

IN THE
INDIANA COURT OF APPEALS
No. 49A02-0305-CV-447

RUTH MORRISON, <i>et al.</i> ,)	Appeal from the Marion Superior
)	Court, Room No. 13
Appellants (Plaintiffs below),)	
)	
v.)	Trial Court No. 49 D13-0211-PL-001946
)	
DORIS ANN SADLER, <i>et al.</i> ,)	
)	Hon. S.K. Reid, Judge
Appellees (Defendants below).)	

REPLY BRIEF OF APPELLANTS

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SUMMARY OF THE ARGUMENT

The challenged statute, IND. CODE 31-11-1-1 creates a classification which denies the appellants (hereinafter "the couples") the right to marry. This classification fails the analysis demanded by *Collins v. Day*, 644 N.E.2d 72 (1994) and its progeny and therefore is unconstitutional as violating Art. I, § 23 of the Indiana Constitution. The disparate treatment accorded the couples is not reasonably related to any inherent characteristics which distinguish same-sex couples from opposite-sex couples. Although a number of purposes for the disparate treatment are articulated by the appellees (hereinafter "State"), the interests posited do not rationally distinguish same-sex from opposite-sex couples. Despite the heavy burden on the couples to demonstrate unconstitutionality, this burden is met.

The couples also meet this burden by demonstrating that the statute is unconstitutional as violating Art. I, § 1 of the Indiana Constitution. This constitutional provision is subject to judicial enforcement and has been previously enforced by the Indiana Supreme Court. Although the right to same-sex marriage was not contemplated by Constitutional Convention of 1850, it has been recognized that at its core the interest protected by Art. I, § 1 is the interest in controlling one's own life without interferences from the State absent some cause and this Court must determine what this means in 21st century Indiana. Inasmuch as this is the core value protected by Art. I, § 1, it includes the right to marry which is one of the most personal and private decisions which a person can make. This right is denied to the couples and this denial, to be constitutional, must satisfy the material burden analysis demanded by our Supreme Court. *Price v. State*, 622 N.E.2d 954, 960 (Ind. 1993). It does not, and is therefore unconstitutional. Even if the less demanding analysis of *City of Indianapolis v. Clint's Wrecker Service, Inc.*, 440 N.E.2d 737 (Ind.Ct.App. 1982) is applied the statute is still constitutionally deficient.

Finally, because the statute is not rationally related to legitimate State interests it also violates Art. I, § 12 of our Constitution.

ARGUMENT

I. The prohibition against same sex marriages grants to a class of citizens privileges and immunities not bestowed on other Indiana citizens and this treatment is not reasonably related to the inherent characteristics which distinguish the couples from opposite-sex couples

A. The analysis under Art. I § 23

Since the couples' brief in this matter, our Supreme Court has decided two cases which further explicate the appropriate analysis under Art. I § 23, *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003); *Dvorak v. City of Bloomington*, 796 N.E.2d 236 (2003). Both cases stress that in analyzing the constitutional permissibility of the classification under Art. I, § 23, the legislature must be accorded considerable deference. *Humphreys*, 796 N.E.2d at 254; *Dvorak*, 796 N.E.2d at 238. The burden is on the challenger to overcome the presumption that an Indiana statute is constitutional and to establish a constitutional violation. *Dvorak*, 796 N.E.2d at 239.

In *Dvorak* the Supreme Court noted that *Collins v. Day, supra*, requires "only that 'the disparate *treatment* accorded by the legislation,' not the *purposes* of the legislation, 'be reasonably related to the inherent characteristics which distinguish the unequally treated classes.'" 796 N.E.2d at 239 (Court's emphasis). However, the Court noted that it is appropriate to look at the legislative purposes to determine if the treatment is reasonably related to the inherent distinctions. *Id.* At 239. And, in *Humphreys*, the Court did look at the legislative purposes for the challenged classification. 796 N.E.2d at 255-56.

These cases do not change the result here. The statute fails the first prong of *Collins* because

the disparate treatment accorded by IND. CODE § 31-11-1-1 is not reasonably related to inherent characteristics which distinguish same-sex couples from opposite-sex couples. The statute is therefore unconstitutional.

