It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.

CHRONOLOGY

- 1780 B.C. – The Code of Hammurabi provided that, "if a man take a wife and does not arrange with her the proper contracts, that woman is not his legal wife."

- The Roman Empire
    - Prior to the 3rd century A.D. – marriage was forbidden to slaves
    - Criteria for Marriage
        - Marriage was a private act (similar to engagement today) that did not require the sanction of any public authority, any symbolic act, nor any written document.
    - Judges had to decide whether a man and woman were legally married
    - Divorce was as easy for the wife as the husband and as informal as marriage.
    - Old Civic Code – marriage is one of the duties of the citizens
        - Emperor Augustus promulgates laws to encourage citizens to marry
        - Recognized male privilege as a fact - Wife classed among the servants
    - New Moral Code (related to Stoicism) – formalized the duties of the married man
        - Wife raised to the status of her husband's friends
        - Matrimonial institution incorporated into conformist Stoicism and required husband and wife required to demonstrate, before giving in to any desire, that it conformed to the dictates of reason.
        - To suspect disharmony in a marriage was regarded as slander or defeatism
    - In 2nd century Rome, marriage contracts between two men of the same age were permitted, though the men were subject to ridicule.
- 2nd Century A.D. – Tertullian (early Father of the Christian Church) wrote that marriage not solemnized in a church was almost as bad as fornication.

- 1076 – Pope Alexander II issued a decree prohibiting marriages between couples who were more closely related than 6th cousins.

- 1215 – Pope Innocent III ordered that throughout the Christian world, marriage banns had to be published in the church.

- 1563 – Council of Trent ordered that marriages be solemnized in the presence of a priest.

- England
    - English law recognized a form of marriage entered into without ceremony, "common law" marriage, which was created by the consent and cohabitation of the marrying couple.
    - 1753 – Lord Hardwicke's Act
        - Affirmed the religious nature of marriage by requiring that solemnization take place in a church, but vested control of marriage as a legal entity in the state.
    - 1836 – Marriage Act provided that marriage was a civil action effected by mutual consent and did not require a religious ceremony.
    - 1857 – Matrimonial Causes Act transferred jurisdiction over marriage from the

English ecclesiastical courts to the civil courts.
  - Civil law reflected the religious English view of marriage
  - Wife subject to the disabilities of coverture
  - Civil divorce not made legal until enactment of the Matrimonial Causes Act of 1857

- The American Colonies
  - Even though many colonies were established by religious dissenters, the colonists imported most of the substantive law of marriage created by the English Church and its ecclesiastical courts.
  - Colonial societies largely viewed marriage as a civil practice rather than a purely religious relationship and, over time, the civil common law view of marriage moved away from its religious roots
    - Married Women's Property Acts abolished common-law disabilities of married women
    - Divorce was permitted
  - Until 1662, there was no penalty for interracial marriages in any of the British colonies in North America.
  - 1662 – Virginia doubled the fine for fornication between interracial couples
  - 1664 – Maryland became the first colony to ban interracial marriages
  - 1750 – all southern colonies, plus Massachusetts and Pennsylvania, outlawed interracial marriages.

- Marriage in the United States of America
  - The law of marriage and divorce is a legal subject that is a monopoly of the states. Every state has a law of marriage and every state has its own legal peculiarities with respect to marriage (including a changing list of what constitutes valid grounds for divorce and changing rules regarding what constitutes marital property).
    - Marriage and the Federal Government
      - Marriage never arose during the farming of the Constitution in 1787
      - Implicit denial of constitutional responsibility reaffirmed during the debates over the 14th amendment after the civil war
      - From Middle of the 19th Century through the 1960s, repeated moments of talk about needing a uniform national marriage law – Only in the case of Mormon polygamy did Congress interfere with the instituted marital rules of the territorial legislatures.
        - *Reynolds v. United States*, 98 U.S. 145 (1878) – affirming conviction of a man who had taken two wives in conformity with the teachings of his religion.
        - *The Late Corporation of The Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890) – upholding legislation revoking the 1851 charger of the Church on grounds that a primary purpose of the church was the promotion of polygamy.
        - Federally mandated state constitutional prohibition on

polygamy as a condition of the admission of Utah to the union compelled the acceptance of monogamy as the legal form of state-sanctioned civil marriage

