

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,

Court of Appeals No. CA A124877
Multnomah County Circuit Court
No. 0403-03057

Plaintiffs-Respondents,

and

MULTNOMAH COUNTY,

Intevenor-Plaintiff-Respondent,

v.

STATE OF OREGON; THEODORE KULONGOSKI, in his official capacity as Governor of the State of Oregon; HARDY MYERS, in his official capacity of 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,

and

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

Intervenors-Defendants-Respondents.

BRIEF OF AMICUS CURIAE BARRY ADAMSON

APPEAL OF A JUDGMENT OF THE MULTNOMAH COUNTY CIRCUIT COURT
HON. FRANK BEARDEN, JUDGE

BARRY ADAMSON, OSB No. 79008
4248 S.W. Galewood
Post Office Box 1172
Lake Oswego, Oregon 97035
503-699-9914

ADDITIONAL COUNSEL ON INSIDE COVER

Attorney for *Amicus Curiae*

Brief filed: June 30, 2004

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THE ENDURING TRUTH OF HISTORICAL REALITY

Historical reality proves formidable. Most readily embrace it as the unalterable truth, warts and all. To others, though, it discredits contrary predispositions and thus proves unendurable; they disdain it, rationalize it, manipulate it, “correct” it, and simply misrepresent it. But, in the face of all the machinations that humanity concocts to deflect the intransigence of historical reality, the underlying truth never changes.

Unaltered since 1857, Article I, section 20, of the Oregon Constitution reads:

“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.”

Also unaltered in substance since 1844 (and perhaps since 1843), the text of ORS 106.010 codifies an even older, pre-statehood marriage limitation that limits marriage to a union between a man and a woman:

“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 . . . [.]”

Some maintain that “marriage” represents a “privilege” within the meaning of Article I, Section 20, and that the Oregon statute that confines “marriage” to a union between “males” and “females” represents precisely the kind of “law” that Article I, Section 20, prohibits. That view relies upon an intuitive, yet wholly uninformed, perspective.

The reality of history informs us, with surprising objectivity, that the words in Article I, Section 20, bear a specific, contextual meaning that furnishes no support for the notion expressed in the preceding paragraph. History in fact reveals a number of truths about (1) Oregon’s enduring marriage limitation now codified as ORS 106.010, and (2) the historical meaning, purpose, and function of the words that appear in Article I, Section 20, of the Oregon Constitution.

First, because the Oregon legislature has consistently limited marriage to a union between a man and woman since 1844, or perhaps even 1843, and because nothing about the state’s adoption of Article I, Section 20, in 1857 changed that historical reality, the legislature has never “passed” — in Article I, Section 20, vernacular — a post-Article I, Sec-

I. SINCE 1844, AND PERHAPS 1843 — AND UNALTERED BY THE 1857 CONSTITUTION — OREGON LAW HAS ALWAYS LIMITED “MARRIAGE” TO A UNION BETWEEN A MAN AND A WOMAN, MEANING THAT THE LEGISLATURE HAS NEVER “PASSED” A POST-ARTICLE I, SECTION 20, LAW LIMITING MARRIAGE

ORS 106.010 offends no aspect of Article I, Section 20, unless it qualifies as a therefore non-existent law “passed” — in the words of Article I, Section 20 — after Article I, Section 20, became effective as part of Oregon’s 1859 statehood. Yet, since at least 1844, *fifteen years prior to Oregon’s statehood* (and perhaps since 1843), Oregon has continuously maintained a legislative limitation that confines “marriage” to a union between a man and a woman.

A. IOWA TERRITORIAL LAW LIMITING MARRIAGE

In 1840, the Iowa territorial legislature adopted an “act regulating marriages” that confined marriage to a union between a man and a woman:

“Be it enacted by the Council and House of Representatives of the Territory of Iowa, [t]hat *male* persons of the age of eighteen years, [and] *female* persons of the age of fourteen years, . . . may be joined in marriage[.] . . .” Act of January 6, 1840, Iowa Territorial Laws of 1840, Ch. 25, § 1 (emphasis added).

Following an immaterial amendment in 1842 (Iowa Territorial Laws of 1842, Ch. 97, § 1), Iowa law has always codified that marriage limitation without change. *See* Iowa Rev. Stat. of 1843 (Terr.), Ch. 100, § 1; *see also* Iowa Code § 595.2(1) (2003) (“Only a marriage between a male and a female is valid.”).^[1]

The Iowa Supreme Court referenced — quoted — that marriage limitation law as early as 1849:

¹ That Iowa marriage limitation law has appeared in the Iowa Code of 1851 (§§ 1464 and 1469), the Iowa Code of 1860 (§§ 2516 and 2521), the Iowa Code of 1873 (§§ 2186 and 2191), the Iowa Code of 1897 (§§ 3140 and 3143), the Iowa Codes of 1924, 1927, 1931, 1935, and 1939 (§§ 10428 and 10434), the Iowa Codes of 1946, 1950, 1954, 1958, 1962, 1966, 1971, 1973, and 1975 (§§ 595.2 and 595.8), and the Iowa Codes of 1977, 1979, and 1981 (§ 595.2, as amended by 1985 Iowa Acts, Ch. 67, §53, 1998 Iowa Acts, Ch. 1099, §1, and 1999 Iowa Acts, Ch. 114, §44). At all times, the “male”/“female” marriage limitation remained intact.

at 136, reproducing part of the July 5, 1843, territorial legislature’s enactment. Available history fails to clarify whether Iowa’s 1839 compilation of territorial laws had been revised to include Iowa’s 1840 marriage limitation statute, such that Oregon’s adoption of Iowa law included the 1840 limitation. However, by 1843 Iowa had published a new compilation of laws that definitely included the marriage limitation. Iowa Rev. Stat. of 1843 (Terr.), Ch. 100, § 1, mentioned above.

Thus, as of 1843 the available legislative history leaves the question unresolved whether Oregon’s adoption of Iowa law included the adoption of Iowa’s 1840 marriage limitation law. That uncertainty did not last long.

— (2). 1844: Oregon Adopts Its Own Marriage Limitation Law —

In June, 1844, in preparation for a revision of Oregon’s provisional territorial laws, the same legislative committee again recommended that the provisional territorial government adopt Iowa’s territorial laws. Harris, *supra*, *History of the Oregon Code*, 1 Or L Rev at 137–38.

On June 27, 1844, Oregon’s provisional territorial government followed that recommendation (Harris, *supra*, *History of the Oregon Code*, 1 Or L Rev at 137–38), resulting in the following:

“All the statute laws of Iowa Territory passed at the first session of the Legislative Assembly of said Territory, and not of a local character, and not incompatible with the condition and circumstances of this country, shall be the law of this government, unless otherwise modified[.] . . .”
Act of June 27, 1844, Or Laws 1844, Art. III, § 1.

Again, even though the 1840 Iowa territorial legislature had adopted a marriage limitation law (*supra*), it appears that the Oregon legislature’s reference to Iowa territorial laws “passed at the *first* session of the legislative assembly of said territory,” *supra* (emphasis added), perhaps (again) referenced only the 1839 Iowa compilation. Although Iowa had published its 1843 compilation of laws, *supra*, a full year prior to Oregon’s Act of June 27, 1844, the “first” session of the Iowa Territorial Legislature occurred in 1839.

In that same legislative session, the territorial legislature also adopted all laws enacted by the 1844 legislature that the 1845 legislature had not repealed:

“Be it enacted by the House of Representatives of [the] Oregon Territory, as follows:

“That the Acts passed by the Legislative Committee of 1844 not incompatible with the original or amended Organic Laws, and not repealed by special enactments of the House of Representatives of 1845, be, and the same are hereby, adopted as the Laws of Oregon.” Act of Aug. 23, 1845, Or Laws 1845.

Although the 1845 legislature (again) adopted Iowa law as Oregon law (*see* Act of Aug. 12, 1845, Or Laws 1845, § 1; Harris, *supra*, *History of the Oregon Code*, 1 Or L Rev at 140), that adoption did not impact Oregon’s 1844 or 1845 marriage limitation; the 1845 adoption act only adopted Iowa law “in all cases *not* otherwise provided for” by Oregon law. Act of Aug. 12, 1845, § 1 (emphasis added).

— (4). 1848: Congress’ Adoption Of Existing Oregon Law As Territorial Law —

By Act of August 14, 1848, 9 Stat 323–331, Cong. Globe, 30th Cong., 1st Sess., vol. 18, at 1060–61, Congress officially organized the Oregon Territory. Section 14 of that Act declared that all existing territorial laws shall continue as the laws of the Oregon Territory:

“. . . [T]he existing laws now in force in the Territory of Oregon, under the authority of the provisional government established by the people thereof, shall continue to be valid and operative therein, . . . , subject, nevertheless, to be altered, modified, or repealed, by the legislative assembly of the said Territory of Oregon . . . [.]” 9 Stat 323, 330; *see also The Organic and Other General Laws of Oregon, 1845 to 1864*, 75–76 (Deady, Ed., 1866); Harris, *supra*, *History of the Oregon Code*, 1 Or L Rev at 141.

Thus, the then-existing marriage limitation law passed by the provisional legislature in 1844 and re-enacted in 1845 became part of the Oregon Territorial law via Congressional fiat.

