No. 75934-1

BRIDGE, J. (concurring in dissent)—The impact of this case upon the plaintiff couples and their children is both far reaching and deeply saddening. The impact extends to all of Washington's gay and lesbian citizens and to the many fair-minded Washington citizens who hoped for a different result in this case. And, I dare say, the result that we reach today will be remembered more for what it does not do than for what it does.

What we are called upon to do here is address the availability of the civil contract of marriage—the only characterization of the issue presented that permits governmental intrusion into what is otherwise a personal, private relationship between two people. The State's intrusion is governed by the articles of our constitution. What we ought not to address is marriage as the sacrament or religious rite—an area into which the State is not entitled to intrude at all and which is governed by articles of faith. What we have *not* done is engage in the

kind of critical analysis the makers of our constitution contemplated when interpreting the limits on governmental intrusion into private civil affairs; what we *have* done is permit the religious and moral strains of the Defense of Marriage Act (DOMA) to justify the State's intrusion. As succinctly put by amici the Libertarian Party of Washington State and the Log Cabin Republicans of Washington: "To ban gay civil marriage because some, but not all, religions disfavor it, reflects an impermissible State religious establishment." Amicus Curiae Br. of the Libertarian Party of Washington State et al. at 11. After all, we permit civil divorce though many religions prohibit it—why such fierce protection of marriage at its beginning but not its end?

If the DOMA is really about the "sanctity" of marriage, as its title implies, then it is clearly an unconstitutional foray into state-sanctioned religious belief. If the DOMA purports to further some State purpose of preserving the family unit, as the plurality would interpret it, then I cannot imagine better candidates to fulfill that purpose than the same-sex couples who are the plaintiffs in these consolidated actions.

I agree with Justice Fairhurst that the DOMA wholly fails a rational basis review. And, I agree that our nation's jurisprudence suggests we should hold that where a union is not prohibited by age or bloodlines (restrictions grounded in legitimate state interests in the protection of minors and preventing congenital birth defects), it is a fundamental right of an individual to marry the person of his or her

choice. Justice Fairhurst also correctly notes that the plurality and concurrences disingenuously frame the question before us. Dissent (Fairhurst, J.) at 2. They ask not whether the right to marry is fundamental, or whether a prohibition on same-sex marriage strengthens the putative state interest in the frequency and longevity of heterosexual marriage (a dubious policy clearly at odds with our liberalized laws of marital dissolution), but whether there is a fundamental right to "same-sex" marriage. Just as the United States Supreme Court majority did in *Bowers v. Hardwick* 20 years ago, today's plurality and Justice J.M. Johnson's concurrence frame the issue before us so as to ignore not only petitioners' fundamental right to privacy but also the legislature's blatant animosity toward gays and lesbians. *See Bowers v. Hardwick*, 478 U.S. 186, 199, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986) (Blackmun, J., dissenting). The passage of time and prudent judgment revealed the folly of *Bowers*, a mistake born of bigotry and flawed legal reasoning. *Lawrence v. Texas*, 539 U.S. 558, 562-78, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). Alas, the same will be said of this court's decision today.

Yet while I wholeheartedly agree with Justice Fairhurst's conclusions that it is the status of marriage itself that is a fundamental right, that the choice of one's spouse implicates fundamental liberty interests, and that the DOMA does not even satisfy rational basis review, I write separately, in this significant issue of our time, to set forth additional grounds for holding the DOMA unconstitutional.

Constitutional Duty of This Court

The plurality and concurrences justify their result by asserting that it is not our place to require equality for Washington's gay and lesbian citizens by declaring the DOMA unconstitutional. Of course, had the United States Supreme Court adopted the plurality's position, there would have been no *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954); there would have been no *Lawrence*, 539 U.S. at 579, in which the Court recognized that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." Indeed, it was the California Supreme Court in 1948 that first declared an antimiscegenation law unconstitutional, *Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17, 29 (1948), a position adopted by the United States Supreme Court in *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), 20 years later. Had the Court adopted the current plurality's mindset, it would not have rectified a long list of now obvious wrongs. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (overturning a city zoning ordinance because it discriminated against the developmentally disabled, finding no rational basis for the ordinance in negative public attitudes toward the disabled); *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) (overturning Texas legislation that excluded undocumented children from public schools); *Zablocki v. Redhail*, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978) (striking down Wisconsin

statute prohibiting marriage absent judicial determination that all support obligations had been met); *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (overturning Oklahoma underage drinking legislation because it discriminated against men); *Sugarman v. Dougall*, 413 U.S. 634, 93 S. Ct. 2842, 37 L. Ed. 2d 853 (1973) (overturning New York statute that imposed a flat ban on employment of aliens in competitive exam-based civil service positions); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973) (rejecting portion of the food stamp act that excluded households containing unrelated individuals); *Frontiero v. Richardson*, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973) (overturning a federal statute that discriminated against female members of the armed services); *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (invalidating Texas statute that made procuring an abortion a crime absent a threat to the life of the mother); *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971) (overturning portion of the Idaho probate code that discriminated against women); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966) (overturning a Virginia poll tax); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (striking down a statute prohibiting the use of birth control); *Sweatt v. Painter*, 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (1950) (overturning Texas legislation restricting admission to the University of Texas School of Law to white students); *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed.

1655 (1942) (striking down Oklahoma's criminal sterilization law); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (invalidating statute prohibiting parents from sending their children to private schools).