- External federal constraints on a state's freedom to act:
  - The Contract Clause
  - The Takings Clause of the 5th Amendment
  - The Full Faith and Credit Clause

- Changes in the law of marriage occurred according to the varying schedules of particular state political environments
  - 1840s – The Great Irish Immigration – The Catholic Church played a distinctive sometimes determinative role in the politics of marriage and divorce reform.
  - State legislators and constitution drafters worked to create legal regimes that were different from one another, sometimes for moral or theological reasons. States were competing for settlers.
    - 1849 – Framers of the California Constitution committed themselves to a community property system of marital property to differentiate themselves from the common law system the eastern states used which was in disrepute as an oppressive feudal system because it gave husband effective title to most forms of property that appeared in a marriage.
- Court Structures among the states
  - Prior to the middle 1800s, some jurisdictions maintained separate courts of equity, which became the only courts in that state that recognized married women's separate property interests and provided equitable remedies unavailable at common law.
  - Over time, equity jurisdiction became a particular set of remedies within the larger common law system.
  - 1900s – some states began to establish "family courts" with specialized responsibilities for divorce, custody & other matters.

- Separation
  - Had different meanings in different states – it's purpose was rarely to create a private contractual form of divorce because abandonment could have done that
  - Separation agreements modified the terms of the marriage but the contracting parties remained married, sometimes expressing their belief in the permanence of marriage, though living apart.
- Divorce
  - Prior to the American Revolution, absolute divorces (divorce with the right to remarry) were only available in the New England Colonies.
  - After the American Revolution, all states but South Carolina (which had no divorce) passed statutes that created regularized (though usually quite limited) divorce practices.
  - The one sure way to get a divorce was to prove your spouse committed adultery.
  - Throughout the 19th and 20th centuries, different states became divorce mills by liberalizing the grounds on which a divorce would be granted and

reduced dramatically the residency requirement to establish one's right to divorce in the state
- Connecticut → Indiana → South Dakota → Nevada
- Process was simplified into a bureaucratic process from an adversarial one
- States thought this would get people from other jurisdictions to spend money and possibly put down roots and stay.

- 19th Century Marriage in America
  - Rights and obligations
    - Husband possessed a dependent wife
    - Wife became a feme (or femme) covert
    - Sex became a duty and a right (without marriage, it was the crime of fornication)
    - Slaves could not be legally married (they lacked legal capacity throughout most of the southern U.S. for matrimony)
    - A few states forbade the party at fault in a divorce from remarrying during the lifetime of a faultless party
  - The concept of "Marital Unity" – the legal notion of oneness of husband and wife explained:
    - Women's usual legal incapacity to sue
    - Women's inability to contract separately from their husbands
    - Domicile of wife remained that of her husband (even when she lived in a different state or country)
    - Impossibility of suffrage for women (one being can't have 2 votes)
  - 1820-1860 – New York's effect
    - Common Law Marriage
      - 1933 – NY legislature abolished it in NY, but NY courts held that when cohabitating New Yorkers visited a state that still allowed common law marriage, the effect was to legalize their relationship even though the relationship had begun after 1933.
  - As late as 1930, 12 states allowed boys as young as 14 and girls as young as 12 to marry with parental consent.
  - As late as 1940, married women were not allowed to make a legal contract in 12 states.
- *Lydia McGuire v. Charles W. McGuire*, 59 N.W. 2nd 336 (Neb. 1953)
  - The Nebraska Supreme Court drew a boundary around the support rights of wives by refusing to intrude into an *intact* marriage – even a court of equity had no business deciding what was or was not "suitable" support.
- Repeals of 14 state's anti-miscegenation laws in the 15 years prior to *Loving v. Virginia* – Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah & Wyoming.
- *Loving v. Virginia*, 388 U.S. 1 (1967)
  - The U.S. Supreme Court ruled that a state cannot prohibit interracial marriage (Virginia, Alabama, Arkansas, Delaware, Florida, Geofria, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma,