B. IND. CODE § 31-11-1-1, by barring the couples from marriage, is subject to analysis under Art. I, § 23

The State argues that inasmuch as IND. CODE § 31-11-1-1 is “sex neutral”, it does not discriminate against the couples based on their gender and therefore it is not subject to attack under Art. I, § 23. The State’s argument is erroneous. Even if the statute does not create a classification based on gender, it surely creates a classification which bars the couples from marrying and which is subject to analysis under Art. I, § 23.

The State argues that because under the statute women can marry men and men can marry women, there is no discrimination based on gender. Yet, the statute prohibits the couples from marrying solely because of their gender. Thus, the Supreme Court of Hawaii concluded in *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993), that a statute prohibiting same-sex marriage created gender based classifications. (“It is the state’s regulation of access to the status of married persons, on the basis of the applicants’ sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws.” *Id.*) The argument which the State makes is not dissimilar to that made by the State of Virginia in *Loving v. Virginia*, 388 U.S. 1 (1967). In an attempt to defend its anti-miscegenation statute the State argued that there was no equal protection violation because the law applied equally to both white and black persons. “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 on race.” 388 U.S. at 8. Similarly, the State argues here that despite the fact that ability to marry is based on a gender based classification, there is no discrimination because all potential marriage participants are treated equally. This does not change the fact that the classification is gender based. *See also, e.g.,* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U.L.REV. 197 (1994).¹

Even if the discrimination here is not deemed to be based on gender, it is clear that the couples in this case are being treated differently than opposite sex couples, thus creating an unequally treated class. The couples, of course, claim that they have the same right to marry as heterosexual couples. It is this “claim . . . that defines the class.” *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 981 (Ind. 2000). *See also, Humphreys*, 796 N.E.2d at 254.² In as much as there are two classes here, analysis under Art. I, § 23 is appropriate and necessary.

- C. The classification created by the challenged statute does not rationally distinguish the unequally treated class and therefore the couples have satisfied their burden of demonstrating that the statute is unconstitutional.

The burden is on the couples to demonstrate that there are no rational reasons for the disparate treatment afforded by the statute. The parties agree that there are three possible justifications for the disparate treatment:

¹ One commentator has noted that arguing that statutes like that in this case are not gender based is essentially a “circular argument that limiting marriage to opposite-sex couples is not gender discrimination because marriage is by definition an opposite-sex institution.” *Developments in the Law - The Law of Marriage and Family*, 116 HARV.L.REV. 2004, 2017 (2003).

² In *Standhardt v. Superior Court*, 77 P.3d 451, 2003 WL 22299701 (Az.Ct.Ap. 2003), the Court, among other things, considered an equal protection challenge to a statute similar to IND. CODE § 31-11-1-1. Although the court found that the statute was constitutional, it accepted the contention that the legislation created a class of opposite-sex couples and a second class of same-sex couples. 2003 WL 22299701, * 11.

- to promote procreation and child-rearing by both natural parents
- to promote the traditional family as the basic living unit of society
- to protect the integrity of traditional marriage

As the couples demonstrated in their original brief, these justifications simply do not support the necessary conclusion that the same sex status of the couples is an inherent characteristic which “rationally distinguish the unequally treated class.” *Collins*, 644 N.E.2d at 79. The State argues to the contrary, but it errs.

1. The prohibition against same-sex marriages is not reasonably related to a government interest in promoting procreation and child-rearing

The State argues that recognizing only opposite-sex marriages promotes procreation and child rearing in the best possible context, where both parents are present, and that given the deferential review demanded here, this is enough. However, the State’s argument is not reasonable on a number of fronts. And, despite the deference which this Court must afford the legislative judgment this rationale is clearly not related to the prohibition on same-sex marriages.

As a logical matter, the State is forced to concede that there is no requirement that persons who marry conceive children. Certainly, the couples are not arguing that prospective spouses should be interrogated as to their ability and willingness to have children. The fact that such questioning would be abhorrent is a recognition not just of our respect for marital privacy but also a recognition that marriage is an essential and important human institution regardless of procreation. *See e.g.*, Jennifer Wriggens, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C.L.REV. 265, 309-310 (2000); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C.L.REV. 1501, 1557-58 (1997). And, it is also clear that given adoption and modern reproductive technology same sex couples may

have children as well.

