

March 8, 2004

Senator Kate Brown  
Senate Democratic Leader  
900 Court Street NE, S323  
Salem, Oregon 97301

Subject: Same-Sex Marriage

Dear Senator Brown:

This letter responds to your request for our opinion whether state law requires a county clerk to license the marriage of a same-sex couple. The answer is yes.

The Legislative Assembly has authorized marriage only between persons of the opposite sex. However, section 20, Article I of the Oregon Constitution, which prohibits the Legislative Assembly from “granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens[,]” requires the state to grant a same-sex couple a license to marry on the same terms as a couple of the opposite sex. Providing same-sex couples with a separate civil contract, such as civil union, is not sufficient; separate is not equal.

We understand that you are seeking this advice to help guide your actions. We have, therefore, tried to provide you with the analysis that we believe Oregon’s courts will most likely apply. In reaching our conclusion, we have accepted the courts’ interpretations of relevant statutes and constitutional provisions and have not sought to address issues as if we were writing on a clean slate.

### **The Definition of Marriage: Man and Woman**

The Legislative Assembly limits marriage to between a man and a woman. ORS 106.010 provides:

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

Although ORS 106.010 uses the preposition “by” instead of “between,” the statute addresses only couples of the opposite sex. ORS 106.010 has remained the same in pertinent respects since the Legislative Assembly adopted the law in 1862. See section 1, chapter 34, General Laws of Oregon 1843-1872 at 660 (“by males . . . and females”). Other sections of the same 1862 law described the “persons . . . joined in marriage” as

“the female” and “the male.” Sections 12 and 13, chapter 34, General Laws of Oregon 1843-1872 at 662. Current law continues this sex-based distinction by requiring “the parties [to a marriage to] assent or declare . . . that they take each other to be husband and wife.” ORS 106.150 (1). In common parlance, the terms “husband” (“a male partner in a marriage”) and “wife” (“a female partner in a marriage”) describe an opposite-sex couple. Merriam Webster’s Collegiate Dictionary 565, 1348 (10th ed. 2000).

Oregon’s courts have always described “marriage [a]s a civil contract . . . between a man and woman.” *Heisler v. Heisler*, 152 Or. 691, 693 (1936). The Legislative Assembly has not authorized other persons to marry, and “marriage in this state can be accomplished only in the manner and method as pointed out in the statute.” *Huard v. McTeigh*, 113 Or. 279, 290 (1925). Because of this limitation, under ORS 106.010, “[h]omosexual couples may not marry.” *Tanner*, 157 Or. App. 502, 525 (1998) (government must provide insurance benefits to unmarried domestic partners of homosexual employees on the same terms as provided to spouses of married employees).

The question then becomes whether same-sex couples may marry in spite of the limitation in ORS 106.010.

### **Same-Sex Couples’ Right to Equal Privileges: General Principles**

Marriage is more than a privilege: it is a “fundamental right.” *McGinley and McGinley*, 172 Or. App. 717, 731 (2001).

Oregon’s courts evaluate the Legislative Assembly’s limitations on the rights of same-sex couples in the same way that the courts evaluate limitations on the rights of racial minorities and religious adherents:

Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice. *Tanner*, 157 Or. App. at 524.

In other words, homosexuals are defined by “personal . . . characteristics”—their sexual orientation—and not by their behavior. *Tanner*, 157 Or. App. at 523.

In treating sexual orientation like race, gender and religion, Oregon’s courts give more protection to homosexuals’ rights than do many other states’ courts. Even the Supreme Judicial Court of Massachusetts, which has ordered that state to make marriage available to same-sex couples, does not treat homosexuals the same as racial minorities and religious adherents. *Goodridge v. Department of Public Health*, 440 Mass. 309, 331, 798 N.E. 2d 941, 961 (2003).

Ordinarily, courts accept the Legislative Assembly’s drawing distinctions between people whose conduct makes them different from others. See *McGinley*, 172 Or. App. at 731-732 (court permitted Legislative Assembly to treat parents who divorce differently

from parents who stay married). Where the Legislative Assembly draws distinctions based on a person's nature, however, the courts will "subject [the reason for the Legislative Assembly's treating people differently] to particularly exacting scrutiny." *Tanner*, 157 Or. App. at 522.

For the Legislative Assembly to limit marriage to between a man and woman, there must be, in the context of a marriage, "genuine differences" between same-sex couples and opposite-sex couples, and those differences must be "justified by [the same-sex couples'] homosexuality." *Tanner*, 157 Or. App. at 524. In *Tanner*, the Court of Appeals found "no . . . justification" for providing benefits to spouses of married employees and not to unmarried domestic partners of homosexual employees. 157 Or. App. at 524.