The plurality too easily dismisses the proper role of the judiciary to protect the constitutional rights of those who have been historically disenfranchised from the political process. "[T]he whims of the majority cannot be invoked to interfere with fundamental rights" and "we must be ever on our guard, lest we erect our prejudices into legal principles." Amicus Br. of the Libertarian Party of Washington State et al. at 5 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943)); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S. Ct. 371, 76 L. Ed. 747 (1932) (Brandeis, J., dissenting). This is never more true than when legislation is specifically targeted at a politically unpopular minority.[1] Courts have a duty to take a searching look at any such legislation. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review."); *Romer v. Evans*, 517 U.S. 620, 633-35, 116 S. Ct 1620, 134 L. Ed. 2d 855 (1996). Judges William L. Downing and Richard D. Hicks, the authors of the trial court opinions in these cases, are to

[1] While exact figures are not available, particularly where lesbians are concerned, homosexuals likely comprise anywhere from 1 to 10 percent of the population. *See The Shrinking Ten Percent*, TIME MAGAZINE, Apr. 26, 1993, at 27. Thus, no matter what figure within that range one espouses, it is indisputable that gays and lesbians are a marked minority.

be commended for their uncommon courage and common sense in facing this issue head on.

Legal authorities do not dispute the fact that gays and lesbians have been subjected to a history of discrimination. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *see* EVAN GERSTMANN, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION 66 (1999) (noting that no court has ever denied that gays and lesbians have suffered a history of discrimination). Indeed, the plurality here does not dispute it. Plurality at 18. Nevertheless, it is essential to briefly explore the history of prejudice against gays and lesbians in this country—as the plurality does not—because we cannot decide this case in a vacuum.

After Prohibition ended in 1933, it was illegal in many states for bars and restaurants to serve gay and lesbian patrons. GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 7 (2004). In the 1930s, Hollywood prohibited the production of films that made even the slightest reference to homosexuality, a ban that survived into the 1960s. *Id*. at 5-6. During the McCarthy era, individuals suspected of being gay and lesbian were purged from government offices at an even higher rate than suspected communists; until the late 1990s, gays and lesbians could be barred from federal employment solely on the basis of their sexual orientation. *Id*. at 6-7. Until 2003,

sexual practices associated with homosexuality were cause for criminal prosecution in many states. *See Lawrence*, 539 U.S. 558.

As recently as 2004, hate crimes motivated by bias against sexual orientation accounted for 15 percent of all hate crimes committed that year; within that 15 percent, approximately 97 percent of the crimes committed were against homosexuals as opposed to heterosexuals. FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 2004, 6-7 (2005). Until January 2006, gay and lesbian Washingtonians feared their livelihoods might be in jeopardy if their sexual orientation were disclosed. *See* ENGROSSED SUBSTITUTE H.B. (ESHB) 2661, 59th Leg., Reg. Sess., at 2-3 (Wash. 2006) (prohibiting discrimination against homosexuals in the workplace, a practice previously condoned by this court in *Gaylord v. Tacoma Sch. Dist. No. 10*, 88 Wn.2d 286, 559 P.2d 1340 (1977)).

In Washington, openly gay and lesbian men and women continue to hold political office in numbers lower than their presumed percentage of the population. Br. of Amici Curiae Pride Foundation et al. at 18 n.20; *see* Susan Paynter, *Gregoire Address to Gays is a Good Start*, SEATTLE POST-INTELLIGENCER, Nov. 18, 2005, at D1 (only four openly gay members in Washington's legislature). Their ability to serve in our nation's armed forces is truncated. 10 U.S.C. § 654. In many states, gays and lesbians continue to fear their children will be removed from their custody as a result of their sexual orientation. Donald K. Sherman, *Sixth Annual Review of Gender and Sexuality Law: Child Custody and Visitation*, 6

Geo. J. Gender & L. 691, 706-10 (2005) (surveying states in which a parent's homosexuality may or will negatively affect custody and visitation). Likewise, they may encounter significant struggles in efforts to adopt. Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 297-302 (1996) (discussing statutory bans on homosexual adoption). And today in Washington, they are denied the economic, social, and emotional benefits of a legal marriage. Plurality at 63. Historically, homosexuals have been the object of what Justice Brennan calls "pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality.'" *Rowland v. Mad River Local Sch. Dist.*, 470 US. 1009, 1014, 105 S. Ct. 1373, 84 L. Ed. 2d 392 (1985) (Brennan, J., dissenting) (dissenting in a denial of certiorari in a case involving discrimination against homosexuals (quoting *Plyler*, 457 U.S. at 216 n.14)). When reviewing laws that discriminate against gays and lesbians, there is no justification for courts to ignore the "pernicious and sustained hostility" gays and lesbians suffered through the decades and continue to face. *Id*.

The plurality asserts that gays and lesbians today are not politically powerless. Plurality at 19-20. Yet the DOMA relies on the notion that the institution of marriage needs to be defended from gays and lesbians, rather like anti-papal laws once sought to "defend" a protestant way of life from an onslaught

of Catholic immigrants, and segregation laws sought to "defend" white-privilege from people of color. *See* Peter H. Schuck, Uri and Caroline Bauer Memorial Lecture: *The Perceived Values of Diversity, Then and Now,* 22 CARDOZO L. REV. 1915, 1924-25 (2001). Like those antiquated laws of yesteryear, today's decision validates a legislative enactment largely born of animus and ignorance and is evidence in and of itself of the lack of meaningful political power gays and lesbians hold. But there are other indicators. In Washington, there are only four openly gay legislators—none in a statewide executive or judicial capacity. Paynter, *supra*, at D1. As the plurality notes, the legislature recently passed a bill prohibiting discrimination against gays and lesbians in jobs, finance, and housing, but that law was the culmination of a 30-year battle and a narrow, one-vote win. And we cannot ignore the fact that while gays and lesbians in Washington now have an avenue of recourse when faced with discrimination in housing, lending, and on the job, there are many other inequalities the law does not address for gays and lesbians, particularly those involved in a same-sex relationship.[2] What is more, gays and lesbians nationwide have not enjoyed the same kind of small victories; Washington is just one of only 17 states to pass an antigay discrimination

