷⁰ the DOMA expressly denies the right to marry on account of the sex of the persons seeking to be married.¹⁷¹ Under the DOMA, an opposite-sex couple is granted access to marriage, while a same-sex couple is denied that right solely because of the sex of one of the applicants.¹⁷² As the court held in *Guard*, under the ERA a sex classification that denies equal access to the law results in sex discrimination.¹⁷³

C. *The DOMA Does Not Satisfy Either of the Exceptions to the ERA*

To be constitutional, the sex classification effected by the DOMA would have to meet one of two exceptions to the ERA created by the Washington State Supreme Court since Division I's decision in *Singer*.¹⁷⁴ These exceptions are narrowly drawn, and have been applied only rarely since the ERA was passed.¹⁷⁵ Because the DOMA does not meet either of the two exceptions, it violates the Washington State Constitution.

168. See *Darrin*, 85 Wash. 2d at 877, 540 P.2d at 893.

169. See *Guard v. Jackson*, 132 Wash. 2d 660, 665, 940 P.2d 642, 644 (1997).

170. *Id.* at 666, 940 P.2d at 645.

171. WASH. REV. CODE §§ 26.04.010–.020 (defining marriage as union of man and woman and prohibiting marriage when parties are persons other than one male and one female).

172. *Id.*

173. See *Guard*, 132 Wash. 2d at 667, 940 P.2d at 645.

174. See *City of Seattle v. Buchanan*, 90 Wash. 2d 584, 491, 584 P.2d 918, 921 (1978) (holding that laws based on actual sex differences do not violate ERA); *Marchioro v. Chaney*, 90 Wash. 2d 298, 306, 582 P.2d 487, 492 (1978) (holding that laws effecting sex classifications do not violate ERA if they mandate equality between men and women).

175. See *Guard*, 132 Wash. 2d at 664, 666, 940 P.2d at 644–45.

1. *The DOMA Is Not Based on Physical Differences Between the Sexes*

The DOMA is not based on actual anatomical differences between men and women. As such, its sex-based classification does not meet the anatomical difference exception to the ERA created and applied by the *Buchanan* court.¹⁷⁶ Further, unlike the statute in *Buchanan*, which neither involved nor impinged on any serious interest,¹⁷⁷ the DOMA's limitation of marriage directly affects a serious interest—the right to marry the partner of one's choice.¹⁷⁸

The dissimilarity between the ordinance at issue in *Buchanan* and the DOMA is clarified by the *Buchanan* court's explanation of the exception it created to the ERA. In *Buchanan*, the court held that there is no violation of the ERA when a law's differential treatment of the sexes is reasonably related to an actual physical difference between them.¹⁷⁹ There, the differential treatment of the sexes created by the city ordinance—which required women, but not men, to cover their breasts in public—was reasonably related to the anatomical difference between men's and women's breasts.¹⁸⁰ However, the differential treatment effected by the DOMA's sex classification, which prevents same-sex couples from marrying, is not reasonably related to the anatomical physical differences between the sexes—notably the inability of same-sex couples to procreate.

The inapplicability of the *Buchanan* exception to the DOMA is evinced most notably by other jurisdictions' treatment of laws banning same-sex marriage. For example, when examining laws limiting marriage to opposite-sex couples, courts with standards less strict than the absolutist standard imposed by Washington State's ERA have noted that physical differences related to sex are no longer valid when viewed in the context of marriage.¹⁸¹ Because opposite-sex couples no longer marry solely to procreate and same-sex couples are capable of

176. See *Buchanan*, 90 Wash. 2d at 591, 584 P.2d at 921.

177. *Id.* at 590, 584 P.2d at 921 (holding that denying women privilege to expose breasts in public did not involve serious interest).

178. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (noting that marriage is right “fundamental to our very existence”).

179. *Buchanan*, 90 Wash. 2d at 591, 548 P.2d at 921.

180. *Id.*

181. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003); *Baker v. Vermont*, 744 A.2d 864, 881 (Vt. 1999).

conceiving and raising children, the anatomical differences between the sexes are no longer valid reasons to preclude same-sex couples from marrying.¹⁸² Further, Washington courts have held that reproductive differences between men and women that are not directly or substantially related to a law's purpose do not justify differential treatment and thus do not meet the *Buchanan* exception to the ERA.¹⁸³