— (6). 1852: Oregon’s Re-Adoption Of Its Marriage Limitation Law —

On January 6, 1852, the Oregon territorial legislature (again) enacted an “act regulating Marriages” that (again) limited marriage to a union between a “male” and a “female”:

“Be it enacted by the Legislative Assembly of the Territory of Oregon, [t]hat *male* and *female* persons . . . may be joined in marriage[.] . . .” Act of Jan. 6, 1852, Or Laws 1852, § 1 (emphasis added).

— (7). 1854: Oregon’s Re-Adoption Of Its Marriage Limitation Law —

On January 17, 1854, the Oregon territorial legislature (again) enacted an “act relating to marriage and divorce” that (again) limited marriage to a union between “males” and “females”:

“Every *male* person who shall have attained the full age of eighteen years, and every *female* [person] who shall have attained the full age of fifteen years, shall be capable in law of contracting marriage, of otherwise competent[.] . . .” Act of Jan. 17, 1854, Or Laws 1854, Ch. I, § 2 (emphasis added).

— (8). 1857: The Oregon Constitutional Convention —

On September 18, 1857, the Oregon Constitutional Convention adopted the Oregon Constitution, and the voters approved it on November 9, 1857.

Article XVIII, Section 7, of the 1857 Constitution declared (and still declares):

“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.” (Emphasis added.)

Thus, Oregon’s existing marriage limitation law remained intact and undiminished — Article I, Section 20, of the Oregon Constitution notwithstanding.

— (9). 1859: Oregon’s Statehood —

On February 14, 1859, Congress voted to make Oregon a state. Act of Feb. 14, 1859, 11 Stat 383–84. The Oregon Constitution took effect on that date, and via Article

Ch. 63, § 1, at 126; *The Organic and Other General Laws of Oregon, 1845 to 1864, supra*, Ch. 63, § 1(26), at 943. The effective date of that repeal coincided with the effective date of the code of civil procedure. *The Code of Civil Procedure and Other General Statutes of Oregon, supra*, Ch. 63, § 4, at 127; *The Organic and Other General Laws of Oregon, 1845 to 1864, supra*, Ch. 63, § 4, at 944.

The “primary act” (*viz.*, the code of civil procedure) bore an effective date of June 1, 1863. Act of Oct. 17, 1862, Or Laws 1862, Ch. 16, § 1167; *The Organic and Other General Laws of Oregon, 1845 to 1864, supra*, Ch. 16, § 1167, at 440. The general repealing act bore the same effective date of June 1, 1863.

Thus, Oregon’s 1854 “act relating to marriage and divorce,” the Act of Jan. 17, 1854, Ch. I, §§ 1–18, at 492–94, remained effective — and unaltered — for six years *after* the adoption of Article I, Section 20.

— (11). 1953: Oregon’s Creation Of The OREGON REVISED STATUTES —

In 1953, the then-existing marriage limitation law — unaltered since 1862 — became part of the OREGON REVISED STATUTES, without change. *See* ORS 106.010 (1953).

— (12). 2004: Oregon’s Enduring Limitation Of Marriage —

ORS 106.010 presently provides:

“Marriage is a civil contract, entered into in person by males of the age of 17 years, and females of the age of 17 years, who are otherwise capable, and solemnized in accordance with ORS 106.050.”

Since its post–Article I, Section 20, creation in 1862, that law has been amended only twice: in 1965 the legislature revised the wording to read as ORS 106.010 presently reads (1965 Or Laws, Ch. 422, § 1), and in 1975 the legislature changed the minimum age for both males and females to “17” (1975 Or Laws, Ch. 583, § 1).

Otherwise, Oregon’s marriage limitation has endured altered.

Historical reality confirms that Oregon’s 1862 post–statehood legislation functioned as nothing more than Oregon’s first post–statehood codification of all of its *pre*–statehood legislation that had never before been aggregated in a cohesive code. Nothing more, nothing less. See the discussion in Harris, *supra*, *History of the Oregon Code*, 1 Or L Rev at 200–06. Nothing of substance changed in the then–existing marriage limitation:

1854 Law	1862 Law
<p>“Every <i>male</i> person who shall have attained the full age of eighteen years, and every <i>female</i> [person] who shall have attained the full age of fifteen years, shall be capable in law of contracting marriage, of otherwise competent[.] . . .” Act of Jan. 17, 1854, Ch. I, § 2 (emphasis added).</p>	<p>“Marriage is a civil contract, which may be entered into by <i>males</i> of the age of eighteen years, and <i>females</i> of the age of fifteen years, who are otherwise capable.” Act of Oct. 17, 1862, Ch. 31, § 1 (emphasis added).</p>

The replacement of a *pre*–Article I, Section 20, *pre*–statehood law with a substantively identical *post*–statehood law for the sole purpose of transitioning from territorial laws to state laws (and codifying the latter) results in no law “passed” for purposes of Article I, Section 20 — particularly in view of the historical reality that the words that comprise Article I, Section 20, necessarily reference the passage of a law that had not theretofore existed. If the law *already* existed, the point of Article I, Section 20, would be rather blunt.

