

IN THE SUPREME COURT OF THE STATE OF OREGON

MARY LI and REBECCA KENNEDY;
STEPHEN KNOX, M.D. and ERIC
WARSHAW, M.D.; KELLY BURKE
and DOLORES DOYLE; DONNA
POTTER and PAMELA MOEN;
DOMINICK VETRI and DOUGLAS
DEWITT; SALLY SHEKLOW and
ENID LEFTON; IRENE FARRERA and
NINA KORICAN; WALTER FRANKEL
and CURTIS KEIFER; JULIE
WILLIAMS and COLEEN BELISLE;
BASIC RIGHTS OREGON; and
AMERICAN CIVIL LIBERTIES
UNION OF OREGON,

Plaintiffs-Respondents,
Cross-Appellants,

and

MULTNOMAH COUNTY,

Intervenor-Plaintiff-Respondent,
Cross-Appellant,

v.

STATE OF OREGON; THEODORE
KULONGOSKI, in his official capacity
as Governor of the State of Oregon;
HARDY MYERS, in his official capacity
as Attorney General of the State of
Oregon; GARY WEEKS, in his official
capacity as Director of the Department of
Human Services of the State of Oregon;
and JENNIFER WOODWARD, in her
official capacity as State Registrar of the
State of Oregon,

Defendants-Appellants,
Cross-Respondents,

Multnomah County Circuit Court
No. 0403-03057

Appellate Court No. A124877

Supreme Court No. S51612

Continued.....

and

DEFENSE OF MARRIAGE
COALITION, CECIL MICHAEL
THOMAS, NANCY JO THOMAS, DAN
MATES, and DICK JORDAN
OSBORNE,

Intervenors-Defendants-Appellants,
Cross-Respondents.

STATE DEFENDANTS'-APPELLANTS' OPENING
BRIEF ON THE MERITS AND
RESPONSES TO QUESTIONS FROM THE COURT

Certified Appeal from the Judgment
of the Circuit Court for Multnomah County
Honorable FRANK L. BEARDEN, Judge

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**STATE DEFENDANTS'-APPELLANTS' OPENING
BRIEF ON THE MERITS AND
RESPONSES TO QUESTIONS FROM THE COURT**

INTRODUCTION AND SUMMARY OF STATE'S POSITION ON APPEAL

This case requires that the parties brief (and that this court decide) a number of novel and complex questions about Article I, section 20, of the Oregon Constitution. In addition, the court has asked the parties to answer questions about Article I, section 20 of the Oregon Constitution and about the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The answers are hardly free from doubt. In light of that uncertainty, and lest our position be misunderstood, the State begins with a summary of the questions that are, and are not, at issue.¹

If this case is decided in a way consistent with the state's analysis, the court *will not* have decided that a law continuing the long-standing limitation of marriage to opposite-sex

¹ It is also important to keep in mind the more narrow legal framework within which the issues before the court must be decided. When faced with similar claims, the Vermont Supreme Court described the nature of inquiry in these terms:

May the State of Vermont exclude same-sex couples from the benefits and, protections that its laws provide to opposite-sex married couples? That is the fundamental question we address in this appeal, a question that the Court well knows arouses deeply-held religious, moral, and political beliefs. Our constitutional responsibility to consider the legal merits of issues properly before us provides no exception for the controversial case. The issue before the court, moreover, does not turn on the religious or moral debate over intimate same-sex relationships, but rather on the statutory and constitutional basis for the exclusion of same-sex couples from the secular benefits and protections offered married couples.

Baker v. Vermont, 170 Vt 194, 197, 744 A2d 864 (1999).

The state wishes to emphasize that the arguments it presents in this brief are addressed only to the secular and state-regulated aspects of marriage and that nothing in this brief is meant to suggest that any individual or religious group would be required to change in any way their practices in respect to their own recognition or solemnization of marriage.

couples, standing alone, would be unconstitutional under Article I, section 20. The court *will* have decided that the trial court erred in requiring the state, through the State Registrar, to register the marriages of same-sex couples, and it will have decided that Article I, section 20 prohibits the legislature from denying to same-sex couples through a single policy choice all of the legal incidents of marriage available under current law only to opposite-sex couples. Importantly, the court *will not* have decided in this case that either the state or the federal constitution prohibits the legislature from creating a “civil union,” or some other institutional gateway to benefits, from making benefit-by-benefit judgments about the distribution of privileges and immunities, or from enacting into law any other remedy consistent with both constitutions.

Following the Statement of the Case (in which the state summarizes both its arguments on appeal and its responses to this court’s questions), this brief is divided into two sections. In “SECTION ONE,” the state sets out and argues its claim of error. In “SECTION TWO,” the state responds to the court’s questions.

STATEMENT OF THE CASE

Nature of the Proceeding

This case is an action for declaratory and injunctive relief under ORS 28.010 to ORS 28.150, a proceeding for judicial review of an order in other than a contested case under ORS 183.484, *and* a mandamus proceeding under ORS 34.110. In their complaint, plaintiffs (who include nine same-sex couples) sought the following: (1) a judgment “declaring that the failure of [ORS chapter 106] to permit marriages of same-sex couples violates Article I, section 20 of the Oregon [C]onstitution”; (2) a judgment declaring that the state defendants’ failure “to file and register the marriage records of same-sex couples * * * violates Article I, section 20 of the Oregon Constitution,” and enjoining the state defendants “from directing or

counseling Oregon agencies * * * to refuse to recognize marriages of same-sex couples,” and “from refusing to file and register the marriage records of marriages of same-sex couples”; (3) a judgment “reversing and setting aside” the state defendants’ “order” refusing “to file and register the marriage records of same-sex couples” and “requiring [them] to register the marriage records”; and (4) a judgment issuing “an alternate writ of mandamus to [state] defendant Woodward [the State Registrar] commanding her to file and register the marriage records of * * * same-sex couples.” (*See* ER-37 through ER-43).²

Defendants-appellants State of Oregon, *et al*, (hereinafter, “the state”) seek reversal of that portion of the trial court’s Revised Limited Judgment granting plaintiffs’-respondents’ petition for a writ of mandamus requiring the State Registrar to register approximately 3000 marriage license documents issued by Multnomah County to same-sex couples between March 3, 2004 and April 20, 2004.

Nature of the Judgment

This appeal is from the trial court’s Revised Limited Judgment, entered on May 6, 2004. (ER-421 to ER-425). The judgment, a copy of which is attached hereto as Appendices App-1, contains a succinct summary of the relevant procedural chronology. On April 16, 2004, the trial court “conducted a [summary judgment hearing] that was limited to the constitutionality issue (including the question of remedy, but not including county authority issue).” (ER-424; ER App-4). On April 20, 2004, the trial court issued its Opinion and Order,³ (ER 426 to ER-442), and, on April 29, 2004, the trial court filed the Revised Limited

² Citations in this brief to “ER-(pages)” are to the “joint” Excerpt of Record filed on behalf of all of the parties, pursuant to this court’s Amended Order Granting Motion to File Extended Briefs and Extended Excerpts of Record, dated September 17, 2004.

³ For the convenience of the court, a copy of the trial court’s Opinion and Order is attached hereto as Appendices App-6.

Judgment, to which the Opinion and Order is attached as an exhibit. (ER-421 to ER-442).

The judgment states, in relevant part:

In accordance with ORCP 67, ORS 18.005 et seq., and the Court's Opinion and Order of April 20, 2004, it is hereby ADJUDGED that:

- (1) Plaintiffs and intervenor-plaintiff have judgment against defendants and intervenor-defendants on the First Claim for relief for a declaration that, to the extent that ORS Chapter 106 acts as a bar to the rights and privileges guaranteed by Article I, section 20 of the Oregon constitution, that portion of Chapter 106 is unconstitutional.
- (2) On plaintiffs' and intervenor-plaintiff's First Claim for Relief, the Court hereby declares that, to the extent that ORS Chapter 106 acts as a bar to the rights and privileges guaranteed by Article I, section 20 of the Oregon constitution, that portion of Chapter 106 is unconstitutional.
- (3) Plaintiffs and intervenor-plaintiff have judgment against defendants and intervenor-defendants on the Fourth Claim for Relief, in the alternative to the Second and Third Claim for Relief, for a writ of mandamus ordering defendant Woodward to record the marriages of same-sex couples licensed and solemnized in Oregon within thirty days of the judgment entered in this case.
- (4) On plaintiffs' and intervenor-plaintiff's Fourth Claim for Relief, in the alternative to plaintiffs' and intervenor-plaintiff's Second and Third Claims for Relief, the Court hereby issues a writ of mandamus ordering defendant Woodward, within thirty days of the judgment entered in this case, to record the marriages of same-sex couples licensed and solemnized in Oregon.
- (5) The remedy for the constitutional violation is as follows: The Court will allow the legislature until ninety days after the commencement of the next regular or special session, whichever comes first, to produce legislation that would balance the substantive rights of same-sex domestic partners with those of opposite-sex married couples or the County will be required to issue marriage licenses to same-sex couples to avoid further violating Article I, section 20. Until that time, the County is enjoined from further issuing marriage licenses to same-sex couples.

There is no just reason for delaying appeal on these claims, and so this limited judgment shall be entered as an appealable judgment pursuant to ORCP 67B forthwith.

(ER-424 to ER-425).

Statutory Basis for Appellate Jurisdiction

This court has jurisdiction to review the Revised Limited Judgment in this case under ORS 19.205(1) and ORS 183.500 and pursuant to this court’s Order Accepting Certified Appeal, dated July 27, 2004.

Jurisdictional Basis for Agency Action and Trial Court Review

The State Registrar has authority under ORS chapter 432 to register records of civil marriages performed in Oregon. The trial court had jurisdiction under ORS 183.484 to review the State Registrar’s refusal to register the marriage records at issue in this case.

Questions Presented on Appeal

1. Does ORS 432.405 require the State Registrar to register (and maintain as vital records) marriage license-and-solemnization documents for marriages that are unlawful or otherwise invalid under ORS chapter 106?
2. Did the trial court err in granting plaintiffs’ petition for mandamus relief, where plaintiffs had available to them a plain, speedy and adequate remedy at law – *i.e.*, the adjudication of any one of their three other claims for relief?

Summary of Argument

Under ORS chapter 106, county clerks may issue marriage licenses only to opposite-sex couples who meet the other requirements for civil marriage and are prohibited from issuing licenses to same-sex couples whether or not those couples meet the other requirements for civil marriage. Multnomah County – notwithstanding ORS 106.077 and ORS 106.110 and based on a legal opinion issued by its counsel – began issuing marriage licenses to thousands of same-sex couples, including several of the plaintiffs, whose marriages were then solemnized. Thereafter, Multnomah County submitted these marriage license forms to the State Registrar for registration as “vital records.” At that time, *no court* had ruled that any provision of ORS chapter 106 was unconstitutional.

The State Registrar has authority to “[a]dminister and enforce the provisions of [ORS chapter 432] and the rules adopted pursuant thereto for the efficient administration of the system of vital statistics” and to “[d]irect, supervise and control the activities of all persons when they are engaged in activities pertaining to the operation of the system of vital statistics.” ORS 432.030. The Registrar is required by ORS 432.405 to register a completed marriage license-and-solemnization form *only* if it constitutes “[a] record of [a] marriage” *and* “it has been completed and filed in accordance with [ORS 432.405] and rules adopted by the * * * Registrar.” Pursuant to ORS 432.405, the legal advice of the Attorney General, and at the direction of the Governor, the Registrar refused to register the marriage license-and-solemnization documents submitted by the same-sex couples, because licenses issued to them by Multnomah County do not constitute “‘marriage record[s]’ as described by ORS 432.405.”

For any one or all of the following reasons, the trial court erred in granting plaintiffs’ Fourth Claim for Relief for a writ of mandamus requiring the State Registrar to register “the marriages of same-sex couples licensed [by intervenor-plaintiff-respondent Multnomah County] and solemnized” before April 20, 2004:

- ORS 432.405 does *not* require that the State Registrar “register” the same-sex marriage license-and-solemnization documents submitted by Multnomah County. The statutory scheme, including ORS 432.405, gives the State Registrar – *not* the individual counties of the state – the authority to determine whether marriage license-and-solemnization documents satisfy the requirements for registration. The Registrar was authorized to refuse to register the marriage documents at issue here because: (1) they are *not* “record[s] of * * * marriage” for purposes of ORS 432.405, because they are based on and include licenses issued by Multnomah County in violation of ORS 106.077 and ORS 106.110, and therefore, are not records of lawful marriages; and/or (2) they were not “completed and filed in accordance with [ORS 432.405] and the rules adopted by the State Registrar,” as required by ORS 432.405(1).
- The trial court’s conclusion that, under ORS 432.405, the State Registrar is required to register same-sex marriage documents issued and completed in violation of ORS 106.077, ORS 106.110 and ORS 106.140 is, in effect, an order that the State

Registrar is required to follow the legal advice of Multnomah County counsel concerning the constitutionality of the statutory requisites for civil marriage.

- Plaintiffs had available to them a plain, speedy and adequate remedy at law – *i.e.*, the adjudication of their first, second, and third claims for relief. Indeed, the remedy plaintiffs sought for their second claim, which is for judicial review under ORS 183.484 of the APA of the Registrar’s refusal to register the marriage documents, is, at least arguably, the *exclusive* remedy in such cases.

Summary of Responses to the Court’s Questions

1. **Question “a”: What attributes of marriage under Oregon law establish that it is a “privilege” or an “immunity” within the meaning of Article I, section 20?**

Summary of Response: This court’s decisions have, explicitly and implicitly, defined “privileges or immunities” broadly, finding a wide variety of legal rights to be within the scope of section 20’s protection. Under existing Oregon law, married persons are entitled to numerous benefits to which those who cohabit without being married are not entitled on the same terms. These benefits include, but are hardly limited to, the right of intestate succession, the marital privilege against certain forms of testimony, and the right to bring a wrongful death action in case of the death of a spouse. Because marriage is the indispensable gateway to that constellation of benefits and because those benefits are no less valuable than others the court has found to be protected by section 20, the rights that Oregon law grants to married persons are, taken together, within the definition of “privileges or immunities.”

2. **Question “b”: If Oregon law allows only certain persons to marry, what characteristics of those persons demonstrate that they are a favored “class of citizens” within the meaning of Article I, section 20 of the Oregon Constitution? Does the history of Article I, section 20, including its predecessors in other states, assist in answering this question?**

Summary of Response: This court’s prior decisions demonstrate that any group of citizens identified by characteristics that exist independently of the challenged statute constitutes a class. Those who wish to marry persons of the same sex and those who wish to marry persons of the opposite sex exist as identifiable groups notwithstanding whether the

law permits them to marry the person of their choice. They are, therefore, “true” classes. And as the answer to question “a”. demonstrates, the law favors those who are permitted to marry by automatically granting them a wide variety of legal benefits. Thus, the short answer to the court’s question is that the desire to marry a person of the opposite sex characterizes the favored class.

