

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,

and

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

Intervenors-Defendants-Appellants,
Cross-Respondents.

Multnomah County Circuit Court
No. 0403-03057

Appellate Court No. A124877

Supreme Court No. S51612

Continued.....

STATE DEFENDANTS'-APPELLANTS', CROSS-RESPONDENTS'
ANSWERING BRIEF ON THE MERITS

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

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STATE DEFENDANTS’-APPELLANTS’, CROSS-RESPONDENTS’ ANSWERING BRIEF ON THE MERITS

INTRODUCTION

In **SECTION ONE** of this answering brief, the state responds to the assignments of error and arguments raised by all three of the cross-appellants' briefs, in the following order: (1) plaintiffs' and Multnomah County's claims that the status of civil marriage *per se* is a privilege under Article I, section 20, of the Oregon Constitution, and that the trial court erred in not treating it as such; (2) DOMC's claim that the trial court "erred in crafting a remedy that extends the benefits of marriage to same-sex couples" and plaintiffs' and the County's claims that, under *Hewitt*, the trial court was required either to deny the statutory right of civil marriage and its attendant benefits to everyone, or to extend the right of civil marriage to same-sex couples, and that the latter is the appropriate remedy here; (3) DOMC's contention that Article I, section 20 does not apply to this case because an "historic exception" exists by which "history wins out over the pure language of the Constitution"; and (4) DOMC's contentions that the trial court erred in requiring the State Registrar to register as vital records the marriage license-and-solemnization documents issued by the County to same-sex couples before April 20, 2004.

In **SECTION TWO**, the state responds to the answers of cross-appellant Multnomah County and cross-appellants DOMC *et al.* to this court's question concerning the Fourteenth Amendment.

SECTION ONE

STATE’S COMBINED ANSWERS AND ARGUMENTS IN RESPONSE TO THE ASSIGNMENTS OF ERROR IN THE OPENING BRIEFS OF CROSS-APPELLANTS MARY LI *ET AL.*, CROSS-APPELLANT MULTNOMAH COUNTY, AND CROSS-APPELLANTS DOMC *ET AL.*

STATEMENT OF THE CASE

The state accepts the statements of the case of Mary Li *et al.* (hereinafter, “plaintiffs”), Multnomah County (hereinafter, “the County”), and the Defense of Marriage Coalition *et al.* (hereinafter, “DOMC”), as adequate for review on appeal, but only as supplemented by the “Statement of the Case” set out in the state’s opening brief, (*see* State App Br 1-12), and with the addition and clarification of pertinent facts in the arguments below.

Summary of Arguments

1. Under current Oregon law, whether marital status *per se* is a “privilege” under Article I, section 20, is an academic question. That is so, because the status of civil marriage does not exist in a legal vacuum and cannot be considered apart from the statutory benefits and obligations that are, in effect, terms and conditions of the “civil contract” of marriage. ORS chapter 106 expressly defines marriage as a civil contract, and the statutory benefits attendant to marriage flow automatically by operation of law from a marriage. For that reason, plaintiffs’ assignments of error nos. 1, 2 and 3, and the County’s assignment of error no. 1, are, in substance, requests for this court to issue an advisory opinion whether marital status *per se* is a “privilege” under Article I, section 20. This court recently confirmed that it lacks the authority to issue such an advisory opinion. *See Yancy v. Shatzer*, 337 Or 345, 347,

97 P3d 1161 (2004) (construing Article VII (Amended), section 1, and concluding, that this court’s “judicial power does not include the authority to adjudicate cases in which there is no existing controversy”).

2. If this court concludes that the statutes denying same-sex couples all of the legal benefits that attend marital status violate Article I, section 20, the nature and number of the “privileges” at issue necessarily inform, if not determine, the question of remedy. As explained in *Hewitt v. SAIF*, 294 Or 33, 50-54, 653 P2d 970 (1982), this court determines the proper remedy for an Article I, section 20 violation by examining “the legislative purpose” of the challenged laws and then “resolv[ing] what the legislature would have done” if the legislature were faced with the invalidity of the statutes. Contrary to the contentions of plaintiffs and the County, *Hewitt* does *not* mean that the court is restricted to choosing between only two remedial options – *i.e.*, either invalidating the existing marriage laws and attendant benefits or extending them to apply to same-sex couples. Here, although this court certainly could decide that the legislature would *not* have wanted to *deny* all the legal benefits of civil marriage to *all* Oregonians, the court cannot know whether or how the legislature would have decided to *extend* them. That is, given the number and variety of those benefits, the court cannot determine which, if any, the legislature would choose to extend, or which, if any, the legislature would choose to withdraw. Thus, as the trial court did, this court should give the legislature an opportunity to craft remedial legislation to cure any constitutional violation. That is the appropriate remedy here because any determination about what the legislature “would have done” requires numerous policy choices that should be made by the legislature.

3. To decide the constitutional question presented in this case, the court must construe Article I, section 20. When it construes original provisions of the state constitution,

“this court ascertains and gives effect to the intent of the framers of the provisions at issue.”

State v. Cavan, 337 Or 433, 441, 98 P3d 381 (2004). This court determines the framers’ intent by:

(1) analyzing the text and context of the provisions, giving words the same meaning that the framers would have ascribed to them; (2) considering the case law interpreting the provisions; (3) and reviewing the historical circumstances that led to their creation.

Id. The court’s goal in this endeavor “‘is to understand the *wording* in the light of the way [the] *wording* would have been understood and used by [the framers],’ * * * and to apply faithfully *the principles* embodied in the Oregon Constitution *to modern circumstances*.”

State v. Rogers, 330 Or 282, 297, 4 P3d 1261 (2000) (quoting *Vannatta v. Keisling*, 324 Or 514, 530, 931 P2d 770 (1997)) (emphasis added). Proper application of this court’s analytical framework rebuts fully both DOMC’s argument that “history wins out over the pure language of Article I, section 20,” and *amicus curiae* Adamson’s contention that the framers’ intent expressed in the text of section 20 was *not* “to assure citizens the equal protection of the laws,” but rather, was limited to “prohibit[ing] the state legislature from granting any exclusive privilege or immunity involving the state’s participation in commercial enterprise.” A construction of Article I, section 20, based on this court’s well-established methodology supports the application of its open-ended terms “to modern circumstances,” like those presented in this case.

4. Regardless whether plaintiffs’ Fourth Claim of Relief properly was before the trial court for decision, the court erred in granting it for the reasons set out in the state’s opening brief. The State Registrar had no statutory duty to register as vital records the marriage license-and-solemnization documents issued by the County to same-sex couples before April 20, 2004, and the Registrar was authorized by ORS 432.405 and other provisions of ORS chapter 432 to refuse to register them.

ANSWER TO PLAINTIFFS’ ASSIGNMENTS OF ERROR NOS. 1, 2, AND 3; AND THE COUNTY’S ASSIGNMENT OF ERROR NO. 1

Under current Oregon law, the civil marriage contract (or “marital status”) is legally inseparable from the statutory benefits that extend automatically to married couples based solely on that status. Therefore, the trial court did not err in considering civil marriage *together with* its attendant statutory benefits to determine whether the statutory scheme violates Article I, section 20, of the Oregon Constitution.

ARGUMENT

I. Standard of Review

The question presented by the plaintiffs’ and County’s claims of error is one of law. *See generally Yancy*, 337 Or at 347, 362-63 (explaining the scope of the court’s “judicial power” under Article VII (Amended), section I); *Newport Church of the Nazarene v. Hensley*, 335 Or 1, 56 P3d 386 (2002) (applying Article I, sections 2, 3, and 20); *State ex rel Adult and Family Services Dept v. Tuttle*, 304 Or 270, 744 P2d 990 (1987) (applying Article I, section 20).

II. The Contentions of the Plaintiffs and the County

Plaintiffs (in their first three claims of error) and the County (in its first claim of error) contend that the status of civil marriage *per se* is a privilege under Article I, section 20, of the Oregon Constitution, and that the trial court erred in not treating it as such. (*See* Plaintiffs App Br 21-34; County App Br 11-16).

III. Trial Court’s Opinion and Judgment

In its Opinion and Order, the trial court explained and concluded, in part:

The issue that defines this case is the denial of the benefits (“privileges”) and legal protections of marriage to same-sex couples. Similarly, when same-sex couples in Vermont initiated a lawsuit seeking a declaration that the refusal to issue marriage licenses violated the marriage statutes and the Vermont Constitution, the Vermont Supreme Court defined the issue as one involving access to benefits[.]

* * * * *

First, we must ask whether the challenged state action involves a “privilege or immunity.” The Oregon Supreme Court [has] offered this definition: “Whenever a person is denied some advantage to which he or she would be entitled but for a choice made by government authority, Article I, section 20 requires that the government decision to offer or deny the advantage be made ‘by permissible criteria and consistently applied.’” *City of Salem v. Bruner*, 299 Or 262, 268-69 (1985) (quoting *State v. Freeland*, 295 Or 367, 377 (1983)). Plaintiffs allege that there are at least 500 rights, benefits and responsibilities that marriage triggers. Moreover, their amended complaint incorporates several pages detailing the legal hurdles and the emotional upheaval that the plaintiff couples have encountered because of their inability to access the benefits and protections that are contingent on marriage. Some examples of these difficulties include having to resort to legal representation to assert legal rights that married couples would automatically have; the necessity of adoption proceedings designed to create relationships with children, and the inability to benefit from employer-sponsored health insurance.

* * * * *

The State recognizes that there are two levels of benefits to marriage as plaintiffs have consistently argued. At one level lie the tangible benefits such as health insurance, death benefits, testimonial rights, etc.[,] and at the other level are social benefits which inure to being the spouse or child of a married couple. It is not clear how our appellate courts would analyze and resolve the issue of extension of privileges beyond the more tangible benefits. It does appear that[,]based on prior appellate decisions[,] the courts would likely extend the privileges required by Article I, section 20 to the tangible benefits married couples now enjoy and that same-sex couples cannot access.

* * * * *

[T]he court here is limiting its holding. Importantly, the court is not extending ORS Chapter 106 to same-sex couples’ right to marriage but to their right to benefits, and thus finding that alternative means should be provided to address that disparity.

(ER-432, ER-433, ER-434, and ER-437) (emphasis added). Accordingly, the trial court’s

Revised Limited Judgment ordered the following remedy:

* * * 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 marriage [*sic*] 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.

(ER-425).

IV. The Trial Court Correctly Declined to Adjudicate the Question Whether Marital Status *per se* Is a “Privilege” Under Article I, section 20

The status of civil marriage is inseparable from the statutory benefits and obligations that are part of (or arise from) a civil marriage contract. For that reason, adjudicating the question framed by the plaintiffs’ and County’s claims of error would have required the trial court (and would require this court) to issue an advisory opinion, which is not within a court’s “judicial power” under Article VII (Amended), section 1.

A. The status of civil marriage

Under current Oregon law, whether marital status *per se* is a “privilege” under Article I, section 20, is an academic question. That is so, because the status of civil marriage does not exist in a legal vacuum and cannot be considered apart from the statutory benefits and obligations that are, in effect, terms and conditions of the civil contract, which is what a marriage is under ORS chapter 106.

ORS 106.010 defines and describes “[m]arriage” as “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.” (Emphasis added). ORS 106.030 provides that, if “either party to a marriage is incapable of *making such a contract* or consenting” to it “for want of legal age or sufficient understanding, or when the consent of either party is obtained by force or fraud,” it is “void from the time it is so declared by a judgment of a court having jurisdiction thereof.” (Emphasis added).

A civil contract of marriage, licensed and solemnized under ORS chapter 106 and entered into by persons qualified to do so, continues in force until one of the parties dies, or until the contract is ended by a judgment of dissolution, pursuant to ORS chapter 107. *See* ORS 106.020; ORS 107.025. And neither party may marry another while the contract is in effect. *See* ORS 106.020. *See also* ORS 163.515 (“knowingly” marrying or purporting to marry “another person at a time when either [person] is lawfully married” is a felony). A judgment for dissolution of a civil marriage contract may be rendered when: (1) “either party to the marriage was incapable of making *such a contract* or consenting thereto for want of legal age or sufficient understanding”; or (2) “the consent of either party was obtained by force or fraud”; or (3) “irreconcilable differences between the parties have caused the irremediable breakdown of the marriage.” ORS 107.015; ORS 107.025(1) (emphasis added). A judgment dissolving a civil marriage contract may (and usually does) provide for the future care, custody and financial support of the parties’ children and “[f]or the division or other disposition between the parties of the real and personal property * * * of either or both of the parties as may be just and proper.” ORS 107.105.

The parties to a civil marriage contract are, by reason of that status, entitled to numerous legal benefits and subject to numerous legal obligations, in addition to those discussed above. *See, e.g.*, ORS 40.255 (husband-wife privilege against disclosure of their confidential communications); ORS 735.615(1)(c) (medical insurance coverage); ORS 112.025 and 112.035 (intestate succession); ORS 114.105 (elective share of estate of spouse who dies testate); ORS 108.040 (“expenses of the family and the education of the

children are chargeable upon the property of both husband and wife”).¹ Thus, as the state explained in its opening brief:

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.