South Carolina, Tennessee, Texas and West Virginia had their anti-miscegenation laws declared unconstitutional).
        - The "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by fee men. Marriage is one of the 'basic civil rights of man' fundamental to our very existence and survival."
    - 1978 – New York became the first state to outlaw rape in marriage
    - By 1990 10 states had outlawed rape in marriage
        - In 36 states, rape in marriage was a crime only in certain circumstances
        - In 4 states, rape in marriage wasn't a crime

- Same-Sex-Marriage
    - 1970s – Courts in Washington, Kentucky and Wisconsin ruled that marriage is a union of a man and a woman and therefore the state had no constitutional mandate to issue marriage licenses to same-sex couples.
    - Hawaii
        - *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) – The Supreme Court of Hawaii ruled that under the state constitution's equal protection clause, a denial of a marriage license to a same-sex couple was presumably unconstitutional unless the state established a compelling reason for doing so.
        - 1999 – Hawaiian constitution amended to allow the legilature to define marriage as between a man and a woman. *Haw. Const., art. 1, § 23.*
        - 2003 – Hawaii enacted a statute that gave domestic partners many of the benefits the law accorded to married couples. *Haw. Rev. Stat. § 572C-1* (2003).
    - Vermont
        - 1999 – Supreme Court of Vermont ruled that the common benefits clause of the state constitution required the state to provide qualified same-sex couples with the same legal benefits accorded in marriage to opposite-sex couples. *Baker v. State*, 744 A.2d 864 (Vt. 1999).
        - Vermont legislature authorized same-sex couples to enter civil unions which gave them some benefits previously available only to married couples.
    - Massachusetts
        - *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003)
        - Supreme Judicial Court of Massachusetts ruled that same-sex couples have the right to obtain civil marriage licenses under the state constitution
    - Alaska
        - 1998 – Alaskan trial court ruled the right of privacy guaranteed in the state constitution gave same-sex couples the right to choose life partners *Brause v. Bureau of Vital Statistics, No. #AN-95-6562 CI*, Alaska Super, Feb. 27, 1998
        - Alaskan constitution amended to define marriage as a relationship between a man and a woman. *Alaska Const. Art. I, § 25.*
    - Federal legislation
        - The Defense of Marriage Act – provides that no state, territory, possession, or Indian tribe: shall be required to give effect to any public

act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship. 28 U.S.C. § 1738C (2003).

- 1 U.S.C. § 7 (2003). Law enacted by Congress that defines marriage as "between one man and one woman as husband and wife" for purposes of interpreting the words marriage or spouse in the federal statutes.
- At least 38 states have enacted similar state legislation exempting themselves from the need to give recognition to same-sex marriages recognized elsewhere.

VARIOUS OREGON STATUTES RELATED TO MARRIAGE

ORS 106.010 Marriage as civil contract; age of parties.

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.

ORS 106.020 Prohibited and void marriages.

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

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

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

ORS 106.030 Voidable marriages.

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

ORS 106.210 Certain marriages validated; children of such marriages declared legitimate.

Any marriage in all other respects legal and regular but heretofore void by reason of:

(1) Oregon Laws of 1866, section 1, page 10 (section 23-1010, O.C.L.A.) prohibiting marriage between a white person and one having Negro, Chinese, Kanaka or Indian blood, or

(2) Section 2 of the Act entitled "An Act to regulate marriages," approved October 17, 1862 (section 63-102, O.C.L.A.) prohibiting marriages between a white person and one having Negro or Mongolian blood,

hereby is declared valid; and any child conceived or born of such marriage shall be deemed legitimate.

ORS 108.010 Removal of wife's civil disabilities; wife's civil rights same as husband's.

All laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband hereby are repealed; and all civil rights belonging to the husband not conferred upon the wife prior to June 14, 1941, or which she does not have at common law, hereby are conferred upon her, including, among other things, the right of action for loss of consortium of her husband.

ORS 108.015 Domicile of married person or minor child.

(1) Each married person may establish and maintain a domicile in the State of Oregon as if that person were not married.

(2) The domicile of a minor shall follow the domicile of the parents of the minor unless the parents establish separate domiciles. If the parents establish separate domiciles, the minor's domicile shall be that of the parent with whom the minor resides. However, if there has been a legal separation, annulment or dissolution, the minor's domicile shall be that of the parent to whom custody of the minor has been legally given.