Upholding traditional societal roles is not a sufficient reason to justify treating same-sex couples differently from opposite-sex couples. The different treatment in ORS 106.010 must reflect "intrinsic differences" between same-sex couples and opposite-sex couples; it is not enough for the Legislative Assembly's distinction to "reflect[] assumptions about . . . relative social roles." *Hewitt v. SAIF*, 294 Or. 33, 49 (1982) (declaring unconstitutional statute that provided different benefits to men than women based on the sexes' different traditional roles in the family and workplace).

It is not enough for the distinction to deter conduct of which a portion of the population disapproves on moral or religious grounds. *Hewitt*, 294 Or. at 36-37 (disapproving *State v. Baker*, 50 Or. 381 (1907), which had cited the promotion of "good morals" to uphold the exclusion of young women from saloons).

It is also not a sufficient justification that the different treatment in ORS 106.010 reflects a long-standing practice. In *Hewitt*, 294 Or. at 46-47, the Supreme Court rejected as having prolonged unfounded "stereotype[s]" generations-old laws and cases that limited the businesses that women could enter or work in.

The parameters of a socially acceptable marriage have expanded over the years. Oregon's founders, who banned "free negro[es]" from the state under *former* section 35, Article I, Oregon Constitution, considered most interracial marriages to be abhorrent:

"If any white person, negro, Chinese, kanaka, or Indian . . . shall knowingly intermarry . . . such person or persons . . . shall be punished by imprisonment . . . [for] not less than three months nor more than one year." Section 1928, chapter 8, General Laws of Oregon 1892 at 967.

This ban remained in effect for generations, see 22 Op. Att'y Gen. 101 (1945) (county clerk could not license marriage of Hawaiian and Caucasian), but is no longer the law. Section 2, chapter 455, Oregon Laws 1951.

### **Insufficient Reasons for Limiting Marriage to Opposite-Sex Couples**

Different states offer similar descriptions of the principal reason for regulating marriage. In Vermont, the state's interest is in "furthering the link between procreation and child rearing." *Baker v. State of Vermont*, 170 Vt. 194, 216-217, 744 A.2d 864, 881

(1999). In Massachusetts, the interest is in “providing a ‘favorable setting for procreation’” and “ensuring the optimal setting for child rearing.” *Goodridge*, 440 Mass. at 331, 798 N.E. 2d at 961. Arizona’s interest is “in encouraging procreation and child-rearing within [a] stable environment[.]” *Standhardt v. Superior Court*, 77 P.3d 451, 461 (2003).

Oregon puts the matter this way:

The interest of the state in the [civil] contract [of marriage] is that the race may be perpetuated in an orderly manner, and children raised in such surroundings as to make them desirable future citizens[.] *Heisler*, 152 Or. at 694.

Under the test explained in *Tanner*, the Legislative Assembly may limit marriage to opposite-sex couples *if, and only if*, same-sex couples cannot participate in the “orderly” perpetuation of the species or in the raising of children as “desirable future citizens” and the reason that same-sex couples cannot participate is their homosexuality.

In our view, the state will be unable to satisfy the courts that same-sex couples cannot participate in an orderly perpetuation of the species or raise “desirable future citizens.”

First, the link between heterosexual relations and childbearing is no longer exclusive. The state cannot now differentiate between same-sex couples and opposite-sex couples based on ability to procreate.

Historically, “unassisted heterosexual relations were the only means . . . by which children could come into the world, and the absence of widely available and effective contraceptives made the link between heterosexual sex and procreation very strong[.]” *Goodridge*, 440 Mass. at 332 n.23, 798 N.E. 2d at 961 n.23. But, as the Supreme Court of Vermont has observed, technology has changed, and so have the times:

It is . . . undisputed that many opposite-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children. . . .

Furthermore . . . there is no dispute that a significant number of children today are actually being raised by same-sex parents, and that increasing numbers of children are being conceived by such parents through a variety of assisted-reproductive techniques. . . .

Thus, with or without the marriage sanction, the reality today is that increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children. *Baker*, 170 Vt. at 217-218, 744 A.2d at 881-882.

Because same-sex couples may now procreate, the state cannot rely on ability to procreate as a reason to limit marriage to couples of the opposite sex.