Indeed, because Congress’ 1859 admission act left in place all existing Oregon laws (per Or Const, Art. XVIII, § 7), and because Oregon’s marriage limitation law *pre*–dated statehood, had the 1862 legislature done nothing at all — *viz.*, not undertaken a post–statehood codification project — the 1854 law would remain in place “as is” and the plaintiffs would have no claim whatsoever. It would be the irony of ironies if a legislative *replication* of an *existing* marriage limitation solely to facilitate a post–statehood codification of laws could alter that result.

1084 (1981). However, thus far no Oregon appellate opinion examines the actual historical context, and that historical context confirms that Oregon’s selection of the 1851 Indiana Constitution as the model for large portions of Oregon’s 1857 Constitution proved more than merely fortuitous.

On August 19, 1857, the Oregon Constitutional Convention voted to add a “committee on bill of rights.” *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857, supra*, at 100 (Journal), at 101–04 (Oregonian), and at 105–106 (Statesman). In his speech in support of the addition of a bill-of-rights committee (and of the necessity of a separately-declared bill of rights), Delegate Smith — a lawyer who arrived in Oregon from Iowa — discussed in detail the state constitutions of New York, Wisconsin, Texas, Iowa, Wisconsin, and Indiana (*id.* at 101), and remarked that

“But of all the constitutions of all the states, I am pleased, as a whole, with that of the state of Indiana — the new constitution governing that state. . . . It is gold refined; it is up with the progress of the age.” *Id.* at 101 (Oregonian); *see also id.* at 105 (Statesman) (speech summarized).

Delegate Waymire likewise believed the Indiana Constitution’s bill of rights “would honor any constitution.” *Id.* at 105 (Statesman).

On August 22, 1857, the bill-of-rights committee submitted its first report. *Id.*, at 117 (Journal), at 119–120 (Oregonian), and at 131 (Journal). The initial draft of Oregon’s bill of rights contained the following proposed section:

“Section 20. 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.” *Id.* at 120 (Oregonian).

With the exception of its preference for the passive voice, the proposed text replicated Article I, Section 23, of the 1851 Indiana Constitution, which provided:

“The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.” Ind. Const., Art. I, § 23 (1851).

On August 26, 1857, the committee of the whole took up the proposed bill of rights in its entirety. *Id.*, at 178 (Journal), and at 184 (Statesman).

gon Constitution, 5 Or L Rev at 202; *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857*, *supra*, at 468–469.

Altogether, 103 of the 186 sections in Oregon’s 1857 Constitution came directly from the 1851 Indiana Constitution. Palmer, *supra*, *The Sources of the Oregon Constitution*, 5 Or L Rev at 214; *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857*, *supra*, at 468–482.

B. THE WORDS IN ARTICLE I, SECTION 23, OF THE 1851 INDIANA CONSTITUTION BEAR BUT ONE MEANING ROOTED IN HISTORICAL CONTEXT

Read in isolation and stripped of any historical or contextual perspective, the intended meaning, purpose, and function of phrases like “class of citizens” and “privileges or immunities” remain uncertain. But, fortunately, history informs us still further that the delegates to Indiana’s 1850–51 Constitutional Convention fashioned those words to address a specific situation peculiar to the times.

The Indiana Supreme Court’s definitive and painstakingly–detailed opinion in *Collins v. Day*, 644 NE2d 72, 76–77 (Ind. 1994), recounts the pertinent history of Article I, Section 23, of the Indiana Constitution from a host of sources. The decisive portions of the opinion in *Collins v. Day* read, in full:

“Properly interpreting a particular provision of the Indiana Constitution involves a search for the common understanding of both those who framed it and those who ratified it. *Bayh v. Sonnenburg* (1991), Ind., 573 NE2d 398, 412, *reh’g denied, cert. denied*, [502] US [1094], 112 S Ct 1170, 117 L Ed 2d 415.

“The constitutional convention met in late 1850 and early 1851 against a backdrop of problems associated with states’ efforts to develop their infrastructures and stimulate economic progress. Beginning in 1836, the State of Indiana had engaged in a general system of internal improvements, issuing bonds which were then sold in the market at a heavy discount, with the resulting money ‘squandered on various railroads and canals,’ none of which were completed. *Lafayette, M. & B.*

“The substance of Section 23 was first proposed on December 31, 1850, by Monroe County delegate Daniel Read. Mr. Read’s remarks to delegates before and during the convention reveal his intent on this issue. Subsequent writers have noted that his convention speeches were ‘in stout opposition to all laws providing for state construction of internal improvements, against laws involving the funds of the state in banking, and against laws lending the credit or trust funds of the state to corporations.’¹ James Albert Woodburn, *History of Indiana University, 1820–1902*, 191 (1940). Mr. Read asserted that the state ‘ought not in any way to become the partner of the merchant, the manufacturer, or the banker.’¹ *id.* at 192. Two months prior to his introduction of Section 23, he quoted to the convention sections of Andrew Jackson’s farewell address, urging that:

“‘unless you become more watchful in your States, and check this spirit of monopoly and thirst for *exclusive privileges*, you will, in the end, find that the most important powers of government have been given or bartered away, and *the control over your dearest interests has passed into the hands of these corporations.*’

“¹ Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana, 1850, 221–22 (1850). One month before introducing Section 23, Read advised:

“‘Money making is not the business of the State. . . . If she sells out a *monopoly* for a bonus, the robbery upon the citizens is ordinarily still worse, as being paid for and sanctified by a right purchased from government. If the State becomes a partner with a few of her citizens, *to the exclusion of others*, offering the same terms, it is still a most odious and anti-republican principle, and more worthy of the days of monopoly . . .’

“¹ *id.* at 646.

“Several weeks before introducing Section 23, Read, *speaking against perpetuities and monopolies*, declared, ‘I think both are contrary to the spirit of a free State, and that we ought to make a declaration of that kind in our Bill of Rights.’¹ *id.* at 975.

“*The comments of others during the convention reveal that the purpose of Section 23 was to prohibit state entanglement in private profit-seeking ventures and to avoid the creation of monopolies.* Mr. Biddle of Cass County stated:

“‘The proposition is a plain one, that there shall be no *exclusive monopolies* – – no *privilege granted to one man* which shall not, under the same circumstances, belong to all men. . . . This

privileges or immunities, nor to assure citizens the equal protection of the laws.”

Collins v. Day, *supra*, 644 NE 2d at 76–77 (emphasis added).^[4]

With that detailed historical recounting, the Indiana Supreme Court not only confirmed what history reveals, but it declared that its Constitution’s “privileges–and–immuni-

⁴ In *Indiana Gaming Commission v. Moseley*, 643 NE2d 296 (Ind. 1994), the Indiana Supreme Court supplied this separate, yet confirming, historical synopsis:

“Fiscal woes attendant to the Wabash–Erie Canal played a central role in the decision to call the Constitutional Convention of 1850, but there were a variety of catalysts for drafting a new state constitution. . . .” 643 NE2d at 299.

“As we noted above, the state’s financial woes played a central part in the decision to write a new constitution. In the wake of the Panic of 1837, the people of Indiana were determined to limit the legislature’s involvement in private commercial efforts. They had seen their state bank struggle and eventually suspend services. They had watched their grand internal improvement system sap the state treasury and bankrupt the state. Blame for these ills largely fell on the legislature, and the people were determined to limit the power of that body. See generally 1 John D. Barnhart & Donald F. Carmony, *Indiana From Frontier to Industrial Commonwealth* ch. 19 (1954); 2 *id.* at ch. 5; James H. Madison, *The Indiana Way* chs. v, vii (1986). Article I, section 23 was the result of this desire to put the state’s finances right.

“The author of the provision, delegate Daniel Read of Monroe County, championed the forces opposing government involvement in private commerce and argued vehemently against state monopolies. Before introducing the Equal Privileges or Immunities Clause, Read asserted:

“Money making is not the business of the State. . . . If she sells out a monopoly for a bonus, the robbery upon the citizens is ordinarily still worse, as being paid for and sanctified by a right purchased from government. If the State becomes a partner with a few of her citizens, to the exclusion of others, offering the same terms, it is still a most odious and anti–republican principle, and more worthy of the days of monopoly.”

“1 [Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana, 1850,] note 6, at 646. Read would later declare that monopolies were ‘contrary to the spirit of a free State, and that we ought to make a declaration of that kind in our Bill of Rights.’ *Id.* at 975. Section 23 was that declaration.” 643 NE2d at 301–02.

However, in *State v. Clark*, 291 Or 231, 630 P2d 810 (1981), *cert den* 454 US 1084 (1981), the Oregon Supreme Court incorrectly attributed the source of the text of Article I, Section 23, of the Indiana’s 1851 Constitution to certain “declarations of rights” in the 1846 Iowa Constitution, the 1835 Michigan Constitution, and the 1834 Tennessee Constitution. 291 Or at 236. History proves *Clark*’s attribution simply wrong.