Note: 108.015 was enacted into law by the Legislative Assembly but was not added to and made a part of ORS chapter 108 by legislative action. See Preface to Oregon Revised Statutes for further explanation.

ORS 108.040 Liability for expenses of family or education of children; liability after separation; time for commencing action.

(1) The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.

(2) Notwithstanding subsection (1) of this section, after the separation of one spouse from the other spouse, a spouse is not responsible for debts contracted by the other spouse after the separation except for debts incurred for maintenance, support and education of the minor children of the spouses.

(3) For the purposes of subsection (2) of this section, spouses shall be considered separated if they are living in separate residences without intention of reconciliation at the time the debt is incurred. The court may consider the following factors in determining whether the spouses are separated in addition to such other factors as may be relevant:

(a) Whether the parties subsequently reconciled.

(b) The number of separations and reconciliations of the parties.

(c) The length of time the parties lived apart.

(d) Whether the parties intend to reconcile.

(e) Whether the parties have filed a petition for separation or dissolution.

(4) An action under this section shall be commenced within the period otherwise provided by law.

ORS 108.110 Petition for support of spouse and children.

(1) Any married person may apply to the circuit court of the county in which the married person resides or in which the spouse may be found for an order upon the spouse to provide for support of the married person or for the support of minor children and children attending school, or both, and, if the married person initiating the action for support is a woman who is pregnant, her unborn child, or both, if her spouse is the natural father of such children, children attending school or unborn child or if her spouse is the adoptive father of such children or children attending school. The married person initiating the action for support may apply for the order by filing in such county a petition setting forth the facts and circumstances upon which the married person relies for such order. If satisfied that a just cause exists, the court shall direct that the married person's spouse appear at a time set by the court to show cause why an order of support should not be entered in the matter. The provisions of ORS 107.108 apply to an order entered under this section for the support of a child attending school.

(2) As used in this section, "child attending school" has the meaning given that term in ORS 107.108.

(3) The petitioner shall state in the petition, to the extent known:

(a) Whether there is pending in this state or any other jurisdiction any type of support proceeding involving children of the marriage, including a proceeding brought under ORS 107.085, 109.100, 125.025, 416.400 to 416.470, 419B.400 or 419C.590 or ORS chapter 110; and

(b) Whether there exists in this state or any other jurisdiction a support order, as defined in ORS 110.303, involving children of the marriage.

(4) The petitioner shall include with the petition a certificate regarding any pending support proceeding and any existing support order. The petitioner shall use a certificate that is in a form established by court rule and include information required by court rule and subsection (3) of this section.

(5) The provisions of this section apply equally to cases where it is the husband making application for a support order.

(6) In any proceeding under this section, the obligee, as that person is defined in ORS 25.010, is a party to the proceeding.

ORS 108.520 Effect of Act repealing Community Property Law of 1947.

The provisions of ORS 108.530 to 108.550 do not impair or affect any right acquired prior to April 11, 1949, but the same may be enjoyed as fully and to the same extent as if ORS 108.520 to 108.550 had not been passed, under and according to the law in force at the time such right was acquired, except as provided in ORS 108.530 and 108.540.

Institutional Issues—Alternatives to Marriage and Fundamental Fairness

Discussion Questions:

Can a separate system of domestic partnership or civil union ever be considered "equal to" or "equivalent to" marriage? Are such alternatives fair?

Are domestic partnership benefits (without certain "burdens" of marriage) subject to reverse-discrimination challenges?

Is the issue one of gender or sexual orientation discrimination, and how does the framing of the issue affect the outcome of a decision?

For alternatives to marriage, when (if ever) should a couple be required to make a formal representation of status to the State?

For an Oregon employer subject to *Tanner*, what standard should govern who receives benefits? Should opposite-sex "domestic partners" be able to receive benefits? Why or why not? Does this change the answer to whether domestic partnership can be "equal to" marriage?

General Principles

- "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Brown v. Board of Educ.*, 347 U.S.483, 495 (1954).