[2] For example, unless a municipality provides otherwise, under Washington's new law gays and lesbians have no access to a partner's "medical, life, and disability insurance, hospital visitation and other medical decision making privileges, spousal support, intestate succession, homestead protections, and many other statutory protections." *Baker v. State*, 170 Vt. 194, 744 A.2d 864, 870, 883-84 (1999). *See* CHAUNCEY, *supra*, at 111-16 (detailing the myriad legal vulnerabilities still suffered by gays and lesbians even where they are afforded protections in employment, housing, and lending).

bill. Chris McGann, *A Long-Awaited Win for Gay Rights; Senate OKs State Anti-Bias Bill*, SEATTLE POST-INTELLIGENCER, Jan. 28, 2006, at A1.

The plurality focuses only on the ability of gays and lesbians to "attract the attention of the lawmakers," *Cleburne Living Center*, 473 U.S. at 445. Plurality at 19-20. But a limited number of protective laws do not a powerful contingent make, particularly where they do not provide comprehensive equal rights. The critical and commercial success of television shows like *Will and Grace* (NBC 1998-2006) and films like *Brokeback Mountain* (Focus Features 2005) notwithstanding, the place of gays and lesbians in our cultural and social landscape continues to be marked by disparity. As noted above, heterosexuals have little reason to fear they will be attacked if their sexual orientation is discovered; gays and lesbians, on the other hand, were second only to people of color in Washington's 2004 statewide statistics for reported hate crime incidents, experiencing more criminal animosity than religious or ethnic groups. HATE CRIME STATISTICS, *supra*, at 58. In Seattle, a locality that has had antidiscrimination laws on the books on behalf of gays and lesbians for many years, hate crimes motivated by sexual orientation were equal to those motivated by race. *Id*. at 59. This is sadly strong evidence indicating that the attention of lawmakers does not always translate into personal and political power.

Those who believe gays and lesbians enjoy substantial political power often point to the perceived economic success of gays and lesbians, claiming it translates

into political clout. *Romer*, 517 U.S. at 645-46 (Scalia, J., dissenting) ("[B]ecause those who engage in homosexual conduct tend to . . . have high disposable income . . . they possess political power much greater than their numbers, both locally and statewide."). But in reality, evidence suggests that gays and lesbians as a class are no more economically advantaged than similarly situated heterosexuals. In fact, studies show that gay men, at least, make 17 to 28 percent less than straight men. M. V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN 45-46 (2001).[3] Yet, a commonly produced stereotype involves that of the urban, affluent gay couple. Not only is it unlikely that gays and lesbians as a group enjoy a markedly higher disposable income indicative of political power, but the reliance on this largely false stereotype suggests that laws discriminating against gays and lesbians are rooted in prejudice, not rationality.[4]

The political vigor of gays and lesbians remains lackluster. We have never had an openly gay president, and there are very few openly gay members on any high court—in Washington, D.C., Washington State, or elsewhere. *See* William C. Duncan, *"A Lawyer Class": Views on Marriage and "Sexual Orientation" in the Legal Profession*, 15 BYU J. PUB. L. 137, 147-49 (2001). There has never been an

[3] Badgett suggests that the stereotype about the wealth of homosexuals is based on data gathered from marketing research specifically targeted at wealthier homosexuals, rather than on empirical data gathered in economic studies. BADGETT, *supra*, at 24-26.

[4] I note that while evidence of political powerlessness has consistently been linked to the areas explored above, there are other areas not discussed by the parties that might have evinced a lack of political power. For example, this discussion might have benefited from a study of the financial resources of various gay and lesbian organizations as compared to other agenda-based organizations, particularly in the area of lobbying.

openly gay or lesbian individual in the United States Senate, and only three currently serve in the House of Representatives. *Gays and Lesbians Win Big at the Polls*, THE ADVOCATE, Dec. 7, 2004, at 16. Nationwide, 511,000 people hold office at the local, state, and national level. Of those, a mere 305 are openly gay. Lornet Turnbull, *Gay and Lesbian Officials to Meet*, SEATTLE TIMES, Nov. 18, 2005, at B1. Despite laudable civil rights successes over the years, gays and lesbians remain a political underclass in our nation.[5]

"A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or

[5] In addition to concluding that gays and lesbians as a class are politically powerful, the plurality and concurrence also conclude homosexuality is not an immutable characteristic. Neither science nor religious tenets can conclusively prove or disprove this proposition. Indeed, the resolution of this question has proved to be something of a struggle for courts. *Compare High Tech Gays*, 895 F.2d at 573-74 (concluding that homosexuality is not immutable for the purpose of an equal protection analysis because it is behavioral and one could refrain from the conduct) *with Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000) (holding that sexual orientation and sexual identity are immutable). But the law can resolve this question. Rather than being merely an unchanging characteristic, "'immutability' may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically." *Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring); *see Hernandez-Montiel*, 225 F.3d at 1093. Courts and legislators therefore should not conclude that homosexuality is mutable because reasonable minds disagree about the causes of homosexuality or because some religious tenets forbid gays and lesbians from "acting on" homosexual behavior. Instead, courts should ask whether the characteristic at issue is one *governments* have any business requiring a person to change. Viewed in that light, homosexuality should properly be considered as a static characteristic. While one may debate the "causes" of homosexuality, there can be little argument that the expression of consensual sexual, affectionate, or romantic attraction is an integral part of an individual's personal and social identity. Amicus Curiae Br. of Am. Psychological Ass'n at 8-10 (arguing that "[O]ne's sexual orientation defines the universe of persons with whom one is likely to find the satisfying and fulfilling relationships that, for many individuals, comprise an essential component of personal identity.").

excluded." *United States v. Virginia*, 518 U.S. 515, 557, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). Both the historical and current circumstances of gay and lesbian people in this country establish they are a minority that has not enjoyed political protection. This country's judiciary, led by the United States Supreme Court, has not shied away from protecting such minorities from discrimination, even when doing so required invalidation of politically popular legislation. The judiciary has been similarly resolute when faced with legislation that infringes upon a fundamental right protected by our constitution. It is not only our prerogative, but our duty under the tripartite system of government to provide prompt relief for violations of individual civil rights.

State Interests Supporting the DOMA

While Justice Fairhurst's dissent concludes that there is no rational relationship between the purposes behind the DOMA and the legislation itself, a conclusion with which I agree, I want to here express discomfort with the lack of *legitimate* state interest supporting the DOMA. Whatever bases the plurality and Justice J.M. Johnson's concurrence assert to support the DOMA, the legislative history of the law reveals that it stems, in substantial part, from thinly-veiled animosity against a minority group, animosity that is rooted in moral and religious objections to same-sex relationships. Its very title asserts as much—"defense" of marriage—"defense" from what? Against whom? The DOMA ought to be recognized for the discriminatory enactment that it is, and rejected as such.

To many, same-sex relationships and same-sex marriages are contrary to religious teachings. But none of the plaintiffs in the cases before us today seek acceptance of same-sex marriage within a particular religious community. They seek access to *civil* marriage. Some churches and religious organizations may refuse to solemnize same-sex unions, and that is their right in the free exercise of religion under our constitution. A religious or moral objection to same-sex marriage is not, however, a legitimate *state* interest that can support the DOMA.[6]

First, it is important to emphasize the secular nature of *civil* marriage. As early as the Enlightenment, marriage began to be seen as a private contract. STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 146-47 (2005); CHAUNCEY, *supra*, at 79-80.[7] In early America, New England's religious dissenters rejected church regulation of marriage. CHAUNCEY, *supra*, at 80. In the southern colonies, the Church of England retained its authority over civil marriage a bit longer, but after the American Revolution, "all states recognized marriage as a purely civil matter." *Id.*

[6] I do not mean to imply that all religious organizations object to same-sex marriage. Some have been quite outspoken in support of the gay and lesbian members of their congregations who wish to marry. Indeed, a coalition of 18 Washington churches, temples, and synagogues filed an amicus brief in support of the plaintiffs in this case. As discussed below, I agree with Judge Downing that it is not for secular government to choose between religions or take moral or religious sides in this debate. *Andersen v. King County*, No. 04-2-04964-4, 2004 WL 1738447, at *8 (King County Super. Court Aug. 4, 2004).

[7] In some religions, the church's involvement in marriage has evolved over time. For example, one historian notes that the sacramental character of marriage was not formally adopted by the Roman Catholic Church until the mid-fifteenth century. CHAUNCEY, *supra*, at 79. It was not until the sixteenth century that the Catholic Church required a ceremony in the presence of a priest. *Id.*

Americans could choose to subject themselves to their church's religious laws, but doing so was purely voluntary. *Id.* As a legal matter, "marriages had legal standing only as a civil contract and status." *Id.*

In Washington, the secular nature of civil marriage was recognized by the territorial legislature as early as 1854. *In re Estate of Wren*, 163 Wash. 65, 72, 299 P. 972 (1931) (describing law enacted by the first legislature of the territory of Washington in 1854, which defined marriage as a civil contract). To this day, the legislature defines marriage as a civil contract and it does not require religious solemnization for a marriage to be valid. RCW 26.04.010, .050; *Wash. Statewide Org. of Stepparents v. Smith*, 85 Wn.2d 564, 569, 536 P.2d 1202 (1975). "It is apparent that the purpose of this statute was to make it clear that marriage is governed by civil law rather than by ecclesiastical law." *Statewide Org. of Stepparents*, 85 Wn.2d at 569.[8] When partners enter into the civil marriage contract, they assume rights, duties, and obligations defined by the State. *Krieg v. Krieg*, 153 Wash. 610, 611, 278 P. 223 (1929) (emphasizing that the marriage

[8] While considering the history of civil marriage in this nation in general, and in Washington in particular, we should also remember some "traditional" aspects of the marriage institution that have (quite correctly) fallen by the wayside. In addition to the anti-miscegenation laws discussed at length in Justice Fairhurst's opinion, the legal doctrine of coverture (suspending the very legal existence of a woman during marriage), restrictions on divorce, restrictions on remarriage after divorce, and the marital exemption to the crime of rape were all once widely accepted aspects of the institution of marriage. *See, e.g.*, *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141, 21 L. Ed. 442 (1872) (Bradley, J., concurring); *Hernandez v. Robles*, 26 A.D.3d 98, 805 N.Y.S.2d 354, 381-82 (2005) (Saxe, J., dissenting). If nothing else, history demonstrates that marriage is not a stagnant institution, and any scholar of the history of women's rights in this country is aware of the evolving nature of the institution in our society.

contract is unusual in that it is one in which the State has an interest and the State may impose conditions upon the contract).