Although some state constitutions indeed incorporated — and still incorporate — what might be described as “declarations of rights” that *appear* to resemble the text of Article I, Section 23, of Indiana’s 1851 Constitution, the remark in *Clark* remains objectively wrong for at least two reasons. *First*, the actual origins, meaning, and purpose of Article I, Section 23, have been definitively pronounced by the Indiana Supreme Court in *Collins v. Day*, *supra*, and that authoritative pronouncement confirms that Indiana did *not* adopt the language as some general “declaration of rights.” *Second*, as explained not far above, Indiana’s 1850–51 Constitutional Convention considered but *rejected* a proposed generic “declaration of rights” of the kind found in other state constitutions at the time

C. ARTICLE I, SECTION 20, BEARS NO HISTORICAL RELATIONSHIP TO THE UNITED STATES CONSTITUTION’S EQUAL PROTECTION CLAUSE

By disregarding history, the Oregon Supreme Court miscomprehended the historical meaning of the words in Article I, Section 20, early on.

When, only six years after Indiana composed it for a singular reason, the Oregon Constitution Convention adopted Indiana’s “privileges–and–immunities” text mostly verbatim, five of the 60 convention delegates had arrived in Oregon from Indiana and 36 other delegates had arrived in Oregon from states surrounding Indiana (Illinois, Missouri, Iowa, and Ohio). Of the 43 convention delegates who had arrived in Oregon from Indiana, Iowa, Illinois, Missouri, and Ohio, three arrived in 1851, ten arrived in 1852, six arrived in 1853, and two arrived in 1855. Thus, 50% of the delegates from those five states, and 35% of *all* convention delegates, arrived in Oregon after the Indiana Constitutional

provision, despite the absence of any textual (or any other) similarity whatsoever.^[8] For instance, the oft-cited opinion in *State v. Savage*, 96 Or 53, 184 P 567 (1919) — cited by the Supreme Court most recently in *Crocker and Crocker*, 332 Or 42, 54, 22 P3d 759 (2001); *Hale v. Port of Portland*, 308 Or 508, 525, 783 P2d 506 (1989); *Hewitt v. SAIF*, 294 Or 33, 42–43, 653 P2d 970 (1982); and *State v. Clark*, *supra*, 291 Or at 243 — begins with the recital that the defendant’s challenge to a certain law rested solely upon Article I, Section 20, of the Oregon Constitution (96 Or at 55) yet launches into a discussion about the Fourteenth Amendment’s Equal Protection jurisprudence (96 Or at 58–59) without a syllable of explanation how something that did not even exist in 1857 — *viz.*, the Fourteenth Amendment — could possibly bear any correlation to something created in 1857.

Having uprooted Article I, Section 20, from its historical origins from the outset, and having wrongly aligned Article I, Section 20, with an expansive 1866 constitutional amendment that Oregon’s 1857 Constitutional Convention could not possibly have contemplated, the Oregon Supreme Court has never paused to ponder whether its various pronouncements over the years conform to the meaning, purpose, and function of language crafted by the 1857 Constitutional Convention.

D. ARTICLE I, SECTION 20, BEARS NO HISTORICAL RELATIONSHIP TO ANY “PRIVILEGES” AND “IMMUNITIES” PROVISIONS IN THE UNITED STATES CONSTITUTION

In *State v. Randolph*, 23 Or 74, 31 P 201 (1892), the defendant protested an indictment and conviction for practicing medicine without a license by urging that the state law

⁸ Section 1 of the Fourteenth Amendment provides:

“ . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The Equal Protection Clause lacks any textual similarity to the Amendment’s Privileges–or–Immunities Clause.

21 LEd 394, 408 (1873)), and no one pretends that the latter referenced specific “rights” or “benefits” bestowed by legislation.^[11]

To the contrary, the phrase as used in Article IV, Section 2, “embraces nearly every civil right for the establishment and protection of which organized government is instituted.” *The Slaughterhouse Cases*, *supra*, 83 US (16 Wall) at 76, 21 LEd at 408. Furthermore, the “privileges and immunities” referenced in Article IV, Section 2, of the United States Constitution describes a relationship *between* states (*The Slaughterhouse Cases*, *supra*, 83 US (16 Wall) at 76–77, 21 LEd at 408–09), not “privileges” or “immunities” *within* a state — as the opinion in *State v. Randolph*, *supra*, incorrectly presumes.

Furthermore, any relationship between the “privileges” / “immunities” reference in Article I, Section 20, of Oregon’s Constitution and Section 2 of the Fourteenth Amendment proves impossible; the Fourteenth Amendment, passed by Congress in 1866, did not even exist when Oregon adopted Article I, Section 20, in 1857.

E. ARTICLE I, SECTION 20, BEARS NO HISTORICAL FUNCTION AS A CONSTITUTIONAL “POLICE POWER”

In *In re Oberg*, 21 Or 406, 28 P 130 (1891), the Court — in its inaugural consideration of Article I, Section 20 — launches into a discussion of Article I, Section 20, without pausing to consider its historical origins, purpose, and meaning. 21 Or at 408. Instead, the Court’s opinion viewed the question as more of a “police power” issue:

“This is not class legislation, conferring special privileges upon some and denying them to others, but legislation which has for its object the public welfare, and within the sphere of its operation prescribes the same rule of exemption to all persons placed in the same situation or circumstances.” *In re Oberg*, *supra*, 21 Or at 410.