Second, Oregon's courts reject the suggestion that opposite-sex couples are better or more appropriate parents than same-sex couples. *Collins and Collins*, 183 Or. App. 354, 359 (2002) (court cannot consider parent's homosexual relationship when deciding custody arrangement); see *Ashling v. Ashling*, 42 Or. App. 47, 50 (1979) (for purposes of deciding custody and visitation, homosexuals and heterosexuals held to same standard of behavior). Other states' courts echo the Oregon courts' equal treatment of parenting by same-sex couples and opposite-sex couples. See, e.g., *Goodridge*, 440 Mass. at 333, 798 N.E. 2d at 962 (rejecting "the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect").

Oregon's laws on parenting also do not draw material distinctions between same-sex couples and opposite-sex couples. See, e.g., ORS 109.309 (1) ("[a]ny person may petition the circuit court for leave to adopt"). For example, rules that implement Oregon's adoption laws treat same-sex couples and opposite-sex couples the same, see, e.g., OAR 413-120-0200 (adoption open to unmarried and married couples) and OAR 413-120-0310 (minimum standards for adoptive homes). Child support rules also account for benefits that a parent receives from a same-sex partner. See OAR 137-050-0410 (4).

Because opposite-sex couples are not better or more suitable than same-sex couples at raising children as "desirable future citizens," the state cannot rely on better or more suitable parenting as a reason to limit marriage to couples of the opposite sex.

Thus, the reasons for the state's regulating marriage do not support limiting marriage to couples of the opposite sex. Without some other basis for limiting marriage to opposite-sex couples, section 20, Article I of the Oregon Constitution, will require the state to make marriage available to same-sex couples on the same terms as the state does to couples of the opposite sex.

Some states have offered other reasons to limit marriage to couples of the opposite sex—reasons that include maintaining uniformity with other states' laws, *Baker*, 170 Vt. at 222-223, 744 A.2d at 885, and preserving scarce state resources, *Goodridge*, 440 Mass. at 336, 798 N.E. 2d at 964—but Oregon's courts will not credit those reasons. Under *Tanner*, 157 Or. App. at 524, the reasons for treating same-sex couples unlike opposite-sex couples must relate to the same-sex couples' homosexuality, and neither maintaining the uniformity of laws nor preserving state resources is related to homosexuality.

(We are aware that the Arizona courts recently ruled that the state's interest in encouraging procreation and child-rearing supported the state's limiting marriage to opposite-sex couples. *Standhardt*, 77 P.3d at 463-464. We have not relied on that case because, unlike Oregon's courts, the Arizona courts do not treat sexual orientation as the equivalent of race or religious affiliation. 77 P.3d at 464. As a result, the Arizona courts required the state to show only some "rational basis" for limiting marriage—a burden much easier for a state to meet than that which the Oregon courts impose.)

## Underpinnings of the Constitution: Opposite-Sex Couples

Review of the policy reasons for regulating marriage does not end the analysis. The state's founders built some inequality into the constitution at the same time that they prohibited the Legislative Assembly from granting special privileges. Inequalities built into the constitution are beyond the reach of section 20, Article I. *Cf. State v. DeFord*, 120 Or. 444, 450 (1926) ("The whole constitution must be construed together"). For example, section 8, Article IV, has always limited eligibility for service in the Legislative Assembly to persons at least 21 years of age. A person under the age of 21 years, therefore, cannot claim that the state has denied the person an equal privilege to serve in the Legislative Assembly.

There is no question that the state's founders could not have conceived of a marriage of persons of the same sex. Even without an Act of the Legislative Assembly, "marriages which [we]re deemed contrary to the law of nature as generally recognized in Christian countries, such as involve polygamy and incest . . . [were] not . . . allowed any validity." *Sturgis v. Sturgis*, 51 Or. 10, 16 (1908). The state considered sexual relations between persons of the same sex to be an "offense against nature," *State v. Start*, 65 Or. 178, 180 (1913), which the Legislative Assembly punished as a felony. 49 Crim Code § 39 (1864).