- "By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces. Disparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them. . . . Also, the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation." *Bakke v. Regents of Univ. of California*, 438 U.S. 285, 298-299 (1978) (citations omitted). *Bakke* held that all distinctions based on race were subject to strict scrutiny under the equal protection clause, not limited to protecting "discrete and insular" minorities. A medical school admissions program, which effectively created racial "quotas," improperly discriminated against a white male applicant.

- "Note in particular that a primary reason for the official institution of marriage has been less to limit entry (though that is certainly one of its purposes) than to police exit. If divorce is difficult, as a result of legal restrictions or social norms, then marriages are more likely to be stable. Marital stability is often desirable for children. It can also be desirable for spouses, who may benefit from social understandings that work against impulsive or destructive decisions that are detrimental to their long-term welfare. But if exit is not policed, through law or accompanying social norms, it is at least harder to contend that the official institution of marriage is valuable as a way of promoting the stability of relationships. And in the modern era, exit is much less rigorously policed. As a matter of law, at least, people can generally leave the marital form whenever they wish to do so. Increasingly, marriage resembles a contract, dissoluble at the will of the parties, rather than a permanent status." Sunstein, Cass R., *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2115 (April 2005).

Specific Cases

- *Tanner v. Oregon Health Sciences Univ.*, 157 Or. App. 502, 971 P.2d 435 (1998), *rev. denied* 329 Ore. 528, 994 P.2d 129.

> "OHSU insists that in this case privileges and immunities are available to all on equal terms: All **married** employees--heterosexual and homosexual alike--are permitted to acquire insurance benefits for their spouses. That reasoning misses the point, however. Homosexual couples may not marry. Accordingly, the benefits are not made available on equal terms. They are made available on terms that, for gay and lesbian couples, are a legal impossibility. We conclude that OHSU's denial of insurance

> benefits to the unmarried domestic partners of its homosexual employees violated Article I, section 20, of the Oregon Constitution and that the trial court correctly entered judgment in favor of plaintiffs on that ground."

- Oregon does not have a statute to formally recognize a "Civil Union" or "Domestic Partnership."

- In *Tanner,* "[t]he trial court judgment defined 'domestic partners' as 'homosexual persons not related by blood closer than first cousins who are not legally married, who have continuously lived together in an exclusive and loving relationship that they intend to maintain for the rest of their lives, who have joint financial accounts and joint financial responsibilities, who would be married to each other if Oregon law permitted it, who have no other domestic partners, and who are 18 years of age or older.'" *Tanner v. OHSU,* 157 Or. App. 502, 508, 971 P.2d 435 (1998).

- The Attorney General, following *Tanner*, determined that the state violates Article I, section 20, of the Oregon Constitution by allowing a state income tax exemption for health insurance coverage that employers provide for their employees' spouses without allowing a corresponding exemption for health insurance coverage that employers provide for their employees' same-sex domestic partners. *49 Op. Atty Gen. Ore. 197* (1999).

- "The ***Tanner*** court did not address the constitutional rights of unmarried opposite-sex domestic partners, and we express no opinion on that issue." *49 Op. Atty Gen. Ore. 197, n. 3.*

- Currently, opposite-sex domestic partners in Oregon are not permitted to make the state tax income exclusion for health insurance benefits that is permitted for same-sex domestic partners. *Department of Revenue, FAQ sheet: Policy-Application of Various provisions of Tax Law to Domestic Partners, OAR 150-316.007-(B).*

- However, unlike some other states, Oregon Administrative Rules for public employees following *Tanner* do not expressly limit eligibility based on sexual orientation or for same-sex partners. OAR 101-010-0005(8) reads:

> (8) "Domestic Partner" means an individual who, together with an Eligible Employee, meets all the criteria listed below. The individual and Eligible Employee:
>
> (a) Are both at least 18 years of age;
>
> (b) Share a close personal relationship and are responsible for each other's welfare;
>
> (c) Are each other's sole Domestic Partners;
>
> (d) Are not married to anyone and have not had a spouse or another Domestic Partner within the prior six months;

(e) Are not related by blood closer than would bar marriage in the State of Oregon;

(f) Have jointly shared the same regular and permanent residence for at least six months.

(g) Are jointly financially responsible for basic living expenses defined as the cost of food, shelter and any other expenses of maintaining a household.