Finally, the anatomical difference exception to the ERA applies where a law based on a sex classification does not curtail a "serious interest."¹⁸⁴ In *Buchanan*, the Washington State Supreme Court reasoned that the privilege of women to expose their breasts in public was neither serious nor intrinsic to the rights guaranteed by the U.S. Constitution.¹⁸⁵ As such, the *Buchanan* court held that, despite the sex classification effected by the Seattle city ordinance, the public's interest in regulating public peace and decorum outweighed the inconsequential interest of women to go topless in public.¹⁸⁶ Contrary to the law at issue in *Buchanan*, the DOMA's sex classification and its resulting prohibition of same-sex marriage affect an interest of great consequence to the citizens of Washington—the right to marry. The serious nature of the interest affected by the DOMA is illustrated by the language the U.S. Supreme Court employed in *Loving*, in which the Court referred to marriage as a right "fundamental to our very existence."¹⁸⁷ Given that the Washington State Supreme Court has applied this anatomical difference exception to the ERA only once in the three decades since the passage of the ERA,¹⁸⁸ the court should not now apply the exception to a situation where the interest affected is one of the "basic civil rights of man."¹⁸⁹

182. See *Goodridge*, 798 N.E.2d at 962.

183. See, e.g., *Guard v. Jackson*, 132 Wash. 2d 660, 667, 940 P.2d 642, 645 (1997) ("The capacity to suffer loss when a child dies is not unique to mothers."); see also *Buchanan*, 90 Wash. 2d at 592, 584 P.2d at 92 (finding that differential treatment between sexes was directly and substantially related to legislative purpose behind city ordinance).

184. *Buchanan*, 90 Wash. 2d at 590, 584 P.2d at 921.

185. *Id.*

186. *Id.* at 590–91, 584 P.2d at 921.

187. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

188. See *Buchanan*, 90 Wash. 2d at 591, 584 P.2d at 921 (creating exception to ERA by holding that laws based on actual anatomical differences do not violate ERA).

189. *Loving*, 388 U.S. at 12 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

2. *The DOMA Does Not Ameliorate the Effects of Past Discrimination*

The sex classification effected by the DOMA does not meet the second exception to the ERA announced by the Washington State Supreme Court in *Marchioro*.¹⁹⁰ The *Marchioro* court upheld a statute under the ERA because it mandated an equality of responsibility between the sexes.¹⁹¹ Through its sex-based classification, however, the DOMA results in inequality based on sex.¹⁹² While the *Marchioro* court cited *Singer* to conclude that laws limiting marriage to opposite sex couples mandate equality between the sexes,¹⁹³ this reference is misplaced and legally inapposite.¹⁹⁴

As it was clarified by the Washington State Supreme Court in *Southwest*,¹⁹⁵ the *Marchioro* exception to the ERA does not apply to the DOMA. Contrary to the affirmative action plan at issue in *Southwest*, which sought to ameliorate past discrimination against women in public works contracting,¹⁹⁶ the DOMA does not create equality in fact. Rather, the DOMA's reliance on and codification of sex-based classifications creates a situation where a person is legally prohibited from marrying the partner of his or her choice because that person is of the same sex.¹⁹⁷ Such sex-based exclusion from the rights and responsibilities of the law is expressly precluded by the plain language of the ERA.¹⁹⁸

D. *Singer Is Inapposite Because the DOMA Does Not Apply Equally to the Sexes*

In upholding the marriage statutes prior to the DOMA, the *Singer* court concluded that Washington State's marriage laws banning same-sex marriage did not violate the ERA because they applied equally to

190. See *Marchioro v. Chaney*, 90 Wash. 2d 298, 308, 582 P.2d 487, 493 (1978).

191. See *id.*

192. See *supra* Part IV.B.

193. See *Marchioro*, 90 Wash. 2d at 307, 582 P.2d at 492 (citing *Singer v. Hara*, 11 Wash. App. 247, 253, 522 P.2d 1187, 1191 (1974)).

194. See *infra* Part IV.D.

195. *Southwest*, 100 Wash. 2d 109, 127–28, 667 P.2d 1092, 1102 (1983).

196. *Id.* at 111, 667 P.2d at 1093–94.

197. See *supra* Part IV.A.

198. WASH. CONST. art. XXXI, § 1 (“Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.”).

both sexes.¹⁹⁹ Specifically, the court reasoned that, because the marriage statutes prohibited both sexes equally from marrying a member of the same sex, they did not violate the ERA.²⁰⁰ Despite Division I's holding in *Singer*, the Washington State Supreme Court has, in adopting an absolutist stance against sex discrimination, recognized no equal application exception to the ERA.²⁰¹ That is, a court will hold any law effecting a sex classification unconstitutional unless that law meets one of only two narrowly drawn exceptions, regardless of whether the law purports to apply equally to both sexes.²⁰² To date, the Washington State Supreme Court has recognized no other exceptions to the ERA.