The only discussion of marriage in the constitution, however, relates to property rights—not to who may marry. The members of the constitutional convention were mostly farmers who had acquired land under an Act of Congress. When a "white male citizen" married, the Act awarded the "wife" an equal share of land in her own name. *See Rugh v. Ottenheimer*, 6 Or. 231, 234 (1877). The Act deviated from the common law rule, which "divested a woman on her marriage of her personal estate, and of control over her realty, and subjected her property to the debts and contracts of her husband[.]" *Brummet v. Weaver*, 2 Or. 168, 173 (1866). Some members of the convention objected to a married woman's owning property separately from her husband and tried to set different ground rules in the constitution. George H. Williams, who later served as United States Attorney General, said:

In this age of woman's rights and insane theories, our legislation should be such as to unite the family circle, and make husband and wife what they should be—bone of one bone, and flesh of one flesh. The provision of our donation law giving the husband and wife separate and distinct estates in the land claim had been the cause of much domestic trouble and many divorces in the country. C. H. Carey, *History of the Constitution of Oregon*, at 368 (1926).

The delegates compromised on the following provision, which is section 5, Article XV of the Oregon Constitution:

The property and pecuniary rights of every married woman, at the time of marriage or afterwards, acquired by gift, devise, or inheritance shall not be subject to the debts,

or contracts of the husband; and laws shall be passed providing for the registration of the wife's separate (sic) property.

This provision shows that the founders drafted the Oregon Constitution with the assumption that marriage involved couples of the opposite sex, but the provision does not itself limit who may marry. We turn, therefore, to whether the assumption constitutes a limitation. Based on an analogous situation, we conclude that it does not.

Since statehood, section 11, Article I, has guaranteed a criminal defendant “the right to public trial by an impartial jury.” At common law, all jurors were men, *State v. Chase*, 106 Or. 263, 271 (1923), and under Oregon law, only men could serve as jurors. 12 Civ Code § 918 (1862). Not surprisingly, therefore, when referring to a jury, “the constitution contemplated a jury of . . . men.” *Chase*, 106 Or. at 270. Years later, when women began to serve on juries, a defendant objected, “argu[ing] . . . that [he was] entitled to a public trial by an impartial jury composed of twelve males.” *State v. Putney*, 110 Or. 634, 643 (1924). The court acknowledged the original assumption of an all-male jury, but concluded that the assumption did not constitute a limitation:

Women are now the peers of men politically, and there is no reason to question their eligibility upon constitutional grounds. The fact that a common-law jury was defined to be a “jury of twelve *men*,” etc., had its origin in the circumstance of the political servitude of women in the early days of juridical history, so that they were not the “peers” of a man accused of crime. In the broad sense of the word, they are now “freemen,” and neither the Constitution nor the laws, when they used the term “men,” except in rare instances, use it with reference to sex. *Putney*, 110 Or. at 643 quoting *Chase*, 106 Or. at 271 (emphasis in original).

If the court in 1924 found changed the original assumption of an all-male jury, the courts today could, as explained in section 3 above, find changed the original assumption of marriage as limited to persons of the opposite sex.

## **5. Civil Union Is Insufficient**

Retaining marriage for opposite-sex couples and creating a separate civil contract for same-sex couples (called, for example, “civil union”) would not satisfy the requirements of section 20, Article I, even if the same-sex contract provided the rights that marriage provides to opposite-sex couples. See *Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 180 Or. App. 420 (2002) (organization offered women membership only in auxiliary group); *King v. Greyhound Lines, Inc.*, 61 Or. App. 197, 201 (1982) (“separate accommodations [are not] equal accommodations”).

*Tanner* does not permit separate but equal treatment—unless the state can demonstrate a sufficient reason for the separate treatment. To permit a distinction between the contracts of same-sex couples and opposite-sex couples, the state would have to show that there is a material distinction between same-sex couples and opposite-

sex couples based on the couples' different sexual orientations. *Tanner*, 157 Or. App. at 524 (differences must be "justified by [the same-sex couples'] homosexuality"). If, as we expect, the state cannot show that there is a material reason to exclude same-sex couples from the rights and obligations of marriage, then there is also no material reason to exclude them from the name "marriage." Offering same-sex couples civil union instead of marriage "maintain[s] and foster[s] a stigma of exclusion that the Constitution prohibits." *Opinions of the Justices to the Senate*, 440 Mass. 1201, 1208, 802 N.E. 2d 565, 570 (2004).

There may also be another alternative: Instead of giving opposite-sex couples a "marriage license" and same-sex couples a "civil union license," the Legislative Assembly could authorize clerks to issue "commitment licenses" (or whatever designation the Legislative Assembly chooses) to all couples. This system would leave "marriage" to religious organizations, with the state authorizing the issuance of the license and the religious organization performing the "marriage." Each religious organization could then decide for itself whether to perform "marriage" ceremonies for same-sex couples.

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If you have any other questions, please contact me.

Very truly yours,

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