(State App Br 37). The same is true for the statutory limitations and obligations that are part of the marriage contract.

In summary: under Oregon law, marital status *per se* cannot be considered separate and apart from its attendant statutory benefits and obligations, which are part of the civil marriage contract. What plaintiffs and the County really are complaining about here is the “remedy”—*i.e.*, the trial court’s decision *not* to extend the right to marry to same-sex couples but, rather, to give the legislature an opportunity “to produce legislation that would balance the substantive rights of same-sex domestic partners with those of opposite-sex couples.” (*See* ER 421-425).

B. Neither the trial court nor this court has authority to issue an advisory opinion

The plaintiffs’ and County’s claims of error are, in effect, claims that the trial court erred in failing to issue an advisory opinion on the question whether marital status *per se* is a “privilege” under Article I, section 20. Neither the trial court nor this court has authority to do that. *See Yancy*, 337 Or at 347 (construing Article VII, section I, and concluding, that this court’s “judicial power does not include the authority to adjudicate cases in which there is no existing controversy”).

¹ The appendix to the plaintiffs’ opening brief sets out a “[p]artial list” that includes 68 such statutory benefits and obligations. (*See* Plaintiffs App Br, App 3-6).

**ANSWER TO PLAINTIFFS’ ASSIGNMENTS OF ERROR NOS. 4, 5, AND 6; THE
COUNTY’S ASSIGNMENT OF ERROR NO. 2; AND DOMC’S ASSIGNMENT OF
ERROR NO. 2**

The trial court did not err in ordering that the Oregon Legislature be given the opportunity to remedy the Article I, section 20, violation that the trial court found in this case. The remedy ordered by the trial court is consistent with this court’s decision in *Hewitt* in that it is focused on legislative purpose and intent.

ARGUMENT

I. Standard of Review

The question whether the trial court erred in ordering the remedy that it did in this case is one of law. *See, e.g., Hewitt*, 294 Or at 50-54.

II. The Contentions of Plaintiffs, the County, and DOMC

Plaintiffs and the County argue that, under *Hewitt*, the trial court was required either to deny civil marriage and its attendant benefits to everyone, or to extend the statutory right of civil marriage to same-sex couples, and that the latter is the appropriate remedy here. (*See* Plaintiffs App Br 38-51; County App Br 16-18). DOMC contends that the trial court “erred in crafting a remedy that extends the benefits of marriage to same-sex couples.” (DOMC App Br 60-65).

III. Proceedings Below and the Trial Court’s Judgment

The Revised Limited Judgment in this case provides for the following remedy to cure the Article I, section 20 violation found by the trial court:

* * * 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 marriage [*sic*] 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.

(ER-425).

IV. The Trial Court Did Not Err in Giving the Legislature an Opportunity to Remedy the Constitutional Violation

A. Remedying an Article I, section 20 violation requires the court to determine what the legislature would have intended

In *Hewitt*, 294 Or at 51, this court adopted a two-step “analytical framework by which the appropriate remedy [for an Article I, section 20 violation] may be assessed.” The court first “examine[s] the legislative purpose in providing benefits under the challenged statute,” and then it “resolve[s] what the legislature would have done if faced with the invalid statute[.]” *Hewitt*, 294 Or at 51. The *Hewitt* court applied this analytical framework to extend the workers’ compensation benefits at issue to men, because the legislative record demonstrated that extending the benefits “most effectively fulfills the purpose of the legislation.” *Id.* at 54. Since *Hewitt*, this court has applied the same analysis in other cases to determine what the legislature “would have chosen” to do, had the legislature known that its initial choice violated the state’s constitution. See, e.g., *Salem College and Academy v. Employment Division*, 298 Or 471, 494, 695 P2d 25 (1985); *Employment Div. v. Rogue Valley Youth for Christ*, 307 Or 490, 497, 770 P2d 588 (1989). Applying that analysis here is complicated by the fact that the legal benefits of civil marriage do not present an “either/or” choice comparable to the choices at issue in *Hewitt*, *Salem College*, and *Rogue Valley*.

Plaintiffs and the County contend that Oregon law limits the court to two options: either extend marriage and all of its attendant benefits to same-sex couples or deny marriage to everyone. (See Plaintiffs App Br 40; County App Br 6-7). They then argue that extending marriage and all of its attendant legal benefits to same-sex couples is the appropriate remedy because: (1) the legislature would not have intended to abolish marriage for everyone; (2) the only alternative is to extend the privilege of marriage to same-sex couples; and (3) anything short of extending “marriage” to same-sex couples—e.g., a “civil union”—would itself be

unconstitutional. (Plaintiffs App Br 42-44; County App Br 18). DOMC argues that, if the court reaches the issue of remedy, the only available remedy is to declare that Oregon’s marriage statutes are unconstitutional and therefore void in their entirety. (DOMC App Br 6). DOMC reasons that the other alternative—extending the “privilege” of marriage to same-sex couples—would mean that marriage must be extended “to all consenting pairs—or even larger groups—of individuals.” (*Id.*).

As explained below, this court never has held that the court is limited to only two choices in fashioning a remedy, and neither of the options offered by the other parties is appropriate here under the unique circumstances presented by this case. Instead, this court should give the Oregon Legislature an opportunity to craft appropriate remedial legislation in the first instance. That approach is appropriate here because: (1) the legislature never has confronted the policy implications of either invalidating or extending *en masse* the legal benefits of civil marriage to same-sex couples; and (2) the wide range of legal benefits that accompany the status of being married in Oregon makes it impossible for the court to determine what the legislature would have chosen in each instance.

B. The court is not limited to choosing between invalidating the marriage laws or extending them to same-sex couples

In *Hewitt*, the court considered whether it had the constitutional *authority* to extend the workers’ compensation benefits at issue to the disfavored class after finding an Article I, section 20 violation. SAIF “urge[d] invalidation of the entire statute, arguing that whenever a statute is found unconstitutional, its invalidation is the only remedy[.]” *Hewitt*, 294 Or at 50. This court, after reviewing decisions from other jurisdictions, disagreed, finding that “there is no universal rule compelling invalidation of constitutionally defective statutes.” *Id.* at 51. Rather, those decisions “affirm that courts are not without power to repair such statutes in appropriate circumstances.” *Id.* The court also found “equally strong support for

the proposition that courts are empowered to extend underinclusive statutes from the United States Supreme Court.” *Id.* at 51-52 (citing *Welsh v. United States*, 398 US 333, 361, 90 S Ct 1792, 26 L Ed 2d 308 (1970) (Harlan, J., concurring)). Thus, the court concluded that its “analysis appropriately includes consideration of the remedial alternative of extension of benefits to the excluded class.” *Id.* at 53.

The court’s conclusion that it was “empowered to extend underinclusive statutes,” means that extension is *a* permissible option. It does not mean that extension or invalidation are the *only* permissible options.² The other cases cited by plaintiffs do not support the proposition that the court has limited the range of permissible remedies to invalidation or extension of the statute at issue. In *Crocker and Crocker*, 332 Or 42, 22 P3d 759 (2001), the court found no Article I, section 20 violation, so it did not even address the question of remedy. In *Zockert v. Fanning*, 310 Or 514, 524, 800 P2d 773 (1990), and *Rogue Valley*, 307 Or at 497, the court merely applied the principle established in *Hewitt* – *i.e.*, extending an underinclusive statute is a permissible remedy where the court believes that “the legislature would have chosen to include” the disfavored class under the circumstances.

Thus, the court never has said that, in such cases, it is limited to only two remedial options.³ Rather, the court retains flexibility to “follow the course which would be least

² Plaintiffs suggest that the *Hewitt* court “specifically considered and emphatically rejected” the option of giving the legislature an opportunity to enact remedial legislation. (Plaintiffs App Br 41). That is incorrect. The *Hewitt* majority rejected the position, advanced by Justice Peterson in dissent, that extending the statute to include the disfavored class amounted to judicial “legislating” that would “violate the separation of powers clause of the Oregon Constitution.” *Hewitt*, 294 Or at 58 (Peterson, J., concurring in part, dissenting in part). That does not preclude this court from giving the legislature an opportunity to craft remedial legislation in this case.

³ The other case cited by plaintiffs—*State ex rel Bushman v. Vandenberg*, 203 Or 326, 334-35, 280 P2d 344 (1955)—stands for the unremarkable propositions that courts are prohibited from exercising legislative powers and that the legislature is prohibited from exercising judicial power.

disruptive of the statutory scheme.” Note, *Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 Colum J L and Soc Probs 115, 146 (1975). That is “similar to the flexibility that the courts have long exercised in extending the scope of the common law.” *Id.* And, as explained below, a remedial option that gives the legislature an opportunity to address the policy implications in the first instance is uniquely appropriate in this case.

C. **Giving the legislature an opportunity to craft implementing legislation would be an appropriate remedy in this case**

The appendix to plaintiffs’ brief lists 68 statutory rights, responsibilities, benefits, obligations, and protections that Oregon law automatically grants to persons who are married. (*See* Plaintiffs App Br, App 3-6). If the current statutes violate the constitution, then each statute presents a separate policy choice: Would the legislature have chosen to extend the statutory benefit to same-sex couples or to withhold the benefit from married opposite-sex couples? The legislature never has considered the policy implications of withdrawing *en masse* all of the current benefits from married opposite-sex couples. Nor has it ever attempted to craft a constitutionally permissible allocation of some or all of these benefits to same-sex couples on the same terms that they are afforded to opposite-sex married couples.

The current statutory limitation of civil marriage to opposite-sex couples has existed essentially unchanged since 1854.⁴ There is no evidence that the 1854 Territorial Assembly considered the possibility or prospect of same-sex marriage. Nor has any Legislative Assembly since 1854 considered the policy implications of same-sex marriage. If such a fundamental change in public policy is to be made in Oregon, the legislature should have the

⁴ *See, e.g.*, Section 6 of “An Act Relating to Marriage and Divorce,” adopted by the Oregon Territorial Assembly in 1854. Statutes of Oregon, 492-94 (1854).

first opportunity to consider and resolve it. This may include extending some benefits, withholding others, or crafting a “civil union” statute or other mechanism that gives same-sex couples an opportunity to access the legal benefits of civil marriage on the same terms as opposite-sex couples who marry.

Adopting a flexible remedy that gives the legislature an opportunity to address the policy issues finds support in recent decisions of the Supreme Courts of Vermont and Massachusetts in cases presenting similar circumstances and questions. In *Baker v. Vermont*, 170 Vt 194, 744 A2d 864 (1999), the Vermont Supreme Court declined to extend Vermont’s marriage license statute to include same-sex couples. The court explained that there may be “a number of potentially constitutional statutory schemes[.]” *Baker v. Vermont*, 744 A2d at 886. The options discussed by the Vermont court

include what are typically referred to as ‘domestic partnership’ or ‘registered partnership’ acts, which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registration scheme, and extend all or most of the same rights and obligations provided by the law to married partners. *Id.*

The Vermont court declined to “endorse any one or all” of those options because doing so would “infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing [the] constitutional mandate[.]” *Id.* at 886-87.

The majority opinion in *Baker v. Vermont* also rejected the dissent’s assertion “that granting the relief requested by plaintiffs—an injunction prohibiting defendants from withholding a marriage license—is our ‘constitutional duty.’” *Id.* The majority explained that such an assertion

appears to assume that we hold plaintiffs are entitled to a marriage license. We do not. We hold that the state is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. That the state could do

so through a marriage license is obvious. But it is not required to do so[.]

Id. Instead of ordering the immediate extension of Vermont’s marriage license laws to same-sex couples, the Vermont Supreme Court held “that the current statutory scheme shall remain in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion.” *Id.* The court explained that such a remedy is “prudent” in order to “avoid the uncertainty that might result during the period when the Legislature is considering potential constitutional remedies[.]” *Id.* at 887 n 15. The Massachusetts Supreme Court took a similar approach in *Goodridge v. Dept. of Public Health*, 440 Mass 309, 798 NE2d 941 (2003). There, the court stayed entry of judgment “for 180 days to permit the Legislature to take such action as it may deem appropriate” in light of the court’s ruling on the constitutional issue. *Id.*, 798 NE2d at 970.

If this court holds that the current Oregon laws denying to same-sex couples the legal benefits incident to civil marriage violate Article I, section 20, this court need not implement either of the two remedial options urged by plaintiffs and the County. Rather, this court can and should craft a remedy that gives the Oregon Legislature a reasonable opportunity to take appropriate action, an approach which is entirely consistent with the principles that guided the court’s determination of remedy in *Hewitt*.

D. The court should not decide whether a “civil union” statute would violate Article I, section 20

Plaintiffs contend that “shunting” same-sex couples into civil unions would amount to “segregation” that would violate Article I, section 20. (*See* Plaintiffs App Br 44). But it would be premature for this court to rule in advance on the constitutionality of a civil union statute, or any other remedial legislation that might be enacted, if the court were to determine that the current laws are unconstitutional. This court “cannot render advisory opinions.”