¹¹ The Articles of Confederation declared:

“[T]he 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.”

III. THE MEANING OF WORDS WRITTEN YESTERDAY RETAIN THAT SAME MEANING TODAY — AND THE COURTS REMAIN POWERLESS TO ALTER THAT REALITY

Although some stubbornly refuse to acknowledge it, the meaning of Constitutional text can readily be discerned as long as one abides by two truths.

First,

“The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now.” *South Carolina v. United States*, 199 US 437, 448, 26 SCt 110, 111, 50 LEd 261 (1905).

The Oregon Supreme Court first declared its allegiance to that reality in 1863 with respect to the Oregon Constitution. *See Noland v. Costello*, 2 Or 57, 58 (1863) (intentions and understandings of the 1857 Constitutional Convention controls); *accord King v. City of Portland*, 2 Or 146, 154–55 (1865). After an extraordinary period during which the Court gave few, if any, nods to the reality that the meaning of Constitutional text depends entirely upon the meaning affixed by the text’s author(s) at the time of authorship, the Court has recently re-emphasized the determinative role of history *vis-a-vis* the meaning of the Oregon Constitution. *See Priest v. Pearce*, 314 Or 411, 415–18, 840 P2d 65 (1992), *Vannatta v. Keisling*, 324 Or 514, 529–31, 931 P2d 770 (1997), *State v. Rogers*, 330 Or 282, 297, 4 P3d 1261 (2000), *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 54–57, 11 P3d 228 (2000), *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 92–93 and 113–15, 23 P3d 333 (2001), and *DeMendoza v. Huffman*, 334 Or 425, 436–43, 51 P3d 1232 (2002). The

into view” (*McCulloch v. Maryland*, 17 US (4 Wheat) 316, 415, 4 LEd 579, 603 (1819) (emphasis added) (discussing the meaning of “necessary”)), and that “[i]f, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction” (*Gibbons v. Ogden*, 22 US (9 Wheat) 1, 188–89, 6 LEd 23, 68 (1824)).

In late 1857 (when its Constitutional Convention convened), Oregon also had the benefit of the then–recent discussions in the March, 1857, decision in *Scott v. Sandford*, 60 US (19 How) 393, 15 LEd 691 (1857), a 7–to–2 decision that generated an extended discussion, with lengthy concurring opinions, of the necessity that the courts abide by Constitutional text even if the courts’ personal opinions might yield a different result:

“It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. . . . The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning *when it was adopted*.” *Scott v. Sandford*, *supra*, 60 US (19 How) at 405, 15 LEd at 700 (emphasis added).

The remedy, as the Supreme Court eloquently observed in *Scott v. Sanford*, lies in an *amendment* of the Constitutional text — NOT a revision via judicial fiat, as a rather disturbing concurring opinion in a recent Oregon Court of Appeals decision advocates (*see Cox v. State*, 191 Or App 1, 7, 80 P3d 514 (2003) (Schuman, J., concurring),^[13] and NOT

¹³ The concurring opinion in *Cox* accords no value to *actual* meaning because, in that author’s opinion, the 1857 Constitutional Convention does not measure up to that author’s subjective and individualized assessment of contemporary values — whatever those might be:

“I presume that neither this court nor the Supreme Court would say that whatever Article I, section 20, ‘meant in 1857, it means precisely the same thing today’ . . . [.] That is because the framers of the Oregon Constitution, whatever else their virtues, had a conception of equality that contemporary legal (and moral) principles has emphatically repudiated. If this court or the Supreme Court were to interpret Article I, section 20, as the framers intended, the court would have to . . . overrul[e] a significant number of cases . . . [.]” 191 Or App at 7.

Even beyond its startling view that the courts can simply re–cast any constitutional provision that they might deem outdated, those few sentences prove so wrong for so many reasons. If, for instance, patently incorrect case law requires overruling, then so be it; the perpetuation of error never corrects the error.