As the Supreme Judicial Court of Massachusetts recognized, the State's interest in civil marriage arises from its police power. *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941, 954 (2003). Civil marriage "anchors an ordered society by encouraging stable relationships over transient ones." *Id.* Civil marriage is central to the way in which the State "identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data." *Id.* Civil marriage is a state-conferred legal status, the existence of which gives rise to benefits and burdens reserved exclusively to the citizens engaged in the marital relationship. *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44, 58 (1993). Because a marriage license only acts as a trigger for state-conferred benefits, the State's role is not to endorse certain morals, lifestyles, or relationships when it grants a marriage license, but rather it should only identify those entitled to the benefits of marital status. *Baker v. State*, 170 Vt. 194, 744 A.2d 864, 899 (1999) (Johnson, J., concurring/ dissenting).

Yet the DOMA's legislative history reveals that what the proponents of the legislation intended was to impose religious and moral restrictions on the state

regulated civil institution of marriage.[9] In addition, there is ample evidence in the legislative history that the DOMA's supporters were motivated by animus, an undisguised desire to discriminate against gays and lesbians. Each of these purposes has been rejected by the United States Supreme Court as illegitimate interests that cannot support legislation targeting a minority group.

Included in the legislative history materials of Washington's DOMA is a transcript of Senator Byrd's testimony to the United States Senate in favor of the federal DOMA. In that argument, Senator Byrd spoke of Judeo Christian tradition, quoted several Bible verses, and predicted that acceptance of families with two mothers or two fathers would be catastrophic for society. Tr. of Senator Byrd's Remarks at 5-6, 10-11. The Washington director of Concerned Women for America called on our legislators to remember that marriage is a "God-ordained institution." Test. of Anne Ball at 1 (quoting biblical passages). She also claimed that legally sanctioning same-sex marriage "does not mean we will be 'slouching toward Gomorrah.' Instead, we will be in an all-out sprint." *Id.* Offering another biblical reference, a different proponent of the DOMA argued that only heterosexual marriages are sanctified by God. Test. of Leilani Lutak at 2.

During floor debate, Representative Mulliken opined that homosexuality is "against the Creator's design," and that homosexuality is "contrary to God's will." House Floor Debate (Feb. 4, 1998), *audio recording by* TVW, Washington State's

[9] Unless otherwise noted, the legislative history materials discussed in this opinion are on file with the Washington State Archives.

Public Affairs Network, *available at* http://www.tvw.org. Other representatives and senators explained that the DOMA's ban on same-sex marriage codified their view of God's intentions. Lynda V. Mapes, *House Passes Ban on Gay Marriages—Backers Say Bill Defends "God's Choice,"* SEATTLE TIMES, Feb. 5, 1998. Several other representatives referred to the religious debate surrounding the bill. (Murray, Dickerson, Mulliken, Appelwick). Representatives Dickerson and Murray lamented the religious intolerance reflected in the legislation. House Floor Debate, *supra*.[10]

However, religious restrictions on the institution of marriage have never governed civil marriage in this country, nor would it be constitutionally permissible for them to do so. For example, historically many religions have strictly forbidden marriage outside of the denomination, but these churches could not prevent interdenominational *civil* marriages because "marriage was [ultimately] a state matter, not subject to . . . religious restrictions." CHAUNCEY, *supra*, at 80-81 (citing The Roman Catholic Code of Canon Law (1918) and statements issued by protestant denominations forbidding marriage to Catholics). This court cannot endorse the use of state law to impose religious sensibilities or religiously-based moral codes on others' most intimate life decisions. *Lawrence*, 539 U.S. at 571; *see also* CHAUNCEY, *supra*, at 85-86. The DOMA reflects a

[10] For additional examples of blatantly discriminatory language in the legislative history of the federal DOMA, on which Washington's DOMA was based, *see* Note: *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2701-04 (2004).

religious viewpoint; *religious* doctrine should not govern state regulation of *civil* marriage.

Furthermore, even absent a religious objection to same-sex marriage, moral judgment is not a sufficiently valid interest to support upholding a law that singles out a minority group for disparate treatment. *Lawrence*, 539 U.S. at 577-78 (adopting the rationale of Justice John Paul Stevens' dissenting opinion in *Bowers*, 478 U.S. 186). As evidenced by its title and plain language, the primary purpose of the DOMA is to defend the traditional institution of marriage, and throughout the legislative history of the bill are references to "protecting" the institution. FINAL BILL REPORT, ESHB 1130, 55th Leg., Reg. Sess., at 3 (Wash. 1998); HOUSE BILL REPORT, ENGROSSED SUBSTITUTE S.B. (ESSB) 5398, 55th Leg., Reg. Sess., at 3 (Wash. 1997); SENATE BILL REPORT, ESHB 1130, 55th Leg., Reg. Sess., at 2 (Wash. 1997). The plain language of the legislation reflects the legislature's intent to *exclude* an entire class of people from the institution of civil marriage.[11]

[11] Justice J.M. Johnson's concurrence argues that the DOMA does not discriminate against gays and lesbians because it does not allow *anyone* to marry a person of the same sex, even heterosexual people, and also does not prohibit gays and lesbians from marrying members of the opposite sex. Concurrence (J.M. Johnson, J.) at 16. I am reminded of the adage cautioning that to say too much says nothing at all. A marriage is frequently distinguished from other social relationships by the presence of romantic love and sexual attraction. Heterosexual people by definition are not interested in pursuing a sexual or romantic relationship with individuals of the same sex and thus are likely not interested in marrying them. Therefore, the DOMA is not at all applicable to heterosexual people. Its irrelevance to heterosexuals does not translate into a lack of discrimination against homosexuals. Likewise, as discussed in more detail below, it is equally imprudent to conclude that the DOMA is not discriminatory because it affords homosexuals the ability to marry a person for whom they have no romantic or sexual attraction.