We discuss whether the statute classifies on the basis of gender or sexual orientation and whether the classification, however described, withstands rational basis scrutiny. We conclude that granting those benefits all together to married persons while denying access to those benefits to same-sex couples who wish to marry violates Article I, section 20.

History sheds relatively little light on what might demonstrate that those permitted to marry are a “favored class,” although it may validate the need to identify a reasoned distinction between those favored and those disfavored. In general, provisions like section 20 were intended to ensure that when government distributes opportunities or benefits, all have an equal chance to compete for them if the benefits were limited or to take advantage of them if they were not. That suggests that rules excluding individuals or groups from those opportunities or benefits create a “favored class” that includes those to whom the opportunities or benefits are available. It also suggests that such distinctions are constitutional when the lines along which the statutes are drawn are based on real, not stereotypical, differences between those favored and those disfavored and are rationally related to those differences.

3. **Question “c”:** If Oregon marriage laws improperly grant privileges or immunities to certain persons, what is the appropriate remedy and what characteristics, if any, would define the persons to whom the State of Oregon must extend the privileges or immunities of marriage “upon the same terms?”

Summary of Response: This court has remedied Article I, section 20 violations by imposing the rule or solution that it determines the legislature would have adopted had the legislature known of the constitutional deficiency in the legislation it actually passed. Typically, this has involved an “either/or” choice: either the legislature would have chosen to extend the privilege to the disfavored class, or it would have denied the privilege to the favored class. That choice is not so clear here because it is impossible to determine how the legislature would have chosen to distribute the mix of benefits that accompany the status of being married if the legislature had to do so as to both opposite-sex couples and same-sex couples. Therefore, if the court concludes that the legislature improperly has granted privileges and immunities in the form of the legal incidents of marriage, the remedy most consistent with this court’s jurisprudence is to permit the legislature to adopt remedial legislation, which could include creating a “civil union” on some other alternative institutional gateway to benefits, separating the legal incidents of marriage each from the other and then determining which of those would be granted to all couples, which denied to all, or adopting alternative legislation that satisfies the requirements of Article I, section 20. The trial court ordered one such remedy; its judgment should be affirmed in that respect.⁴

⁴ The remedy ordered by the trial court should be modified, however, to give the legislature additional time to enact remedial legislation.

4. **Question “d”: Do Oregon’s marriage laws deny equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution?**

Summary of Response: No federal equal protection question is presented by this case or this appeal, because none of the parties raised this issue below, the trial court made no ruling on the question, and this court’s rules and case law prevent it from considering it for the first time on appeal. Because of the potential differences between state and federal rational basis analysis and because the state of federal law in this newly-emerging area of law is uniquely unsettled, the state has taken the liberty of not responding on the merits to the court’s question at this time. Nevertheless, if plaintiffs or other parties provide the court with a substantive response, the state will address their arguments in its response, as appropriate.

Statement of Facts

On March 2, 2004, Multnomah County Counsel issued a legal opinion concluding that (1) current statutes authorize issuance of marriage licenses to opposite-sex couples only; and (2) those statutes violate Article I, section 20. (ER-59). Relying on that opinion, the Chair of the Multnomah County Board of County Commissioners directed the Tax Collection and Records Management Division of the Department of Business and Community Services (Division) to begin issuing marriage licenses to same-sex couple applicants beginning March 3, 2004. (ER-11). The Division began issuing marriage licenses to same-sex couple applicants as directed on that date. (ER-11). Within a few weeks, the County had issued thousands of marriage licenses to same-sex couples, including the licenses issued to four of

the plaintiff couples in this case. (ER-56). Multnomah County is the only county in Oregon that has issued marriage licenses to same-sex applicants. (ER-56).⁵

On March 12, 2004, Oregon Attorney General Hardy Myers issued a legal opinion in which he concluded that “current Oregon laws prohibit county clerks from issuing marriage licenses to same-sex couples” and that “the Oregon Supreme Court likely would conclude that withholding from same-sex couples the legal rights, benefits and obligations that—under current law—are automatically granted to married couples of the opposite sex likely violates Article I, section 20.” (ER-84). The Attorney General cautioned, however, that “it would be unwise to change current state practices until, and unless, a decision by the Supreme Court makes clear what, if any changes are required.” (ER-84).

In turn, the Governor directed state agencies, including the State Registrar, to continue to adhere to the text of the statutes. (ER-86, ER-92).⁶

On March 17, 2004, Multnomah County tendered to Woodward same-sex couple marriage records together with the marriage records of opposite-sex couples. (ER-57). Woodward identified, filed, and registered the opposite-sex couples’ marriage records and identified but did not file and register the same-sex couples’ marriage records for the sole reason that they are same-sex couples. (ER-57). Woodward and the Director of the Department of Human Services, Gary Weeks, continue to decline to file and register the

⁵ Benton County was prepared to begin issuing marriage licenses to same-sex couples, but it decided to refrain from issuing any marriage licenses pending resolution of this case. (ER-56).

⁶ Ordinarily, marriage licenses issued by a county are filed with the Oregon Center for Health Statistics and are registered by the State Registrar of the Center for Health Statistics. *See* ORS 432.405. Once filed and registered with the State Registrar, licenses are publicly available for official confirmation of the existence of a couple’s marriage. (ER-57).

licenses issued by Multnomah County to plaintiffs and other same-sex couples on the ground that “the Oregon statutory code does not permit marriages of same-sex couples.” (ER-57).

Plaintiffs are the American Civil Liberties Union (ACLU), Basic Rights Oregon, and nine same-sex couples “who seek to protect themselves and their children by availing themselves of marriage” and of the social and legal incidents of marriage. (ER-12).⁷ Four of the plaintiff couples have received marriage licenses from Multnomah County. (ER-56). The other plaintiff couples reside in counties that have declined to issue marriage licenses to same-sex couples. (ER-56, ER-169, ER-283, ER-332, ER-489, ER-485).

Plaintiffs acknowledge that “[t]he Oregon statutory code does not permit marriages of same-sex couples.” (ER-37; *see also* ER-38, ER-39). They allege that this “has the practical effect of directly and substantially harming all plaintiff couples in that it excludes them from marriage, the social validation that it confers, and the hundreds of rights, responsibilities, benefits, and obligations that it affords.” (ER-36). Each of the four claims for relief alleged in the complaint is premised on the allegation that this “exclusion” constitutes an “unjustified denial of a privilege or immunity based on sexual orientation or gender” in violation of Article I, section 20, of the Oregon Constitution. (ER-37, ER-38, ER-39, ER-41).

SECTION ONE

ASSIGNMENT OF ERROR

The trial court erred in granting plaintiffs’-respondents’ Fourth Claim for Relief for a writ of mandamus requiring the State Registrar to register “the marriages of same-sex couples licensed [by intervenor-plaintiff-respondent Multnomah County] and solemnized” before April 20, 2004, because: (1) the statutory scheme, including ORS 432.405, gives the

⁷ Multnomah County also has intervened as a plaintiff. (ER-44).

State Registrar – *not* the individual counties of the state – the authority to determine whether marriage records satisfy the requirements for registration as vital records; (2) the trial court’s ruling that the State Registrar must register marriage license forms issued and completed in violation of ORS chapter 106 is, in effect, an order that the State of Oregon is required to follow the legal advice of Multnomah County counsel concerning the constitutionality of the statutory requisites for civil marriage; and (3) plaintiffs had available to them a plain, speedy and adequate remedy at law.

ARGUMENT

I. Standard of Review

This court reviews the trial court’s issuance of the writ of mandamus for errors of law. *See* ORS 34.110. *See generally State ex rel LaVasseur v. Merten*, 297 Or 577, 580-82, 686 P2d 366 (1984).

II. Preservation of Error

Plaintiffs’ Fourth Claim for Relief sought an alternative writ of mandamus based on allegations, which included the following:

* * *

Defendant Woodward [the State Registrar] has a non-discretionary duty to file and register marriage records of marriages that are licensed and solemnized in Oregon.

* * *

Defendant Woodward has failed to perform her non-discretionary duty to file and register marriage records of marriages that are licensed and solemnized in Oregon. Specifically, defendant Woodward has failed to perform her non-discretionary duty to file and register the marriage records of marriages of same-sex couples that are licensed and solemnized in Oregon, including those of plaintiffs Li and Kennedy, Knox and Warshaw, Burke and Doyle, and Potter and Moen.

* * *

Defendant Woodward has failed to do so consistent with the directive of defendant Kulongoski and the counsel of defendant Myers because the Oregon statutory code does not permit marriages of same-sex couples.

* * *

Article I, section 20 of the Oregon [C]onstitution prohibits the unjustified denial of a privilege or immunity based on sexual orientation or gender.

* * *

The failure to perform the non-discretionary duty to record marriages of same-sex couples that are licensed and solemnized in Oregon, including those of plaintiffs/petitioners Li and Kennedy, Knox and Warshaw, Burke and Doyle, and Potter and Moen, constitutes an unjustified denial of a privilege and therefore constitutes a violation of the Oregon Constitution.

(ER-40 to ER-41). The prayer for relief on plaintiffs' Fourth Claim states:

WHEREFORE, plaintiffs respectfully ask the Court to grant them the following relief:

* * * * *

(d) Alternatively, on their fourth claim for relief, *and only if no other adequate remedy is available on their first three claims*, issuance of an alternative writ of mandamus to defendant Woodward commanding her to file and register the marriage records of marriages of same-sex couples licensed and solemnized in Oregon, including those of plaintiffs/petitioners Li and Kennedy, Knox and Warshaw, Burke and Doyle, and Potter and Moen[,] or to appear and show cause why she has not done so.

(ER-41) (emphasis added).

In its answer to the mandamus claim in plaintiffs' complaint, the state responded that: "[The trial court] lacks subject matter jurisdiction to decide plaintiffs' fourth claim for relief (mandamus) because other legal remedies are available to plaintiffs." (ER-292). And in the trial court, the parties stipulated to certain facts, which included the following:

On March 17, 2004, Multnomah County tendered to defendant Woodward the marriage records of plaintiffs Li and Kennedy, Knox and Warshaw, Burke and Doyle, and Potter and Moen mixed together with the marriage records of different-sex couples. Defendant Woodward identified, filed, and registered the marriage records of the different-sex couples and

identified but *did not file* and register the marriage records of plaintiffs Li and Kennedy, Knox and Warshaw, Burke and Doyle, and Potter and Moen for the sole reason that they are same-sex couples. Letters to that effect, dated March 23, 2004, are attached as Exhibit 17.

(ER-57) (emphasis added). The letters referenced in the stipulation (Exhibit 17) informed each of the plaintiff couples, in part:

The marriage license issued by Multnomah County to you does not constitute a "marriage record" as described in ORS 432.405.

In accord with the advice from counsel and pursuant to the Governor's direction, I cannot file or register these records.

(ER-103) (emphasis added). At the hearing before the trial court on April 16, 2004, counsel for the state explained:

Second, the filing and registration by the State. That's why Defendant Woodward is a defendant in this case. That's her job to file and register marriage certificates, marriage licenses. And, by filing them, that has a meaning. Those licenses are recognized as registered by the state.

(Tr 30).

The trial court's Revised Limited Judgment "ADJUDGED" *inter alia*, that:

(3) Plaintiffs and intervenor-plaintiff have judgment against defendants and intervenor-defendants on the Fourth Claim for Relief * * * *for a writ of mandamus ordering defendant Woodward to record the marriages of same-sex couples licensed and solemnized within thirty days of the judgment entered in this case.*

(4) On plaintiffs' and intervenor-plaintiffs' Fourth Claim for Relief * * * *hereby issues a writ of mandamus ordering defendant Woodward, within thirty days of the judgment entered in this case, to record the marriages of same-sex couples licensed and solemnized in Oregon.*

(ER-424) (emphasis added). In its Opinion and Order – which was issued April 20, 2004, and is attached to the Revised Limited Judgment as Exhibit 1 – the trial court concluded:

All parties have agreed in advance that there is a need for a quick determination of the constitutional issue and the refusal of the State to accept the issued licenses for filing by the State Registrar. Ordinary time lines under the ORCP have been shortened and an expedited briefing schedule was also agreed upon. Hundreds of licenses have been issued to same-sex couples and

most have completed the process by having the marriage solemnized by a person authorized to do so under the law and those licenses are now in a legal limbo. Under these circumstances, there is no adequate, much less speedy remedy that is available under the ordinary legal process.

The Department of Human Services is an executive agency, and as such, it answers to the Governor. Under this department, the Health Service's Center for Health Statistics is the subdivision that handles the marriage records. The State Registrar's responsibilities include supervising the Health Service's Center for Health Statistics, which serves as the depository for vital statistics records, including marriage and divorce records. The staff record these events and process certified copies of records when requested by individuals. ORS 432.010, 432.030. *See also Health Services Appoints New State Registrar*, Press Release Archive, October 11, 2000 [website address omitted].

Even though same-sex couples have paid marriage license fees, their licenses are not recognized by the State. On the other hand, opposite-sex couples who have paid the same fees will have their marriage records filed and registered. ORS 432.405 states, in mandatory language, that a record of "each marriage performed in this state" *shall* be filed with the State Registrar. It may be that in this day and age the registering of marriage licenses is strictly a statistical function with little or no attendant rights. But, it is a required function. Failing to register same-sex marriage licenses and solemnization certificates is a direct violation of the law. To the extent that the State Registrar's inaction affects property rights, health and survivorship benefits, etc., then Article I, section 20 requires acceptance and registering of the license and solemnization certificate. To the extent that rights and benefits are not dependent on registering the license and accompanying documents, the law nevertheless requires the State Registrar [to] accept the record of a marriage performed in this state.

The State Registrar (Jennifer Woodward) is ordered to accept and register marriages that have been performed pursuant to ORS 432.405 within thirty days after entry of judgment. A decision on this issue resolves the second and third claims for relief which also sought to require the State Registrar to comply with ORS 432.405.

(ER-440-41).

III. The Registrar's Refusal to Register the Marriage Documents

ORS chapter 106 authorizes county clerks to issue marriage licenses to opposite-sex couples (who meet the other requirements for civil marriage) and prohibits them from issuing licenses to same-sex couples (whether or not those couples meet the other requirements for

civil marriage). *See* ORS 106.077 and ORS 106.110. On or about March 3, 2004 (a few days before plaintiffs filed their complaint in this case), Multnomah County — notwithstanding the provisions of ORS chapter 106 and based on a legal opinion issued by its counsel — began issuing marriage licenses to same-sex couples, including several of the plaintiff couples. (*See* ER-11; ER-59). Thousands of the same-sex couples to whom Multnomah County issued marriage licenses completed the statutory solemnization-of-marriage process⁸ and (apparently) delivered, or caused to be delivered, to the county clerk their completed marriage license and solemnization forms. (*See* ER-56).