Brown v. Oregon State Bar, 293 Or 446, 449, 648 P2d 1289 (1982). As the court recently concluded in *Yancy*, the “judicial power” is limited to deciding controversies that are presently justiciable, and “[e]ncompassed within the broad question of justiciability are a constellation of related issues, including standing, ripeness and mootness.” *Yancy*, 337 Or at 347, 349.

The constitutionality of a “civil union” statute that is yet to be enacted, and may not be enacted, is a question that is not yet justiciable. Unless and until the legislature acts, it is impossible to know whether remedial legislation might be unconstitutionally “stigmatizing,” whether the legislature would craft a “civil union” system for same-sex couples that is completely separate from the current marriage laws, or whether any “separate” system would not be sufficiently “equal” to satisfy the Oregon Constitution.⁵ This court should decline to opine in advance on the constitutionality of civil unions, or any other remedy that might be considered by the legislature.

E. The court should not decide whether laws prohibiting polygamous or incestuous relationships would violate Article I, section 20

DOMC argues that invalidating the marriage statutes is the only remedy available in this case and reasons that, if Article I, section 20 requires extending the privilege of marriage to same-sex couples, then it also requires the court to recognize the validity of polygamous and incestuous “marriages.” (See DOMC App Br 61-63). However, the premise of DOMC’s argument is incorrect. As explained in the state’s opening brief and above, Article I, section 20 prohibits the legislature – by means of a single policy decision – from granting *all* of the

⁵ For example, the legislature could choose to abolish “marriage” licenses altogether, replacing them with “civil union” licenses for both same-sex and opposite-sex couples. Or it could retain “marriage” licenses and also provide for “civil union” licenses that could be made available to both same-sex couples and opposite-sex couples. Until the legislature acts, it is impossible for the state to predict, or for this court to decide, whether the remedial legislation the legislature enacts will comply with Article I, section 20.

legal benefits of civil marriage to opposite-sex couples and denying *all* of them to same-sex couples. But, that does *not* mean that marital status must be extended to same-sex couples.

Furthermore, analysis of the current laws prohibiting polygamous or incestuous “marriages” would involve issues that are significantly different from those involved in this case.⁶ And the constitutional validity of those limitations has not been challenged in this case. DOMC’s hypothetical argument does not present any justiciable controversy in this case. *See Yancy*, 337 Or at 347, 349; *Brown*, 293 Or at 449.

ANSWER TO DOMC’S ASSIGNMENT OF ERROR NO. 1

The trial court did not err in applying Article I, section 20 to this case.

I. Standard of Review

The correct construction and application of an original provision of the Oregon Constitution is a question of law. *See, e.g., State v. Cavan*, 337 Or 433, 98 P3d 381 (2004) (construing Article I, section 11).

II. DOMC’s “Historical Exception” Argument

DOMC asserts that this court’s opinions establish an “historical exception doctrine” by which “history wins out over the pure language of the Constitution.” (DOMC App Br 20). From the premises that such an exception exists, has the effect DOMC claims for it and applies in the same way to every section of the Oregon Constitution’s Bill of Rights, and based on DOMC’s observation that the framers themselves (if asked) would have said in

⁶ Among other things, incestuous “marriages” would need to be evaluated in light of the legitimate state interests in public health, including the genetic concerns about the children born to parents who are, by blood relationship, first cousins or closer kin. Polygamous “marriages” would need to be evaluated in light of the legitimate state interests in an orderly society — *e.g.*, multiple-partner relationships would present a very different set of questions and policy choices about intestate succession rules, the testimonial privilege, and numerous other marital benefits that are based upon a two-party relationship. *See Potter v. Murray City*, 760 F2d 1065, 1070 (10th Cir), *cert den*, 474 US 849, 106 S Ct 145, 88 L Ed2d 120 (1985) (“the State is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship”).

1857 that “marriage” is “between one man and one woman,” DOMC asks this court to conclude that laws restricting marriage to opposite-sex couples are “historical exceptions to any provision in the Constitution which would tend to call them into question, including Article I, section 20.” (DOMC App Br 24).

III. DOMC’s Analysis of Article I, section 20, Is Contrary to This Court’s Methodology for Construing Original Provisions of the Oregon Constitution

In *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992), this court succinctly described the correct analytical framework for construing and applying the text of original provisions of the Oregon Constitution:

There are three levels on which that constitutional provision must be addressed: Its specific wording, the case law surrounding it, and the historical circumstances that led to its creation.

Since *Priest*, this court repeatedly has explained the foregoing methodology and its purpose.

In *State v. Rogers*, 330 Or 282, 296-97, 4 P3d 1261 (2000), for example, the court described, as follows, its approach to the construction of Article I, section 11:

[We] consider the specific wording of Article I, section 11, the historical circumstances that led to its creation, and the case law surrounding it. *See Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992) (setting out methodology). Our goal is “to understand the *wording* in the light of the way [the] *wording* would have been understood and used by those who created the provision,” *Vannatta v. Keisling*, 324 Or 514, 530, 931 P2d 770 (1997), and *to apply faithfully the principles embodied in the Oregon Constitution to modern circumstances as those circumstances arise. See, e.g., State v. Delgado*, 298 Or 395, 400-03, 692 P2d 610 (1984) (applying the principle embodied in the “right to bear arms” to weapons analogous to those in existence in 1857).

(Emphasis added; brackets in original). This court most recently affirmed this framework in *Cavan*, 337 Or at 441, and there reiterated that the court’s goal is “faithfully to apply the principles embodied” in the original provisions of the state constitution “to modern circumstances”:

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 v. Fred Meyer*, 331 Or 38, 54-55, 11 P3d 228 (2000) (quoting *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992)). 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) considering the case law interpreting the provisions; (3) and reviewing the historical circumstances that led to their creation. *Priest*, 314 Or at 415-16. In addition, the court’s goal is faithfully to apply the principles embodied in those provisions to modern circumstances as they arise. *State v. Rogers*, 330 Or 282, 297, 4 P3d 1261 (2000).

DOMC’s argument in support of its first claim of error does not apply this court’s now well-established methodology for construing original provisions of the constitution. Instead, DOMC advances a form of historic absolutism that not only misapprehends the significance of “historical circumstances,” but also overrides (if not ignores) the other elements required by the court’s analytical framework. In the argument below, the state applies that framework in order to respond to DOMC’s arguments.

A. The text and context of Article I, section 20

Article I, section 20, provides:

No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not belong to all citizens.

1. The terms “privileges” and “immunities,” as they would have been understood by the framers, are broad enough to encompass the legal incidents of civil marriage

By its terms, section 20 prohibits the legislature from enacting laws granting “privileges,” or “immunities” to individual citizens or to “classes of citizens,” unless the “privileges” or “immunities” are available (or “belong to”) every “citizen” “upon the same terms.” But the section does not expressly limit, define, or otherwise specify the meaning or scope of the terms “citizens,” “privileges,” or “immunities,” all of which terms are key to the

resolution of this case.⁷ Other sections of the constitution *do* identify the “privileges” protected by their terms, *see, e.g.*, Article I, section 23 (circumstances under which the “privilege” of the writ of habeas corpus may be suspended); Article II, section 13 (specifying certain “privileges” of electors), but section 20 does not.

When construing original provisions of the constitution, this court has referred to “dictionaries that were available to the framers when they drafted [those provisions]” to determine “what the framers likely understood [the] terms” therein “to mean,” and two of those dictionaries are “John Bouvier’s 1839 law dictionary and Noah Webster, *An American Dictionary of the English Language* (Johnson 1828).” *See Cavan*, 337 Or at 441-42 (construing Article I, section 11, and referring to both dictionaries to analyze the section’s text and context). *See, e.g., State v. McNab*, 334 Or 469, 476, 51 P3d 1249 (2002) (observing that, “[a]lthough the text of Article I, section 21, does not reveal the conceptual contours of ‘punishment,’ the framers had available to them [Bouvier’s 1839 law dictionary] that contained” a “comprehensive definition of punishment,” and concluding that “[n]otably, each form of noncorporate punishment within that definition imposes on the offender some detriment, restraint, or deprivation that is intended to deter the offender and others from committing future offenses”); *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 92, 23 P3d 333 (2001) (referring to both dictionaries to determine the meaning of the term “remedy,” as intended by the framers of Article I, section 10).

⁷ “State and federal constitutions provide the basic blueprints for our systems of government, allocating powers, obligations, and rights among federal and state governments and their citizens. The blueprints, however, provide little detail. To the contrary, they are exasperatingly blurry in many key respects. * * * [The] Oregon Constitution provides that no citizen may be denied ‘equal privileges or immunities.’ But it fails to provide a list of what constitutes a ‘privilege’ or an ‘immunity.’” J. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation* [79 Or L Rev 793, 796](#) (2000).

Like the plain language of the text itself, the definitions in these sources do not specifically limit the scope of the “privileges” and “immunities” encompassed by Article I, section 20. Bouvier’s 1839 law dictionary defined “immunity” to be “[a]n exemption to serve in an office, or to perform duties which the law generally requires other citizens to perform,” and defined “privilege” (when used in the sense of “rights”) as follows:

PRIVILEGE, *rights*. This word taken in its active sense is a particular law, or a particular disposition of the law, which grants certain special prerogatives to some persons, contrary to common right. In its passive sense, it is the prerogative granted by the same particular law. Examples of privilege may be found in all systems of law: members of congress and of the several legislatures, during a certain time, parties and witnesses while attending court, and coming to and returning from the same, electors, while going to the election, remaining on the ground, or returning from the same, are all privileged from arrest, except for treason, felony or breach of the peace.

John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America* 482, 298 (1839). Webster’s definitions of the two terms are set out below, in relevant part:

IMMUNITY, *n.* * * * 1. Freedom or exemption from obligation. To be exempted from observing the rites or duties of the church, is an *immunity*.

2. Exemption from any charge, duty, office, tax or imposition: a particular privilege; as the *immunities* of the free cities of Germany; the *immunities* of the clergy.

3. Freedom; as an *immunity* from error.

* * * * *

PRIVILEGE, *n.* * * * 1. A particular and peculiar benefit or advantage enjoyed by a person, company or society, beyond the common advantages of other citizens. A privilege may be a particular right granted by law or held by custom, or it may be an exemption from some burden to which others are subject. The nobles of Great Britain have the *privilege* of being triable by their peers only. Members of parliament and of our legislatures have the *privilege* of exemption from arrests in certain cases. The powers of the banking company are *privileges* granted by the legislature. * * *.

2. Any peculiar benefit or advantage, right or immunity, not common to others of the human race. Thus we speak of national *privileges*, and civil and

political *privileges*, which we enjoy above other nations. We have ecclesiastical and religious *privileges* secured to us by our constitutions of government. *Personal privileges* are attached to the person; as those of ambassadors, peers, members of legislatures, &c. *Real privileges* are attached to place; as the *privileges* of the king's palace in England.

3. Advantage; favor; benefit.

Noah Webster, *An American Dictionary of the English Language*, s.v. “Immunity” and “Privilege” (Johnson, 1828) (emphasis in original). These dictionary definitions of the term “immunity” and the term “privilege” are dependent on the interaction and relationship of the defined terms with other elements of law. And none of these definitions establishes a fixed content for the terms “immunity” or “privilege.”

Thus, the words “privileges” and “immunities,” as they probably were understood when the Oregon Constitution was drafted, referred generally to those rights and protections that set a citizen apart from his or her fellow citizens and allowed him or her to do or have something that could not be done or had by all on the same terms. The many legal benefits married persons now “automatically” receive fit well within the parameters of “privileges” and “immunities,” so defined and understood. Many such benefits give one spouse a privileged position with respect to the party to whom she or he is married, while others give married partners special prerogatives contrary to common right. For example: What is commonly referred to as the marital “privilege,” is, under Bouvier’s definition, an immunity from the requirement to testify when the law would generally require one to do so. The prerogative to claim a marital share of the assets of an estate certainly meets Bouvier’s definition of a privilege in that the spouse may claim that which others in common right may not. Consequently, most (if not all) of the legal incidents of marriage provided under current law constitute privileges, and immunities, as those words would have been understood by the framers of Article I, section 20.

2. The framers did not intend to limit the term “citizen” in Article I, section 20 only to those who were citizens in 1857

The framers used the term “citizen” differently in other parts of the constitution of 1857, and those differences help to illuminate its meaning as used in Article I, section 20. In some provisions, they expressly limited the scope or content of the term by using specific identifying characteristics to describe those to whom the term applied. The original Article I, section 31 stated that “white foreigners” who became residents of Oregon were to enjoy the same property rights as “native born citizens.”⁸ The original Article II, section 2 limited the right to vote in elections other than those specified in the constitution to “white male citizen[s] of the United States” and to certain persons who declared their intention to “to become a citizen of the United States.”⁹ In contrast, the text of Article I, section 20 does not limit its application to “citizen of the United States,” to “native born citizens” or to “white males.”

⁸ Original Article I, section 31 provided:

White foreigners who are, or may hereafter become residents of this State shall enjoy the same rights in respect to the possession, enjoyment and descent of property as native born citizens. And the Legislative Assembly shall have power to restrain, and regulate the immigration to this State of persons not qualified to become citizens of the United States.