In addition, *Singer* is inapposite because Division I erroneously dismissed the precedent set by the U.S. Supreme Court in *Loving*.²⁰³ Refuting the argument that Virginia's anti-miscegenation statutes applied equally to both races, the *Loving* court noted that any equal application was negated by the fact that the racial classifications made by the law constituted "an arbitrary and invidious discrimination."²⁰⁴ The *Singer* court dismissed the analogy to *Loving* by asserting the definition of the very matter at issue: marriage.²⁰⁵ As a result, the *Singer* court failed to apply the level of scrutiny required by the ERA. In other words, in ruling that Washington State law did not unconstitutionally preclude a same-sex couple from exercising the right of marriage, the court utilized a definition of marriage as the "legal union of one man and one woman."²⁰⁶ Under Division I's rationale, no discrimination existed, nor could it ever exist because John Singer and Paul Barwick were not precluded from marrying each other by virtue of their sex; rather their relationship was wholly foreign, by definition, to the institution of

199. *Singer v. Hara*, 11 Wash. App. 247, 249, 522 P.2d 1187, 1189 (1974).

200. *Id.* at 255 n.8, 522 P.2d at 1192 n.8 (noting that marriage statutes applied equally to both sexes and thus did not violate ERA).

201. *See supra* Part I.C (outlining only two existing exceptions to ERA).

202. *See* *Guard v. Jackson*, 132 Wash. 2d 660, 664, 940 P.2d 642, 644 (1997); *see also* *City of Seattle v. Buchanan*, 90 Wash. 2d 584, 491, 584 P.2d 918, 921 (1978) (holding that laws based on anatomical differences do not violate ERA); *Marchioro v. Chaney*, 90 Wash. 2d 298, 306, 582 P.2d 487, 492 (1978) (holding that laws effecting sex classifications do not violate ERA if they mandate equality between men and women).

203. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that racial classifications effected by Virginia's anti-miscegenation statutes violated equal protection clause).

204. *Id.* at 10.

205. *Singer*, 11 Wash. App. at 254–55, 522 P.2d at 1191–92.

206. *Id.* at 254, 522 P.2d at 1196.

marriage itself.²⁰⁷

As the *Baehr* and *Goodridge* courts noted when they found their states' laws prohibiting same-sex marriage to be unconstitutional, the logic employed by the *Singer* court is conclusory at best and deceptive at worst.²⁰⁸ Further, such logic does not withstand the absolute bar to sex-based classifications effected by the ERA as the Washington State Supreme Court has interpreted it since *Singer*.²⁰⁹ Because *Singer* does not control the Washington State Supreme Court as it did the *Andersen* and *Castle* courts,²¹⁰ the Washington State Supreme Court should follow its precedent under the ERA to find that the sex-based classifications inherent to the DOMA are unconstitutional.

V. CONCLUSION

The Washington State Supreme Court should hold that the DOMA violates the Washington State Constitution because the DOMA effects a sex classification that is precluded by Washington State's ERA. Ultimately, the court may choose to rule on grounds other than the ERA, but given the criticism other state courts have leveled against the logic employed by Division I in *Singer*, the Washington State Supreme Court would be remiss to allow *Singer*'s logic to stand. Furthermore, as Washington's DOMA represents a codification of the *Singer* opinion, it is subject to similar criticism. In light of the current political and social zeitgeist, a Washington State Supreme Court ruling holding that the

207. See *id.* at 254–55, 522 P.2d at 1191–92.

208. See *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993) (rejecting logic in *Singer* as “tortured and conclusory sophistry”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 972–73 (Mass. 2003) (Greaney, J., concurring) (“To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide.”). It should be noted that while the majority opinion in *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999), dismisses a sex discrimination argument and any analogy to *Loving*, the court in Vermont was not construing the state's marriage statutes with the kind of absolutist standard required by Washington's ERA.

209. See *supra* Part I.A–B (summarizing Washington State Supreme Court's construction of ERA as absolute bar to sex classifications, which courts subject to absolutist standard of review).

210. See *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215, at *3 (Super. Ct. Thurston Cty. Sept. 7, 2004) (memorandum opinion on constitutionality) (noting that only Court of Appeals or Washington State Supreme Court can review *Singer*); *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *11 (Super. Ct. King County Aug. 4, 2004) (memorandum opinion and order on cross motions for summary judgment) (deferring to Washington State Supreme Court on constitutionality of DOMA under ERA).

DOMA is unconstitutional could engender a movement to amend the state's constitution to ensure what the DOMA could not—that marriages between same-sex couples are constitutionally prohibited. Such a movement would require, in addition to a vote of the legislature, a vote of the people. As a result, just as they did in 1972 with the ERA, the people of Washington would have to vote to alter the rights and protections afforded by the Washington State Constitution. Ironically, while a vote for the ERA expanded such rights and protections, a vote in the present case would have the opposite effect.