Thereafter, Multnomah County submitted to the State Registrar “the marriage records of plaintiffs Li and Kennedy, Knox and Warshaw, Burke and Doyle, and Potter and Moen” and other same-sex couples, together with “the marriage records” of a number of opposite-sex couples. (ER-57). The Registrar “identified, filed, and registered the marriage records of the [opposite-sex] couples and identified[,] but did *not* file and register the marriage records of the same-sex couples.” (*Id.*). At trial, the parties stipulated, as follows:

Marriage licenses, when filed and registered with the State Registrar, are publicly available for official confirmation of the existence of a couple’s marriage. At this time, defendants Weeks [the Director of the Department of Human Services] and Woodward [the State Registrar] will not file and register the marriage records of same-sex couples whose marriages were licensed and solemnized in Oregon *because the Oregon statutory code does not permit marriages of same-sex couples.*

(ER-57) (emphasis added).

As further discussed below, the State Registrar has the authority and responsibility to “[a]dminister and enforce the provisions of [ORS chapter 432] and the rules adopted

⁸ *See generally* ORS 106.120 to ORS 106.180. They were able to do so, notwithstanding ORS 106.140, which prohibits “person[s] authorized to solemnize marriage” from “join[ing] persons in marriage contrary to any of the provisions of ORS 106.010 to 106.060 or 106.100 to 106.190.”

pursuant thereto for the efficient administration of the system of vital statistics” and to “[d]irect, supervise and control the activities of all persons when they are engaged in activities pertaining to the operation of the system of vital statistics.” ORS 432.030. The Registrar is required to register a completed marriage license form *only* if it constitutes “[a] record of [a] marriage” *and* “it has been completed and filed in accordance with [ORS 432.405] and rules adopted by the * * * Registrar.” *See* ORS 432.405. In this case, pursuant to ORS 432.405, the legal advice of the Attorney General, and direction of the Governor, the Registrar refused to register the same-sex couples’ marriage license documents submitted by Multnomah County and, by letter dated March 23, 2004, explained to each of the plaintiff couples: “The marriage license issued by Multnomah County to you does not constitute a ‘marriage record’ as described in ORS 432.405.” (ER-86; ER-92; ER-57; ER-103-106).

The Revised Limited Judgment in this case, does *not* declare that Article I, section 20, of the Oregon Constitution requires counties to issue marriage licenses to same-sex couples who are otherwise qualified to apply for and obtain them. (*See* ER-421).

IV. The Trial Court Erred in Granting Plaintiffs’ Fourth Claim for Relief and in Issuing a Writ of Mandamus Requiring the State Registrar to Register the Records of the Marriages of the Same-Sex Couples to Whom Multnomah County Issued Marriage Licenses, in Violation of ORS Chapter 106.

A. The statutory scheme governing the registration of marriage records gives the State of Oregon acting through the State Registrar – *not* the individual counties – the authority to determine whether marriage records satisfy the requirements for registration, and ORS 432.405 plainly does *not* require that the Registrar register a marriage record which is improper or invalid under ORS chapter 106.

The trial court ordered mandamus relief in this case based on an erroneous construction of ORS 432.405. That is, the trial court concluded that ORS 432.405 requires the State Registrar to register, as “vital records,” marriage license-and-solemnization

documents, without regard to whether the licenses were issued and the marriages solemnized in compliance with ORS chapter 106, which establishes the requirements and qualifications for civil marriage in Oregon, and notwithstanding that neither the trial court, not any state appellate court, had declared unconstitutional and unenforceable any of those statutory requirements and qualifications. If the trial court is correct, then the Registrar is without authority or discretion to refuse to register marriage license - and - solemnization documents that are, in fact, the records of unlawful or invalid marriages, so long as the county clerk who submitted the documents and the person who solemnized the “marriage” have filled in all of the blanks on the form. That is not what ORS 432.405 says and plainly is not the intent of the statutory scheme, which for these purposes includes *both* ORS chapter 432 *and* ORS chapter 106. *See generally PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993) (setting out three-stage methodology for statutory construction and explaining that, at the “first level of analysis,” the court starts with the “text of the statutory provision itself” and also “considers the context of the * * * provision, which includes other provisions of the same statute and other related statutes”).

ORS chapter 432 establishes and provides for the operation of a uniform state system for the registration and maintenance of “vital records” and “vital statistics,” under the supervision of the Director of the Department of Human Services and the State Registrar.

ORS 432.101 provides:

(1) The Department of Human Services shall establish the Center for Health Statistics, which shall install, maintain and *operate the system of vital statistics throughout this state in cooperation with appropriate units of local government. The Center for Health Statistics shall be responsible for the proper administration of the system of vital statistics* and for the preservation and security of its official records.

(2) In order to promote *nationwide uniformity in the system of vital statistics*, the State Registrar of the Center for Health Statistics may refer to

the Model State Vital Statistics Act and Regulations for recommendations regarding forms of certificates and reports required by this chapter.

(3) *Each certificate, report and other document required by this chapter shall be on a form or in a format prescribed by the state registrar.*

(4) All vital records shall contain the date of filing.

(5) Information required in certificates, forms, records or reports required by this chapter may be filed, verified, registered and stored by photographic, electronic or other means *prescribed by the state registrar.*

(Emphasis added).

The State Registrar is appointed by the Director of the Department of Human Services, ORS 432.020, and the Director is appointed by the Governor. *See* ORS 409.100. The Registrar's duties and authority are set out in ORS 432.030, which provides, in relevant part:

(1) The State Registrar for the Center for Health Statistics shall:

(a) Under the supervision of the Director of Human Services, have charge of the Center for Health Statistics.

(b) *Administer and enforce the provisions of this chapter and the rules adopted pursuant thereto for the efficient administration of the system of vital statistics.*

(c) Direct and supervise the system of vital statistics and the Center for Health Statistics and be the custodian of its records.

(d) *Direct, supervise and control the activities of all persons when they are engaged in activities pertaining to the operation of the system of vital statistics.*

(e) Conduct training programs to promote *uniformity of policy and procedures throughout the state* in matters pertaining to the system of vital statistics.

(f) *Prescribe, furnish and distribute such forms as are required by this chapter and the rules adopted pursuant thereto or prescribe other means for transmission of data to accomplish the purpose of complete and accurate reporting and registration.*

* * * * *

(2) The state registrar may delegate such functions and duties vested in the state registrar to employees of the Center for Health Statistics and to employees of any office established or designated under ORS 432.035.^{9]}

(Emphasis added).

ORS chapter 106 establishes the requirements for civil marriages and for the licensing and solemnization of such unions, and, as explained below, only the records of marriages that are valid under ORS chapter 106 and filed with the State Registrar must be registered under ORS 432.405. ORS 106.010 provides:

Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150.

Although this section does not say so expressly, other sections of the chapter make it clear that only opposite-sex couples may marry.¹⁰ In addition to the age and gender requirements for civil marriage, ORS chapter 106 provides that no person who has a living spouse may marry, *see* ORS 106.020(1), and prohibits marriage between persons of certain degrees of consanguinity, *see* ORS 106.020(2).

Persons who satisfy the statutory requirements for civil marriage and who wish to be married must apply for and “obtain a license therefore from the county clerk.”

ORS 106.041(1). ORS 106.041(3) requires that each applicant for a license

⁹ ORS 432.035 provides, in relevant part:

The State Registrar * * * shall designate for each county a county registrar. In consultation with the state registrar, the county registrar may designate one or more deputy county registrars in any county. So far as practicable, a county health official shall be designated county registrar.

¹⁰ *See, e.g.*, ORS 106.150(1) (solemnization of marriage requires couple to declare “that they take each other to be husband and wife”); ORS 106.041(1) (marriage licenses to specify that applicants are to be “join[ed] together as husband and wife”).

shall file with the county clerk from whom the license is sought a written application for the license *on forms provided for this purpose by the Department of Human Services* which shall include the applicant's Social Security number, certain statistical data regarding age, place of birth, *sex*, occupation, residence and *previous marital status* of the applicant and, if required, the name and address of the affiant under ORS 106.050.

(Emphasis added). The license, if issued, is “directed to any person or religious organization or congregation authorized by ORS 106.120 to solemnize marriages, and authorize[s] such person, organization or congregation to join together as husband and wife the persons named in the [license] application.” ORS 106.041(1). Under ORS 106.077(1), a county clerk has authority to issue a marriage license to an applicant-couple “[w]hen the county clerk has received the written application for the license from both applicants, *and all other legal requirements for issuance of the license have been met,*” and ORS 106.110 provides that “[n]o county clerk shall issue a license contrary to the provisions of ORS 106.041 to ORS 106.077 or 106.100.” (Emphasis added). In other words, ORS 106.110 prohibits county clerks from issuing a marriage license to a couple if either applicant fails to satisfy the “legal requirements” for civil marriage. ORS 106.140 establishes a similar prohibition with respect to the solemnization of a civil marriage:

* * * No person authorized to solemnize marriage shall join persons in marriage contrary to *any of the provisions of ORS 106.010* or 106.100 to 106.190.

(Emphasis added). ORS 106.160 and ORS 106.165 require that the person solemnizing a marriage “shall give to the parties to the marriage” a “standard form of the marriage certificate,” which the “Director of Human Services” has prescribed “by rule * * * to be used in this state.”¹¹ The solemnization certificate must be returned “to the county clerk who

¹¹ ORS 106.150 states the requirements for solemnization:

issued the license,” ORS 106.170, and the clerk is required to file it in the county’s “record of marriages,” but “the record of marriage maintained by a county *is not a vital record as defined by ORS 432.005.*” ORS 106.180 (Emphasis added).

In this case, after the same-sex couples’ marriage licensing-and-solemnization documents were returned to the Multnomah County Clerk, the county submitted them to the State Registrar, who declined to register them on the ground that none constituted a “record of * * * marriage” within the meaning of ORS 432.405. (*See* ER-57). A certified copy of one such document (the licensing-and-solemnization document recording the marriage of one of the plaintiff couples) is attached hereto as Appendices App-23.¹² The marriage licensing-

(...continued)

(1) In the solemnization of a marriage, no particular form is required except that the parties thereto shall assent or declare in the presence of the clergyperson, county clerk or judicial officer solemnizing the marriage, and in the presence of at least two witnesses, that they take each other as husband and wife.

(2) All marriages, *to which there are no legal impediments*, solemnized before or in any religious organization or congregation according to the established ritual or form commonly practiced therein, *are valid*. In such case, the person presiding or officiating in such religious organization or congregation shall make and deliver to the county clerk who issued the marriage license the certificate described in ORS 106.170.

(Emphasis added).

¹² The certified copy itself is attached as an appendix to the state’s “original” brief filed with the court. Copies of the certified copy are attached as appendices to the copies of the state’s “original” brief. The state asks this court to take judicial notice of the document and the information that appears on its face. The court may take judicial notice for the first time on appeal. ORS 40.080 (“[j]udicial notice may be taken at any stage of the proceeding”); *League of Oregon Cities v. State of Oregon*, 334 Or 645, 654 n 8, 56 P3d 892 (2002), *recons den*, 336 Or 593, 87 P3d 672 (2004) (taking judicial notice of facts surrounding enactment of ballot measure); *Leo v. Keisling*, 327 Or 556, 559 n 1, 964 P2d 1023 (1998) (similar). *See also* ORS 40.065(2) (“[a] judicially noticed fact must be one that is not subject to reasonable dispute in that it is * * * [c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned”); ORS 40.070(2) (“[a] court shall take judicial notice if requested by a party and supplied with the necessary information”).

and-solemnization documents, which the Registrar refused to register, showed on their face that the marriages were invalid under the provisions of ORS chapter 106, because both members of each couple were the same sex.

ORS 432.405 governs the registration of marriage records as “vital records.” The statute provides:

(1) A *record of each marriage* performed in this state shall be filed with the Center for Health Statistics and shall be registered *if it has been completed and filed in accordance with this section and rules adopted by the State Registrar of the Center for Health Statistics.*^[13]

(2) The county clerk or county official who issues the marriage license shall prepare the record in the form prescribed or furnished by the state registrar upon the basis of information obtained from the parties to be married.

(Emphasis added). In the context of the other provisions of ORS chapter 432 and the sections of ORS chapter 106 discussed above, the statutory terms “a record of each marriage performed in this state” must mean the records of *lawful marriages*. First, the statutory scheme, necessarily assumes that marriage licenses will be issued only to couples who satisfy the statutory requirements for civil marriage and that only the marriages of those couples will be solemnized. Second, ORS 432.005 (16) defines “[v]ital records” to include “certificates or reports of * * * *marriage, dissolution of marriage* and data related thereto.”¹⁴ (emphasis added). The record of an unlawful, invalid, or void marriage (or dissolution of marriage, for that matter) cannot be “*vital*” to the state within the meaning of ORS 432.005(16) or the

¹³ ORS 432.005(13) defines “[r]egistration” to mean “the process by which *vital records* and vital reports are completed, filed and incorporated into the official records of the Center for Health Statistics.” (Emphasis added). ORS 432.005(6) defines “[f]ile” to mean “the presentation and acceptance of a *vital record* or report provided for in this chapter by the Center for Health Statistics.” (Emphasis added).

¹⁴ “Vital statistics” are “the data derived from certificates or reports of birth, death, induced termination of pregnancy, *marriage, dissolution of marriage*, suicide attempts by persons under 18 years of age and related reports.” ORS 432.005(18) (emphasis added).

other provisions of chapter 432. For example, ORS 432.121(2) makes it clear that persons will, at times, need to rely on copies of the state’s marriage, divorce and other vital records to determine or protect their legal rights.¹⁵ Third, ORS 432.405 requires registration of a marriage record *only if* the record “has been *completed and filed* in accordance with this section and rules adopted by the State Registrar.” (Emphasis added). The applicable rules include OAR 333-011-0016 (2) (“Duties of the State Registrar), which provides, in relevant part, that “no certificate shall be complete and correct and acceptable for registration” that: (1) “is prepared on an improper form”; (2) “contains *improper* or inconsistent data”; or (3) “is not prepared in conformity with *regulations or instructions* issued by the State Registrar.”¹⁶ (Emphasis added).