⁹ Original Article II, section 2 stated:

In all elections, not otherwise provided for by this Constitution, every white male citizen of the United States, of the age of twenty-one years, and upwards, who shall have resided in the State during the six months immediately preceding such election; and every white male of foreign birth of the age of twenty-one years, and upwards, who shall have resided in the United States one year, and shall have resided in this State during the six months immediately preceding such election, and shall have declared his intention to become a citizen of the United States, one year preceding such election, conformably to the laws of the United States on the subject of naturalization shall be entitled to vote at all elections authorized by law.

The framers’ use of the phrase “native born citizen” in original Article I, section 31 and their use of the phrase “white male citizen” in original Article II, section 2, indicates that they understood the term “citizen” — standing alone — to mean something more than (or different from) a static, closed group or class. Thus, their adoption of Article I, section 20, which uses the open-ended and unqualified term “citizen” shows an intent *not* to limit the protections of section 20 to the “native born,” to “white male[s],” or to any other subset of those who could (either at the time or in the future) become citizens. The debates that occurred at the time of the adoption of the Oregon Constitution in fact bear this out. (*See* discussion below at pages 41-42). At that time, Bouvier’s 1839 law dictionary defined “citizen” in a way that is consistent with that intent and understanding:

CITIZEN, *persons*. One who, under the constitution or laws of the United States, has the right to vote for representatives in congress and other public officers, and who is qualified to fill offices in the gift of the people. Citizens are either native born or naturalized. Native citizens may fill any office; naturalized citizens may be elected or appointed to any office under the Constitution of the United States, except the office of president. The constitution provides that “the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.” [Citations omitted.]

John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America* 178-79 (1839).

3. Conclusions from the text and context of Article I, section 20

Analysis of the text and context of Article I, section 20 shows at least two things. First the terms “privileges” and “immunities” both were understood in 1857 to be expansive enough to apply to the legal benefits the legislature has from time to time granted to persons who marry. Second, the framers unquestionably knew that they were not imbuing the term “citizens” with a concrete, final, and immutable meaning. Thus, although the court could conclude that the text alone demonstrates that the current legal incidents of marriage are

“privileges” and “immunities,” the language of the sections is not necessarily so definite that its meaning can be determined by reference to the words alone. Consequently, the state proceeds to a discussion of the court’s cases.

B. The case law construing and applying Article I, section 20

DOMC’s arguments also fail at this stage of the *Priest v. Pearce* methodology. Although DOMC does not acknowledge as much, its view of this court’s search for the intent of the framers of our constitution necessarily leads to an unjustifiably strict and unyielding jurisprudence of “original intent.” (DOMC App Br 15-20). That is, DOMC contends that, notwithstanding the text of the provision at issue or developments in society and the law since the adoption of that text, this court has concluded that it must, always and without exception, decide every constitutional case as the court (or the framers) would have decided it in 1859. DOMC’s statement of the rule it says this court must apply is, as follows:

[T]he historical exception doctrine recognizes that in those situations where a constitutional phrase—no matter how bold or ringing in its assertion—could not have been intended by the framers to replace some legal, social or historic fact, then *history wins out over the pure language of the Constitution*.

(DOMC App Br 20) (emphasis added). That is not an accurate description of what this court has done. Rather, this court has used history to illuminate the principles embodied in the constitutional language. As described above, this court repeatedly has said that the ultimate goal of its interpretive process is to apply the principles embodied in the constitution to “modern circumstances.” Moreover, this court’s opinions construing the very provision at issue in this case cannot be harmonized with DOMC’s position.

DOMC’s “historical exception” argument relies primarily on this court’s decision in *State v. Robertson*, 293 Or 402, 412, 649 P2d 569 (1982), and other decisions applying

Article I, section 8, of the Oregon Constitution.¹⁰ This court’s use of the phrase “historical exception” in *Robertson* and in subsequent cases does *not* support DOMC’s conclusions about either the meaning or the application of that “doctrine” in this case. As discussed below, this court has expressly rejected the rigid historicism DOMC has embraced and urges this court to follow, and it is clear that the “historical exception doctrine” (as it is described by DOMC) is *not* part of this court’s methodology for construing original provisions of the Oregon Constitution.

In *Robertson*, this court did not apply the “historic exception” principle to determine how the framers would have decided that case. To the contrary, the court in *Robertson* took care to explain that

[c]onstitutional interpretation of broad clauses locks neither the powers of lawmakers nor the guarantees of civil liberties into their exact historic forms in the 18th and 19th centuries, as long as the extension remains true to the initial principle. *See, e.g., State v. Kessler*, 289 Or 359, 614 P2d 94 (1980) (definition of “arms” within Or Const art I, § 27); *State ex rel Russell v. Jones*, 293 Or 312, 647 P2d 904 (1982) (right to counsel); *Sterling v. Cupp*, 290 Or 611, 625 P2d 123 (1981) (“unnecessary rigor” under art I, § 13).

¹⁰ Article I, section 8 provides that “[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.” This court explained in *Robertson* that Article I, section 8

forecloses the enactment of any law written in terms directed to the substance of any “opinion” or any “subject” of communication, unless the scope of the restraint is wholly confined within some *historical exception* that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 were demonstrably not intended to reach.

Robertson, 293 Or at 412 (emphasis added). *See also, e.g., Higgins v. DMV*, 335 Or 481, 487, 72 P3d 628 (2003) (explaining that “petitioner * * * contends * * * that the administrative rule is invalid because it limits free speech on the basis of [its] content * * * and does not confine its prohibition to some well-established historical exception to the state free speech guarantee,” and citing *State v. Robertson*, 293 Or 402, 412, 649 P2d 569 (1982) as “stating analysis under * * * Article I, section 8, including historical exception doctrine”).

Robertson, 293 Or at 434.¹¹ The foregoing qualification applies equally to the other cases upon which DOMC relies in which this court uses the term “historic exception.”¹²

There is another, perhaps more fundamental, flaw in DOMC’s argument and the premises on which it rests. If the “historical exception doctrine” serves the purpose and has

¹¹ Thus, the *Robertson* court’s use of the phrase “historic exception” did not mean that the court was using “history” to trump the plain text, as DOMC contends. For example, in *Kessler*, which the *Robertson* court cites in the quote above, the court construed Article I, section 27, which provides that “[t]he people shall have the right to bear arms for the defend[s]e of themselves.” There, the court did not conclude that section 27 guaranteed the right to possess only those arms that the drafters would have recognized and protected in 1857. Rather, the court noted developments in weapons technology and concluded that certain weapons unknown to the enactors would still be within the ambit of section 27’s text. *Kessler*, 289 Or at 369. DOMC’s history-trumps-text argument also is rebutted by and is contrary to this court’s approach to the construction of Article I, section 10, in *Smothers v. Gresham Transfer*, 332 Or 83, 92, 23 P3d 333 (2001) (explaining that, “[a]s applicable to modern circumstances, the phrase ‘every man’ means every person”).

¹² In *Delgado v. Souders*, 334 Or 122, 46 P3d 729 (2002), *State ex rel Hathaway v. Hart*, 300 Or 231, 708 P2d 1137 (1985), and *State ex rel Dwyer and Dwyer*, 299 Or 108, 698 P2d 957 (1985), this court used historical facts to understand the words of Article I, section 11 (guaranteeing jury trials in all “criminal prosecutions”). None of these decisions support DOMC’s conclusion that “history wins out over the pure language of the Constitution.” (DOMC App Br 20). In *Delgado*, for example, after discussing the historical analogs to the Stalking Protective Orders (SPO) challenged in that case, the court explained:

In light of the foregoing, we conclude that the procedures set out in ORS 30.866 for obtaining an SPO fall within a historical exception to Article I, section 11, and, therefore, *cannot be characterized as a “criminal prosecution” within the meaning of that provision*. Accordingly, defendant was not entitled to the constitutional safeguards set out in that provision, such as the right to a jury trial.

Delgado, 344 Or at 141 (emphasis added). In its opening brief, DOMC substituted an ellipsis for the emphasized phrase from the complete excerpt reproduced above. The emphasized phrase is significant because it demonstrates that, in *Delgado*, this court was seeking to understand and apply the words “criminal prosecution” to the controversy it then faced. This court did not marshal historical evidence to trump text.

Nor does the decision in *Molodyh v. Truck Insurance Exchange*, 304 Or 290, 744 P2d 992 (1987), support DOMC’s claim. There, plaintiff contended that Article I, section 17, which provides for jury trials “in all civil cases,” guaranteed him a jury trial in his dispute with an insurance company over the value of the loss plaintiff sustained. The court agreed with the plaintiff. Because the holding was *consistent* with the text, *Molodyh* provides no support for the proposition that history “wins out” over the text of the constitution.

the effect that DOMC claims for it, this court certainly would have included and applied it by now as an integral part of the court's *Priest v. Pearce* methodology. But it has not done so. Indeed, the only case in which this court applies that methodology and even discusses *Robertson* and "historical exception[s]" is *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997), and there, the use of the "historical exception" principle is confined to determining the proper scope and application of Article I, section 8. See *Vannatta*, 324 Or at 529, 536-37.

Application of DOMC's rule that "history wins out over the pure language of the Constitution" would require this court to overrule its decisions in one or more cases applying Article I, section 20, including its decision in *Hewitt*. In *Hewitt*, 294 Or at 46, the court stated that "[t]he purposeful historical, legal, economic and political unequal treatment of women is well known." That characterization of the historical discrimination against women on the basis of their gender was, if anything, understated. Delegates and the constitution that they created in 1857 explicitly discriminated on the basis of gender in some of the most important attributes of citizenship. For example, women were denied the right to vote:

One delegate moved to expand the elective franchise, not to limit it. David Logan moved to strike the word "male" before the word "citizen," thus extending suffrage to women. The motion was rejected, without recorded debate.

Claudia Burton and Andrew Grade, *A History of the Oregon Constitution of 1857 – Part 1*, [37 Willamette L Rev 469, 572-73](#) (2001). As one historian has observed, Oregonians of 1857 certainly "did not see freed slaves, Indians, or women standing equally before the law." Steven Dow Beckham, *Oregon History*, Oregon Bluebook 357 (2003-2004).

In terms of the undeniably chauvinist history of the times, the case for an "historical exception" to Article I, section 20 that would allow for gender discrimination is at least as strong as it is for an historical exception that would, in effect, deny the privileges and

immunities of Article I, section 20 to same-sex couples. Nevertheless, in *Hewitt* this court held:

Accordingly, we hold that when classifications are made on the basis of gender, they are, like racial, alienage and nationality classifications, inherently suspect.

294 Or at 46. Notwithstanding that the authors of section 20 did not view women then as full citizens and would surely have decided *Hewitt* differently in 1857, this court nevertheless concluded that women were protected by that provision against most discriminations. In short, if DOMC’s “historic exceptions doctrine” exists and applies to Article I, section 20, then *Hewitt* was wrongly decided.¹³

C. Historical circumstances relevant to the adoption of Article I, section 20

Because the text neither forecloses the interpretation placed on Article I, section 20 by plaintiffs nor mandates the result urged by DOMC, and because this court’s case law interpreting and applying Article I, section 20 does not answer definitively the question presented in this case, the court must necessarily consider the historical circumstances surrounding Article I, section 20.

¹³ The constitution of 1857 discriminated against others as well. Article I, section 31, of the original Oregon Constitution provided that: “White foreigners who are, or who may hereafter become residents of this State” enjoyed the same property rights as native born citizens. Carey, *A History of the Oregon Constitution* 403 (1926). Article I, section 35 was added to the constitution by a vote of the people at the time of adoption. *Id.* at 404. It provided that no “free negro or mulatto” who was not a resident of the state at the time of the adoption of the constitution could ever enter the state, hold property here, enter into contracts, or maintain suits. It further directed the legislature to “provide by penal laws, for the removal, by public officers, of all such negroes, and mulattos, and for their effectual exclusion from the State, and for the punishment of persons who shall bring them into the state, or employ, or harbor them.” *Id.* at 430. Article II, section 6 provided: “No Negro, Chinaman, or Mulatto shall have the right of suffrage.” *Id.* at 404-05. As a result, if DOMC were correct, much of what is today taken for granted about the provision’s reach – including the proposition that Article I, section 20 prohibits the state from drawing racial lines between citizens or classes of citizens – would have to be abandoned.

Before beginning that examination, the state here clarifies what it claims for the historical evidence. The state does *not* claim from that evidence that the framers would have concluded in 1857 that their draft of Article I, section 20 would render unconstitutional the Territorial statutory restriction of marriage to opposite sex couples.¹⁴ The state *does* contend that the historical evidence supports the proposition that the framers’ use of open-ended terms was intentional and that they understood that future generations would fill the terms “citizens” and “privileges and immunities” with meaning. Thus, the historical circumstances surrounding the adoption of Article I, section 20 help to explain the absence of definitions for the key terms in section 20 and also establish a foundation for the continuation of this court’s modern approach to its interpretation of that constitutional provision.

The state’s historical analysis begins with the frank acknowledgment that if the framers of the Oregon Constitution had, in 1857, been asked whether restricting the legal incidents of marriage to opposite-sex couples denied same-sex couples a privilege in violation of Article I, section 20, they would have said that it did not. However interesting that question might be for professional historians, it is not the historical question that matters

¹⁴ *Amicus* Adamson cites and discusses Article XVIII, section 7 of the Oregon Constitution. (Adamson *Amicus* Br 7). The section states: “All laws in force in the Territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until altered, or repealed.” If *Amicus* Adamson’s citation and discussion of this section is for the purpose of establishing that Territorial laws limiting marriage to opposite-sex couples continued in force uninterrupted into statehood, then the state does not disagree. The state said as much in its opening brief. But *Amicus* Adamson claims far too much for Article XVIII, section 7, if his contention is that the section made all statutory distinctions between citizens constitutional. By its express terms, Article XVIII, section 7 continued all territorial laws in effect, only to the extent they were not in conflict with the newly effective constitutional provisions. Thus, Article XVIII, section 7 ensured that the newly-convened Legislative Assembly would not be required to begin its lawmaking function from scratch, and it avoided any possibility of a lawless gap arising between the end of the Territorial period and the initial operations of the new state. The provision continued laws in effect, but only to the extent consistent with the constitution. For these reasons, *Amicus* Adamson’s discussion of Article XVIII, section 7 begs the question of the meaning of Article I, section 20, particularly as applied to modern circumstances.

for this or any other case concerning the interpretation of Article I, section 20. The relevant historical question is how the history of Oregon can help the court understand the application of the open-ended text of Article I, section 20 to a controversy that almost certainly never occurred to the framers.

In posing that question, lawyers and judges must immediately confront the question of their competence to practice any form of historical research, regardless of the historical question to be examined. The conventional criticism of reliance on “law-office” history is based on the perceived tension between the fact that the advocate’s practice is to “pick and choose sources that will support a thesis” and the belief that historians attempt to “reconstruct the climate of an earlier generation.” *See, e.g.,* D. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 Yale LJ 1717, 1748 (2003).

The state has noted elsewhere the difficulty judges and lawyers may have when asked to evaluate historical evidence. (*See, e.g.,* State’s Brief on the Merits in *State v. Ciancanelli* (S49707) at 49). Historical evidence often leaves ample room for judgment and dispute.¹⁵

¹⁵ Of course, indisputable historical facts do exist. *Amicus* Adamson correctly asserts that “underlying historical truth,” about which there can be no controversy and no room for dispute, does exist. The date on which Oregon was officially admitted to the Union is one example. But the derivation of the framers’ intent from such facts is far less susceptible to dogmatic pronouncements than *Amicus* Adamson’s discussion of Indiana’s 1851 Constitution would suggest. He harnesses a recitation of such facts to the proposition that the framers intended Article I, section 20 of the Oregon Constitution to have a singular, exclusive, and specific meaning that precludes its application to any controversy akin to a claim for equal protection of the laws arising under the United States Constitution. His recitation of the facts is incomplete, and his conclusion is both illogical and contrary to this court’s established jurisprudence. It is incomplete, because it fails to inform this court of the broader historical context within which the framers did their work. That historical context is detailed in this brief. His conclusion is illogical, because it assumes that the framers of Article I, section 20 could only have had *one* purpose for the section. Assuming *arguendo* that the interpretation placed on Indiana history by an Indiana court in 1994 can be transferred uncritically to the Oregon Constitution, there is nothing in that history or in that interpretation negating the possibility that the framers intended Article I, section 20 to serve more than one purpose. The broader view of the framers’ intentions that the state derives from the more complete historical context easily coexists with *Amicus* Adamson’s recitation

Nevertheless, as described above, this court’s methodology for understanding the framers’ intent requires parties to marshal and the court to evaluate historical evidence. The state has never asserted that lawyers and judges cannot bridge the gap between the skills of the historian and the skills necessary to invoke history in the analysis of the Oregon Constitution.¹⁶

In its opening brief, the state began the assessment of the relevant historical evidence with an examination of the form of historical evidence specified by the court in its question. The state noted in that brief that it consciously limited its response to the narrow focus of the court’s question – *i.e.*, whether “the history of Article I, section 20, including its predecessors in other states, assist in answering [the] question” “what characteristics of those persons” whom Oregon law allows to marry “demonstrate that they are a favored ‘class of citizens’ within the meaning of Article I, section 20.”

of historical facts. And *Amicus* Adamson candidly and accurately admits that his interpretation of our history would require this court to overrule many of its prior applications of Article I, section 20. (Adamson *Amicus* Br 11). *Amicus* Adamson does not cite it, but *Hewitt* surely would be one of the cases this court would be required to repudiate should his interpretation of the framers’ intent be accepted by this court.

¹⁶ Professional historians apply their expertise to construct a coherent picture of the past as it really was “and of events as they really happened.” R. G. Collingwood, *The Idea of History* 246 (1956). Collingwood went on to describe what he characterized as the “most important” characteristic of the historian’s work in terms that could as easily describe a lawyer’s task on behalf of a client:

[T]he historian’s picture stands in a peculiar relation to something called evidence. The only way in which the historian or any one else can judge, even tentatively, of its truth is by considering this relation; and, in practice, what we mean by asking whether a historical statement is true is whether it can be justified by an appeal to the evidence: for a truth unable to be so justified is to the historian a thing of no interest.

The processes of selecting, acquiring, presenting, and testing “evidence” are as familiar to lawyers as they are to historians. In this light, the criticism of law-office history is less a critique of the lawyer’s capacity to invoke historical evidence than it is of the rigor with which that is done.

In applying its framework for analysis of provisions in the original constitution, this court has not limited itself to the state constitutional antecedents to the Oregon Constitution. Instead, as it did most recently in *Yancy*, 337 Or at 356-58, the court has drawn on a wide array of sources to understand the historical circumstances surrounding a given provision of the original constitution. These have included secondary historical sources such as the writings of historians or commentators, “contemporary secondary sources,” United States Supreme Court case law, and primary sources such as the records compiled during the constitutional convention itself. In this answering brief, the state draws on some of the much wider array of historical sources that shed light on the application of Article I, section 20 to modern circumstances.

From 1805 — when the Lewis and Clark expedition established Fort Clatsop — to 1857 — when the delegates met in convention in Salem — residents of the territory that was to become the State of Oregon experienced almost continuous change in the basic institutions of society. In the course of confronting those changes, proto-Oregonians confronted and debated variants on the core issues in this case. In light of that history, it is no surprise that the framers left to future generations the responsibility of giving content to the “privileges” and “immunities” that cannot be unequally granted to citizens.

Between 1805 and 1860, the non-indigenous population of the territory exploded. Most of the growth occurred in the 15 years immediately preceding the convention.¹⁷ As late as 1838 there may have been as few as “51 adult male white inhabitants in the Willamette

¹⁷ The state acknowledges that this court has invoked state constitutional “privileges and immunities” clauses from the early 1800s in its historical analysis of the “precedents” to Article I, section 20. America was a dramatically different place in 1859 than it was when the first of these state constitutions were adopted. At the very least, these changes should signal caution about uncritically transferring the intent of the drafters of a state constitution adopted in the 1820s to one drafted in 1857, even where the words used in each are similar or even identical.

Valley – 23 French-Canadians, 18 American ‘stragglers’ from California or former trappers, and 10 American missionaries.” J.A. Hussey, *Champoege –Place of Transition* 115 (1967).

In the fall of 1842 the first substantial and organized body of American emigrants to reach Oregon arrived in the Willamette Valley after an overland journey from the Missouri frontier * * * . A number of these newcomers settled at Oregon City, pushing it in a few months from a hamlet of three or four structures to a respectable town containing more than thirty buildings.

Hussey, *Champoege* at 104. By 1860, less than two decades after emigration began in earnest, 52,465 persons had poured into the state. Oregon Bluebook 6 (2003-2004).

The structure of government also changed continuously in the decades before the convention met. For the American settlers, at least, the changes were part of an unbroken effort to join the United States. From the beginning, settlers expected the future to be one in which basic political institutions were different than the ones that had prevailed in the past.

As early as 1838, the Reverend Jason Lee traveled to Washington D.C. with a petition, signed by over half of the adult males then residing in the Willamette Valley, urging Congress to extend the jurisdiction of the United States over Oregon. In a subsequent petition to the same effect, American residents of the territory explained that:

Laws are to protect the weak against the mighty, and we feel the necessity of them in the steps that are constantly taken by the Hon Hudsons Bay Co in their opposition to the improvement and enterprize (sic) of American Citizens.

Petition to United States Senate, March 25, 1843, reprinted in D. Duniway and N. Riggs, *The Oregon Archives, 1841 – 1843*, 228 Oregon Historical Quarterly June, 1959. A writer who visited the Willamette Valley in 1839 and a few years later reported on his visit described the sentiment of American settlers in the following terms:

During my tarry [in the Willamette Valley], several American citizens unconnected with the mission, called on me to talk of their fatherland, and inquire as to the probability that its laws would be extended over them. The constantly repeated inquiries were, “Why are we left without protection in this part of our country’s domain? Why are foreigners permitted to domineer over American citizens, drive their traders from the

country, and make us as dependent on them for the clothes that we wear as are their own apprenticed slaves?”

* * * * *

Their condition is truly deplorable. They are liable to be arrested for debt or crime, and conveyed to the jails of Canada! Arrested on American territory by British officers, tried by British tribunals, imprisoned in British prisons, and hung or shot by British executioners! They cannot trade with the Indians. For, in that case, the business of British subjects is interfered with, who, by way of retaliation, will withhold the supplies of clothing, household goods, & c., which the settlers have no other means of obtaining.”

Thomas J. Farnham, *Travels In The Great Western Prairies: The Anahuac and Rocky Mountains and in the Oregon Territory* 89 (1843).

Lee and other residents of the valley engaged in repeated efforts to create for themselves a self-governing legal structure. In 1841, the first effort collapsed as a result of “disagreements between French-Canadians and Americans about the form of self-government and its powers * * * .” Oregon Bluebook 350 (2003-2004). On May 2, 1843, the settlers created a Provisional Government at an open-air meeting at Champoege on the south bank of the Willamette in modern-day Marion County. Five years later, the governing legal structure changed again when President Polk signed the Act creating the Oregon Territory and establishing the first federal government for the territory. Hussey, *Champoege* at 171.

National political and legal developments during Oregon’s territorial phase form another part of the historical circumstances surrounding the drafting and enactment of Article I, section 20. These currents in our history also support the conclusion that the framers had a broader vision for the future of Article I, section 20 than DOMC’s interpretation allows.

The phrase “privileges and immunities” is not unique to state constitutions. Rather, it appeared first in the Fourth of the Articles of Confederation, and then in Article IV, section

2, of the United States Constitution, which states: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” While this provision was intended to ensure that the several states did not discriminate against each other’s citizens, that states chose this same language for their own constitutions can hardly be ascribed to mere coincidence. Thus, the general understanding of those terms at the time the Oregon Constitution was written cannot be ignored.¹⁸

The most authoritative construction of the federal constitutional provision was the opinion of Justice Bushrod Washington of the United States Supreme Court, while sitting on circuit, in *Corfield v. Coryell*, 6 F Cas 546 (1823). Justice Washington explained that the clause protected fundamental rights.

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one

¹⁸ *Amicus* Adamson criticizes this court for misunderstanding the relationship between Article I, section 20 and the “privileges and immunities” clause in Article IV, Section 2, of the United States Constitution. (Adamson *Amicus* Br 22-24). It is important to note that the state does not claim here that the United States Supreme Court’s interpretations of that “privileges and immunities” clause should simply be transferred to the similarly worded provision in the Oregon Constitution in the way that *Amicus* Adamson contends this court incorrectly did in *State v. Randolph*, 23 Or 74, 31 P 201 (1892). The state agrees that the United States Supreme Court’s interpretation of a provision in the United States Constitution cannot control this court’s interpretation of even an identical provision in the Oregon Constitution. Instead, we describe the contemporaneous understanding of the phrase “privileges and immunities” as part of the historical context in which Article I, section 20 was drafted and would have been understood by its drafters and by the people who adopted it.

state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) “the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.”

Corfield, 6 F Cas at 551-52.

This was unquestionably the most influential statement on the subject before the Civil War. Justice Story cited *Corfield* in the first edition of his treatise on the Constitution. 3 Story, *Commentaries on the Constitution*, 673-75 (1833).¹⁹ The authors of the Privileges and Immunities Clause of the Fourteenth Amendment discussed it. See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan L Rev 5, 10-18 (1949); Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment*, 30-36 (1977). All the opinions in the *Slaughterhouse Cases*, 83 (16 Wall) US 36, 21 L Ed 394 (1872), cited *Corfield* with approval.

The majority opinion in the *Slaughterhouse Cases* looked at the history of the phrase and explained that “privileges and immunities” were “civil rights”:

The first occurrence of the words “privileges and immunities” in our constitutional history, is to be found in the fourth of the articles of the old Confederation.

¹⁹ Significantly, delegates to Oregon’s constitutional convention not only were aware of Story’s work, but also quoted it during debate. (See discussion below at pages 41-42).

It declares “that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively.”

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: “The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.”

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of *Corfield v. Coryell*, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1825. [Footnote omitted]

[The opinion quotes much of the same language from *Corfield* quoted above].

This definition of the privileges and immunities of citizens of the States is adopted in the main by this court in the recent case of *Ward v. The State of Maryland*, [79 US (12 Wall) 418, 430, 20 L Ed 452 (1871)], while it declines to undertake an authoritative definition beyond what was necessary to that decision. *The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted.* They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure.

83 US at 75-76 (emphasis added).²⁰

The contemporary understanding of the scope of the term “privileges and immunities” is further illuminated by consideration of the escalating national conflict over the extension of slavery and the civil rights of freed slaves. The conflict took pointed legal form in *Dred Scott v. Sandford*, 60 US 393 (1857), decided on March 6, 1857, about four months before residents of the Territory of Oregon decided to hold a constitutional convention. Dred Scott, a slave who had resided with his master in a territory in which slavery was prohibited, filed a lawsuit in federal district court alleging that he was a citizen of Missouri, while his master, whom Scott alleged had committed an assault on Scott and his family, was a citizen of New York. The defendant “pleaded in abatement to the jurisdiction of the court, that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves.” *Dred Scott*, 60 US at 400. When the case reached the United States Supreme Court, that court said the plea in abatement required it to decide “whether the facts stated in the plea are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States.” *Id.* at 403. The court went on to frame the question it believed it faced:

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States,

²⁰ This discussion is taken almost in its entirety from the state’s “Memorandum in Response to Questions,” in *Salem College*, 298 Or at 695 . In that case, the court described the state’s argument as “interesting,” but rejected it on the ground that the court’s modern section 20 cases “ha[d] not held it necessary to characterize some rights as fundamental before testing such favoritism under Article I, section 20.” 298 Or at 488 n 13. The court’s more recent emphasis on the intentions of the enactors, however, should make the mid-nineteenth century understanding of what “privileges and immunities” were more persuasive today.

and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen?

The court asserted that the case involved only the authority of the United States Congress to extend freedom to slaves residing in a *territory*. *Id.* at 432. It held:

[It] is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.

Id. at 452. Although the court asserted that the question to be decided had no implications for a state's "undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights", *id.* at 405, no less sagacious a lawyer than Abraham Lincoln thought the decision necessarily presaged a ruling that no *state* could constitutionally extend the privileges of citizenship to blacks by prohibiting slavery:

I have stated what cannot be gainsayed—that the grounds upon which this decision is made are equally applicable to Free States as to the Free Territories
* * * .

Roy Baster, *The Collected Works of Abraham Lincoln* 95 (Vol. 3 1953) (Speech at Edwardsville, Illinois on September 11, 1958).

As Lincoln's observations about *Dred Scott* emphasize, at the very moment in history that the framers of Article I, section 20 met, national politics were focused on the key terms of that section: Who were the citizens to whom the state's privileges and immunities were guaranteed? How would states define the classes of citizens to which privileges and immunities would attach?

Delegates to Oregon's constitutional convention considered and discussed the significance of *Dred Scott*. Although the discussion took place in the context of limiting the

right of suffrage in state and local elections, it reveals that delegates debated the meaning of citizenship and the question of who could claim its benefits:

[Delegate] Farrar pointed out that federal law required that an immigrant have resided in this country for five years before being eligible to become a United States citizen, and he questioned whether a state had the power to confer state citizenship after a shorter period of residency. Matthew Deady agreed, despite stating that he had no prejudice against foreigners - his father had been a foreigner. John Reed quoted Story's Commentaries in support of the position that states had no power to admit an alien to citizenship after a period shorter than the period set in federal law.

Several delegates disagreed with this legal argument made by Farrar, Deady, and Reed. Perry Marple thought the state clearly had the legal right to define state citizenship. La Fayette Grover argued that the Dred Scott case established that states had the right to regulate the qualifications of state citizenship, though Reed disagreed with reading the case too broadly, claiming that it "did not decide anything in relation to states making citizens of aliens."

Burton and Grade, [37 Willamette L Rev at 569-570](#)

The mere possibility that Oregon would deny slaves and freed slaves citizenship in the newly formed state was sufficient to cause some members to vote against the final document:

A major dispute at the Convention was whether the delegates should debate the issue of slavery and include a provision allowing or barring the practice in the proposed constitution or should, instead, refer the issue separately to the voters for their decision. The democrats, who had clear political control in the Convention, regularly rebuffed attempts to debate this issue. The refusal to debate the question and the bare possibility that the voters should approve slavery, or approve the exclusion of free Negroes, and incorporate such provisions in the constitution, were sufficient grounds to lead delegates such as Thomas Dryer and W.H. Watkins to vote against the constitution when it came before the Convention for final approval on September 18, 1857 (a.m.).

Id. at 559.

DOMC implies that the “constitutional debate on race” is irrelevant to the issue in this case.²¹ That implication is incorrect. The mid-nineteenth century debate about slavery and race does illuminate the question before this court. As described above, that debate was manifest in the Oregon constitutional convention on the very issue in this case: to whom would the privileges of citizenship be extended?

Moreover, the text of the Oregon Constitution explicitly reveals the impact that the debate about slavery had on the framers. Article XVIII, section 2 of the constitution specified three questions to be posed concurrently with the vote to ratify or reject the proposed constitution. The first question was “Do you vote for the Constitution?” The second question was “Do you vote for Slavery in Oregon?” Finally, electors were asked “Do you vote for free Negroes in Oregon?” The constitution was approved. In the same election, Oregonians voted no on both of the remaining questions: against slavery and against “free Negroes in Oregon.”

Section 4 of the same article contained alternative elements of the Bill of Rights that were to be variously effective or void depending on the outcome of the votes on the questions. As a result of the vote on the third question, Oregon denied the basic privileges of citizenship to blacks and their descendants unless they resided in Oregon at the time the constitution was adopted:

No free negro, or mulatto, not residing in this State at the time of the adoption of this Constitution, shall come, reside, or be within this State, or hold any real estate, or make any contracts, or maintain any suit therein; and the Legislative Assembly shall provide by penal laws, for the removal, by public officers, or all such negroes, and mulattoes, and for their

²¹ “ ‘Well,’ BRO Plaintiffs will undoubtedly say, ‘if you want to talk about history, let us be fair: the framers never would have thought that the racist sentiments ensconced in the Oregon territorial statutes were unconstitutional either. That does not mean that those ideas are constitutionally acceptable.’ But the constitutional and historical difference between the two scenarios is palpable.” (DOMC App Br 24).

effectual exclusion from the State, and for the punishment of persons who shall bring them into the State, or employ, or harbor them.

Original Article XVIII, section 4.

When Article I, section 20 was drafted and submitted to the electorate, the votes on all three questions had yet to be cast and tallied. The framers necessarily must have considered the text of their draft constitution consistent with either outcome on the second and third questions. Specifically, if the vote had been reversed on the third, then the constitution would have contained no barrier to the immigration of blacks and their descendents to Oregon. Black Oregonians, unlike Dred Scott, would have been citizens entitled to invoke the state’s legal machinery.²²

Despite these momentous alternative consequences to the vote on the third question, the framers did not make Article I, section 20 contingent in any way on the outcome of that vote. They did not, for example, provide alternative versions of Article I, section 20, one to take effect if the electorate decided to allow free blacks and their descendents to exercise the privileges of citizenship and another to be effective if blacks and their descendents were excluded from Oregon. Nor did they qualify it in any way so as to deny its application to any “negro” or “mullato” regardless of the outcome of the vote on the third question.

D. The text and context of Article I, section 20, the case law construing and applying it, and the relevant historical circumstances support the application of Article I, section 20 to this case

As explained in the state’s opening brief, the framers plainly did intend Article I, section 20 to express a form of economic egalitarianism; on that, at least, the state does not disagree with *Amicus* Adamson or with DOMC. The state acknowledges that the historical

²² By operation of specific discriminatory provisions elsewhere in the constitution, black Oregonians would have been denied specific elements of citizenship. For example, they would have been denied the right to vote. Original Article II, section 2.

evidence demonstrates that at least one of the framers' primary concerns in adopting Article I, section 20 was to ensure that economic privileges were not unfairly granted to a favored citizen or class of citizens. But the key "civil rights" issues of the day—slavery and the *Dred Scott* decision—should not be ignored in any analysis of framers' intent. Nor should the contemporaneous understanding of the scope of the phrase "privileges and immunities" be ignored. And when the historical evidence on those issues is taken into consideration, we cannot conclude that the framers intended to exclude "civil rights" of a political nature when they chose to protect "privileges" and "immunities" without expressly limiting that protection to economic interests.

The foregoing text and history establish three realities pertinent to the search for "initial principles" by which this court can apply Article I, section 20 to "modern circumstances." First, the framers used open-ended terms, including "citizen" and "privileges" or "immunities," in Article I, section 20. In the same way that they consciously denied specific benefits of citizenship to blacks, women, "mulattos," "chinamen" and non-white foreigners in other parts of the constitution, the framers could have prevented Article I, section 20's reach from ever embracing those groups that were disfavored in 1857. Yet the text of Article I, section 20 does not qualify the terms "citizen" and "privileges" or "immunities" in any way. Second, whether Oregon would be a state in which slaves were property rather than citizens was directly and explicitly considered by the delegates to the convention and then by the people. Again, even in the face of that debate and particularly in the face of its implications for the meaning of citizenship in the new state, the framers drafted and the people approved the open-ended language of Article I, section 20. Finally, the framers and voters had every reason to expect based on their own experience in the Oregon Territory that their political and economic institutions would continue to evolve within the

framework of their new constitution. Their own experience in a rapidly changing Territory must have taught them that their new constitution would be tested in new circumstances. They well knew that societal attitudes and the law had evolved over time. Article I, section 20's open-ended text is consistent with the framers' expectation that its interpretation would evolve over time.

All three of those realities point to the conclusion that the framers did not intend to limit the protections guaranteed by Article I, section 20 only to those who qualified as citizens in 1857, nor did they intend to limit the protection of Article I, section 20 only to what were explicitly recognized as privileges and immunities in 1857. The state does not contend that the history of Article I, section 20 *requires* this court to find a violation of Article I, section 20 in this case. But the text, case law, and history discussed above support the inference that the framers of Article I, section 20 intended to allow future generations the opportunity to broaden the types of individuals who could become citizens and to elaborate on the privileges or immunities that must be distributed “on the same terms.” A broader understanding of the spirit of the times negates DOMC’s contention that the scope of protections provided by Article I, section 20 was fixed by the framers for all time in 1857 terms. In fact, history strongly supports the conclusion that the framers anticipated that future circumstances and events would further inform and define the open-ended content of Article I, section 20 in ways that they might well have found unimaginable in 1857. And that, as *Hewitt* illustrates and the state demonstrates elsewhere in its brief, is what this court has done in the nearly 150 years since the constitution of this state was adopted.

IV. Contrary to DOMC’s Contentions, Article I, section 20 *Does* Apply in This Case Because the Statutes at Issue Are Not “Facially” Neutral, and Even if They Were, They Would Not Be Insulated From an Article I, section 20 Challenge

DOMC argues that Article I, section 20 does not apply at all in this case because everyone who is of age and not already married is permitted by the law to marry. (DOMC Br 37-40). That is, they state the undeniable fact that every man and every woman may marry, so long as each marries a person of the opposite sex, and, therefore, the law cannot be viewed as discriminating on the basis of gender. Similarly, they claim that the statutes do not discriminate on the basis of sexual orientation because the law permits any person of any orientation to marry, again, so long as they marry persons of the opposite sex. The state addressed that argument in its opening brief, explaining that the “open class” principle simply does not adequately account for some intimate, personality- or identity-forming characteristics. (State App Br 46-47).

DOMC also argues that the court must ignore what they style as the “ ‘couple’s collective rights’—a right never-before recognized in American jurisprudence.” (DOMC App Br 40 n 35). But the assertion that the law not only must blind itself to the inherently dual nature of marriage, but always has done so, is incorrect. In *Loving v. Virginia*, 388 US 1, 87 S Ct 1817, 18 L Ed 2d 1010 (1967), the United States Supreme Court considered a Virginia “antimiscegenation” statute that made it crime for a white person to marry a black person. Just as Oregon’s marriage statutes leave it open to all to marry persons of the opposite sex, Virginia’s left it open to all to marry persons of the same race.

To defend its law, the State of Virginia offered an argument strikingly similar to DOMC’s.

[T]he State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race.

388 US at 8. The Court rejected that argument.

There can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races.