It is not enough to respond to these points by arguing that the legislature has the prerogative to draw lines both broadly and narrowly. The point is, as the United States Supreme Court has recognized, procreation is not essential to marriage and, therefore, arguing to the contrary is not reasonable. In *Turner v. Safley*, 482 U.S. 78 (1987), the Court, among other things, struck down a regulation which prohibited prisoners from marrying unless the prison superintendent determined that there were compelling reasons for allowing the marriage. In striking down the regulation the Court noted the many attributes of marriage which remained, even taking into account the "limitations imposed by prison life" which presumably included a denial of the right to procreate or even to consummate the relationship.

Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouse, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits . . . property rights . . . and other, less tangible benefits . . .

482 U.S. at 95-96.³ This view of the commitment of marriage as separate from procreation

³ The State cites a number of Supreme Court cases which simply do not counter the conclusion that reproduction is not critical to marriage. In *Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53 (2001), the court upheld against an equal protection attack a statute that made it more difficult for a child born out of wedlock and out of the United States to gain citizenship based on the citizenship of his or her father than a similar child born to an American mother abroad. The Court noted that the government had a legitimate interest in

conforms to the Court's earlier recognition in *Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965), that marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet, it is an association for as noble a purpose as any involved in our prior decisions."

The bottom line is that we recognize, without questioning, that heterosexual marriage produces a unity that is important, valued, and essential, even if the unity does not produce children. Yet, the State proposes to deny this unity to same-sex couples for a reason, inability to biologically procreate, which has no bearing on the validity and importance of heterosexual marriages.⁴ We also recognize that with adoption, surrogacy, and artificial insemination couples, both opposite and same-sex, can have children in a non-traditional manner. This hardly weakens the legitimacy of marriage

seeking to assure that a biological parent-child relationship actually exist and this is obviously easier when the mother is the citizen-parent. 533 U.S. at 62. The ultimate interest in *Nguyen* was that "the child and the parent have some demonstrated opportunity to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provided a connection between child and citizen parent, and, in turn, the United States." *Id.* at 64-65. This hardly is an endorsement of the principle advanced by the State, that marriage of opposite-sex persons is the institution which best furthers the social interests in procreation. (Appellees' Brief at 8). Indeed, inasmuch as the case concerns procedures for out-of-wedlock children it highlights the obvious fact that children are born without the benefit of marriage. The case focuses on parents and children, not on marriage. Similarly, in *Reno v. Flores*, 507 U.S. 292, 310 (1993), also cited by the State, the Court emphasized that it is always best that children be in the custody of their parents "whom our society and this Court's jurisprudence have always presumed to be the preferred and primary custodians of their minor children." Charlotte and Dawn Egler, the parents of a minor child, would certainly agree with this sentiment. The Court is certainly not stating that marriage is the social institution which best furthers society's interests in procreation. Neither does the Court so hold in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), which instead stressed that if a child is born into a married unit, it is not unconstitutional to presume that he is a child of the marriage.

⁴ Moreover, the State's reliance on procreation is dangerous given the evolving nature of reproductive technology. Charlotte and Dawn Egler's child was conceived by the fertilization of Dawn's egg through an anonymous sperm donor, and the egg was then implanted within Charlotte who carried the child to term. It is difficult to argue that this is not a biological unit.

as an institution. Nor does it explain why opposite-sex couples are able to build a marital unit around, for example, an adopted child, but a same sex couple is not. Marriage is a unity that society has a strong interest in preserving, regardless of whether children issue from the marriage. The marriage statute and its prohibition against same-sex couples do not bear a substantial relationship to any governmental interest in promoting procreation. The fact that married couples can procreate is not an inherent characteristic which is reasonably related to the distinguishing characteristics between same-sex and opposite-sex couples. *Collins*, 633 N.E.2d at 78-79.

2. The fact that the government has an interest in promoting the family as the basic unit of society can not be used to rationally distinguish same-sex couples from opposite-sex couples

Both the couples and the State agree that the family is the basic foundation of society. But this does not answer the question of whether it is rational to proclaim that only opposite sex couples can create a family. This Court has already noted, in *In re Adoption of MMGC*, 785 N.E.2d 267, 270 (Ind.Ct.App. 2003), that a family made up of two same-sex persons and an adopted child is a family which creates “a stable, supportive and nurturing environment.” There is no rational reason to claim that a family made up of same-sex persons is different in this regard than opposite-sex persons. “[F]amilies are different today than they once were.” *Cornell v. Hamilton*, 791 N.E.2d 214, 219 (Ind.Ct.App. 2003). A family made up of a same-sex and opposite-sex couple cannot be rationally distinguished in this regard.

3. The State’s purpose of protecting the integrity of traditional marriage also does not rationally distinguish same-sex and opposite-sex couples and this Court can expand the notion of marriage in a coherent way

On one level it is impossible to respond to the State’s argument that same-sex marriage should not be allowed so as to protect the integrity of traditional marriage. Of course, if protecting

traditional marriage, no matter what, is in and of itself rational, then there is simply nothing further to say. But, there is something further to say because merely claiming tradition is not sufficient to rationally distinguish same-sex and opposite-sex couples.

The American view of marriage is not static.

Loud calls for changing marriage have been heard in our nation's history. For example, Elizabeth Cady Stanton, in her famous Address to the Legislature of the State of New York, in 1854, stated:

Look at the position of woman as wife. Your laws relating to marriage – founded as they are on the old common law of England, a compound of barbarous usages, but partially modified by progressive civilization – are in open violation of our enlightened ideas of justice, and of the holiest feelings of our nature.

While advocating radical changes in marriage laws, Stanton was not advocating a retreat from marriage. Marriage and marriage law have been constantly changing, and seemingly fundamental aspects of both have changed.

Wriggins, 41 B.C.L.REV. at 313. (Footnote omitted).

Nowhere can the evolving nature of marriage, and the fallacy of relying on "tradition" as a rationale for refusing to change the required definition of marriage, be seen more clearly than in the view of marriage between members of different races. The State objects to the analogy between Indiana's law and the anti-miscegenation statutes struck down in *Loving*. Admittedly, the analogy is not a perfect one. The horror and tragedy of American slavery is unique. But, what is not unique is that those who argued to uphold statutes criminalizing miscegenation did so by arguing tradition. "Opponents of mixed-race marriage also relied on the status quo, or 'tradition' to support the proposition that things should not change: 'It has always been the policy of this state to maintain

separate marital relations between the whites and the blacks.” Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 Harv.C.R.-C.L.L.Rev. 255, 265 (2002) (citing, *Frasher v. State*, 3 Tex.Ct.App. 263, 268 (1887)).⁵

Yet, the State argues that if marriage is deemed to include same-sex couples floodgates will open and the State will be forced to recognize polygamous and incestuous relationships. But there are basic distinctions between a same-sex marriage and a polygamous and incestuous one. The latter relationships have been recognized as dangerous. For example, more than a century ago the United States Supreme Court noted that “polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connections with monogamy.” *Reynolds v. United States*, 98 U.S. 145, 166 (1878). “The practice of same-sex marriage would not lead to despotism or undermine democracy, as the

⁵ Opponents also made religious based arguments which were not entirely dissimilar from the arguments made by at least one of the *amici* in the case at bar. Professor Ross collected a series of these arguments:

[Marriage] is a public institution established by God himself, is recognized in all Christian and civilized nations, and is essential to the peace, happiness and well-being of society.

Such equality does not in fact exist, and it never can. The God of nature made it otherwise, and no human law can produce it, and no tribunal can enforce it.

Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Ross, 37 Harv.C.R.-C.L.L.Rev. at 264-65. (footnotes omitted).

Reynolds Court feared polygamy would, nor would it undermine the way in which heterosexual marriage functions to teach, in a deep and concrete way, the lesson that the apparent sacrifices of individuality, required by the community, ultimately reestablish and strengthen individuality.” Strassberg, 75 N.C.L.Rev. at 1615.

Nor can a same-sex relationship be compared to one between first cousins or those more closely related. “[S]ome incest-marriage provisions may protect against actual harms. By contrast, no harms follow, to the participants or anyone else, from the participation of lesbian and gay adults in committed, loving, coupled, marital relationships.” Wriggens 41 B.C.L.Rev. at 319. The floodgate argument is unavailing.