The Final House Bill Report reflects that testimony in favor of the bill included the opinion that "[w]e shouldn't lower our moral standards or allow the concept of family to be distorted by a minority." FINAL BILL REPORT, ESHB 1130, *supra*, at 4. The Senate committee debate included testimony that "[d]eviating from moral foundations causes devastating impact on families and children in particular." HOUSE BILL REPORT, ESSB 5398, *supra*, at 1. In support of the DOMA, the Washington Director of Concerned Women for America complained same-sex marriage would lead to children being taught that same-sex marriage is the moral equivalent of opposite-sex marriage. Test. of Anne Ball at 1. She also characterized the gay civil rights movement as a campaign to call "wrong right and right wrong." *Id.*; *see also* Test. of Forrest Messenger at 2 (arguing that same-sex marriage would reduce "moral standards").

Moral judgment of a minority class of citizens is inherent in the DOMA. Yet the United States Supreme Court recently emphasized that "'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.'" *Lawrence*, 539 U.S. at 577-78 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)); *see also id.* at 582 (O'Connor, J., concurring) ("Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."). While the *Lawrence* Court explicitly did not address the issue of same-sex marriage, rightly

so since that issue was not before it, the Court's emphasis on this principle is central to the *Lawrence* opinion.[12]

Finally, I agree with one commentator who has opined that the legislature's moral stance in framing the DOMA amounts to animosity with a nicer name. Note: *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2697 (2004). *See also Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (opining that "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples" (quoting *id.* at 585) (O'Connor, J., concurring)). Even ignoring religious underpinnings, "bare [legislative] desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Moreno*, 413 U.S. at 534. Discrimination and animosity are not legitimate state interests. *Id.*; *see also Romer*, 517 U.S. at 634 (legislation "born of animosity" toward gays and lesbians is unconstitutional). It is our duty to ensure that legislative classifications are not drawn "for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.

[12] In his concurrence, Justice J.M. Johnson draws a comparison between same-sex marriage and polygamy. Concurrence (J.M. Johnson, J.) at 32. Comparing same-sex marriage to polygamy is like comparing chalk to cheese. Of course, each of the plaintiffs in this case seeks to marry *a* person whom they love; none seeks to enter into a plural marriage. Indeed, in *Lawrence*, Justice Antonin Scalia was unable to convince a majority of the United States Supreme Court that the specter of polygamy should overcome the *Lawrence* Court's legal reasoning. The same tactics should also fail here. *See* Amicus Curiae Br. of the Libertarian Party of Washington State et al. at 2 n.1 ("The 'slippery slope' issues raised by Appellants . . . should not provide sensationalistic distractions.").

There exists manifold evidence of overt animosity in the legislative history of the DOMA. During floor debate, Representative Murray noted that the prime sponsor of the DOMA advocated that homosexuals be removed from American society and suggested that homosexuals can and should be "reprogrammed." House Floor Debate, *supra*. A written statement in support of the DOMA argued that marriage should not be "diluted" by extension to same-sex couples and suggested that homosexual marriages could not contribute to society in the same way that opposite-sex marriages do. Statement of Professor Lynn D. Wardle at 3-4. Another proponent of the DOMA characterized homosexual people as inherently more promiscuous than heterosexual people and "broken." Test. of Leilani Lutak at 1-2. Another explained that in her view, good parenting and homosexuality are mutually exclusive. Test. of Suzanne Cook at 2.

Other members, during floor debate in both houses and testimony in committee, decried the discriminatory intent and intolerance motivating the legislation. Representative Appelwick and Senators Thibaudeau, Fine, Kohl, and McAuliffe condemned the hostility underlying the bill. House Floor Debate, *supra*; Senate Floor Debate (Feb. 6, 1998), *audio recording by* TVW, Washington State's Public Affairs Network, *available at* http://www.tvw.org; FINAL BILL REPORT, ESHB 1130, *supra*, at 4 ("The bill represents the use of people's hate and fear to try and destroy families that are loving, caring, nurturing, and ordinary in every other way."); SENATE BILL REPORT, ESSB 5398, *supra*, at 1. The League of

Women Voters noted that the legislation singled out gay and lesbian couples, unfairly equating them with "criminal bigamists and those committing incest." Letter from League of Women Voters of Washington at 1 (Feb. 4, 1997).

Like Justice Fairhurst, I also take issue with the notion that children thrive better in opposite-sex households than in same-sex households. It is important to note that some of the studies about the negative effects of fatherlessness or motherlessness contained in the record might more accurately measure the growth and development of children raised in *single-parent* homes, not in homes headed by two parents of the same sex.[13] Concurrence (J.M. Johnson, J.) at 38 n.42 (citing Clerk's Papers (CP) at 372). Or, the results of some studies might be skewed by the specter of an acrimonious divorce between two heterosexual parents. *Id.*[14]

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[13] In fact, a recent review of 15 different studies addressing the effects on children of growing up in a same-sex household reveals that those children "are no more likely to have problems with self-esteem, psychological adjustment, or gender identity than kids [raised] with heterosexual parents." *Kids With Gay Parents Do Just Fine*, PARENTS MAGAZINE, Feb. 2006, at 46.