The trial court construed the terms “record of each marriage performed in this state” to mean, in effect, any marriage records submitted by a county for filing and registration, regardless whether the marriages are valid under ORS chapter 106, provided that all of the

¹⁵ ORS 432.121(2) provides:

(2) The State Registrar * * * shall authorize the inspection, disclosure and copying of the [vital records and reports] referred to in subsection (1) of this section as follows:

(a) To the subject of the record; spouse, child, parent, sibling or legal guardian of the subject of the record; an authorized representative of the subject of the record, spouse, child, parent, sibling or legal guardian of the subject of the record; and, in the case of death, *marriage* or divorce records, to other next of kin.

(b) *When a person demonstrates that a death, marriage or divorce record is needed for the determination or protection of a personal or property right.*

(Emphasis added).

¹⁶ Other provisions of ORS chapter 432 and the applicable rules confirm the importance of accurate, reliable records and the Registrar’s responsibility to insure the

Footnote continued...

blanks are filled in accurately on the forms. For example, under ORS chapter 106, persons under the age of 17 cannot marry, and county clerks are prohibited from issuing marriage licenses to such persons. *See* ORS 106.010, ORS 106.050, ORS 106.060, ORS 106.077, and ORS 106.110. Under the trial court’s construction of ORS 432.405, if a county clerk were (for some reason) to issue a license to an under-age couple, and the couple found someone to solemnize the marriage, the State Registrar would be required to register the licensing-and-solemnization documents for the couple’s marriage and the documents would constitute a “vital record” under ORS chapter 432, notwithstanding that the marriage is unlawful and the fact of its invalidity – *i.e.*, the ages of the parties – appears on the face of the documents submitted to the Registrar. That is not the law.

In summary, the statutory scheme gives the State Registrar – *not* the individual counties of the state – the authority and responsibility to determine whether marriage licensing-and-solemnization documents satisfy the requirements for registration under ORS 432.405. In this case, the Registrar was authorized to refuse to register the same-sex marriage documents at issue here because: (1) at the time they were submitted no court had declared any of the statutory requirements for civil marriage unconstitutional; (2) the same-sex marriage documents submitted for registration included and were based on licenses issued by Multnomah County in violation of ORS 106.077 and ORS 106.110, and, for that reason, were not “record[s] of * * * marriage” for purposes of ORS 432.405; and (3) even if the same-sex marriage documents are “record[s] of * * * marriage,” they were not “completed and filed in accordance with [ORS 432.405] and the rules adopted by the State Registrar,” as required by ORS 432.405(1).]

(...continued)

integrity of such records. *See, e.g.*, ORS 432.075; ORS 432.180(3); OAR 333-011-0061(2)

Footnote continued...

B. Neither ORS 432.405, nor any other law, requires the State Registrar to follow the legal advice of Multnomah County counsel concerning the constitutionality of the statutory requisites for civil marriage.

As discussed above, under ORS chapter 106, county clerks may issue marriage licenses only to opposite-sex couples (who meet the other requirements for civil marriage) and are prohibited from issuing licenses to same-sex couples (whether or not those couples meet the other requirements for civil marriage). From March 3 to April 20, 2004, Multnomah County issued marriage licenses to same-sex couples in violation of ORS 106.077 and ORS 106.110 and based on a legal opinion issued by its counsel that the county should ignore the statutory requirements of ORS chapter 106, even before a court could determine their constitutionality. Thereafter, Multnomah County submitted these marriage license forms to the State Registrar for registration as “vital records.” In its judgment, the trial court ordered the state to accept these documents as though they were valid marriage licenses.

Multnomah County evidently relied upon decisions of this court seeming to authorize a state official to reconcile a conflict between the constitution and a statute by adhering to the former and disregarding the conflicting portion of the latter. *See, e.g., Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or 358, 364-65, 723 P2d 298 (1986), *appeal dismissed*, 480 US 942, 107 S Ct 1597, 94 LEd 2d 784 (1987). *See also Employment Div. v. Rogue Valley Youth for Christ*, 307 Or 490, 770 P2d 588 (1989) (“[t]he Division must administer the law in accordance with constitutional principles, and must enforce its statutory obligations”; but “[i]f a statute tells an agency to do something that a constitution forbids, the agency should not do it.”) The state agrees that these cases stand for the proposition that executive officials have the power

(...continued)
and (3).

to assess the constitutionality of a governing statute or rule in the context of applying it. In *Cooper*, for example, the executive officer (the State Superintendent of Public Instruction) determined in the course of a proceeding to revoke a teaching certificate that he had no authority to consider the constitutionality of the application of state statute. This court rejected his view, holding that “The Superintendent of Public Instruction himself holds a constitutional office, Or Const, Art VIII, § 1, and must satisfy himself that he conducts it in accordance with the constitution.” *Cooper* at 365.

Nevertheless this court has made it clear that executive officials exercise their authority within strict limits. This court has cautioned that, although “Oregon administrative agencies have the power to declare statutes and rules unconstitutional,” “it is an authority to be exercised infrequently, and always with care,” *Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 662, 20 P3d 180 (2001) (quoting *Nutbrown v. Munn*, 311 Or 328, 346, 811 P2d 131 (1991), *cert den*, 502 US 1030 (1992)).

The power to void a statute because it conflicts with the constitution is one that is reserved to the courts. *See* Or. Const., Art. VII (Amended) (judicial power). *See also*, *Wallace v. International Ass’n.*, 155 Or 652, 662, 62 P2d 1090 (1936) (courts have authority to declare statute invalid “if the act is clearly unconstitutional”). That view is consistent with the general principle that a statute “is presumed to be constitutional” until declared invalid by a court. *See Tompkins v. District Boundary Board*, 180 Or 339, 350, 177 P2d 416 (1947). *See also*, *Miles v. Veatch*, 189 Or 506, 528, 220 P2d 511, *on reh’g*, 221 P2d 905 (1950) (“[t]here is a presumption that every legislative act is constitutional”). It is consistent, too, with the rule that before an agency disregards the terms of a statute, it must seek to interpret the statute so as to exclude unconstitutional applications. *Cooper*, 301 Or at 365. *Cooper* itself demonstrated this restraint by construing a statute narrowly to avoid a potential

violation of Article I, section 8. *Id.* at 378. If courts themselves are subject to this rule of restraint, then the state perceives no reason to believe that executive officers, including Multnomah County, would not be under at least as great a burden to search out a solution that preserves as much of the statute as it is possible to do consistently with the constitutional mandate.

The state does not intend to suggest that resolving the perceived tension between a constitutional commandment and a statutory mandate is easy. Indeed, given that officials typically are sworn to uphold the constitution *and* the laws of Oregon, the public official may find it difficult to resolve such conflicts when they are perceived to exist. Nevertheless, in this case, Multnomah County's declaration and actions were inconsistent with the restraint required of executive officials by this court. As we have noted, this case presents novel questions of law.¹⁷ *Cooper* establishes that executive officials may take into account uncertainties about the constitutionality of a statute, but it certainly does not require the official to resolve those doubts by disregarding the statute.

In this case, as the state points out in response to question "c" from the court, a wide range of potential remedies exist for the violation of Article I, section 20 that the court's question assumes. And as the state also points out in this brief, the linchpin for remedying a perceived conflict between Article I, section 20 and a statute is to determine what the Oregon Legislature would have done had it perceived the same conflict. Here, Multnomah County proceeded to act as if it were certain that the legislature would have acted to extend to same-

¹⁷ The Court of Appeals' decision in *Tanner v. OHSU*, 157 Or App 502, 971 P2d 435 (1998), did not determine that Oregon's marriage license statute is unconstitutional. The court expressly declined to address that issue in *Tanner*, and this court has not considered it. Nor has this court approved the *Tanner* analysis. The courts in other states that *have* addressed the issue have arrived at different conclusions

sex couples all of the attendant legal benefits that currently attach to marriage – and, indeed, Multnomah County proceeded to act as if the Oregon Legislature would have acted to provide those benefits to same-sex couples through marriage. As we point out elsewhere in this brief, there are a number of possible ways for the legislature to cure a constitutional defect in Oregon’s marriage statutes, if such a defect is ultimately found to exist.

In the state’s view, Multnomah County also had an array of remedies for what its counsel advised was a conflict between the constitution and the statutes. Multnomah County chose one of them. But it was not the only choice, as Benton County’s decision to stop issuing licenses to anyone illustrates. A third choice – making a benefit-by-benefit allocation of the benefits that Multnomah County controls to persons who would have been married but for what Multnomah County’s counsel opined was an unconstitutional limitation of marriage to opposite-sex couples – would equally have ensured that the privileges and immunities granted to opposite-sex couples were granted “on the same terms” to same-sex couples by Multnomah County. Multnomah County also could have filed a declaratory judgment action seeking judicial resolution of the constitutionality of Oregon’s marriage statutes. Finally, it is significant in this case that Multnomah County’s declaration and assumption that provisions of ORS chapter 106 were unconstitutional and would not be followed by the county affected and purported to apply to a *state-wide* statutory scheme, administered by a state agency. Multnomah County’s action in issuing marriage licenses to same-sex couples purported to affect the rights of those same-sex couples well beyond the physical and legal borders of Multnomah County.

The trial court’s conclusion that, under ORS 432.405, the State Registrar – and the Governor, to whom the Registrar ultimately is accountable — has no discretion or authority to refuse to register the same-sex marriage documents, is, in effect, an order that the State

Registrar is required to follow the legal advice of Multnomah County counsel and the determination made by Multnomah County concerning the constitutionality of the statutory requisites for civil marriage. The Attorney General – not Multnomah County Counsel – is authorized to give legal advice to the State Registrar, *see* ORS chapter 180, and, for the reasons discussed above in subsection IV-A, the Registrar had authority under ORS 432.405 to refuse to register the marriage license and solemnization documents submitted by the county, because they were not records of legal or valid marriages under ORS ch 106. *See generally Multnomah County v. \$5,650 In U.S. Currency*, 309 Or 285, 289, 786 P2d 729 (1990) (“[t]he fact that a county acts under a home rule charter does not mean that it can call upon the state court to enforce ordinances or otherwise to exercise jurisdiction in any case that the county wishes”).

C. Mandamus was not authorized under ORS 34.110, because plaintiffs had available to them “a plain, speedy and adequate remedy in the ordinary course of law” – *i.e.*, the adjudication and resolution of any one of their three other claims for relief

ORS 34.110 authorizes the issuance of a writ of mandamus “to any inferior, corporation, board, officer or person, *to compel the performance of an act which the law specifically enjoins*, as a duty resulting from an office, trust or station.” (Emphasis added). But mandamus “is an extraordinary remedial process which is awarded not as a matter of right, but in the exercise of a sound judicial discretion,” *Buell v. Jefferson County Court*, 175 Or 402, 408, 152 P2d 578, *reh’g den* 154 P2d 188 (1944), and, under ORS 34.110, a writ of mandamus “shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of the law.” *State ex rel Anderson v. Miller*, 320 Or 316, 322, 882 P2d 1109 (1994). “An adequate remedy is one that affords ‘any and all relief to which the relator is entitled.’” *Id.* (quoting *State ex rel Hupp etc. Corp. v. Kanzler*, 129 Or 85, 97, 276 P2d 273 (1929)). Ordinarily, “[d]irect appeal is an adequate [and sufficiently speedy]

remedy unless the relator would suffer a special loss beyond the burden of litigation.”¹⁸

Anderson, 320 Or at 323 (quoting *State ex rel Automotive Emporium v. Murchison*, 289 Or 265, 269, 611 P2d 1169 *reh’g den*, 289 Or 673, 616 P2d 496 (1980)).

In this case, in addition to their claim (petition) for mandamus, plaintiffs assert three other claims: Their First Claim for Relief seeks a declaration that “the failure of the Oregon statutory code to permit marriages of same-sex couples violates Article I, section 20 of the Oregon [C]onstitution,” based on allegations that “[t]he Oregon statutory code does not permit marriages of same-sex couples,” that the State defendants refuse to recognize same-sex marriages for that reason, and that “Article I, section 20 of the Oregon Constitution prohibits the unjustified denial of a privilege or immunity based on sexual orientation or gender.” (ER-37). On their Second Claim for Relief, they seek a judgment “declaring that the failure of defendants to file and register the records of marriages of same-sex couples licensed and solemnized in Oregon * * * violates Article I, section 20 of the Oregon Constitution,” “enjoining defendants from directing or counseling Oregon agencies * * * to

¹⁸ In *State ex rel Automotive Emporium v. Murchison*, 289 Or 265, 269, 611 P2d 1169, *reh’g den*, 289 Or 673, 616 P2d 496 (1980), this court explained the principle, as follows:

Neither is the prospect of suffering the burden of litigation a sufficient injury in itself to justify mandamus. Direct appeal is an adequate remedy unless the relator would suffer a special loss beyond the burden of litigation by being forced to trial. Examples of such injury are the obligation to make nonrecoverable interim payments, *State ex rel Huntington v. Sulmonetti*, 276 Or 967, 557 P2d 641 (1976), and being required to litigate when a summary judgment is set aside by the trial court after its authority to do so has expired. *State ex rel State Farm Auto Ins. Co. v. Olsen*, 285 Or 179, 590 P2d 231 (1979). Here, however, there is no special loss asserted.

Because direct appeal is a plain, speedy and adequate remedy for the review of the ruling challenged by relators, *mandamus is inappropriate*.

(Emphasis added; footnote omitted).

refuse to recognize marriages of same-sex couples,” and “enjoining defendants from refusing to file and register the marriage records of marriages of same-sex couples.” (ER-38). The Third Claim for Relief is under the APA and seeks judicial review, pursuant to ORS 183.484, of the State Registrar’s refusal “to file and register the marriage records of plaintiffs/petitioners Li and Kennedy, Knox and Warshaw, Burke and Doyle, and Potter and Moen.” (ER-39).

The trial court concluded that the plaintiffs’ other claims did not provide an “adequate” remedy, for the following reasons:

All parties have agreed in advance that there is a need for a quick determination of the constitutional issue and the refusal of the State to accept the issued licenses for filing by the State Registrar. Ordinary time lines under the ORCP have been shortened and an expedited briefing schedule was also agreed upon. Hundreds of licenses have been issued to same-sex couples and most have completed the process by having the marriage solemnized by a person authorized to do so under the law and those licenses are now in a legal limbo. Under these circumstances, there is no adequate, much less speedy remedy that is available under the ordinary legal process.

(ER-440). The trial court’s conclusion is contrary to this court’s mandamus jurisprudence (discussed above) concerning the adequacy of other remedies, and it ignores the fact that all of the alternative remedies in this case are available in the same expedited proceeding.

Furthermore, the trial court’s analysis rests on the false premise that “the constitutional issue” and “the refusal of the State to accept the issued licenses for filing” are *separate* issues.

Simply put, *only* the resolution of “the constitutional issue” will resolve the registration conundrum. This is so because, unless the limitation on marriage is unconstitutional, the same-sex marriages in question are invalid under ORS chapter 106, and, for that reason (as discussed above in subsection IV-A), the Registrar is authorized to refuse to register the same-sex couples’ marriage documents. Although the trial court observed correctly that the licenses issued by Multnomah County to same-sex couples “are now in a legal limbo,” its

granting plaintiffs’ request for mandamus relief did not change that fact.¹⁹ Mandamus is not appropriate or authorized in this case because plaintiffs had available to them — in this same proceeding — an adequate and speedy remedy in the ordinary course of law – *i.e.*, the adjudication of any one or all of their three other claims for relief and direct appeal from any adverse ruling by the trial court.²⁰

CONCLUSION

For the reasons discussed above, this court should reverse that portion of the trial court’s Revised Limited Judgment granting plaintiffs’-respondents’ petition for a writ of mandamus requiring the State Registrar to register approximately 3000 marriage license documents issued by Multnomah County to same-sex couples between March 3, 2004 and April 20, 2004.

¹⁹ Indeed, the trial court’s May 12, 2004, letter to counsel states, in part:

The problem is the status of the already-issued marriage licenses. Those licenses were not properly issued if you consider the statute’s clear intent that only opposite-sex couples can marry in the state of Oregon. They were properly issued if the appellate courts agree with my ruling that issuing marriage licenses to opposite-sex couples [*sic*] is the only way to meet the constitutional mandate and the legislature fails to provide an alternative. In short, the Supreme Court will ultimately decide the validity or lack thereof of the already issued licenses. My decision is simply that those licenses become valid by Circuit Court order 90 days after the next legislative session if there is no intervention by the Supreme Court or the legislature.

(Letter, May 12, 2004 – Tr Ct Rec).

²⁰ The Oregon Court of Appeals has held that, when available, the remedy under the APA is not merely adequate, but “exclusive.” *See, e.g., Scovell v. Goldschmidt*, 106 Or App 111, 114-115, *rev den* 311 Or 432 (1991) (stating the principle); *Mongelli v. Oregon Life & Health Guaranty*, 85 Or App 522, 518, 737 P2d 633 (1987) (“[p]etitioners are precluded from obtaining mandamus under ORS chapter 34 because they have a remedy under the APA even if they do not prevail in their attempt to obtain it”); *Dinsdale v. Young*, 72 Or App 778, 779, 697 P2d 200 (1985), *rev’d on other grounds*, 299 Or 522, 702 P2d 1112 (“[u]nder the circumstances before us, the APA remedies are exclusive, and recourse to mandamus is not available for that reason”).

SECTION TWO – ANSWERS TO COURT’S QUESTIONS

The court has asked the parties to address the following questions, which the court has prefaced with an observation about one difference between Article I, section 20, of the Oregon Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution:

Article I, section 20 of the Oregon Constitution prohibits the enactment of laws that grant privileges or immunities to any citizen or class of citizens that do not equally belong, on all the same terms, to all citizens. By contrast, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, among other things, prohibits states from denying to any person the equal protection of the laws.

- a. What attributes of marriage under Oregon law establish that it is a “privilege” or an “immunity” within the meaning of Article I, section 20?
- b. If Oregon law allows only certain persons to marry, what characteristics of those persons demonstrate[] that they are a favored “class of citizens” within the meaning of Article I, section 20 of the Oregon Constitution? Does the history of Article I, section 20, including its predecessors in other states, assist in answering this question?
- c. If Oregon marriage laws improperly grant privileges or immunities to certain persons, what is the appropriate remedy and what characteristics, if any, would define the persons to whom the State of Oregon must extend the privileges or immunities of marriage “upon the same terms?”
- d. Do Oregon’s marriage laws deny equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution?

(Emphasis by the court). The state addresses the court’s questions in order.²¹

²¹ The state addresses below the differences between Article I, section 20 and the Equal Protection Clause.

I. Question “a”: What attributes of marriage under Oregon law establish that it is a “privilege” or an “immunity” within the meaning of Article I, section 20?

This court has not announced a specific test for determining what constitutes a “privilege” or an “immunity” under section 20. However, in several prior cases, the court has decided that certain statutory benefits are “privileges” or “immunities” within the meaning of section 20. For example, the court has treated the right to receive unemployment compensation as a privilege or immunity. *Newport Church of the Nazarene v. Hensley*, 335 Or 1, 56 P3d 386 (2002). The court has extended similar treatment to, *inter alia*: a tax rebate, *Sherman v. Department of Revenue*, 335 Or 468, 71 P3d 67 (2003); immunity from paying support for a child attending school, *Crocker and Crocker*, 332 Or 42, 22 P3d 759 (2001); the ability to recover tort damages, *Hale v. Port of Portland*, 308 Or 508, 783 P2d 506 (1989), *overruled on other grounds by Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001); the ability to bring a filiation proceeding, *State ex rel Adult and Family Services Dept v. Tuttle*, 304 Or 270, 744 P2d 990 (1987); and the ability to obtain a preliminary hearing, *State v. Clark*, 291 Or 231, 630 P2d 810, *cert den*, 454 US 1084 (1981).²²

The parties to a civil marriage contract are, by reason of that status, entitled to numerous benefits under Oregon law. For example, “in any civil or criminal action, a spouse has a privilege to refuse to disclose and to prevent the other spouse from disclosing any confidential communication” between “them during the marriage.” ORS 40.255(2). The “decendent’s surviving spouse” may bring a wrongful death action. ORS 30.020. A

²² These cases do not necessarily conclude that the challenged distinctions violate Article I, section 20, but they all (explicitly or implicitly) treat the benefit granted or denied by the law in question as a privilege or immunity for which the party can, at a minimum, state a claim under section 20.

“surviving spouse” has the right of intestate succession and may elect a statutory share of the deceased spouse’s estate. ORS 112.025; 112.035; 114.105. And upon dissolution of the marriage, a spouse may be entitled to receive money from the other for spousal support. ORS 107.105. Thus, the benefits and obligations that result from entering into a civil marriage contract govern significant legal aspects of the couple’s life.²³ Under existing law, the status of marriage and the benefits Oregon statutes extend based solely on that status are inseparable. Because the statutes confer these benefits “automatically” upon married persons and, because marriage is the only way to obtain them, Oregon law has bound together the status of marriage with its attendant benefits. It follows that the opportunity to obtain those benefits is a privilege or immunity as those terms have been interpreted by this court.

²³ In addition, the Oregon Medical Insurance Pool (OMIP) provides health insurance coverage to persons whose medical conditions do not allow them to obtain coverage in the private sector. The “spouse” of a medically eligible person is entitled to coverage. ORS 735.615(1)(c). Oregon’s Family Health Insurance Assistance Program (FHIAP) subsidizes the purchase of health insurance for eligible individuals who meet certain income tests. Eligibility is determined based on family income and family size. *See* ORS 735.726. A “family” includes an adult and the adult’s “spouse.” ORS 735.720(2)(b) and (c). Under the Oregon Insurance Code, group health plans are required to treat marriage as a qualifying event that entitles an employee to change enrollment options outside the open enrollment period. Also, group health insurance plans that provide insurance for “dependents” must do so on a nondiscriminatory basis. In other words, if the employer provides coverage for dependents, the dependents of all employees must be covered. *See* ORS 743.734(6)(b). Dependents are defined to include the “spouse” of a covered employee. ORS 743.730(10). Under Oregon’s workers’ compensation laws, if the death of a covered employee results from an accidental injury, wage replacement benefits are paid to the worker’s surviving “spouse.” ORS 656.204(2). In addition, the abode of a debtor’s spouse is entitled to a homestead exemption against sale on execution of a judgment. ORS 18.395; 18.428. A spouse has the right to consent to an autopsy and to control the disposition of remains. ORS 97.082; 97.130. A spouse is entitled to protection against tax liens on real property. ORS 311.645. A spouse may obtain various veterans’ benefits. *E.g.*, ORS 407.475; 408.310; 408.410. A spouse has a right to private visits or cohabitation in nursing homes. ORS 441.605. A spouse is entitled to preference in succeeding a deceased or disabled OLCC agent. ORS 471.752. The examples set out here and in the text are not exhaustive.

II. Question “b”: If Oregon law allows only certain persons to marry, what characteristics of those persons demonstrate that they are a favored “class of citizens” within the meaning of Article I, section 20 of the Oregon Constitution? Does the history of Article I, section 20, including its predecessors in other states, assist in answering this question?

The short answer to the court’s question is that the statutes limiting marriage to opposite-sex couples create a “favored class” of opposite-sex couples. The court’s question, however, appears to have a number of layers, as discussed below.

A. Oregon law allows only certain persons to marry.

This question may perhaps best be answered by addressing some of its underlying premises separately. For example, the question begins with a qualification: “*If* Oregon law allows only certain persons to marry * * *” (Emphasis added). Oregon statutes limit who may marry, and they do so in two separate ways. First, some people may not marry at all. For example persons under 17 years of age may not marry. ORS 106.010.²⁴ Nor may persons having a living spouse. ORS 106.020(1).²⁵ And some marriages are voidable by order of a court. ORS 106.030.²⁶ Other statutes limit who may marry whom. For example, persons of certain degrees of consanguinity may not marry each other. ORS 106.020(2).²⁷

²⁴ ORS 106.010 provides:

Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150.

²⁵ ORS 106.020(1) provides:

The following marriages are prohibited; and, if solemnized within this state, are absolutely void:

(1) When either party thereto had a wife or husband living at the time of such marriage.

²⁶ ORS 106.030 provides:

Nor may persons of the same sex marry. ORS 106.010 sets out the legal significance of and basic qualifications for marriage. It states: “Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150.” Although this section does not state expressly that a marriage must consist of a man and a woman, other statutes that provide context for it leave no doubt that is the case. *See, e.g.*, ORS 106.150(1) (parties to marriage must declare that they take each other to be “husband and wife” ORS 106.041(1) (requirements for marriage license specify that parties are to join as “husband and wife”). The legislature has not defined “husband” or “wife” for purposes of chapter 106, but we see no basis for giving them other than their “plain, natural and ordinary meaning.” *PGE 317 Or* at 611. The plain meaning of those terms is unambiguous. “Husband” means “a married man,” and “wife” means “a married woman.” *Webster’s Third New International Dictionary*, 1104, 2614 (unabridged ed 1993).

(...continued)

When either party to a marriage is incapable of making such contract or consenting thereto for want of legal age or sufficient understanding, or when the consent of either party is obtained by force or fraud, such marriage shall be void from the time it is so declared by judgment of a court having jurisdiction thereof.

²⁷ ORS 106.020(2) provides:

The following marriages are prohibited; and, if solemnized within this state, are absolutely void:

* * *

(2) When the parties thereto are first cousins or any nearer of kin to each other, whether of the whole or half blood, whether by blood or adoption, computing by the rules of the civil law, except that when the parties are first cousins by adoption only, the marriage is not prohibited or void.

B. What characteristics of those who may marry demonstrate that they are a “favored class?”

The statutory limitation of marriage to opposite-sex couples draws lines among Oregon’s citizens; the fact of marriage, in effect, grants a considerable number of benefits to married persons. Hence, “favoritism” of a sort is a given.

The next question is who is “favored” by the lines the statutes draw. Obviously, all persons over the age of 17 are favored and all persons under the age of 17 disfavored. That the state and federal constitutions permit legislatures to treat differently those below an arbitrarily selected age, and therefore considered incapable of exercising the full degree of judgment required for certain social conduct, is too well-settled to require discussion. Although married persons may not marry another, it cannot reasonably be said that the law disfavors them, because they are already members of the “favored” class. And those are the only two “classes” of persons absolutely barred from marrying. Viewed in terms of an outright prohibition on marriage, then, the “favored” class consists of all persons above the age of 17.

The laws at issue here, however, are not outright prohibitions on who may marry; they are, rather, limitations on who may marry whom. And to consider those statutes in a meaningful way requires consideration of another factor. That factor may be described in terms of choice – *i.e.*, who may marry the person of his choice and who may not. Addressing the pertinent classification requires recognizing that marriage necessarily involves two people and therefore may be discussed intelligibly only by looking at both. That recognition is illustrated by the United States Supreme Court’s decision in *Loving v. Virginia*, 388 US 1, 87 S Ct 1817, 18 L Ed 2d 1010 (1967). There, the Court was faced with a statute that made interracial marriage a crime. Although acknowledging that the law applied equally to whites and blacks, in that each was equally forbidden to marry the other, the Court had no difficulty

in concluding that the law was based on an impermissible racial classification. *Id.* at 11.

That is, the law classified on the basis of race because it limited whom one could marry by the race of the other. Implicit in that decision is the recognition that because marriage involves two persons, a law affecting who may marry whom cannot be analyzed without considering its effects on both.

Viewed in those terms, the “classes” at issue here become more sharply delineated. Although no one is completely disabled from marrying, the law limits the class of persons that any person may marry. And putting the prohibition on marrying close relatives to one side, it does so based upon the gender of the person one wants to marry.²⁸ Thus, the answer to the court’s question is that the statute favors the class of persons who wish or choose to marry a person of the opposite sex – or, viewed in the terms described above, the class of opposite-sex couples – by permitting them to marry and thereby gain access to a wide variety of benefits that are denied, at least on the same terms, to those who are barred from marrying the person of his or her choice.²⁹

1). Does the prohibition on same-sex marriage classify on the basis of gender or sexual orientation?

The next question is whether the law distinguishes between those classes on the basis of gender or sexual orientation. That is a difficult question on which courts of other jurisdictions have divided. *Loving*’s reasoning suggests that the denial of marriage to same-

²⁸ Whether that means that the statute classifies on the basis of gender or, instead, on the basis of sexual orientation is addressed in additional depth below.

²⁹ Article I, section 20, requires that privileges and immunities be available “on the same terms.” Thus, the possibility that private contracts might make it possible for same-sex couples to create enforceable private rights and obligations that parallel some of those created by statute for the benefit of opposite-sex couples does not alter the constitutional analysis.

sex couples classifies on the basis of gender. That is, although men and women are equally forbidden to marry same-sex others, whom an individual may marry is finally determined by that individual's gender and the gender of the person he or she wishes to marry. Just as whites could marry whites but not blacks and blacks could marry blacks but not whites, women can marry men but not women, and men can marry women but not men. *See, e.g., Goodridge v. Department of Public Health*, 440 Mass 309, 345-46, 798 NE 2d 941 (2003) (Greaney, J., concurring) ("That the classification is sex based is self-evident. The marriage statutes prohibit some applicants, such as the plaintiffs, from obtaining a marriage license, and that prohibition is based solely on the applicants' gender. As a factual matter, an individual's choice of marital partner is constrained because of his or her own sex."); *Baehr v. Lewin*, 74 Haw 530, 591-82, 852 P2d 44, 67-68, *recons granted in part and den in part*, 74 Haw 650, 875 P2d 225 (1993) (similar); *but see Baker v. Vermont*, 170 Vt 194, 215, 744 P2d 864 (1999) ("we are not persuaded that sex discrimination offers a useful analytic framework for determining plaintiffs' rights under the Common Benefits Clause" of Vermont's Constitution).

The statute also may classify on the basis of sexual orientation. Most persons will choose the gender of their marital partner on the basis of their own sexual orientation. Thus, it could be argued that giving couples who seek heterosexual relationships the ability to obtain all of the legal incidents of marriage, while denying that ability to couples who seek homosexual relationships, unless they choose to marry a person of the opposite sex despite their sexual orientation, distinguishes between the two classes on the basis of sexual orientation. Because it seems reasonable to assume that how a law classifies can best be characterized by identifying who benefits from and who is disadvantaged by the law, the answer here would appear to be that the law disfavors those who choose (or seek) to marry

persons of their same sex. And because it seems reasonable to recognize that that class of people is distinguished largely, if not necessarily exclusively, by their sexual orientation, it may follow that the law classifies on the basis of sexual orientation.

2). Is sexual orientation a “suspect” class?

If limiting marriage to opposite-sex couples is viewed as based on sexual orientation, the court must then address whether sexual orientation is a “true” class and, if so, a “suspect” class.³⁰ Finally, if the class is “true” but not “suspect,” the court must determine whether the line the statute draws is rational. The state discusses those questions in turn.

This court has described the difference between “true” and other classes. Where the distinctions drawn among people are “created by the challenged law itself,” no class cognizable under section 20 exists. But groupings in which all the members share “characteristics which they have apart from the law in question” are “true” classes. *Clark*, 291 at 240. The oft-used example of the former is the court’s filing deadline. *Id.* That rule distinguishes a “class” – late filers – and sets it apart from another class – timely filers. Timely filers receive a “privilege” – their filing is accepted by the court – not available to late filers. But without the statute setting forth deadlines, the “classes” would not even exist. Rather, they come into existence as “classes” only because of the statute.

The group of persons wishing to marry persons of their own sex is not a class created by the statutes limiting marriage to persons of opposite sexes. Hence, this case involves “true” classes.

Because the court has had a limited number of opportunities to consider it, what constitutes a “suspect” class for purposes of section 20 appears to remain a work in progress.

³⁰ See, e.g., *Hale v. Port of Portland*, 308 Or 508, 526, 783 P2d 506 (1989) (using term “true class” to describe those groupings not created by the statute in question).

The court recently described the distinction between “suspect” classes and other true classes in terms of the “immutability” of the distinguishing characteristic.

Under the equal-privileges doctrine, the classification must be based on the personal or social characteristics of the asserted “class.” [*Hale v. Port of Portland*, 308 Or 508, 525, 783 P2d 506 (1989)]. When distinctions are based on personal characteristics that are not immutable, this court reviews the classification for whether the legislature had a rational basis for making the distinction. See [*Seto v. Tri-County Metro. Transportation Dist.*, 311 Or 456, 466-67, 814 P2d 1060 (1991)] (geographic classification reviewed for rational basis); *Hewitt v. SAIF*, 294 Or 33, 45, 653 P2d 970 (1982) (classifications based on immutable traits are suspect).

Crocker, 332 Or at 55. The next question, then, would appear to be whether sexual orientation is an “immutable” characteristic.

But that question leads immediately to a conundrum. In *Hewitt*, where the court first used the term “immutable” to define those characteristics that mark a “suspect” class, the court was discussing a law that distinguished on the basis of sex. But modern psychology proposes and modern medical techniques establish that a person’s sex is not absolutely immutable. Moreover, this court has described religion both as immutable, *Jensen v. Whitlow*, 334 Or 412, 423, 51 P3d 599 (2002), and as an impermissible basis of discrimination, *State v. Buchholz*, 309 Or 442, 446, 788 P2d 998 (1990). It is commonplace in modern America for people’s religious beliefs and affiliations to change. Consequently, we cannot say with any degree of certainty how “immutable” a characteristic must be to render a classification suspect.³¹

Nor is it possible, in light of the current lack of scientific agreement, to say with any certainty just how “immutable” one’s sexual orientation may be. *Hewitt*, *Jensen*, and

³¹ Thus, it is possible for a person to be male at one point and female at another, Christian at one point and Buddhist at another, and desirous of marrying a woman at one point and a man at another. See generally, *Norwest v. Presbyterian Intercommunity Hosp.*, 293 Or 543, 568, 652 P2d 318 (1982) (discussing possibility that child could fall into each of the two “classes” created by the statute at different times).

Buchholz suggest that any classification based on personal characteristics as deeply ingrained and identity-forming as religion and gender would be considered “suspect.”

Recognizing the realities of gender and religious mutability, the Court of Appeals concluded that social and historic identification and prejudice are the hallmarks of suspect classes.

We therefore understand from the cases that the focus of suspect class definition is not necessarily the immutability of the common, class-defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice.

Tanner v. Oregon Health Sciences Univ., 157 Or App 502, 523, 971 P2d 435 (1998). The proposition that groups historically subject to discrimination may be entitled to special protection has historical support. *See United States v. Carolene Products*, 304 US 144, 152 n 4, 58 S Ct 778, 82 L Ed 2d 1234 (1938) (prejudice against “discrete and insular minorities” may call for “more searching judicial inquiry”).³² Applying that test, the Court of Appeals concluded that “sexual orientation” is a suspect class under section 20.

[W]e have no difficulty concluding that plaintiffs are members of a suspect class. Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.

Tanner, 157 Or App at 524.

³² The term “invidious” is often used to describe the kind of discriminations at which constitutional equality provisions are aimed. *E.g.*, *Hewitt*, 294 Or at 43. *Webster’s* defines “invidious” as synonymous with “hateful.” *Webster’s Third New International Dictionary*, 1190 (1993). The court need not determine in this case that adverse stereotyping and prejudice are necessary characteristics of a “suspect” classification, though they may be sufficient.

One other aspect of this court's section 20 jurisprudence calls for discussion. This court has concluded that the constitution permits the legislature to grant benefits to certain classes of citizens so long as any person can, so far as the law is concerned, gain access to the favored class. *E.g., In re Oberg*, 21 Or 406, 28 P 130 (1891), *cited with approval* in *Clark*, 291 Or at 238.³³ And it is true that Oregon law permits homosexual men and women to marry persons of the opposite sex and thereby gain access to the benefits that flow to married persons.

If the possibility that a person may join the favored class were sufficient to defeat an Article I, section 20 claim, then laws favoring (for example) men or members of one religion would be permissible because, with greater or lesser degrees of difficulty, anyone can gain access to the favored class.³⁴ Just as a man may become a woman or a member of one religion may join another religion, a gay or lesbian citizen could join the favored class here by marrying a person of the opposite sex. Each of the foregoing choices or decisions would

³³ The *Oberg* court stated:

All sailors of a seagoing vessel within the prescribed limits are treated alike, and entitled to enjoy the privileges or immunities granted. The act prescribes the same rule of exemption to all persons placed in the same circumstances. It does not grant to a sailor immunity from arrest for debt, and refuse it to his neighbor, if they be similarly situated. The same privilege or immunity is extended by the act to all in the same situation. Any person who is a sailor may enjoy the immunity, and any citizen desiring such immunity may have it in the words of the constitution, "upon the same terms," by becoming a sailor. While one may enjoy the benefit of the exemption, and another may not, this results not because the statute favors one, and discriminates against another, but because one brings himself within its terms, and the other does not.

21 Or at 408.

³⁴ In respect to religious affiliation, government sectarian neutrality may not depend as much upon Article I, section 20 as on the religion clauses of the constitution. *See Salem College & Academy v. Employment Division*, 298 Or 471, 695 P2d 25 (1985).

appear to require changes in deeply ingrained and identity-forming personal characteristics. Although this court never has decided the question, the class of persons whose sexual orientation leads them to choose to marry a person of the same sex seems more comparable to the classes defined by gender and religion than to the class at issue in *Oberg*. Consequently, the “open class” principle, while readily applicable to economic and some other relations, appears to have limited utility when applied to at least some intimate, personality-forming, yet possibly “mutable” personal characteristics.

C. What legal test follows from classification determination?

Although it is clear what follows from the determination that a classification is *not* “suspect” – *i.e.*, application of a rational basis test – it is not entirely clear what this court will do when the class *is* “suspect.” The only case in which this court has ever held that a statute violated Article I, section 20 after determining that it affected a “suspect” class is *Hewitt*. The court’s determination that the statute was unconstitutional as written was relatively brief. Having determined that gender classification was suspect, the court concluded that the suspicion could be overcome if the law’s effects were based on real, not assumed, differences between men and women.

The suspicion may be overcome if the reason for the classification reflects specific biological differences between men and women. It is not overcome when other personal characteristics or social roles are assigned to men or women because of their gender and for no other reason. That is exactly the kind of stereotyping which renders the classification suspect in the first place.

Hewitt, 294 Or at 46. In other words, the statute was unconstitutional because the basis on which it distinguished between men, who were denied a benefit, and women, who received it, had no basis in reality, but was instead based on mere stereotypes about men and women.³⁵

³⁵ That is not to suggest that *Hewitt* holds that statutes classifying on “suspect” grounds are subject only to mere rationality review. It is only to say that having determined
Footnote continued...

Consequently, beyond explaining that gender discriminations must, at a minimum, be based on specific biological differences between men and women, the court has never been called upon to explain what degree or kind of “scrutiny” it will apply to gender or other suspect classifications. *See SER Adult and Family Services Div. v. Bradley*, 295 Or 216, 224, 666 P2d 249 (1983) (“restraints on the ability of illegitimate children to ascertain paternity must be imposed only for reasons relating specifically to the proof problems encountered in paternity determinations”).³⁶ In *Klamath Falls v. Winters*, 289 Or 757, 772, 619 P2d 217 (1980), *appeal dismissed*, 451 US 964, 101 S Ct 2037, 68 LEd 2d 343 (1981) for example, this court described federal “rational basis” scrutiny: “[A] statutory scheme violates equal protection if it discriminates without any rational basis in terms of the purposes of the act, *i.e.*, affords benefits to some while denying those benefits to others in a manner that is capricious or arbitrary.” By contrast, the “strict scrutiny” the federal courts apply in suspect class cases is extremely rigorous. For example, the Supreme Court recently stated:

To withstand our strict scrutiny analysis, respondents must demonstrate that the University’s use of race in its current admission program employs “narrowly tailored measures that further compelling governmental interests.” * * *. Because “racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,” * * *,

(...continued)

that the classification in question was arbitrary and irrational, the court had no need to go further in its analysis of the law’s constitutionality.

³⁶ The test these cases applied seems consistent with the “police power” analysis the state has described in other recent briefs. (As we have previously explained, the state is mindful of the court’s repeated injunction against both the term “police power” and its reflexive use as a substitute for analysis. Nevertheless, when discussing how courts historically, and in some cases recently, have considered the constitutionality of laws, the methodology implied by that term appears inescapable. Thus, the state uses the term advisedly). That is, the court examines the legitimacy of the law’s goal and the fit between that goal and the means selected to achieve it. Indeed, that is precisely what the federal courts do, requiring only a greater degree of need and congruence of means (compelling state interest and narrowly tailored means) to achieve the goal when they apply “strict” scrutiny.

our review of whether such requirements have been met must entail “a most searching examination.””

Gratz v. Bollinger, 539 US 244, 270, 123 S Ct 2411, 156 L Ed 2d 2 (2003) (citations omitted). In sum, unlike the federal courts, this court has not yet had occasion to explain how it would review a statute that distinguished among citizens on “suspect” grounds.

D. Application of the rational basis test.

But even if the law discriminates on the basis of sexual orientation and even if that is not a suspect class, the law nevertheless must be rationally related to legitimate state purposes. In this case, that question is whether providing the many statutory benefits that accompany the status of marriage *only* to those who choose to marry persons of the opposite sex satisfies that test. The question when conducting rational basis scrutiny is not what the legislature actually believed, but what a “legislator rationally could believe[.]” *Crocker*, 332 Or at 55.³⁷ This standard is exceptionally deferential, but not without substance. As the United States Supreme Court recently stated, “even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.” *Romer v. Evans*, 517 US 620, 632, 116 S Ct 1620, 134 L Ed 2d 855 (1996).

Other courts that have considered this same question have focused in large measure on procreation and child rearing when identifying the state interests that laws denying marriage to same-sex couples are said to further. *E.g.*, *Goodridge*, 440 Mass at 333-36; *Standhardt v. Arizona*, 206 Ariz 276, 288-89, 77 P3d 451 (Ariz App 2003), *rev den*, 2004

³⁷ See *Exxon Corporation v. Eagerton*, 462 US 176, 195-96, 103 S Ct 2296, 76 L Ed 2d 497 (1983) (under federal equal protection rational basis test a statute will be sustained “if the legislature could have reasonably concluded” that the classification would promote a legitimate state purpose).

Ariz LEXIS 62 (May 25, 2004); *Baker*, 170 Vt at 216-223. Although the courts have not reached uniform conclusions, the connection between opposite-sex family units, procreation, and child-rearing has considerable historic and cultural support. But technology and Oregon law have attenuated that link, at least with respect to the full range of the legal benefits of marriage. First, people who wish to get married in Oregon need not promise to have children, nor prove that they are capable of doing so. *See* ORS chapter 106. And technology, some of it not particularly novel, permits women in same-sex relationships to conceive and bear children. Likewise, a man in a same-sex relationship may father and rear a child carried by a surrogate. Moreover, same-sex couples can adopt children. *See* ORS 109.304 to ORS 109.410. Oregon law protects those children to the same degree that it does the children of married couples, except that their parents are denied the benefits conferred by the marriage statutes.

The legislative choice to restrict marriage to opposite-sex couples could be advanced as a rational choice if there were a dispute about whether children raised by same-sex parents fare as well overall as children reared by opposite-sex parents. Applying a lenient rational basis standard, it might even be possible to argue that the legislature acts rationally by waiting to see whether those children fare as well.

The difficulty with that argument in Oregon is that, as noted above, the legislature places no limits on the ability of same-sex couples to have and rear children. Thus, what is denied to same-sex couples is not the ability to have and rear children, but the all of legal incidents of civil marriage, some of which are unrelated to procreation or children. Visiting a traditionally stigmatizing label – “illegitimate” — upon the children of same-sex couples would not further the legitimate governmental interest in protecting children. *See Clark v. Jeter*, 486 US 456, 108 S Ct 1910, 100 L Ed 2d 465 (1988) (applying “intermediate”

scrutiny; striking down 10 year statute of limitations for “illegitimate” child to establish paternity); *SER Adult and Family Services Div. v. Tuttle*, 304 Or 270, 744 P2d 990 (1987) (same applying section 20). Thus, Oregon has disconnected marital status and its attendant benefits from childbearing and child-rearing.