The State further argues that the couples have not posited a coherent theory of marriage. (Appellee’s Brief at 29). The point, however, is that when the debate moves beyond the circular argument that only opposite-sex marriages can exist because that is the form of traditional marriage, it becomes clear that there simply is no difference between the same-sex marriage and the opposite-sex marriage other than the sex of the participants. Thus, the “coherent theory” of same-sex marriage is no different than the “coherent theory” of opposite-sex marriage. The theory is that two adults, bonded by love and commitment, should be able to join into a union “for better or for worse, hopefully enduring, and intimate to the degree of being sacred.” *Griswold v. Connecticut*, 381 U.S. at 486. Legalization of same-sex marriage is fully consistent with this “coherent theory.”

II. IND. CODE § 31-11-1-1 is unconstitutional inasmuch as it interferes with a core value of autonomy and self-determination protected by Art. I, § 1 of the Indiana Constitution

A. Art. I, §1 of the Indiana Constitution is subject to judicial enforcement

The State seizes on dictum in *Doe v. O’Connor*, 790 N.E.2d 985, 991 (Ind. 2003), to argue

that Art. I, § 1 of the Indiana Constitution does not create enforceable rights. In *O'Connor* the Court noted that a number of states had determined that their constitutional provisions similar to Art. I, § 1 did not create substantive enforceable rights.⁶ However, the Indiana Supreme Court has already held on a number of occasions that Art. I, § 1 does create enforceable rights and, in fact, has invalidated statutes based on this provision. See e.g., *Department of Financial Institutions v. Holt*,

⁶ In *O'Connor*, the Supreme Court cited cases from Ohio, Vermont, Alabama, Alaska Idaho, Nevada and Rhode Island as illustrative of cases where provisions similar to Art. I, § 1 were deemed not to be enforceable. 790 N.E.2d at 991. However, a number of these cases do not support this point and a number of these states have explicitly held that their Art. I, § 1 analog creates substantive rights.

The Alabama Supreme Court has held that Art. 1 §§ 1 and 35 of its constitution combine to create liberty interests which, to some degree, protect economic interests. See e.g., *State ex rel. Galanos v. Mapco Petroleum, Inc.*, 519 So.2d 1275 (Ala. 1987).

The Indiana Supreme Court cites to *Cogan v. State Dep't of Revenue*, 657 P.2d 396 (Alaska 1983). However, that case merely holds that the right to life, liberty and the pursuit of happiness in Art. I, § 1 of the Alaska Constitution does not prohibit the imposition of an income tax. The Alaska Supreme Court has held that the right to liberty in Alaska Constitution Art. I, § 1 includes the right to be left alone. *Breese v. Smith*, 501 P.2d 159, 168 (Alaska 1972).

The Supreme Court of Idaho has specifically held that its art. 1, §§ 1 and 21 create a privacy right. *Murphy v. Pocatello School District #25*, 480 P.2d 878, 884 (1971). The case cited by our Supreme Court, *Nelson v. Bounday County*, 706 P.2d 94, 100 (Idaho Ct. App. 1985), states only that the pursuit of happiness protected by art. 1, § 1 of the Idaho Constitution "has been intertwined with a person's right to follow his chosen occupation . . . [but it] does not stretch as far as to prohibit the otherwise proper termination of a public employee."

In *Attebury v. State*, 438 P.2d 789 (Nev. 1968), the Court did not reject a conclusion that Art. 1 § 1 creates enforceable rights, but merely held that "[a]ppellant has failed to demonstrate by authority or argument how his rights under Article 1, section 1, of the Nevada Constitution have been violated by this enactment."

And, the Rhode Island Supreme Court in *Allard v. Department of Transportation*, 609 A.2d 930 (R.I. 1992), noted that there was a rational connection between the challenged law and legislative aims, and therefore there was no violation of Art. I, § 2 of the Rhode Island Constitution.

231 Ind. 293, 108 N.E.2d 629 (1952); *Kirtley v. State*, 227 Ind. 175, 84 N.E.2d 712 (1949); *Department of Insurance v. Schoonover*, 225 Ind. 187, 72 N.E. 747, 750 (1947); *State Board of Barber Examiners v. Cloud*, 220 Ind. 552, 44 N.E.2d 972 (1942); *Street v. Varney Electrical Supply Co.*, 160 Ind. 338, 66 N.E. 895 (Ind. 1903); *Herman v. State*, 8 Ind. 545, 1855 WL 3695 (Ind. 1855). *O'Connor* does not challenge these prior holdings to the extent they found that Art. I, § 1 could be judicially enforced.