(h) If previously married, would commence the six-month period on the final date of divorce.

- If a state employer is trying to cut costs, can or should the entity offer benefits to "domestic partners" based on the OAR definition (without regard for sexual orientation), or with the additional criterion that the couple is one "who would be married to each other if Oregon law permitted it," as *Tanner* defined "domestic partner?"

Gender or Sexual Orientation

- In *Abbott v. Rumsfeld*, the petitioner challenged inability to secure benefits for his domestic partner under federal employees' health insurance. "The FEHB regulations at issue, in pertinent part, state that eligibility for health care coverage of an employee's 'partner,' or spouse, requires a legal union between members of the opposite sex." *Hearing No. 340-A2-3752X Appeal Nos. 01A30587, 01A30619 Agency Nos. H3-02-001, H3-02-002* U.S. EEOC, June 6, 2003. The EEOC denied any gender discrimination. "Specifically, we find that complainant claims denial of a benefit of employment (health care coverage of a partner under the FEHB program), not because of disparate treatment due to his sex, but rather because his domestic partner is male, rather than female, which is a matter of sexual orientation. Discrimination based on sexual orientation does not state an actionable claim."

- This same reasoning was used to deny a claim of *reverse* discrimination in *Foray v. Bell Atlantic*, 56 F. Supp. 2d 327 (S.D.N.Y. 1999). The company elected to provide insurance benefits limited to "same-sex domestic partners." The ability to claim benefits without marriage was challenged by a heterosexual male. The District Court rejected the challenge based on gender discrimination, because "plaintiff has not been treated differently from a woman with an opposite-sex partner."

State Recognition and Ceremony

- *Holguin v. Flores*, 122 Cal. App. 4th 428, 18 Cal. Rptr. 3d 749 (2004). In this case, unmarried heterosexual male challenged his inability to sue for the wrongful death of his female partner. The California domestic partnership statute required that a couple be "of the same sex or one partner be over age 62 and eligible for benefits under the Social Security Act based on age." *Holguin*, 122 Cal. App. 4th at 433. The Court of appeals upheld the statute applying rational basis scrutiny to an equal protection challenge:

> "The Legislature rationally could have concluded the survivors of same-sex couples and couples with an aged member eligible for Social Security benefits are deserving of solicitude because they

> are as likely to suffer economic loss from the death of their partners as are spouses but, because of other statutory schemes, they are legally or practically prevented from marrying. n59 Couples such as Holguin and Booth are not entitled to the same solicitude because the law did not prevent them from marrying. n60."

- The *Holguin* court noted that, if marriage became available to same-sex couples with the domestic partnership system remaining an option for same-sex couples, the constitutional analysis could be significantly different

- Vermont adopted a civil union bill in 2000, which provided a statutory scheme for same-sex couples to acquire the benefits and responsibilities of married couples. The University of Vermont had previously made benefits available to domestic partners of same-sex employees. With the enactment of civil union legislation, the University amended its policy and limited benefits to those same-sex couples who elected to create a state-recognized civil union within a certain period of time.

- Miller brought a reverse discrimination challenge for the lack of benefits for his heterosexual partner of 18 years. *Willard Miller v. University of Vermont,* 24 VLRB 1 (Jan. 24 2001). The Vermont Labor Relations Board upheld the University's benefits scheme, both before and after the availability of civil unions.

    - For the pre-2000 challenge, the Board held there was no disparate impact on Miller for sexual orientation, because homosexual employees, unlike Miller, were unable to marry their partners. On this basis, the homosexual employees were not "similarly situated" to Miller. The Board adopted the reasoning of *Foray*, but applied the reasoning based on sexual orientation rather than gender.

    - For the post-2000 challenge, the Court noted that no employee—whether heterosexual or homosexual—received insurance benefits for their partners unless the employee was in a "state-sanctioned union (i.e., marriage or civil union).

- Because of relatively early positions taken against sexual orientation discrimination on campuses nationwide (i.e., by the American Association of University Professors), there are many developments in employment policies and litigation associated with Colleges and Universities as employers. For a good survey on campus policies and recent litigation, *see* Euben, Donna, *Domestic Partnership Benefits on Campus: A Litigation Update* (August, 2005).