Hewitt v. SAIF, supra, supplies one of the best examples of a judicial “legislature” run amok. In *Hewitt*, the Court not only perpetuated the indisputably inaccurate notion that Article I, Section 20, bears any correlation to the Fourteenth Amendment’s Equal Protection Clause, but it openly disdained a consistent history of “gender”-based legislative differentiations by nothing more than the unwarranted denigration of the “era” in which the people of Oregon wrote their Constitution. 294 Or at 36–38. Arrogating unto itself the prerogative to declare that “[s]urely no judge today” would abide by the truth of historical reality (*id.* 38), the Court pontificated that its subjective views of contemporary social values — whatever those might encompass — justified a crusading “duty” to obliterate “outmoded notions,” leaving it “free” to view Article I, Section 20, on a “clean slate” (*id.* at 41–42). Thus freeing itself from the constraints of historical reality, the Court simply invented Article I, Section 20, concepts such as “‘invidious’ social categories” (*id.* at 43), “suspect class[es]” (*id.* at 43–44), “‘immutable’ personal characteristics” (*id.* at 45), and, ultimately the *ipse dixit* conversion of Article I, Section 20, to Oregon’s own “equal rights provision” (*id.* at 45). Along the way, the Court decreed that it alone could identify “unexamined societal stereotypes and prejudices” (*id.* at 46) and that certain “classifications” of people necessarily prove “inherently suspect” (*id.* at 46 — making some “classes” more equal than others, an irony that ought not be overlooked). The Court simply made all of that up; nothing in history links any of those notions with Article I, Section 20.

Having been untethered from historical reality by *Hewitt*, Article I, Section 20, jurisprudence began to more closely resemble some formless lump on a potter’s wheel to which successive artisans supplied inherently arbitrary attributes. For example, in *Hale v. Port of Portland*, 308 Or 508, 783 P2d 506 (1989), the Article I, Section 20, the Court enlarged the term “privileges” via judicial fiat — a term that, when composed, bore a discrete historical context and meaning — to encompass an “ability” to sue government for tort damages. 308 Or at 524; *see also Zockert v. Fanning*, 310 Or 514, 521, 800 P2d 773 (1990) (“no question” but that Article I, Section 20’s “privilege” includes appointed counsel — a concept wholly unknown in 1857). And, mimicking *Hewitt*, the *Hale* Court in-

from a law like ORS 106.010. *See*, for instance, *Hale v. Port of Portland*, *supra*, 308 Or at 525–26, and *State v. Clark*, *supra*, 291 Or at 240–41.

Thus, in the words of *Clark*, plaintiffs’ “class” bears no “characteristics . . . apart from the law itself.” 291 Or at 240. “Apart from” ORS 106.010, plaintiffs may fit within a “class” of non–heterosexuals, or a “class” of non–heterosexual couples, or a “class” of non–heterosexual couples who want to marry, but a purported “class” of non–heterosexual couples *who want to marry but cannot* has no existence apart from ORS 106.010. As such, no “true” class exists. In the words of *Van Wormer v. City of Salem*, 309 Or 404, 788 P2d 443 (1990),

“[t]he subset [*viz.*, “class”] exists only *because* the statutory scheme of which it is a part exists.” 309 Or at 408 (emphasis added).

Tanner, *supra*, missed this essential distinction, (mis)characterizing the plaintiffs in that case as a “true” class of “unmarried homosexual couples” (157 Or App at 523–24) when, given the plain import of ORS 106.010, that description references a *non–existent* “class.” ORS 106.010 itself renders that description a purely oxymoronic characterization; at the very least, a “true” class must be *capable* of having existence.

BARRY ADAMSON, OSB No. 79008
4248 S.W. Galewood
Post Office Box 1172
Lake Oswego, Oregon 97035
503–699–9914

by: _____
BARRY ADAMSON
Attorney for *Amicus Curiae* Barry Adamson

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MARY LI and REBECCA KENNEDY; STEPHEN) Court of Appeals No. CA A124877
KNOX, M.D., and ERIC WARSHAW, M.D.; KELLY)
BURKE and DOLORES DOYLE; DONNA POTTER) Multnomah County Circuit Court
and PAMELA MOEN, DOMINICK VETRI and) No. 0403-03057
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 UN-)
ION OF OREGON,)

Plaintiffs-Respondents,)

and)

MULTNOMAH COUNTY,)

Inteviewer-Plaintiff-Respondent,)

v.)

STATE OF OREGON; THEODORE KULONGOSKI, in)
his official capacity as Governor of the State of)
Oregon; HARDY MYERS, in his official capacity)
of 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,)

and)

DEFENSE OF MARRIAGE COALITION, CECIL MI-)
CHAEL THOMAS, NANCY JO THOMAS, DAN)
MATES, and DICK OSBORNE,)

Intervenors-Defendants-Respondents.)

PROOF OF FILING AND PROOF OF SERVICE OF
BRIEF OF AMICUS CURIAE BARRY ADAMSON

On June 30, 2004, the undersigned filed an original and 20 copies of BRIEF OF AMICUS CURIAE BARRY ADAMSON by first-class mail addressed to:

State Court Administrator
Records Section
Supreme Court Building
1163 State Street
Salem, Oregon 97310

On March June 30, 2004, the undersigned served two copies of BRIEF OF AMICUS CURIAE BARRY ADAMSON to the following parties by first-class mail:

