



DEPARTMENT OF JUSTICE

1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400
TTY: (503) 378-5938

March 12, 2004

Honorable Ted Kulongoski
Governor of Oregon
State Capitol Building
900 Court Street NE
Salem, OR 97301-4047

Dear Governor Kulongoski:

As you know, Multnomah County recently began issuing marriage licenses to same-sex couples. That action thrusts the county, and therefore the state, which must administer many laws that relate to or depend upon a person's status as married or single, into the center of an emerging national debate. The legal issues that arise for the State of Oregon are whether state statutes prohibit the issuance of marriage licenses to same-sex couples, and, if so, whether the denial of that privilege to same-sex couples violates the Oregon Constitution. You have asked us the following questions: (1) How would the Oregon Supreme Court view these issues? (2) Until the Oregon Supreme Court decides them, should state agencies treat same-sex marriages as legal marriages for all purposes? We can state confidently that existing Oregon statutes limit the grant of marriage licenses to one man and one woman. That conclusion requires us to consider whether the Oregon Supreme Court would conclude that the limitation violates the Oregon Constitution. A statement by the Vermont Supreme Court when presented with the same question aptly frames the nature of the inquiry.

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

rather on the statutory and constitutional basis for the exclusion of same-sex couples from the secular benefits and protections offered married couples.

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

Under current Oregon law, marriage carries with it a number of rights and responsibilities. Those benefits and obligations are automatically available to opposite-sex couples who choose to marry, but they are denied to same-sex couples who are otherwise similarly situated. Although we want to emphasize that this issue is hardly free from doubt and that many questions remain unanswered, our best prediction is that the court would conclude that that denial violates the Oregon Constitution.¹

I. Statutory Analysis

We have identified no constitutional provision that would prevent the Legislative Assembly from enacting a law under which same-sex couples could marry. We begin our analysis with an assessment of existing law to determine whether it allows the State of Oregon or its political subdivisions to extend the state's secular sanction of marriages to same-sex couples. If Oregon statutes permitted same-sex couples to marry, then our inquiry would end there. On the other hand, if existing law forbids a man to marry a man or a woman to marry a woman, then we must examine whether that prohibition will survive constitutional challenge.

To interpret a statute, we are to consider its text and context and, if its meaning remains unclear, legislative history. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993). Oregon's marriage statutes are codified in ORS chapter 106. ORS 106.010 sets out the legal significance of and basic qualifications for marriage. It states: "Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150." Although this section does not state expressly that a marriage must consist of a man and a woman, other statutes that provide context for it leave no doubt that is the case. *See, e.g.*, ORS 106.150(1) (parties to marriage must declare that they take each other to be "husband and wife"); ORS 106.041(1) (requirements for marriage license specify that parties are to join as "husband and wife"). The legislature has not defined "husband" or "wife" for purposes of chapter 106, but we see no basis for giving them other than their "plain, natural and ordinary meaning." *PGE* at 611. The plain meaning of those terms is unambiguous. "Husband" means "a married man," and "wife" means "a married woman." Webster's Third New International Dictionary, 1104, 2614

¹ It is extremely important to emphasize that our opinion addresses only the secular and state-regulated aspects of marriage. Nothing in this discussion is meant to suggest that any religious group would be required to change its practices in respect to the recognition or solemnization of marriage in any way. To the contrary, the religion clauses of the state and federal constitutions would prevent the state from interfering with the freedom of religious groups to make their own determinations about what is and is not a marriage.

(unabridged ed 1993).² Thus, we conclude that existing Oregon statutes authorize issuance of a marriage license only to one man and one woman.

II. Constitutional Analysis

Multnomah County acted in response to an opinion from County Counsel asserting that refusal to issue licenses to same-sex couples would violate Article I, Section 20, of the Oregon Constitution. That section provides:

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

This section, by its terms, refers to any “citizen or class of citizens.” And the Oregon Supreme Court has explained that it guards against differential granting of privileges and immunities to “individual citizens at least as much as against unjustified differentiation among classes of citizens.” *State v. Clark*, 291 Or 231, 239, 240-41, 630 P2d 810 *cert den* 454 US 1084 (1981). Because the law in question denies marriage licenses to all same-sex couples, we confine our discussion to “class” discriminations.

The next question is whether marriage and its legal incidents are privileges or immunities within the terms of Section 20. Oregon law governing marriage reveals its civil nature. ORS 106.010 defines a “[m]arriage” as “a civil contract.” The civil nature of marriage that is established in ORS ch 106 is significant. It is a secular relationship that has always been subject to control by the legislature. *See Maynard v. Hill*, 125 US 190, 1 L Ed 654, 8 S Ct 723 (1888). Nor is any religious ceremony necessary to solemnize a marriage. *See* ORS 106.120 (authorizing judges and county clerks to perform marriages).

² Context also includes prior versions of the statute or statutes at issue. Statutes regulating marriage have been in effect in Oregon since it was a territory. Section 6 of “An Act Relating To Marriage And Divorce,” enacted by the Territorial Assembly on January 17, 1854, is the direct precursor to ORS 106.150. It provided that “[i]n the solemnization of marriage, * * * the parties shall declare * * * that they take each other as husband and wife * * * .” The 1854 Act was supplanted by “An act to regulate marriages,” which took effect on January 15, 1863 by operation of the original state constitution. Section 5 of the 1863 Act replaced section 6 of the 1854 Act, but made only minor changes in its wording and none in its meaning. Section 5 provided that “[i]n the solemnization of marriage, * * * the parties thereto shall assent or declare * * * that they take each other to be husband and wife.” In the same vein, section 12 required from the clerk of the county “in which the female resides” a license authorizing the official performing the ceremony “to join together the persons therein named as husband and wife.” According to contemporary dictionaries, “husband” and wife” had the same “plain, natural and ordinary meaning” at that time as they do today. Section 13 reinforces that the parties to an 1863 marriage could not have been two persons of the same sex, as it required parental consent for a license if “*the female*” was younger than 18 or “*the male*” was younger than 21 (emphasis added). Successor statutory provisions, also containing express recognition that the marital relationship is one of “husband and wife,” have been carried forward without interruption right up to the present versions of ORS 106.150, 106.041(1) and ORS 106.020(1). *See* 1920 Oregon Laws §§ 9720-9724; 1940 Oregon Compiled Laws Annotated § 63-101 – 63-105.

In sum, marriages in Oregon, at least as established under ORS 106.010, are civil and secular in nature.

The parties to a civil marriage contract are, by reason of that status, entitled to numerous privileges and benefits under Oregon law. For example, “in any civil or criminal action, a spouse has a privilege to refuse to disclose and to prevent the other spouse from disclosing any confidential communication” between “them during the marriage.” ORS 40.255(2). The “decedent’s surviving spouse” may bring a wrongful death action. ORS 30.020. A “surviving spouse” has the right of intestate succession and may elect a statutory share of the deceased spouse’s estate. ORS 112.025; 112.035; 114.105. And upon dissolution of the marriage, a spouse may be entitled to receive money from the other for spousal support or support of the couple’s children. ORS 107.105.

Thus, the benefits and obligations that result from entering into a civil marriage contract govern significant legal aspects of the couple’s life. Consequently, it is virtually beyond question that the opportunity to enter into such a marriage contract is a privilege or immunity as those terms have been interpreted by Oregon courts. *See, e.g., Hale v. Port of Portland*, 308 Or 508, 783 P2d 506 (1989) (the ability to recover tort damages is a “privilege” of the type contemplated by Article I, section 20); *Newport Church of the Nazarene v. Hensley*, 335 Or 1, 56 P3d 386 (2002) (unemployment benefits sufficient “privilege or immunity” to support determination that differential in availability violated Article I, section 20). Thus, we must ask whether denying that privilege to same-sex couples violates section 20.

In earlier decisions under Article I, section 20, the Oregon courts interpreted this Oregon constitutional provision to provide the same protection as the Federal Equal Protection Clause. *See, e.g., Sch. Dist. No. 12 v. Wasco County*, 270 Or 622, 632, 529 P2d 386 (1974). In *State v. Clark*, 291 Or 231, 630 P2d 810 (1981), however, the Oregon Supreme Court embarked on a separate path interpreting Article I, section 20 independently from the case law developed under the federal constitution. While the current Article I, section 20 jurisprudence has been described as a “work in progress,” *Tanner v. OHSU*, 157 Or App 502, 520, 971 P2d 435 (1998), there are a number of principles that have developed in the 23 years of its application since *State v. Clark* that can be discerned with reasonable certainty.³

The first inquiry that must be addressed under Article I, section 20 is whether the statutes involved disparately affect what has been termed a “true class”. Article I,

³ One caution is in order. The Supreme Court has recently stated that it will reexamine its construction of a constitutional provision if it is asked to do so and provided with a principled argument demonstrating that its prior construction of that provision was inconsistent with the court’s template for constitutional construction. *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 54, 11 P3d 228 (2000). And the court has also stated that it will construe the constitution to effectuate the original intentions of the enactors. *Smother’s v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001) (illustrating principle). Whether the court would reconsider its section 20 analysis in light of the intentions of the framers in 1857 and, if so, what the result would look like are essentially unknowable at this time. Therefore, we confine our discussion to existing principles.

section 20, by its terms, refers to any “citizen or class of citizens.” And the Oregon Supreme Court has explained that this section guards against differential granting of privileges and immunities to “individual citizens at least as much as against unjustified differentiation among classes of citizens.” *Clark*, 291 Or at 239, citing *State v. Cory*, 204 Or 235, 282 P2d 1054 (1955); *White v. Holman*, 44 Or 180, 74 P 933 (1904); *In re Oberg*, 21 Or 406, 28 P 130 (1891). Here, the relevant issue is whether ORS 106.010 violates Article 1, section 20 by permitting marriages only between opposite-sex couples and denying same-sex couples the legal rights, privileges and immunities that result from marriage under Oregon law. The question, therefore, is whether the class of same-sex couples is denied benefits that are available to other citizens – namely, opposite-sex couples – and whether there is a legitimate and sufficient governmental interest served in treating these classes of citizens differently. Because the law in question, whether viewed in terms of gender or sexual orientation, is not limited to individuals, we confine our discussion to “class” discriminations.

Laws that disparately treat a true class may violate Article I, Section 20 of the Oregon Constitution. *State ex rel Huddleston v. Sawyer*, 324 Or 597, 610, 932 P2d 1145 (1997). A true class is one whose members share characteristics that they have apart from the challenged statute itself, i.e., they share “antecedent personal or social characteristics or societal status,” like race, religion, ethnicity, military service, or past or present residency, *Clark*, 291 Or at 240. *Hale v Port of Portland*, 308 Or 508, 525, 783 P2d 506 (1989).

The Oregon Supreme Court’s modern Article I, section 20 jurisprudence describes three separate degrees of scrutiny depending on the nature of the class at issue. At one end of the spectrum are those classes identified by antecedent personal characteristics of a fundamental nature, such as race or sex. *E.g.*, *Hewitt v. SAIF*, 294 Or 33, 43-46, 653 P2d 970 (1982); *Clark*, 291 Or at 240-41.⁴ A statute classifying on grounds like these is “suspect” and must, at a minimum, reflect real rather than stereotypical differences between those who receive and those who are denied the benefit in question based upon the classification in question. And those real differences must be germane to the purpose of the legislation. *Hewitt*, 294 Or at 46-47, 49-50. At the other end of the spectrum are those distinctions created by the challenged legislation itself, which are not considered classes at all for purposes of Article I, section 20. *Sealey v. Hicks*, 309 Or 387, 397, 788 P2d 435 (1990); *Clark*, 291 Or at 240-43. As *Clark* explained, “every law itself can be said to ‘classify’ what it covers from what it excludes.” 291 Or at 240. As an example, *Clark* points to the court’s filing deadline which grants the “privilege” of the opportunity for review to those who meet its terms and denies it to those who do not. *Id.* These laws do not violate Article I, section 20. Because both gender and sexual orientation are personal characteristics that exist independent of the marriage statutes, they are unquestionably “true” classes for Article I, section 20 purposes.

⁴ *Clark* lists some other grounds, not all of which are immediately recognizable as being comparable to race, sex or ethnicity. See *Clark*, 291 Or at 241. The outer limits of these “true” classes has not yet been identified.

The court will evaluate whether the statute denying marriage licenses to same-sex couples distinguishes on the basis of gender, sexual orientation, or both. The Supreme Court has determined that classifications based on gender are suspect. *Hewitt*, 294 Or at 46-47. Although the Court of Appeals has concluded that discriminations based on sexual orientation are suspect, *Tanner v. OHSU*, 157 Or App 502, 971 P2d 435 (1998), the Supreme Court has not yet addressed that question, and we cannot say with certainty whether it would agree. Therefore, we discuss first whether the classification in the statute is based upon gender or sexual orientation.

In *Loving v. Virginia*, 388 U.S. 1, 87 S Ct 1817, 18 LEd 2d 1010 (1967), the United States Supreme Court was faced with a statute that made it a crime for a white person to marry a black person. Although acknowledging that the law applied equally to whites and blacks, in that each was equally forbidden to marry the other, the Court had no difficulty in concluding that the law was based on an impermissible racial classification. *Id.* at 11. Implicit in that analysis is the recognition that marriage necessarily involves two persons, and that such a law cannot be analyzed without considering its effects on both. Applied to the current question, that reasoning would suggest that the denial of marriage to same-sex couples classifies on the basis of gender. That is, although men and women are equally forbidden to marry same-sex others, whom an individual may marry is finally determined by that individual's gender and the gender of the person he or she wishes to marry. That is, women can marry men, but not women, and men can marry women, but not men. An example may be helpful. Assume that Alan has two suitors for his hand in marriage, Bob and Cathy. Bob, like Alan, is male. Cathy, on the other hand, is female. Alan is free to marry Cathy, but cannot marry Bob. *See, e.g., Goodridge v. Department of Public Health*, 440 Mass at 345-46 (Greaney, J., concurring) ("That the classification is sex based is self-evident. The marriage statutes prohibit some applicants, such as the plaintiffs, from obtaining a marriage license, and that prohibition is based solely on the applicants' gender. As a factual matter, an individual's choice of marital partner is constrained because of his or her own sex."); *Baehr v. Lewin*, 74 Haw 530, 852 P2d (1993) (similar); *but see Baker v. Vermont*, 70 Vt at 215 ("we are not persuaded that sex discrimination offers a useful analytic framework for determining plaintiffs' rights under the Common Benefits Clause" of Vermont's Constitution.)

If the Oregon courts conclude that the statute classifies on the basis of gender, the likelihood that they would find that limitation unconstitutional is very high. After describing gender as suspect, *Hewitt* states:

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

Hewitt, 294 Or at 46. While it is obviously true that biological differences between men and women exist, the connection between many of the “privileges” and “immunities” granted to married persons – such as the testimonial privilege, intestate succession, and child support – and gender or biological differences between men and women are no easier to discern than the relationship between workers’ compensation benefits and gender was in *Hewitt*. Consequently, if the court determines that the statute classifies on the basis of gender, we predict that the court would conclude that it violates Article I, section 20, of the Oregon Constitution.

Even if the Supreme Court does not determine that the marriage statutes classify on the basis of gender, it might determine that the statute classifies on the basis of sexual orientation. It is unquestionably true that the exclusion of same sex couples from the privilege of marriage and its legal incidents primarily disadvantages homosexual persons. And only homosexual persons are denied the opportunity to marry the person of their choice *by the law*. Consequently, depending on the manner in which the Supreme Court chooses to frame the inquiry, the court might view the classification as based on sexual orientation, rather than gender. The question then becomes whether that court would agree with the Court of Appeals that the classification is suspect.

The major unanswered question about suspect classes is whether membership in such a class must stem from an immutable personal characteristic such as race or gender, from societal discrimination against the class, or from some combination of the two. In *Tanner*, the Court of Appeals reviewed a number of Supreme Court opinions and concluded, relying on what are technically *dicta*, that suspect classes are determined by historic societal treatment of distinct groups.

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

Tanner, 157 Or App at 523. The proposition that groups historically subject to discrimination may be entitled to special protection has impressive historical support. *See United States v. Carolene Products*, 304 US 144, 152 n 4, 58 S Ct 778, 82 L Ed 2d 1234 (1938) (prejudice against “discrete and insular minorities” may call for “more searching judicial inquiry.”).

On the other hand, the Oregon Supreme Court has actually held that a classification is suspect only once, in *Hewitt*, a case involving an immutable characteristic.⁵ And the

⁵ *Hewitt* describes gender as “determined by causes not within the control of the individual.” 294 Or at 46. In light of modern surgical and therapeutic techniques, techniques that were known to the *Hewitt* court, it is debatable whether that description, or the description of gender as “immutable,” is accurate. In light of the

court recently stated, albeit in *dictum*: “When distinctions are based on personal characteristics that are not immutable, this court reviews the classification for whether the legislature had a rational basis for making the distinction.” *Crocker and Crocker*, 332 Or 42, 55 22 P3 789 (2001).

Nevertheless, in *Hewitt*, the court referred to one other classification that is plainly not immutable as an example of a suspect class. 294 Or at 46 (citing alienage – i.e., foreign citizenship). Consequently, the court could conclude that classes that historically have been the subject of discriminatory treatment are by definition suspect, or adopt an intermediate position in which both relative immutability and historic discrimination play a role.

If the Supreme Court concludes that immutability is a necessary attribute of a suspect class, whether sexual orientation is suspect may depend on the nature of evidence, expert opinion, or other authority presented at a trial or on appeal. In short, if immutability is a necessary condition for a suspect class, then we cannot at this time predict the outcome.

Having concluded that historic prejudice, not immutability, determines whether a class is suspect, the Court of Appeals in *Tanner* had little difficulty in concluding that sexual orientation met that test.

Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.

154 Or App at 524. As we previously noted, the Supreme Court has not adopted this conclusion. *Crocker* was decided after *Tanner*. One of the *amici* in *Crocker* cited *Tanner* to the Supreme Court in support of the proposition that the statutes there should be subjected to heightened scrutiny⁶, but the Supreme Court did not cite *Tanner* in its opinion. Nevertheless, if the Supreme Court were to determine that this statute classifies on the basis of sexual orientation, it would have to consider whether sexual orientation is a suspect classification. If the court addresses that issue, we believe that the court would conclude that sexual orientation is a suspect classification.

The question then would become whether any genuine differences between heterosexual citizens and homosexual citizens justify excluding the latter, as a class, from marriage and its legal incidents, such as intestate succession. We have little hesitation in concluding that the court would strike down a law that simply prohibited homosexual

court’s description of gender, it is sufficient to treat it as immutable for present purposes. It may be that “immutable,” in its strictest sense, does not necessarily capture the precise meaning the court intends.

⁶ Brief of *amici curiae* Dierking and Schuster at 10, 17, 23, 24.

persons from inheriting. *See, Sealey* 309 Or at 398 (court would no doubt strike down purely arbitrary classification). Yet existing law has the effect of apportioning benefits such as intestate succession and the testimonial privilege, for example, on the basis of sexual orientation because it does not permit homosexual persons to marry. So long as the law conditions the availability of benefits on marriage status, it appears unlikely that a law discriminating on suspect grounds among those who can obtain those benefits will survive the searching review that accompanies the determination that the classification in question is suspect.

The remaining question is what the court would do if it concluded that the classification in question was not suspect. Non-suspect classifications are subject to “rational-basis” scrutiny. *Crocker*, 332 Or at 54. The question when conducting rational basis scrutiny is not what the legislature actually believed, but what a “legislator rationally could believe[.]” *Id.* at 55.⁷ This standard is exceptionally deferential, but not without substance. As the United States Supreme Court recently stated, “even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.” *Romer v. Evans*, 517 U.S. 620, 632, 116 S Ct 1620, 134 L Ed 2d 855 (1996). Although the Oregon Supreme Court has not explicitly said as much, its application of the rational-basis standard leaves little doubt that it also requires a rational connection between the challenged classification and the legitimate legislative goal. *E.g., Crocker; Sealey.*

Other courts that have considered this same question have focused in large measure on child rearing when identifying the state interests that laws denying marriage to same-sex couples are said to further. *E.g., Goodridge v. Department of Public Health*, 440 Mass 309, 798 NE2d 941, 998-1002 (2003); *Standhardt v. Arizona*, 410 Ariz Adv Rep 25, 77 P3d 451 (Ariz App 2003); *Baker*. Although the courts have not reached uniform conclusions, the connection between opposite-sex partners and child-rearing has considerable historic and cultural momentum. But technology and Oregon law have, if not completely severed that link, at least attenuated it to a considerable degree. First, of course, people who wish to get married in Oregon need not promise to have children. And technology, some of it not particularly novel, permits women in same-sex relationships to conceive and bear children. Likewise, a man in a same-sex relationship may father and raise a child carried by a surrogate. Oregon law does not disadvantage those children in any way of which we are aware, except by virtue of the marriage statutes. Moreover, same-sex couples can adopt children.

The legislative choice to restrict marriage to opposite sex couples could be advanced as a rational choice if there were substantial dispute about whether children raised by same-sex parents fare as well overall as children raised by opposite-sex parents. At least one difficulty with that argument in Oregon would be, as we have already noted,

⁷ Compare, *e.g., Exxon Corporation v. Eagerton*, 462 US 176, 195-96, 103 S Ct 2296, 76 L Ed 2d 497 (1983) (under federal equal protection rational basis test a statute will be sustained “if the legislature could have reasonably concluded” that the classification would promote a legitimate state purpose)

that the legislature places no limits on the ability of same-sex couples to have and raise children. Thus, what is denied to same-sex couples is the status of marriage and its attendant benefits, many of which are unrelated to procreation or children, not the ability to have and raise children. Consequently, the connection in Oregon between the specific law in question and that rationale appears strained at best.

We do not mean to suggest that the long historic and cultural connection between opposite-sex couples, marriage, and child-rearing is meaningless. But the Oregon legislature has chosen to grant particular privileges to married persons that seem to have little or no connection to child-rearing, while at the same time imposing no restrictions on the ability of same-sex couples to have and raise children. In that light, a reasonable person might characterize the maintenance of this one distinction as arbitrary.

Nevertheless, state courts considering this question have reached differing conclusions when asked to determine whether, under their respective state constitutions, a rational basis exists for excluding same-sex couples from the benefits that attend the status of civil marriage.⁸ Consequently, we would be less than candid if we did not acknowledge that there is room for disagreement on this question, and we are far less comfortable with the conclusion that the court would find that this statute lacks a rational basis than we are with the other conclusions that we have drawn. On the other hand, we doubt that the issue will be resolved on that ground. Rather, we believe that the court is more likely to find that the classification in the statute implicates a suspect class and to invalidate limiting marriage to opposite-sex couples on that ground.

We need to emphasize again, however, the large number of uncertainties that permeate our answer to this question. The court's mode of analysis may be in flux. *See* n 3. The Supreme Court has not addressed a suspect class case since *Hewitt*, which was decided over 20 years ago. And this is a socially divisive issue that has been resolved in different ways by state courts throughout the nation. The judgments in this opinion reflect the best efforts of the Department of Justice. But they are, nonetheless, predictions about what the court would do; they do not represent firm conclusions based on existing precedent because controlling precedent simply does not exist.

⁸ Compare, e.g., *Goodridge*, 440 Mass at 331 (“we conclude that,” under the individual liberty and equal protection provisions of the Massachusetts Constitution, the statute denying marriage licenses to same-sex couples “does not meet the rational basis test for either due process or equal protection”), and *Baker v. Vermont*, 170 Vt. 194, 224, 744 A2d 864 (1999) (“viewed in the light of history, logic, and experience, we conclude that,” under the Common Benefits Clause of the Vermont Constitution, “none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law”), with *Standhardt v. Arizona*, 410 Ariz Adv Rep 25, 43, 77 P3d 451 (2003) (“Because Arizona’s prohibition against same-sex marriage rationally furthers a legitimate state interest” –i.e., “encouraging procreation and child rearing within the marital relationship” – “the prohibition does not deprive Petitioners of their constitutional rights to substantive due process, privacy, or equal protection” under the Arizona Constitution).

III. Conclusion

We can summarize our conclusions as follows: (1) current Oregon laws prohibit county clerks from issuing marriage licenses to same-sex couples; (2) under current law, the legal status of being “married” carries with it legal rights, benefits and obligations; and (3) the Oregon Supreme Court likely would conclude that withholding from same-sex couples the legal rights, benefits and obligations that—under current law—are automatically granted to married couples of the opposite sex likely violates Article I, section 20 of the Oregon Constitution; but (4) because of the uncertainties about the Article I, Section 20 analysis that the Oregon Supreme Court would bring to bear on the question, it would be unwise to change current state practices until, and unless, a decision by the Supreme Court makes clear what, if any changes are required.

As we have noted throughout this opinion, however, the conclusions that we have reached are not without doubt. The Constitution reserves the legislative power to the Legislative Assembly and to the people through their initiative and referendum powers. *See*, Oregon Constitution, Article IV, Section 1. Subject to constitutional limitations, the Legislative Assembly is free to make any policy choice that it wishes. The Executive Branch, including both the Attorney General and the Governor, are charged with the faithful execution of the law. *See*, Oregon Constitution, Article V, Section 10. The judicial power of the state is allocated to the Oregon Supreme Court and the other courts of the state. *See*, Oregon Constitution, Article VII (amended), Section 1. Under this division of responsibility between the three branches of government, the constitutionality of Oregon’s marriage statutes must ultimately be determined by the Oregon Supreme Court.

It is up to the Legislative Assembly in the first instance to craft statutes that satisfy the requirements of the Oregon Constitution. We offer no opinion on whether a “civil union” system or other modifications to statutes that the Legislative Assembly might adopt would be found to comply with the Oregon Constitution. Our opinion is thus limited to current law.

Sincerely,

A handwritten signature in black ink, appearing to read "Hardy Myers", written in a cursive style.

HARDY MYERS
Attorney General