[14] I also note that Justice J.M. Johnson's concurrence argues a child "thrive[s] best" in families headed by his or her biological father and mother. Concurrence (J.M. Johnson, J.) at 38. This argument not only invalidates the many healthy and happy family constellations consisting of adoptive parents, foster parents, or stepparents, but it is also premised in part on the astonishing and scientifically faulty notion that homosexuals are often pedophiles. Concurrence (J.M. Johnson, J.) at 38 n.42 (citing CP at 358 (testimony from Family Council relaying abstracts of studies purporting to find high percentage of gay men are pedophiles)). In fact, this corrosive stereotype has been debunked by noted experts in the field of psychology and in courts alike. *See, e.g.*, Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 DUKE J. GENDER L. & POL'Y 207, 216-17 & n.55 (1995) (citing Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 156 (1991)); *Dale v. Boy Scouts of Am.*, 160 N.J. 562, 734 A.2d 1196, 1243 (1999), *rev'd on other grounds*, 530 U.S. 640 (2000) ("The myth that a homosexual male is more likely than a heterosexual male to molest children has been demolished.").

Most importantly, even if numerous reputable scientific studies were to conclusively show that children raised in same-sex households are seriously disadvantaged (a development I very much doubt would occur), those problems are not solved by the DOMA, since homosexual couples may raise children whether they are married or not. And, since same-sex couples can and will (and should) raise children together, the economic and social benefits denied to those couples through the DOMA are also denied to their children. Rather than protecting children, the DOMA harms them.[15] The DOMA does nothing to fortify or preserve heterosexual marriage.

Thus, while I agree with Justice Fairhurst that the complete lack of connection between the plurality's asserted state interests and the denial of marriage to homosexuals reveals that animus motivated the DOMA, it is necessary to confront the overt evidence of discriminatory intent behind this law. These disturbing aspects of the DOMA's legislative history are a piece of this debate that cannot be ignored. The DOMA is, at best, a "classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Romer*, 517 U.S. at 635. At worst, the DOMA amounts to the use of state law to enforce religious and moral objections to gays and lesbians in general and to same-sex

[15] In contrast to the lack of legitimate reasons for justifying the DOMA, there is voluminous argument presented by amici and parties attesting to the psychological, social, financial and political harm prohibitions like the DOMA visit upon the partners in a same-sex relationship, and upon any children raised within that union.

relationships in particular. It is a deplorable consequence that the plurality condones.

The Equal Rights Amendment

The plurality and concurrence also conclude that the DOMA does not violate Washington's Equal Rights Amendment (ERA), Const. art. XXXI, § 1, which provides, "[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex." I disagree with the plurality's reading of the ERA and believe the plurality ignores the nearly absolute prohibition against discrimination based on sex that this court has interpreted the ERA to create in the decades since *Singer v. Hara*, 11 Wn. App. 247, 522 P.2d 1187 (1974). Moreover, Justice J.M. Johnson's concurrence fails to appreciate that the ERA ultimately protects the rights of *the individual* under the law. Thus, both the plurality and the concurrence are too quick to reject the *Loving* analogy. 388 U.S. at 12.

The DOMA violates the ERA because it discriminates on the basis of sex. A woman cannot marry the woman of her choice but a man can marry the woman of his choice. In other words, the only thing preventing plaintiff Heather Andersen from marrying her partner, Leslie Christian, is the fact that Andersen is a woman. Andersen should no more readily be prohibited from marrying her partner than she is from voting for president or practicing law. Plaintiffs David Serkin-Poole and Michael Serkin-Poole should no more readily be prohibited from marrying than they are prohibited from attending nursing school or raising children. Of course, it

also goes without saying that, regardless of the historical discrimination against women that was the catalyst for the ERA, it protects both men and women from discrimination based on *gender*. *Guard v. Jackson*, 132 Wn.2d 660, 666, 940 P.2d 642 (1997) (holding wrongful death statute, as applied, discriminated against a man).

In the decades since the Court of Appeals decided *Singer* in 1974, this court has imposed a strict reading of the ERA. Washington is one of only two states that applies an "absolute" standard of review to sex-based classifications that is even more narrow than strict scrutiny. Thomas C. Schroeder, Note & Comment: *Does Sex Matter? Washington's Defense of Marriage Act Under the Equal Rights Amendment of the Washington State Constitution*, 80 WASH. L. REV. 535, 543 (2005); *Guard*, 132 Wn.2d at 663-64; *SW Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce Co.*, 100 Wn.2d 109, 127, 667 P.2d 1092 (1983) ("The ERA absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional 'strict scrutiny.'"); *Darrin v. Gould*, 85 Wn.2d 859, 871, 540 P.2d 882 (1975) (The ERA "added something to the prior prevailing law by eliminating otherwise permissible sex discrimination if the rational relationship or strict scrutiny tests were met"). "The ERA mandates equality in the strongest of terms and absolutely prohibits the sacrifice of equality for *any* state interest, no matter how compelling." *Elec. Contractors Ass'n*, 100 Wn.2d at 127.

The ERA's absolute prohibition is subject to only two narrow exceptions. *Guard*, 132 Wn.2d at 664. The ERA is not violated when the classification is based on an actual physical difference between the sexes or when the classification is part of a program designed to alleviate effects of past discrimination and attain equality in fact. *Id.* (citing *City of Seattle v. Buchanan*, 90 Wn.2d 584, 584 P.2d 918 (1978); *Elec. Contractors*, 100 Wn.2d at 127). Thus, absent application of these exceptions, no sex-based classification is allowed in Washington, regardless of the purported government interest. Surely, the DOMA does not survive this absolute prohibition.