The state does not mean to suggest that the long historic and cultural connection between opposite-sex couples, marriage, and child-rearing is meaningless. But the Oregon legislature has chosen to grant particular privileges to married couples (such as intestate succession) and immunities (such as the husband-wife privilege) that are independent of the state’s interests to related child-rearing, while at the same time imposing no restrictions on the ability of same-sex couples to have and raise children. In other words, the legislature already has severed the links that might have sustained a child-centered rationale for limiting marriage to opposite-sex couples.³⁸

As noted above, some of the benefits granted to those who are permitted to marry have no relationship, to procreation or children. For example, the husband-wife evidentiary privilege appears designed to protect marital harmony, trust, and intimacy, but has nothing

³⁸ Courts of other states have divided on this subject. *Compare, e.g., Goodridge*, 440 Mass at 331 (“we conclude that,” under the individual liberty and equal protection provisions of the Massachusetts Constitution, the statute denying marriage licenses to same-sex couples “does not meet the rational basis test for either due process or equal protection”), *and Baker*, 170 Vt at 224 (“viewed in the light of history, logic, and experience, we conclude that,” under the Common Benefits Clause of the Vermont Constitution, “none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law”), *with Standhardt*, 206 Ariz at 290 (“Because Arizona’s prohibition against same-sex marriage rationally furthers a legitimate state interest” –*i.e.*, “encouraging procreation and child rearing within the marital relationship” – “the prohibition does not deprive Petitioners of their constitutional rights to substantive due process, privacy, or equal protection” under the Arizona Constitution). The state has not done a comprehensive examination of the statutes of those states to compare the legislative choices made in them to the choices made by the Oregon Legislature.

necessarily to do with children; husbands and wives without children and with no intention of ever having children are nevertheless entitled to claim that privilege.³⁹ Similarly, a spouse may claim by intestate succession notwithstanding whether the couple had children.

Current Oregon law grants a wide range of legal benefits to those who are legally permitted to marry, solely on the basis of their status as “married” persons. Access to those benefits on the same terms as they are extended to opposite-sex couples is effectively denied to same-sex couples, solely because they are not legally permitted to marry. Using marital status as the exclusive mechanism for granting this panoply of legal benefits to those individuals who have demonstrated their commitment to a relationship with another person does not appear to be rationally related to the state’s legitimate interests in promoting effective child-rearing, *as the legislature has defined that interest*. Consequently, it appears current law impermissibly grants “privileges or immunities”—consisting of the total package of legal benefits that are automatically and singularly available to those who are married—to opposite-sex couples on different terms from the terms on which those benefits are allowed to same-sex couples.

That conclusion does not require the court to extend the status of “marriage” to same-sex couples, as explained below. Nor does it require the court to hold that denying marriage licenses to same-sex couples, standing alone, violates Article I, section 20. In *Baker v. Vermont*, 744 A2d at 886, the Supreme Court of Vermont declined to decide whether “the denial of a marriage license operates *per se* to deny constitutionally protected rights.”

³⁹ Under ORS 40.255, the privilege to “refuse to disclose” confidential communications made during a marriage – including those between separated, but not divorced, spouses – survives even their divorce. In contrast, no partner in a same-sex relationship – regardless of whether the couple is cohabitating – may invoke the marital privilege and refuse to disclose their confidential communications.

Instead, the court held that the plaintiff same-sex couples were entitled by the Vermont Constitution “to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples.” *Baker*, 744 A2d at 886. That approach is a sensible one, and is the remedy adopted by the trial court in this case.

E. History

The court also asked whether the history of section 20 assists in determining whether the limitation on who may marry demonstrates that those persons are a favored “class of citizens.”⁴⁰ In *Yancy v. Shatzer*, ___ Or ___, ___ P3d ___ (September 16, 2004), (slip op at 11-12) the court explained:

When construing original provisions of the Oregon Constitution, this court ascertains and gives effect to the intent of the framers of the provisions at issue. *Stranahan*, 335 Or at 54-55. That intent is determined by (1) analyzing the text and context of the provisions, giving words the same meaning that the framers would have ascribed to them; (2) reviewing the historical circumstances that led to their creation; and (3) examining the case law interpreting those provisions. *Priest v. Pearce*, 314 Or 411, 416, 840 P2d 65 (1992). This court’s goal is to apply faithfully the principles embodied in those provisions to modern circumstances. *State v. Rogers*, 330 Or 282, 297, 4 P3d 1261 (2000).

Because the court in *Yancy* found no “definitive answer” in the “constitutional text and historical underpinnings of that text,” it turned to “the accepted understanding of the concept [at issue] predating the adoption of the Oregon Constitution in 1857, as reflected in contemporary sources, United States Supreme Court case law, and that of this court.” *Yancy*, (slip op at 15). Applying that analysis here provides little assistance in identifying or defining the “class of citizens” affected by the statutes in question.

⁴⁰ Specifically, the court has asked whether the history of Article I, section 20, “including *its predecessors in other states*, assist in answering this question.” (Emphasis added). In this brief, the State limits its historical discussion primarily to the terms of the court’s question.

This court has long recognized that section 20 differs from the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. For example, the court stated:

The provisions of the state Constitution are the antithesis of the fourteenth amendment in that they prevent the enlargement of the rights of some in discrimination against the rights of others, while the fourteenth amendment prevents the curtailment of rights.

State v. Savage, 96 Or 53, 59, 184 P 567 (1919). Any “enlargement of the rights of some” may, at some point, begin to appear to be a “curtailment of [the relative] rights” of others. The court explained how the two provisions converge.

Because the clause would ordinarily be invoked by persons who wanted a privilege or immunity for themselves rather than to withdraw it from others, its protective effect was soon held to extend to rights against adverse discrimination as well as against favoritism * * * and its use against discriminatory or otherwise “unequal” adverse treatment is long established.

Clark, 291 Or at 236-37 (footnotes and citations omitted). But notwithstanding that convergence, the very different histories of the two provisions suggest different motivations.

The history of the Fourteenth Amendment is too well known to require much discussion. Enacted after the Civil War, the Fourteenth Amendment was designed to protect “disfavored individuals or groups” from discrimination by state laws. *Clark*, 291 Or at 236. Privileges and immunities clauses like Oregon’s, however, predated the Fourteenth Amendment and were aimed at a different goal.

Antedating the Civil War and the equal protection clause of the fourteenth amendment, [section 20’s] language reflects early egalitarian objections to favoritism and special privileges for a few rather than the concern of the Reconstruction Congress about discrimination against disfavored individuals or groups. * * *.

Id.

Article I, section 20, of the Oregon Constitution appears to be taken verbatim from Article I, section 23, of the Indiana Constitution. Claudia Burton and Andrew Grade, a

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Willamette L Rev 469, 484-486 (2001). And that provision, in turn, had its roots in the constitutions of several other states.

Its direct predecessors were Iowa Const Art I, § 6 (1846), Mich Const Art I, § 3 (1835), Tenn Const art XI, § 7 (1834). The original state declarations of rights had proscribed, more narrowly, “exclusive or separate emoluments or privileges from the community, but in consideration of public services,” Va Decl of Rights § 4 (1776) (similarly Mass Decl of Rights § VI (1780)), repeated in many state constitutions.

Clark, 291 Or at 237.

The specific history of section 20 in the Oregon Constitutional Convention is unenlightening. Article I, section 20, was adopted without recorded debate. *Id.*, 37 Willamette L Rev at 533. The debates in the Indiana Constitutional Convention of 1850, however, contain considerable discussion about the predecessor to the Oregon provision. Although they reflect disagreement about what the provision would accomplish, the delegates all appeared to agree that it was addressed primarily to preventing the government from granting monopolies or other forms of economic favors to powerful factions without making them available to all on equal terms. *See Indiana Historical Collections Reprints*, 2 *Debates in Indiana Convention 1850*, 1393-1403, 1430-31 (1935) (*Debates*).⁴¹

⁴¹ The disagreements tended to center on whether if the government, after a fair process, granted one citizen or company a franchise to build a road or operate a ferry, it had to permit anyone (or perhaps everyone) else to do the same. For example, Mr. Biddle, apparently a judge when not sitting as a convention delegate, *Debates* at 1394, after generally describing the dispute, stated:

But I undertake to say that this proposition interferes with no such right, or with the legislative power to grant the privilege of the use of the ferry from year to year as it is now granted. It does not mean that every citizen of Indiana has right to a ferry license before granted to another; it only means that every citizen may apply under the same circumstances and on similar terms.

These provisions have been attributed to “the desire to eliminate the injustice of unmerited favoritism and special treatment.” David Schuman, *The Right To “Equal Privileges And Immunities”: A State’s Version of “Equal Protection,”* 13 Vt L Rev 221, 222 (1988). Consequently, it is at least arguable that their focus was not to achieve generalized equality in all aspects of life but, rather, to ensure only that government did not tip the economic scales in favor of powerful groups or individuals.⁴² See Robert F. Williams,

(...continued)

Ibid. Mr. Rariden remained skeptical, asserting that he simply did not know “the effect of that provision exactly.” *Id.* at 1430. He feared that if the state granted a franchise to build a canal around the “Falls of the Ohio River,” no one would undertake that useful and potentially profitable venture “if the State of Indiana were to reserve to itself the power of authorizing the construction of another canal along side of it to destroy its profits[.]” *Id.* at 1430-31.

The disagreement about what the provision meant was not limited to delegates. For example:

It is more easy to discover what that section does not mean, than to find any practical operation for it as a principle of government. It may be that some unforeseen event may, in process of time, transpire, which shall call the principle announced in that section into exercise, but the section of the act referred to does not seem destined to perform that office. It was correctly argued by the appellant that the agency here provided for was an office. The relation of the agent to the public is similar to that of inspectors of provisions, measurers of wood, weighers of hay and coal, &c. It is quite evident that all men can not hold these offices or employments, and if they can not, whatever else the 23d section of the bill of rights may mean, it can have no application to the privileges or immunities there mentioned.

Beebe v. State, 6 Ind 401, 439 (1855). As was often the case at that time, the members of the court issued their opinions seriatim. Consequently, this statement may reflect the views of only a single justice.

⁴² Even assuming the accuracy of the claim that Article I, section 20, and its state constitutional predecessors arose from concerns about monopolies or economic favoritism, it would be wrong to ascribe to the framers a rigid distinction between economic liberty and individual rights. In fact, advocacy of free labor and opposition to slavery were first cousins in the political discourse of the 20 years before Article I, section 20, was drafted. One of Abraham Lincoln’s biographers described the convergence of economic and individual liberties in the pre-civil war period:

Footnote continued...

Equality Guarantees in State Constitutional Law, 63 Tex L Rev 1195, 1207 (1985) (“many states amended their constitutions during the populist era to curb the granting of ‘special’ or ‘exclusive’ privileges, after a series of abuses by the relatively unfettered state legislatures responding to powerful economic interests”); J.W. Hurst, *The Growth of American Law: The Law Makers*, 241 (1950) (describing constitutions like those of Indiana and Oregon as containing limitations designed to curb special privilege).⁴³ Williams describes provisions like Oregon’s as arising out of “the Jacksonian opposition to favoritism and special treatment for the powerful.” 63 Tex L Rev at 1207.⁴⁴ Predecessors of Article I, section 20, were born out of concern that “factional” influences on lawmakers (roughly equivalent to what are now described as “special interests”) would interfere with the natural tendency of the marketplace

(...continued)

But Lincoln’s opposition to slavery was rooted in a fierce resentment of everything that grew out of the slave system, up to the whole agrarian ideology itself. Although Lincoln’s claims to have “always” opposed slavery have been skeptically discounted since the 1960s (because he showed little enthusiasm for abolition before the 1850s), Lincoln was not exaggerating in making this claim, since he defined *slavery* as any relationship which forestalled social dynamism and economic mobility, or obstructed “the paths of laudable pursuit for all.” For Lincoln, his first experience of what he called *slavery* described how his own father, a Jeffersonian farmer, manipulated and exploited his labor as a young man. It would take only time and circumstances for Lincoln to expand his resentment at Jeffersonian “slavery” to include the blacks who were owned by Jefferson’s heirs. Even though he harbored persistent racist doubts about whether blacks could be “equal” to whites “in color, size, intellect, moral developments, or social capacity,” Lincoln came to see black slavery as synonymous with the denial of his own liberal aspirations for “improvements of condition.”

Allen Guelzo, *The Redeemer President*, 9 (1999) (emphasis added).

⁴³ Corporate privilege was particularly suspect. See generally R. Welter, *The Mind of America, 1820-1860*, 77-104 (1975).

⁴⁴ The reference is to President Andrew Jackson. See generally Hachey, *Jacksonian Democracy and the Development of the Wisconsin Constitution*, 62 Marq L Rev 485 (1979).

to provide equal opportunities for economic success. See Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*, Introduction, Chs 1 and 2 (1993).

At least one statement of Indiana law supports the “anti-monopoly” view:

We shall not here attempt to indicate the application this section of the constitution is to have in the cases that may arise; but as touching the present, the only effect to be given to it is, that in creating a bank, the legislature must provide that, so far as the state is concerned, every citizen shall have an equal right to obtain stock in it, till the amount authorized is taken.

Bank of Indiana v. City of New Albany, 11 Ind 114, 116 (1858). Other cases decided before or reasonably closely after the enactment of the Oregon Constitution construing similar provisions generally arise from the marketplace and economic relations and shed little light on what might constitute a “class.” *E.g.*, *Turpin v. Locket*, 10 Va 113, 151-152 (Va 1804) (addressing ownership of church property); *Mabry v. Tarver*, 20 Tenn 94, 98 (Tenn 1839) (addressing licensing); *Bank v. Cooper*, 2 Yerger (10 Tenn) 599 (1831) (striking down law establishing special court to handle all suits against the Bank of Tennessee); *Durkee v. Janesville*, 28 Wis 464 (1871) (citing cases).

The debates in the Indiana Constitutional Convention contain only a single reference to classes, but one that suggests a more expansive motive. Mr. Pettit, speaking in favor of the language eventually adopted by the convention, and in opposition to an amendment to that language addressed to funding education, 2 *Debates* at 1399, described the equal privileges provision as

a plain, simple, unequivocal declaration of equal rights and privileges. It is a direct and unequivocal prohibition upon the Legislature against giving any advantage to one class of persons over another. It reads as follows:

[Reads text of provision].