388 US at 11. DOMC may respond that marriage among persons of the same sex is not “generally accepted conduct.” But that argument, like their assertion that that “[t]here is no fundamental right to same-sex marriage,” (DOMC App Br 53), is pitched at the wrong level of generality. The Court was not addressing whether *interracial* marriage was a fundamental right or generally accepted conduct. Rather, the Court focused its attention on marriage, then looked at the terms on which it was granted or denied to determine whether those terms withstood constitutional scrutiny. That is the standard manner in which equal privileges or equal protection analyses are conducted; the court first identifies the right or privilege granted to some and denied to others, then evaluates the basis on which the law grants or denies that right or privilege. Thus, contrary to DOMC’s argument, it is not enough to assert that all may marry; the proper question is whether the basis on which marriage and its legal incidents are denied passes constitutional muster, a subject the state has addressed at length.

But DOMC takes the argument a step further, arguing that section 20 cannot apply to laws having a disparate impact. Rather, they assert, the discrimination must appear on the face of the statute. In one sense, of course, the classification made by ORS chapter 106 is patent, just as it was in *Loving*, in that the statute specifies whom one may marry and whom one may not in terms no more neutral – or less restrictive – than the terms on which Virginia drew its line. Thus, DOMC’s argument falls at the first hurdle.

Moreover, this court has never stated that section 20 cannot apply to classifications created by facially neutral statutes. The court’s statements and holdings point in the opposite direction. For example, the court recently stated:

[D]iscriminatory application of a generally applicable law might violate Article I, section 20, * * *. See *State v. Clark*, 291 Or 231, 239, 630 P2d 810 (1981) (Article I, section 20, “reaches forbidden inequality in the administration of laws”).

In re Gatti, 330 Or 517, 534, 8 P3d 966 (2000). And in *State v. Freeland*, 295 Or 367, 667 P2d 509 (1983), the court considered a district attorney’s policy of affording a preliminary hearing in some cases while taking others to the grand jury. Although the record contained no evidence of discriminatory motive, 295 Or at 381, the court nevertheless required the district attorney to have judicially reviewable criteria in place to prevent discriminatory application of the policies. In other words, the court concluded that the policy could violate section 20 as applied as well as on the face of the law or policy in question. If the court can look below the surface of facially neutral policies to find discriminatory effects, there is little reason to believe that it cannot do the same with statutes.

And that is precisely what the court does in construing Article I, section 8, of the Oregon Constitution. This court expressly considers the *effects* of the laws in such cases. Laws directed by their terms at expression are unconstitutional unless they fall within a historic exception; laws directed by their terms at a particular effect, but that specify by their terms that the harm is produced by expression, are examined for over-breadth. Laws that do not refer to expression at all, however, are not thereby immunized from challenge. Rather, they are examined as applied to a particular set of facts to determine whether they are being used to infringe upon protected expression. *E.g.*, *City of Eugene v. Miller*, 318 Or 480, 488, 871 P2d 454 (1994); *State v. Plowman*, 314 Or 157, 164, 838 P2d 558 (1992), *cert den*, 508 US 974, 113 S Ct 2967, 125 L Ed2d 666 (1993).²³ In other words, even a methodology that is expressly focused on the face of the statute need not be blind to the law’s impact.

²³ For example, a law that says, “Do not discuss politics,” is addressed by its terms at the content of speech. A law that says, “Do not annoy the court by discussing

Here, it is indisputable that the law's effects differ, depending upon the gender or the sexual orientation of those who seek to marry. Those who choose to marry a person of the opposite sex may do so; those who choose to marry a person of the same sex may not. Thus, the statute at issue here is not facially neutral and, even if it were, that would not necessarily insulate it from a section 20 challenge.

ANSWER TO DOMC'S ASSIGNMENT OF ERROR NO. 3

The trial court erred in granting plaintiffs' Fourth Claim for Relief for a writ of mandamus requiring the State Registrar to register the marriage license-and-solemnization documents issued by the County to same-sex couples between March 3 and April 20, 2004. Regardless whether plaintiffs' Fourth Claim of Relief properly was before the trial court for decision, the State Registrar had no statutory duty to register these marriage documents as vital records and the State Registrar was authorized by ORS 432.405 and other provisions of ORS chapter 432 to refuse to register them.

ARGUMENT

I. Standard of Review

Whether the trial court erred in granting summary judgment on the plaintiffs' Fourth Claim for Relief is a question of law. *See* ORS 34.110; *State ex rel La Vasseur v. Merten*, 297 Or 577, 580-82, 686 P2d 366 (1984) (discussing requirements for mandamus). *See generally Jones v. General Motors*, 325 Or 404, 419-20, 939 P2d 608 (1997) (discussing requirements for summary judgment);

politics," is aimed at a harmful effect – annoying the court – but specifies that speech is the way in which the harm is produced. A law that says, "Do not annoy the court," is not addressed to speech at all, but could be unconstitutional if applied to a discussion of politics that irritated the court.

II. DOMC's Contentions

DOMC contends that the trial court erred in granting the plaintiffs' Fourth Claim for relief for two reasons, which DOMC summarizes in its opening brief, as follows:

* * * Article VI, Section 10 prohibits any county from ruling on the constitutionality of statutes with statewide concern – *e.g.*, deciding the marriage statutes are unconstitutional. The trial court erred by requiring the State Defendants to record marriage certificates of same sex couples, because the marriages are legal nullities. This Court should order the State Defendants to “unregister” the same sex marriage licenses.

* * * Proper mandamus procedures were wholly lacking in this case, and mandamus cannot issue outside the statutory scheme. The trial court has no authority to issue a writ of mandamus without the relator following the procedures set forth in ORS Chapter 34. Moreover, the [trial] court specifically instructed the parties not to brief the issues involved in the mandamus claim or argue that claim at oral argument, yet it issued the peremptory writ contrary to its own instructions. Relief cannot lie for [the] Plaintiffs' mandamus claim.

(DOMC App Br 12).

III. For the Reasons Set Out in the State's Opening Brief, the Trial Court Erred in Granting Plaintiffs' Fourth Claim for Relief.

The record appears to support DOMC's contention that the plaintiffs' Fourth Claim for Relief was not before the court for summary judgment, and, for that reason, the court should not have entered judgment on that claim.²⁴ For example, the Revised Limited Judgment (from which this appeal is taken) states, in relevant part:

1. On April 5, 2004, plaintiffs moved for summary judgment on their First Claim for Relief. Plaintiffs also move to dismiss [DOMC's] first counterclaim for lack of standing.

2. On April 5, 2004, [the County] moved for summary judgment on the [plaintiffs'] First Claim for Relief. The County also moved to dismiss

²⁴ The state does not join in or otherwise respond to DOMC's contention that “Article VI, Section 10 prohibits any county from ruling on the constitutionality of statutes with statewide concern,” because that argument is not material to the question whether the trial court erred in requiring the State Registrar to register the marriage license-and-solemnization documents at issue here.

[DOMC's] first, second, third, fourth and fifth counterclaims for lack of standing, and [DOMC's'] fifth counterclaim for mootness and failure to state a claim.

3. On April 5, 2004, [the State] moved for summary judgment [on all claims]. In doing so, the State briefed the issue of whether the County has the authority to issue marriage licenses to same-sex couples in contravention of the Oregon statutory code ("the county authority issue").

4. On April 5, 2004, [DOMC] moved for summary judgment on the [plaintiffs'] First and Second Claims for Relief. [DOMC] also moved for summary judgment on [DOMC's] first and fourth counterclaims.

* * * * *

8. On April 12, 2004, plaintiffs opposed the State's and [DOMC's] motions for summary judgment with respect to the First Claim for Relief only. In light of the State's and [DOMC's] motions for summary judgment beyond the First Claim for Relief and the State's briefing of the county authority issue, plaintiffs filed [a] Rule 21 Motion to Strike * * * [and] also moved to dismiss [DOMC's] fourth counterclaim for lack of standing.

9. On April 12, 2004, The County opposed the State's and [DOMC's] motions for summary judgment.

10. On April 12, 2004, The State opposed plaintiffs' and the County's motions for summary judgment on the First Claim for Relief.

11. On April 12, 2004, [DOMC] opposed plaintiffs' and the County's motions for summary judgment on the First Claim for Relief. In doing so, [DOMC] briefed the county authority issue. In addition, [DOMC] opposed plaintiffs' and the County's motions to dismiss [DOMC's] counterclaims for lack of standing [and] * * * also moved to dismiss plaintiffs' and the County's claims for relief for lack of standing.

12. *On April 13, 2004, the Court sent a letter to all parties in which it noted that "new issues have been raised by defendants and intervenors which are beyond the agreed upon scope" and in which it stated that "[its] focus and [its] ruling will be on the constitutionality issue only and all other issues will be separated and dealt with later if need be."*

13. On April 14, 2004, *the parties filed replies that were limited to the constitutionality issue*²⁵ (including the issue of remedy, but not including the county authority issue), with the exception of plaintiffs' and the County's

²⁵ The "constitutionality issue" means the plaintiffs' First Claim for Relief. (See, e.g., ER-37 through ER-43, ER-149).

oppositions to [DOMC's] motion to dismiss plaintiffs' and the County's claims for relief for lack of standing, and plaintiffs' and the County's briefing of the issue of whether an interlocutory ruling would be certifiable and appealable. *In light of the court's letter of April 13, 2004, the parties reserved further argument on other issues.*

14. On April 16, 2004, *the Court conducted a hearing on the constitutionality issue (including the issue of remedy, but not including the county authority issue).* * * *.

15. On April 20, 2004, the Court issued its Opinion and Order * * *.

(ER-422 to ER-424) (emphasis added).²⁶

Regardless whether plaintiffs' Fourth Claim of Relief properly was before the trial court for decision, the court erred in granting it for the reasons set out in the state's opening brief. That is, the State Registrar had no statutory duty to register as vital records the marriage license-and-solemnization documents issued by the County to same-sex couples between March 3 and April 20, 2004, and the State Registrar was authorized by

²⁶ On April 27, 2004, DOMC filed objections to the proposed entry of a limited judgment, which included the following:

Given the Court's instruction that the only issue before the Court on the April 16, 2004 hearing was the constitutionality of ORS Chapter 106 (Plaintiffs' First Claim for Relief), [DOMC's] sixth affirmative defense was neither briefed nor argued. Yet the Court used plaintiffs' Fourth Claim for Relief as a basis for affording a remedy to Plaintiffs. *There is no ground for adjudicating Plaintiffs' Fourth Claim for Relief absent a briefing and arguing of the propriety and procedural correctness of Plaintiffs' mandamus claim – a mandamus claim filed with other claims in violation of ORS 34.190, granted without the issuance of a writ or the submission of a petition as required under ORS 34.130 and ORS 34.140, and directing action of a state officer without an answer or motion to dismiss filed specifically on the mandamus issue as required in ORS 34.170.*

Succinctly, Plaintiffs' mandamus claim is untenable as pleaded and prosecuted. None of the initial jurisdictional or procedural hurdles have been surmounted. No order can be based on Plaintiffs' Fourth Claim for Relief until the manner in which the mandamus claim was brought is properly addressed.

(ER-417 to ER-418) (emphasis added).

ORS 432.405 and other provisions of ORS chapter 432 to refuse to register them. (*See State App Br 12-34*).

SECTION TWO

STATE’S ANSWER TO THE COUNTY’S AND DOMC’S RESPONSES TO THE COURT’S 14TH AMENDMENT QUESTION

In its opening brief, the state urged the court not to reach the merits of the question whether Oregon’s marriage laws deny equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution because that issue was not raised and preserved by any party to this litigation and was not the basis for any determination made by the trial court. The state continues to urge this court not to address this federal constitutional question inasmuch as it is not properly before the court for consideration. *See State v. Farmer*, 317 Or 220, 224, 856 P2d 623 (1993) (unpreserved claim of error “*cannot* be reviewed on appeal”) (emphasis in original)).

In its opening brief, the state further noted that plaintiffs have never presented any claims under the federal constitution and that it would be inappropriate for the state to hypothesize the claims they might assert. In their opening brief, plaintiffs declined to answer the court’s question about the Fourteenth Amendment, stating rather inexplicably that they anticipated that the state would address that issue in its assignment of error on appeal and that they would then respond. Consequently, no federal law argument has yet been presented by plaintiffs or by the state in this litigation.

DOMC and the County, however, have presented the court with federal analyses. Those arguments are necessarily presented abstractly because no concrete claims have been asserted under the federal constitution by the plaintiffs who initiated this litigation. The briefs filed by DOMC and the County come to very different conclusions about whether Oregon’s marriage

laws violate the Fourteenth Amendment. In part, DOMC and the County reach those different conclusions because of apparently diametrically opposed views about the continuing vitality of *Baker v. Nelson*, 291 Minn 310, 191 NW2d 185 (1971), *appeal dismissed*, 409 US 810, 93 S Ct 37, 34 L Ed 2d 65 (1972). Without intending to state here any conclusion about the ultimate outcome of a case in which a party does raise a Fourteenth Amendment challenge to Oregon’s marriage statutes and the legal incidents of marital status, the state submits that the significance of *Baker v. Nelson* in such a hypothetical case is not as clear as either DOMC’s or the County’s treatment of it suggests. (See State App Br 65 n 16). We set out the following discussion to provide the court with the appropriate framework for analyzing the Fourteenth Amendment question, if the court should reach it.

In *Baker v. Nelson*, the United States Supreme Court dismissed a direct appeal in a case that is similar to the present litigation. The County’s opening brief does not address *Baker v. Nelson*. (County App Br 18-25). On the other hand, in its opening brief, DOMC asserts that the dismissal in *Baker v. Nelson* establishes conclusively that the federal constitutional question is settled adversely to plaintiffs’ interests. (DOMC App Br 49-53).

In *Baker v. Nelson*, the Minnesota Supreme Court held that same-sex marriages were neither authorized by that state’s marriage statute nor compelled by the federal Equal Protection Clause.²⁷ In so holding, the court distinguished the race-based restrictions on marriage the United States Supreme Court had previously struck down in *Loving v. Virginia*, stating that “in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.” *Baker v. Nelson*, 291 Minn at 315.

²⁷ The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that “[n]o state shall * * * deny to any person within its jurisdiction the equal protection of the laws.”

Invoking the United States Supreme Court’s mandatory appellate jurisdiction—which has since been repealed—the same-sex couple sought review. The Supreme Court, which had no discretion to refuse adjudication of the case on its merits, summarily decided the case and dismissed the appeal “for want of a substantial federal question.” *Baker v. Nelson*, 409 US 810.

Although summary decisions of the United States Supreme Court have precedential authority, determining the amount of weight they should receive and the precise issues they control is not a straightforward task. As the United States Supreme Court has instructed, its summary decisions do not necessarily reflect its agreement with the opinion and reasoning of the lower court. *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). Nor do they resolve questions that “merely lurk in the record.” *Mandel v. Bradley*, 432 US 173, 176, 97 S Ct 2238, 53 L Ed 2d 199 (1977). But they are to be taken as a ruling on the merits with respect to the specific challenges presented in the statement of jurisdiction and necessarily decided by the Court’s decision to summarily dispose of the case. *Id.*; *Washington*, 439 US at 478 n 20. 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).²⁸

It follows, then, that before this court could examine whether denying marital status and the attendant legal benefits to same-sex couples runs afoul of the federal Equal

²⁸ While lower courts are generally bound by the United States Supreme Court’s summary actions on the merits, the United States Supreme Court does not generally view itself as constrained by the principles of *stare decisis* when faced with its prior summary decisions. In other words, the Court does not give such decisions the same deference it gives to written opinions issued after briefing and argument. See *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) (so noting).

Protection Clause, it first must decide, as a threshold matter, whether the Court’s decision in *Baker v. Nelson* controls that inquiry. Although a number of jurisdictions have considered whether prohibitions on same-sex marriage violate the federal Equal Protection Clause, very few have analyzed whether *Baker v. Nelson* controls that inquiry. Those that have done so appear to be split on the issue. See, e.g., *In re Kandu*, 2004 Bankr LEXIS 1233 (August 17, 2004) (holding that *Baker v. Nelson* “now has little, if any, precedential value regarding the constitutionality of excluding all same-sex couples from the federal rights and benefits associated with marriage”); *Lockyer v. City and County of San Francisco*, 33 Cal 4th 1055, 1126-27, 95 P3d 459 (2004) (Kennard, J., concurring) (concluding that *Baker v. Nelson* is binding as to whether a state law restricting marriage to opposite-sex couples violates the federal constitution’s guarantees of equal protection and due process of law); *Adams v. Howerton*, 486 F Supp 1119, 1124 (CD Cal 1980), *aff’d*, 673 F2d 1036, *cert den*, 458 US 1111, 102 S Ct 3494, 73 L Ed 2d 1373 (1982) (recognizing that *Baker* is binding precedent regarding the constitutionality of a state court judgment prohibiting two people of the same sex from marrying each other).

The appellants in *Baker v. Nelson* presented three constitutional questions: (1) “Whether appellee’s refusal to sanctify appellants’ marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment”; (2) “Whether appellee’s refusal, pursuant to Minnesota marriage statutes, to sanctify appellants’ marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment”; and (3) “Whether appellee’s refusal to sanctify appellants’ marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.” (DOMC App Br, DER-7). In the body of the jurisdictional statement submitted in *Baker v. Nelson*, the appellants contended that:

The right to marry is itself a fundamental interest, fully protected by the due process and equal protection clauses of the Fourteenth Amendment. See *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 535 (1923). In addition, significant property interests, also protected by the due process clause, flow from the legally ratified marital relationship. In his testimony at trial, the appellant Baker enumerated six such interests which he cannot enjoy because of the State's refusal to recognize his marriage to the appellant McConnell:

1. The ability to inherit from one another by intestate succession.
2. The availability of legal redress for the wrongful death of a partner to a marriage.
3. The ability to sue under heartbalm statutes where in effect.
4. Legal (and consequently community) recognition for their relationship.
5. Property benefits such as the ability to own property by tenancy-by-the-entirety in states where permitted.
6. Tax benefits under both Minnesota and federal statutes.
(Among others, these include death tax benefits and income tax benefits – even under the revised Federal Income Tax Code.)

(DOMC App Br, DER-7).

The state contends that the privileges and immunities at issue in this case include civil marriage together with its attendant legal benefits. In contrast, DOMC and the County assert (or assume) that only the marital status *per se* is at issue here. The divergent positions taken by the parties in this case cloud the analysis of *Baker v. Nelson*. While it is clear that appellants in *Baker v. Nelson* generally were contending that Minnesota's marriage licensing statutes that excluded same-sex marriage violated the due process and equal protection provisions of, and the right to privacy guaranteed by, the United States Constitution, it is not clear whether the appellants' claims under the Equal Protection Clause were limited to a challenge to marital status alone or whether they were also basing that particular claim on a claim of entitlement to what they characterized as the bundle of rights and interests that comprised marriage under Minnesota law. It is clear that appellants were contending that those property interests were protected by

the Due Process Clause; it is less clear whether they were also relying upon the bundle of rights and interests that comprised marriage for their Equal Protection Clause claim as well.

To date the United States Supreme Court has not expressly overruled its summary decision in *Baker v. Nelson*. Consequently, it is binding precedent on those questions actually presented and necessarily decided by the Court's summary disposition of the case, unless subsequent doctrinal developments that have occurred in the 30 years since that decision indicate otherwise.

As discussed in the state's opening brief, this court could decide that ORS chapter 106 distinguishes between citizens on the basis of gender. When the United States Supreme Court decided *Baker v. Nelson*, a gender-based classification could comport with the Equal Protection Clause simply by bearing a "rational relationship to a state objective" sought to be advanced. *See Reed v. Reed*, 404 US 71, 76, 92 S Ct 251, 30 L Ed 2d 225 (1971) (analyzing constitutionality of statutory preference for male estate administrators using a "rational relationship" test). But contemporary equal protection analysis, which did not begin to develop until several years after the Court decided *Baker v. Nelson*,²⁹ demands that the government demonstrate that a gender-based classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. *See United States v. Virginia*, 518 US 515, 531, 116 S Ct 2264, 135 L Ed 2d 735 (1996) (*VMJ*).

As also discussed in the state's opening brief, this court could conclude that ORS chapter 106 distinguishes between citizens based on sexual orientation. In the last decade, the Supreme Court has issued opinions that impose restrictions on the ability of states to deny equal protection

²⁹ *See, e.g., Craig v. Boren*, 429 US 190, 197, 97 S Ct 451, 50 L Ed 2d 397 (1976) (invalidating an Oklahoma statute which forbade the sale of 3.2 beer to males under the age of 21 and females under the age of 18).

on that basis. *Compare Romer v. Evans*, 517 US 620, 635, 116 S Ct 1620, 134 L Ed 2d 855 (1996) (holding that, even under rational basis review, moral disapproval of homosexuals as a class cannot be a legitimate government interest), *with Bowers v. Hardwick*, 478 US 186, 192-93, 106 S Ct 2841, 92 L Ed 2d 140 (1986) (holding that there is no fundamental right “for homosexuals to engage in acts of consensual sodomy” and that a statute criminalizing such acts satisfied the rational basis test because “the law * * * is constantly based on notions of morality”); *see also Lawrence v. Texas*, 539 US 558, 123 S Ct 2472, 156 L Ed 2d 508 (2003) (overruling *Bowers* and striking down Texas ban on homosexual sodomy as unconstitutional intrusion on liberty to engage in private sexual conduct that is protected by the Due Process Clause).

It is possible that same-sex couples could argue in some future case that: (1) *Baker v. Nelson* lacks any precedential value in light of the Court’s more recent decisions in *VMI*, *Romer*, and *Lawrence*; (2) denying marriage licenses to same-sex couples is by itself discrimination on the basis of gender and/or sexual orientation and a substantial interference with the fundamental right to marry; and (3) the state cannot overcome the heightened level of scrutiny the federal constitution requires a court to apply to such classifications.³⁰ None of the decisions discussed above are necessarily incompatible with the Court’s decision in *Baker v. Nelson*. *See, e.g., Lawrence*, 539 US at 578 (observing that the Court was not deciding “whether the government must give formal recognition to any relationship that homosexual persons seek to enter”).

Reported cases decided before the Supreme Court’s decisions in *VMI*, *Romer* and *Lawrence*

³⁰ *See generally VMI*, 518 US at 531 (gender-based classifications overcome a federal equal protection challenge only if they serve important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives); *Zablocki v. Redhail*, 434 US 374, 387-88, 98 S Ct 673, 54 L Ed 2d 618 (1978) (statutory classifications that significantly interfere with the exercise of the fundamental right to marry violate federal equal protection principles unless they are “supported by sufficiently important state interests” and are “closely tailored to effectuate only those interests”).

found that *Baker v. Nelson* was controlling on the question whether state laws that limit marriage to opposite-sex couples violate the Equal Protection Clause. See e.g., *McConnell v. Nooner*, 547 F2d 54, 65 (8th Cir 1976); *Adams v. Howerton*, 485 F Supp at 1124; *Matter of Cooper*, 592 NYS2d 797 (NY App Div 1993). And, as noted above, Justice Kennard of the California Supreme Court recently concluded that the Supreme Court’s decision in *Lawrence* “did not undermine the authority” of *Baker v. Nelson*, so that case still “defines federal constitutional law on the question whether a state may deny same-sex couples the right to marry.” *Lockyer*, 33 Cal 4th at 1127. Thus, despite the substantial intervening doctrinal developments, *Baker v. Nelson* arguably remains binding on this court at present.

Consequently, it could well be argued that the answer to this court’s federal equal protection question is that, under *Baker v. Nelson*, the state may deny marriage licenses to same-sex couples without violating federal equal protection principles. But there is an additional complicating factor that makes uncertain the weight to be given this argument. As outlined in the state’s opening brief and noted above, this case is not merely about whether Oregon must grant marriage licenses to same-sex couples. Rather, this case is about whether the state can deny to same-sex couples the myriad benefits inextricably linked to marriage by operation of existing Oregon law. In *Mandel v. Bradley*, 432 US at 176, the Supreme Court held that a lower federal court gave undue weight to a summary dismissal where the statute at issue in the subsequent case was distinguishable from the statute before the Court in the case summarily dismissed. Therefore, it would appear that it would be necessary to engage in a critical comparison of all of the legal benefits that flowed from Minnesota’s 1972 marriage statute and the myriad legal benefits that flow from Oregon’s marriage statutes presently to determine whether there are differences that rise to the level of making the statutes distinguishable for purposes of evaluating the binding effect of *Baker v. Nelson* for the current case.

Inasmuch as the plaintiffs did not raise or rely upon the Equal Protection Clause of the Fourteenth Amendment in support of their claims, and the trial court decision pending before this court did not rely upon the Fourteenth Amendment either, the state has not had prior occasion to engage in the searching inquiry that would be necessary to compare the benefits of marriage under Minnesota law as it existed in 1972 with the benefits of marriage under Oregon law presently. While it would seem logical to assume that numerous differences would exist between the legal benefits afforded married persons by 1972 Minnesota law and the legal benefits afforded married persons by 2004 Oregon law, the significance of those differences would be extremely difficult to evaluate. That difficulty only highlights the wisdom of this court's oft-repeated rule that it will not decide the merits of arguments not raised by the parties, developed in the record of the case, or ruled on by the trial court.

Of course, the continuing vitality of the Supreme Court's summary disposition of *Baker v. Nelson* ultimately will be a question that must be resolved by the United States Supreme Court itself. As noted above, we cannot state with certainty that intervening doctrinal developments have eroded the basis of *Baker v. Nelson* so substantially as to render it irrelevant. Nor can we conclude with certainty that it has binding effect in this case for the reasons discussed above. But this issue should be of no moment in this case where we can state with certainty that no party raised any claim under the Fourteenth Amendment and the trial court did not base its decision on that constitutional provision.

CONCLUSION

For the reasons discussed above, this court should: (1) affirm the portion of the Revised Limited Judgment adjudicating plaintiffs' First Claim for Relief, and (2) reverse the portion of the Revised Limited Judgment granting plaintiffs' request for a writ of mandamus requiring the State Registrar to register approximately 3000 marriage license documents issued by the County to same-sex couples before April 20, 2004.

Respectfully submitted,

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