Moreover, Indiana is not unique among the states in holding that Art. I, § 1 creates enforceable rights. As noted previously by the couples, there are some states which have found that their Art. I, § 1 analog, standing alone, creates enforceable rights, *see e.g.*, *Breese v. Smith*, 501 P.2d 159, 168 (Alaska 1972); *Grissom v. Dade County*, 293 So.2d 59, 62 (Fla. 1974); *Commonwealth v. Camphell*, 117 S.W.383, 385 (Ky.App.1909); *Petition of Kerry D.*, 737 A.2d 662, 665 (N.H. 1999); *Planned Parenthood of Central New Jersey v. Farmer*, 762 A.2d 620, 629 (N.J. 2000); *Denoncourt v. Commonwealth*, 470 A.2d 945, 948, 950 (Pa. 1983). It is also true, as noted by the State, that a number of other states (see Appellees' Brief at 35-37), have found that enforceable rights are created by a number of constitutional provisions, including the states' Art. I, § 1. Whether our sister states have viewed their Art. I, § 1 provision either singly or with other provisions as creating substantive and enforceable rights is not particularly relevant. What is relevant is that these states have recognized that the language of their Art. I, § 1 analog gives rise to substantive content and is judicially enforceable.

B. The freedom to choose one's marital partner, regardless of gender, is a core value protected by Art. I, § 1

The State's argument is simple. State constitutional analysis focuses on the intent of the

framers and the historical context. According to the State our Constitution is not intended to be viewed as a living, evolving document. (Appellees' Brief at 46). Because same-sex marriage was not allowed at the time that the Constitution was created, Art. I, § 1 can not now be interpreted as including within it a right to same-sex marriage.

It is true that in interpreting the Indiana Constitution "constitutional text, history of the times, intent of the framers, etc. – are proper keys." *McIntosh v. Melroe Company*, 729 N.E.2d 972, 974 (Ind. 2000). But, it is clear that this is not the end of the analysis. For example, immediately after the passage of the Constitution, the Indiana Supreme Court declared that an inherent natural right protected by Art. I, § 1 was a right of citizens to possess and manufacture alcohol. *Beebe v. State*, 6 Ind. 501, 1855 WL 3616 (Ind. 1855). This holding was reversed by the Supreme Court in 1918. *Schmitt v. F.W. Cook Brewing Co.*, 187 Ind. 623, 120 N.E. 19, 21 (1918). Under the State's rationale, the *Beebe* decision should have arrested all further constitutional development in the area.

The State spends much of its brief discrediting earlier decisions holding that Art. I, § 1 safeguarded economic rights. Admittedly, the precise holdings of these cases, like that of *Lochner v. New York*, 198 U.S. 45 (1905), have been either explicitly rejected or silently forgotten as society has changed and evolved through time. However, rather than helping the State, these cases graphically demonstrate that our constitutional analysis is not mired in the past, but can evolve and change.

What the intent of the framers and the history of the times surrounding the passage of the Constitution do tell us is that at its core Art. I, § 1 preserves the right of persons to privacy with

regard to the government.⁷ In *Herman*, decided four years after the passage of the Constitution, the Court noted, concerning the right of people to drink liquor that:

If the constitution does not secure this right to the people, it secures nothing of value. If the people are subject to be controlled by the legislature in the matter of their beverages, so they are as to their articles of dress, and in their hours of sleeping and waking. And if the people are incompetent to select their own beverages, they are also incompetent to determine anything in relation to their living, and should be placed at once in a state of pupilage to a set of government sumptuary officers; eulogies upon the dignity of human nature could cease; and the doctrine of the competency of the people for self-government be declared a deluding rhetorical flourish. If the government can prohibit any practice it pleases, it can prohibit the drinking of cold water.

1855 WL 3695, *8. Although the Supreme Court has rejected the notion that government cannot regulate the drinking and manufacture of alcohol, it has never rejected the notion, recognized at this early time, that Art. I, § 1 safeguards an area of personal privacy free from government intrusion absent sufficient cause. This, of course, is the notion expressed by Delegate Smith at the 1850 Constitutional Convention, as noted by the court in *In the Matter of Lawrance*, 579 N.E.2d 32, 39, n. 3 (Ind. 1991), that, at its core, the interest protected by Art. I, §1 is the interest that all persons have in the “complete sovereignty over their affairs, including the simplest pursuit of happiness and

⁷ The State argues that the fact that the 1850 Constitutional Convention rejected a provision which would have prohibited the impairment of the unity and sacredness of marriage demonstrates that the framers wanted to leave regulation of marriage to the legislature. (Appellee’s Brief at 38). Indiana Constitutional Convention 1850- Convention Journal at 896. It is difficult to read much into the rejection of a proposal. But it appears to be a recognition, more than a century and a half ago, that the meaning of marriage is not static and could change and evolve over time. And, even though marriage is subject to legislative regulation, that regulation is certainly subject to the requirements of the Indiana Constitution inasmuch as a law in violation of the State Constitution is unlawful. See e.g., *Municipal City of South Bend v. Kimsey*, 781 N.E.2d 683 (Ind. 2003) (Striking down annexation statute as violating Ind. Const. Art. 4 § 23).

‘the right to walk abroad and look upon the brightness of the sun at noon-day[.]’ 1 *Debates in Indiana Convention* 968 (1850).”

The Supreme Court has proceeded to determine the meaning of state constitutional provisions even in the absence of direct history. *See e.g., State v. Gerschoffer*, 763 N.E.2d 960, 965 (Ind. 2002); *McIntosh*, 729 N.E.2d at 974. Here, regarding Art. I, § 1, there is “history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions.” *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443, 446 (2001), quoting *McIntosh*, 729 N.E.2d at 986 (Dickson, J., dissenting).

Contrary to the State’s contention, the couples are asking this Court to engage in the analysis required by the Indiana Supreme Court to determine what this right of privacy, recognized in 1851, means in 2003. In *Gerschoffer*, the Court noted, concerning the application of Ind. Const. Art. I, § 11 to drunk driving roadblocks, that the “historical context offers only limited insight on the issue of roadblocks because “[t]he automobile has made an alteration in our way of life unforeseen and unforeseeable by the Founding Fathers.”” 763 N.E.2d at 965 (internal citation omitted). Indeed, the Indiana Supreme Court recognized that societal changes necessitate a change in the view of the protections of the Indiana Constitution when it ruled, more than 100 years ago, that women could become members of the Bar. “The fact that the framers of the constitution, or the legislators, in enacting our statute, did not anticipate a condition of society when women might desire to enter the profession of law for a livelihood cannot prevail against their right to do so independently of either.” *In re Leach*, 134 Ind. 665, 34 N.E. 641, 642 (1893).⁸

⁸ While it is true that this Court “must enforce the Constitution as written and intended,” *Board of Trustees of Public Employees’ Retirement Fund v. Pearson*, 459 N.E.2d 715, 717 (Ind. 1984), it is also true that in looking at the text, structure and history of the Constitution, the

Given the realities of 21st century Indiana, what does the right to “manage one’s own life,” protected by Art. I, §1, mean? *Lawrance*, 579 N.E.2d at 39, n. 3. This Court should recognize that the notion of privacy and personal autonomy, recognized since the time of the Constitutional Convention of 1850 as being a part of the rights protected by Art. I, § 1, also include the right of couples to marry as a core value.

- C. The challenged statute unconstitutionally burdens the core value of the right of the couples to marry

The State argues that the “core value” scrutiny demanded by *Price v. State*, 622 N.E.2d 954, 960 (1993), and *City Chapel*, 744 N.E.2d at 447, should not be used to analyze any burden imposed by the challenged statute on the couple’s right to marry. Instead, the State argues that the statute need only satisfy the lesser standard established by *City of Indianapolis v. Clint Wrecker’s Service*, 440 N.E.2d 737, 742 (Ind.Ct.App. 1982), before the advent of the Supreme Court’s “core value” analysis. As the couples demonstrate in their original brief, the constitutionality of the statute must be measured by the higher standard demanded when a core value is implicated. Even if the lesser standard proposed by the State is used, the challenged statute is nevertheless unconstitutional.

- 1. The challenged statute materially burdens a core value and is therefore unconstitutional

Article I, § 1 protects the privacy of citizens from unwanted and unwarranted intrusions of the government. The core of this notion of privacy is that intimate matters of personal autonomy concerning one’s life are not to be interfered with by government without the highest cause. Otherwise, the government could interfere with “our hours of sleeping and waking.” *Herman*, 1855

current state of the world must also be observed. Otherwise, Indiana’s constitutional jurisprudence would be mired in 1851.

WL 3695, *8. There is no more personal decision in life than who to marry. The State argues that this is not a privacy issue inasmuch as the couples are asking for government endorsement of their relationship. The notion of constitutional privacy does not require that people hide things from the government. Instead, it recognizes that there are certain areas of human association and conduct that are so significant that absent cause it cannot be subjected by the government to “unwarranted usurpation, disregard or disrespect.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (referring to the United States Constitution). The right to marry is a core value protected by the notion of privacy which is at the heart of Art. I, § 1 of the Indiana Constitution.

The Indiana Supreme Court has held that a core value is materially burdened when “the right, as impaired, would no longer serve the purpose for which it was designed.” *Price*, 622 N.E.2d at 960, n. 7. Such a material burden is impermissible. *Id.* If a core value is implicated, the State must demonstrate that the burden is not material either because the impairment is slight or by showing that the exercise of the constitutional right “threatens to inflict ‘particularized harm’ analogous to tortious injury on readily identifiable private interests.” *Whittington v. State*, 669 N.E. 2d 1363, 1370 (Ind. 1996).

The State argues that the material burden analysis is not to be used when the law has a broader social goal. (Appellee’s Brief at 51). Of course, this puts the cart before the horse. If a core value is implicated, the State carries an elevated burden which cannot be satisfied merely by claiming a broader social purpose. The Supreme Court has made it clear that “‘[t]he material burden’ analysis looks only to the magnitude of the impairment and does not take into account the social utility of the state action at issue.” *City Chapel*, 744 N.E.2d at 447. Otherwise, the core value analysis would not result in any elevated protection for rights which are at the heart of our Constitution.

Clearly, the challenged statute prohibits the couples from marrying. The impairment on a core value is not slight. The only question is whether the State can demonstrate that allowing the couples to marry would threaten particularized harm on readily identifiable private interests. The State is unable to point to any harms that will occur if the couples are allowed to marry.

2. Even under the lesser standard of *Clint Wrecker's Service* the challenged statute is unconstitutional

The State argues that the challenged statute is necessary for the collective peace, safety, and well-being of society and therefore meets the lesser scrutiny demanded by *Clint Wrecker's Service*. But, the scrutiny demanded by *Clint Wrecker's Service* is not meaningless. It demands both that the statute "promote the health, morals, education, good order and welfare of the people" and that it bears a reasonable and substantial relation to accomplishing this purpose." 440 N.E.2d at 742. As indicated in the original brief and above, the reasons posited by the State do not promote the general welfare of people. There is no substantial relationship.

III. The statute also violates Art. I, § 12 of the Indiana Constitution

The State argues that Art. I, § 12 of our Constitution only applies to tort causes of action. However, it is clear that Art. I, § 12 contains a substantive component which, at the very least, is offended if the "law does not bear a substantial relation to permissive state objectives." *N.B. v. Sybinksi*, 724 N.E.2d 1103, 1112 (Ind.Ct.App. 2000); *McIntosh*, 729 N.E.2d at 976. This insures "that state action is not arbitrary or capricious regardless of the procedures used." *N.B.*, 724 N.E.2d at 1112.

The State argues that the challenged statute is rational because it is rationally related to multiple legitimate interests. However, as indicated in the original brief and above, the prohibition

on same sex marriage is simply not rationally related to legitimate interests of the State.

CONCLUSION

As a number of the *amicus* briefs in this case illustrate, it is difficult for some to look at the issue of same-sex civil marriage without raising religious, moral, and ethical arguments which have no place in evaluating what the Indiana Constitution requires in this instance. Ending the discrimination against the couples and allowing the couples to be treated as equal members of society who can enter into the very private and personal state of marriage will not cause any societal harm but instead will be beneficial. The challenged statute is unconstitutional and the trial court's decision must be reversed.



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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 7,000 words.



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I hereby certify that a copy of the foregoing was served on the below named person(s) on this 3rd day of November, 2003, by first class U.S. postage, pre-paid.

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