I could not have doubted, sir, that if we had been about to establish for the first time, law for a civilized community—if it had been our first effort to lay a platform or form a declaration of personal and political rights—I could not for one moment have doubted that this would have been one of the first

declarations adopted by acclamation—that it would have met with universal approbation.

This section applies to the future action of the Legislature. It declares that the legislature shall not hereafter place one class of citizens upon a pedestal of fame and wealth, and trample another in the dust of ignominy and poverty. [Applause.]

2 *Debates* at 1401 (second brackets in original).⁴⁵ Other discussions, while not expressly referring to “classes,” similarly reflected the general belief that the provision was intended to ensure that whatever advantages the government made available were made available on equal terms to all. *E.g.*, *Debates*, 1393 (remarks of Mr. Read of Monroe); 1394 (remarks of Mr. Biddle); 1394-95 (remarks of Mr. Niles); 1395 (remarks of Mr. Pepper of Ohio).

These clues do not provide a definitive answer to the delegates’ intentions in prohibiting special privileges or immunities for “classes of citizens.” Nevertheless, in light of their intention to prevent favoritism by government, it seems reasonable to suggest that they were simply being cautious by ensuring that no one would conclude that even if the legislature could not grant special privileges to individual citizens, it was still free to grant those privileges to some groups of citizens or to corporations. In other words, a ban that prohibited favoritism only to “citizens,” could have been read narrowly as applying solely to individuals and thus construed to permit the legislature to grant special preferences to combinations of citizens. Including a prohibition on class preferences ensured that could not happen. While the state acknowledges again that it can find no authoritative basis for this interpretation, logic and what history we have appear to support it.

⁴⁵ Caution is always required when suggesting that the statements of one person reflect the understandings of an entire body such as the Indiana convention. The *Debates*, however, demonstrate that no one was reluctant to express their disagreement with any sentiment expressed by another, and no one took issue with Mr. Pettit’s general characterization.

Viewed in that light, “a favored ‘class of citizens’ within the meaning of Article I, section 20 of the Oregon Constitution” – assuming that it is a “true” class – is any group or combination of citizens who may obtain from the government any benefits that are not available on equal terms to all other groups or combinations of citizens.

III. Question “c”: If Oregon marriage laws improperly grant privileges or immunities to certain persons, what is the appropriate remedy and what characteristics, if any, would define the persons to whom the State of Oregon must extend the privileges or immunities of marriage “upon the same terms?”

This question appears to have two parts, both of which address the appropriate remedy for a violation of Article I, section 20. First, the court has asked what remedy is appropriate; second, the court has asked who is entitled to the benefits of the remedy. As the court may have intended, those questions appear to collapse into a single inquiry because this case involves constitutionally mandated equality. In other words, if the constitution demands equality among the affected citizens or classes of citizens, the remedy for denial of that equality will almost of necessity consist of eliminating the discriminatory effects of the challenged law. That does not necessarily mean, however, that the remedy in every case will be to extend the benefits in question to the disfavored citizens or classes.

Where a single privilege or immunity is at issue, the choice is relatively simple. To remedy the unconstitutional denial of that benefit to one group, the benefit can either be withheld from everyone or extended to everyone. This case is different in at least two respects. First, many benefits flow from the single distinction drawn by the law between same-sex and opposite-sex couples. Although the possible remedies include extending all of the benefits to all couples (as urged by plaintiffs) or withdrawing the right to marry along with its attendant benefits from all couples, this case presents the possibility of a third curative—*e.g.*, some benefits might be withheld from all, some extended to all. Second, even if the proper remedy is to extend all of the legal benefits of marriage to the disfavored class,

how that should be accomplished presents policy choices that should be decided by the legislature in the first instance.

Two cases decided by this court suggest how the court might go about crafting an appropriate remedy. In each, the court concluded that the constitution mandated equality of treatment, then was forced to decide whether to extend the benefit in question to those the legislature had omitted or withdraw it from those to whom the legislature had granted it.

Hewitt; Salem College & Academy v. Employment Division, 298 Or 471, 695 P2d 25 (1985).

In *Hewitt*, after determining that the statute limiting survivor benefits discriminated unconstitutionally, the court was forced to consider the appropriate remedy. The court concluded that decisions of other states provided guidance.

First, they demonstrate [that] there is no universal rule compelling invalidation of constitutionally defective statutes. Second, * * * these opinions affirm that courts are not without power to repair such statutes in appropriate circumstances. Finally, they provide an analytical framework by which the appropriate remedy may be assessed: we first examine the legislative purpose in providing benefits under the challenged statute; we then resolve what the legislature would have done if faced with the invalid statute. Would it terminate coverage to all recipients or extend benefits to those improperly excluded? We find equally strong support for the proposition that courts are empowered to extend underinclusive statutes from the United States Supreme Court. Justice Harlan concurring in *Welsh v. United States*, 398 US 333, 361, 90 S Ct 1792, 26 L Ed 2d 308 (1970) stated:

“Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.”

Wiesenfeld, supra, examined the legislative purpose in providing Social Security benefits to widows and found extension of benefits to widowers the alternative least disruptive of that purpose.

Hewitt, 294 Or at 51-52. Concluding that the legislature, had it known that it was required to extend benefits to all or deny them to all, would have opted to grant them to all, the *Hewitt*

court concluded that allowing the benefits in question notwithstanding gender best effectuated the legislative design.

Salem College was similar in that the court concluded, at least in part under the constitutional guarantee of religious equality, that the unemployment law impermissibly granted benefits to some while denying them to others who were, for constitutional purposes, similarly situated. Faced with the need to decide whether to extend those benefits to those excluded or withdraw them from those statutorily entitled – and armed with the recognition that Oregon employers would pay millions of dollars in extra federal taxes if it withdrew benefits – the court had little difficulty concluding that the legislature “surely would have chosen” to extend the benefits to the excluded class. *Salem College*, 298 Or at 494. *Accord*, *Employment Division v. Rogue Valley Youth for Christ*, 307 Or 490, 497, 770 P2d 588 (1989).

While the state takes it as beyond dispute that the legislature would not choose simply to abolish marriage in Oregon, the issue in this case is somewhat more complex. This case does not present an “either/or” choice comparable to the legislative choice at issue in *Hewitt*. Here, the legislature might take any one of a number of approaches. One option would be to amend existing laws to ensure that all of the legal incidents of “marriage” are made available to same-sex couples on the same terms as they now are available to opposite-sex couples. The legislature might opt to eliminate or reduce the legal benefits currently provided to married persons – in effect, denying those benefits on the same terms to opposite-sex couples and same-sex couples alike. Or it could choose a combination, extending some benefits to same-sex couples and eliminating other benefits altogether. Other options—like the Vermont “civil union” statute—might be crafted that could satisfy constitutional requirements. Rewriting the statute to authorize county clerks to issue marriage licenses to

those who would not be entitled to receive them under the current statutes is not the only option. An examination of remedies adopted by other state legislatures reveals a variety of approaches other than an extension of existing marriage laws to same-sex couples.⁴⁶ Oregon's legislature should have the opportunity to consider policy options in the first instance.

In *Baker v. Vermont*, the Vermont Supreme Court concluded that “the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law” violates the Vermont Constitution. *Baker*, 744 A2d at 886. The court thus found “a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides to opposite-sex married couples.” *Id.* The court noted that the state “could do so through a marriage license,” but that was not the only option. *Id.* at 887.

As a result, the *Baker v. Vermont* court declined to grant plaintiff's request for “injunctive and declaratory relief designed to secure a marriage license[.]” *Baker*, 744 A2d at 886. Instead, the court kept the current statutory scheme in effect for a reasonable period of time to give the Vermont legislature an opportunity to consider and enact remedial legislation. Although the this court has never been presented with such a case, the approach adopted by the Vermont court is consistent with this court's Article I, section 20, jurisprudence, in that it looks to what the legislature would have chosen to do (or would choose to do). The Vermont approach also avoids the “vexing separation of powers

⁴⁶ As of May 2001, thirty-six states had adopted “defense of marriage” statutes patterned after the federal Defense of Marriage Act. *See Goodridge*, 798 NE2d at 990 (Cordy, J., dissenting). Vermont crafted a “civil union” statute, and Massachusetts is reportedly considering a constitutional amendment that would ban same-sex marriage but allow civil unions. No state simply extended its existing marriage statute to include same-sex couples.

question” noted by Justice Peterson in his *Hewitt* dissent. And it avoids the uncertainty and disruption to state laws and programs that hinge on defining who is “married” and who is not.⁴⁷ If this court finds a constitutional violation, it should follow the lead of the Vermont Supreme Court in fashioning a remedy.⁴⁸

IV. Question “d”: Do Oregon’s marriage laws deny equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution?

The state respectfully urges this court not to reach the merits of this question because it was not raised and preserved below. ORAP 5.45 provides that each “question or issue to be decided on appeal shall be raised in the form of an assignment of error” and that “[n]o matter claimed as error will be considered on appeal unless [it] was preserved in the lower court.” That rule is intended to ensure that parties are not taken by surprise, misled, or denied the opportunity to meet an argument. *Davis v. O’Brien*, 320 Or 729, 737, 891 P2d 1307 (1995). Additionally, to preserve error, “a party must provide the trial court with an explanation of his or her objection that is specific enough to ensure that the court can identify its alleged error with enough clarity to permit it to consider and correct the error immediately, if correction is warranted.” *State v. Wyatt*, 331 Or 335, 343, 15 P2d 22 (2000); *see also State v. Brown*, 310 Or 347, 356, 800 P2d 259 (1990) (“The reasons for the rule [requiring preservation] in the trial court are to allow the adversary to present its position and to permit the court to understand and correct any error.”).

⁴⁷ Some of those programs are described in note 23, above. A search for the word “spouse” or “marriage” in the Oregon Revised Statutes reveals that hundreds of existing laws could be affected.

⁴⁸ The next regular session of the Legislative Assembly is scheduled to begin January 10, 2005. ORS 171.010. The court should give the legislature a reasonable opportunity to craft any necessary remedial legislation during that session, with a deadline of July 1, 2005 for enactment.

Plaintiffs’ amended complaint alleged that Oregon’s marriage laws violate Article I, section 20, of the Oregon Constitution. Plaintiffs did not raise any federal constitutional claims in their complaint. Indeed, none of the parties raised the federal equal protection issue at any point in the proceedings below. Nor is it an issue on which the trial court ruled *sua sponte*. As a result, this question is not properly before the court. Indeed, this court’s case law and rules suggest that this court *cannot* consider this unpreserved claim for the first time on appeal. *See State v. Farmer*, 317 Or 220, 224, 856 P2d (1993) (unpreserved claim of error “*cannot* be reviewed on appeal” (emphasis in original)).

The state respectfully declines to address in this brief the merits of the court’s question about the Fourteenth Amendment. As noted above, the plaintiffs, perhaps recognizing the unsettled state of federal law in this area⁴⁹ did not raise any federal claim in the proceedings below. Although it is true that the United States Supreme Court recently

⁴⁹ Under *Baker v. Nelson*, 291 Minn 310, 191 NW 2d 185 (1971), *appeal dismissed*, 409 US 810, 93 S Ct 37, 34 L Ed 2d 65 (1972), denying marriage licenses to same-sex couples may be permissible without violating the Equal Protection Clause. In that case, the United States Supreme Court summarily dismissed the appeal “for want of a substantial federal question.” 409 US 810. As the Court has instructed, its summary decisions are to be taken as rulings on the merits only with respect to the specific issues necessarily decided by the Court’s decision to summarily dispose of the case. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 US 463, 478 n 20, 99 S Ct 740, 58 L Ed 2d 740 (1979); *see Illinois State Board of Elections v. Socialist Workers Party*, 440 US 173, 99 S Ct 983, 59 L Ed 2d 230 (1979) (“no more may be read into [a summary dismissal] than was essential to sustain that judgment”); *Mandel v. Bradley*, 432 US 173, 176, 97 S Ct 2238, 53 L Ed 2d 199 (1977) (lower court gave undue weight to summary dismissal addressing constitutionality of distinguishable statute). As to the “specific challenges presented in the statement of jurisdiction” and necessarily decided by the Court, the decision generally will “prevent lower courts from coming to opposite conclusions” and remain binding until the Court instructs or doctrinal developments indicate otherwise. *Mandel*, 432 US at 176; *Hicks v. Miranda*, 422 US 332, 344, 95 S Ct 2281, 45 L Ed 2d (1975). Since *Baker* was decided, the Court has issued opinions that create some uncertainty about *Baker’s* continued validity. *See, e.g., Romer*, 517 US at 635 (holding that, even under rational basis review, moral disapproval of homosexuals as a class cannot be a legitimate government interest).

stated, “even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained,” *Romer*, 517 US at 632, and thus that the analysis of Article I, section 20 and the analysis of the Fourteenth Amendment may each apply to this case under the “rational basis” standard, it is not necessarily certain that application of the rational basis test under federal law would be identical to that applied by this court under Article I, section 20. *See, e.g., Rogue Valley Youth for Christ*, 307 Or at 498 (1989) (observing this court has treated the First Amendment Free Exercise clause as identical in meaning with the Oregon constitutional provisions covering the same subject and noting that identity of meaning does not imply that verbal formulas developed by the United States Supreme Court in applying the federal text also govern application of the state’s comparable clauses.). Because this court will not reach any federal question if the dispute is resolved under Article I, section 20, and particularly because the applicable federal law is uncertain, the state declines in this case to hypothesize plaintiffs’ argument. If plaintiffs provide the court with a substantive response, then the state will address that response in its responsive arguments.

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Defendants'-Appellants' Opening Brief on the Merits and Responses to Questions from the Court to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on September ____, 2004.

I further certify that I directed the Defendants'-Appellants' Opening Brief on the Merits and Responses to Questions from the Court to be served upon Lynn R. Nakamoto, attorney for respondents, Kenneth J. Choe, attorney for respondents, Agnes Sowle attorney for intervenor-plaintiff-respondent Multnomah County, Vance M. Croney, attorney for prospective intervenor-plaintiff-respondent Benton County, Kelly Clark, attorney for intervenors-defendants-appellants, cross-respondents, Defense of Marriage Coalition, Herbert G. Grey, attorney for intervenors-defendants-appellants, cross-respondents, Defense of Marriage Coalition, Benjamin W. Bull, attorney for intervenors-defendants-appellants, cross-respondents, Defense of Marriage Coalition, Kelly E. Ford, attorney for intervenors-defendants-appellants, cross-respondents, Defense of Marriage Coalition, Kevin Clarkson, attorney for intervenors-defendants-appellants, cross-respondents, Defense of Marriage Coalition, Raymond M. Cihak, attorney for intervenors-defendants-appellants, cross-respondents, Defense of Marriage Coalition, on September ____, 2004, by mailing two copies, with postage prepaid, in an envelope addressed to:

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