This absolute reading of the ERA has evolved since *Singer*, calling the reasoning of that case into question. The *Singer* court argued that Washington law denied same-sex couples the right to marry, not due to gender, but because of a definition of marriage that necessitates an opposite-sex couple. In other words, discrimination based on gender was permissible in that case because opposite-sex marriage is the "traditional" definition of marriage. As other courts have noted, the *Singer* court's logic amounts to "tortured and conclusory sophistry." *Baehr*, 852 P.2d at 63. This is especially so in the face of the high burden required to justify classifications based on sex. As the United States Supreme Court recently noted, constitutional law can mandate change with an evolving social order. *Lawrence*, 539 U.S. at 577-78; *see also Loving*, 388 U.S. at 10-12. Mere reliance on tradition

was not enough to justify discriminatory legislation in the face of rational basis review; surely tradition cannot withstand the ERA's absolute prohibition.

In rejecting the plaintiffs' ERA claim, the plurality and the concurrence rely on the equal application theory, asserting that because the DOMA restricts men and women equally as classes (because it prohibits both lesbians and gay men from marrying same-sex partners), there is no sex discrimination here. But this equal application theory, as applied to the institution of marriage, has already been rejected by the United States Supreme Court in *Loving*:

> Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race. . . . [W]e reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classification from the Fourteenth Amendment's proscriptions of all invidious racial discriminations . . . . In the case at bar . . . we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

Loving, 388 U.S. at 8-9. The same logic holds true for classifications based on sex in Washington under the ERA. Mere equal application of the DOMA is not enough to remove it from the ERA's absolute prohibition against sex-based classification; equal application does not immunize the DOMA from the ERA's heavy burden.

The plurality and concurrence respond by noting that the *Loving* Court also discussed the history of discrimination against African-Americans and the historical use of antimiscegenation laws to promote white supremacy. The

plurality and concurrence argue that absent this history, the DOMA can survive the test that antimiscegenation laws failed.

However, this argument, and indeed the equal application theory at its core, depends upon the assumption that the ERA was intended to prohibit only broad-based discrimination on the basis of sex without regard for individual impacts. For example, under the equal application theory adopted by the plurality and concurrence, a state law could require that upon dissolution of a marriage, all female children must reside with the mother and all male children must reside with the father. *See Baker*, 744 A.2d at 906 n.10 (1999) (Johnson, J., concurring/ dissenting). Similarly under the equal application theory, a facially "neutral" law could prohibit all people from holding jobs traditionally held by persons of the opposite sex. *See* Stephen Clark, *Same-Sex But Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L. J. 107, 143-44 (2002). Because such laws would facially apply equally to both sexes, they would not violate the ERA under the equal application theory.

It is simply disingenuous to turn a blind eye toward the individual application of the statute; simply put, there is little doubt that the DOMA was enacted because of, not merely in spite of, its adverse effects upon gays and lesbians. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470, 102 S. Ct. 3187, 73 L. Ed. 2d 896 (1982) (overturning a Washington initiative, despite its facially neutral language, because of its obvious "substantial and unique" effect

upon racial minorities). The *Loving* Court recognized the individual character of the freedom at stake: "[u]nder our Constitution, the freedom to marry, or not marry, a person of another race *resides with the individual* and cannot be infringed by the State." *Loving*, 388 U.S. at 12 (emphasis added). Moreover, this court has analyzed the individual impact of government discrimination in prior ERA cases. *Guard*, 132 Wn.2d at 666 (analyzing whether the statute at issue in that case, *as applied*, was discriminatory); *State v. Wood*, 89 Wn.2d 97, 103, 569 P.2d 1148 (1977) (considering an *as applied* challenge); *Darrin*, 85 Wn.2d at 875 (though challenged regulation was based on justification that a majority of girls would be unable to compete with boys in contact football, there was no finding that what was true for a majority of girls was true for the *particular* plaintiffs). The equality of the sexes required by the ERA begins and ends with the rights of the individual under the law. *Accord Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145, at *5-6 (Baltimore City Cir. Court Jan. 20, 2006). In every instance where a man is denied the ability to marry the man of his choice, but a woman is not, that man bears a burden that the woman does not. *As applied*, the DOMA discriminates against the female plaintiffs who wish to marry their female partners and the male plaintiffs who wish to marry their male partners.

Conclusion

The DOMA denies fundamental basic human rights to Washington's gay and lesbian citizens, human rights that impact the very core of their everyday lives.

The plaintiffs in this case represent the ever-growing diversity of the openly gay community in Washington. They are teachers, attorneys, ministers, and foster parents. In their everyday lives they are bosses, coworkers, neighbors, clients, parents, friends, and volunteers. It is in these seemingly mundane, everyday roles that the discrimination imposed by the DOMA is deeply felt, but it is nowhere more wounding than in their very homes. Unless the concept of equal rights has meaning there, it has little meaning anywhere.

"Those who cannot remember the past are condemned to repeat it." GEORGE SANTAYANA, THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS: REASON IN COMMON SENSE 82 (1953). Future generations of justices on this court and future generations of Washingtonians will undoubtedly look back on our holding today with regret and even shame, in the same way that our nation now looks with shame upon our past acts of discrimination. I will look forward to the time when state-sanctioned discrimination toward our gay and lesbian citizens is erased from our state's law books, if not its history. I dissent.

AUTHOR:

Justice Bobbe J. Bridge

WE CONCUR: