SJR

42

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 3/2/98

FURTHER: Finance

Date of 5-Day Notice: 3/5/98
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 3-10-98

Judiciary Committee considered SENATE JOINT RESOLUTION NO. 42

Proposing an amendment to the Constitution of the State of Alaska relating to marriage.

and recommends:

[X] be **replaced** with ____ CS FOR SENATE JOINT RES. 42(JUD)

[ ] adopt **previous** ____ CS ____( )

[ ] attached amendment(s)

[ ] adopt Letter of Intent by ____ Committee

[ ] further referral to the ____ Committee

Senate Bill:
[✓] same title
[ ] new title

House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR"____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
Dan O'Donnell	X	Kelly Ellis		X	
Mike Miller	X				
Pearce	✓				
CHAIR: Idris T. Taylor	X	CHAIR:			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
SJR & CS GOV'S OFFICE/ELECTIONS	3-6-98	Addl	3.0

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

[ ] **APPROPRIATION -- no fiscal note**

***include fiscal notes accompanying Governor's bill**

FISCAL NOTE

No. 1

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Bill Version: CSSJR 42(JUD)
(S) Publish Date: 3-10-98

Revision Date (Note if correction)
Dept. Affected Office of the Governor
Title Const. Amend: Relating to marriage
BRU Elective Operations
Component General and Primary
Sponsor Senate HESS Committee
Requester Senate Judiciary Committee
Component Senal No. #22

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual	3.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	3.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	3.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	3.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This figures includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58, and the programming costs for counting votes cast on the measure. However, only four measures can be printed on a single ballot card. If this measure requires printing an additional ballot card, the costs will increase by $56.0.

Prepared by Gail Fenumiai
Division Division of Elections
Phone 465-3935
Date 3/6/98
Approved by C Lt. Governor Fran Ulmer
Agency Office of the Lieutenant Governor
Date 3/6/98

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CS FOR SENATE JOINT RESOLUTION NO. 42(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

A RESOLUTION

Proposing an amendment to the Constitution of the State of Alaska relating to marriage.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. Article I, Constitution of the State of Alaska, is amended by adding a new section to read:

Section 25. Marriage. To be valid or recognized in this State, a marriage may exist only between one man and one woman. No provision of this Constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex. Additional requirements related to marriage may be established to the extent permitted by the Constitution of the United States and the Constitution of the State of Alaska.

* Sec. 2. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

WRITTEN STATEMENT OF PROFESSOR LYNN D. WARDLE
IN SUPPORT OF S.J.R. No. 42 and S.C.R. No. 25
Submitted for Alaska Senate Judiciary Committee Hearing on Monday, March 9, 1998

Mr. Chairman and distinguished members of the Senate Judiciary Committee:

I am honored to present this written statement in support of S.J.R. No. 42 and S.C.R. No. 25. By way of introduction, I am a professor of law.[1] Family Law is my primary area of scholarship; I have taught courses in Family Law, Children and the Law, Origins of the Constitution, Conflicts of Law and Comparative Family Law for twenty years.[2] These proposed Resolutions happen to touch on all of those fields. I also have authored or co-authored a multivolume treatise on family law, two other law books, and more than thirty articles or chapters dealing with family law subjects. Additionally, I am active in both national and international scholarly and law reform organizations dealing with family law and related areas.[3]

I am familiar with the *Brause v. Bureau of Vital Statistics* case, I have read the memoranda filed in the court, read the decision, and have been consulted about it. Thus, I have been invited to give my professional comment and analysis regarding S.J.R. No. 42 and S.C.R. No. 25. Of course, the opinions I express are my own professional views; I do not speak for any of the institutions or organizations with which I am associated.

I will discuss legal three points. First, I will explain about the legal status of same-sex marriage today. Second, I will clarify why S.J.R. No. 42 and S.C.R. No. 25. are reasonable, responsible, and necessary. Third, I will explain why I believe that they are constitutional under federal constitutional standards.

I. Status of Same-Sex Marriage in the World Today

I begin with a little background. No nation of the world permits same-sex marriage today. None. A few jurisdictions allow some form of same-sex domestic partnership. To date, all are in Europe (and arguably Hawaii). According to the International Gay and Lesbian Association, only

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[1]Currently I teach at Brigham Young University Law School. I also have taught at Howard University School of Law in Washington, D.C., at Sophia University Faculty of Law in Japan, and at the University of Aberdeen in Scotland.

[2]I have written or co-authored several books and several dozen law review articles or chapters in books about family law. Two of my most recent publications (published this year) are law review articles examining constitutional arguments for same-sex marriage, Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U.L.Rev. 1-101, and the rules and practices regarding international recognition of marriages, Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, Family Law Quarterly, vol. 29, pp. 497-517 (Fall 1995).

[3]Presently I am the Secretary-General of the International Society of Family Law, an international learned society of 550 scholars and judges from 56 different nations devoted to the study of family law, and I am an active member of the American Law Institute consultative group that is working on a "Family Law Project."

six (of forty-nine listed European jurisdictions) permit some sort of legal domestic partnership. [4] Since 1989, Denmark,[5] Norway,[6] Sweden,[7] Iceland,[8] and the Netherlands,[9] have each enacted legislation authorizing the formal registration of same-sex "domestic partnerships" and extending to such relationships most of the economic and many of the noneconomic legal incidents of marriage.[10] Also, after a decision by the national supreme court, the legislature in Hungary legalized common-law same-sex live-in companionship for purposes of recognizing their mutually-owned purchases and acquisitions.[11] But none of these jurisdictions allow same-sex marriage. Even the most liberal of these domestic partnership laws clearly distinguishes domestic partnership from marriage, denies same-sex domestic partnerships significant marital benefits (especially pertaining to assisted procreation, adoption, and the official celebration, status, and dignity of marriage) and imposes significant restrictions not applicable to marriage. No jurisdiction on the face of the earth today recognizes same-sex marriage, and it appears safe to say

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[4]ILGA publishes this and other information on the internet at: http://inet.uni2.dk/~steff/survey.htm (search March 7, 1998).

[5]Danish Registered Partnership Act, No. 372 (June 7, 1989). *See generally* Linda Nielsen, *Family Rights and the 'Registered Partnership' In Denmark*, 4 INT'L J. L & FAM. 297 (1990); Marianne H. Pedersen, *Denmark: Homosexual Marriages and New Rules Regarding Separation and Divorce*, 30 J. FAM. L. 289 (1991-92).

[6]The Norwegian Act on Registered Partnership for Homosexual Couples, Act No. 40 of 30 April 1993.

[7]Law Regarding Registered Partnership of 23 June 1994 (Bert Andersen, trans. 1995). *See also* Deborah M. Henson, *A Comparative Analysis of Same-Sex Partnership Protections: Recommendations for American Reform*, 7 Int'l J. L. & Fam. 283, 287-288 (1993).

[8]Law on approved cohabitation, articles 1-9 (June 12, 1996)(Kristjan Matiesen trans. 1996); *see generally Iceland gives gay marriages legal stamp*, Reuters World Service, June 27, 1996 (Icelandic legislature has legalized "gay marriage" following Denmark, Norway & Swedish precedents).

[9]Joanne von Alroth, *Gay Couples' Registry Backed in Oak Park*, Chi. Trib. July 26, 1997 at 3. *See further* Rex Wockner, *supra* note 30; Steffen Jensen, *Partnership Law in the Netherlands*, ILGA, Euroletter 51 (July 1997).

[10]Certain restrictions commonly are imposed on same-sex domestic partnerships do not apply to heterosexual marriages, such as the requirement that at least one of the partners be a citizen or resident national of the country, and limitations re: joint custody, adoption, artificial insemination, state-church weddings, and exemption from marital status under international treaties, are common. *See generally* Nielsen, *supra* note 5, at 300.

[11]Year of 1996, XLII Law §§ 1-3 (May 21, 1996) (Stuart Schulte transla. 1996). *See also Hungary's gays welcome law on rights as first step*, Reuters World Service, May 22, 1996.

that no nation in history ever has allowed same-sex legal marriage (though some have tolerated widespread homosexual practices or conferred some social or legal status on some kinds of homosexual partners).

The overall global picture shows overwhelming support for exclusively heterosexual marriage. No legislature of any jurisdiction in the world has ever approved of same-sex marriage. Many jurisdictions (including most of the American states and Congress) have recently enacted laws denying legal recognition to same-sex marriage from other jurisdictions.[12] Likewise, in the past twenty-five years, dozens of lawsuits have been filed in the USA seeking judicial legalization of same-sex marriage, and all of these, unanimously, rejected the claim that there is a fundamental right to same-sex marriage.[13] Even the highly criticized *Baehr* case in Hawaii rejected, like all American trial and appellate courts before it, the claim that there is a fundamental right to marry someone of the same sex. Moreover, virtually all international conventions that describe marriage have defined it as the union of a man and a woman.[14] Polls have repeated found that the people in America strongly oppose legalizing same-sex marriage.[15]

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[12]In the past three years, Congress and the legislatures of more than half of the American states have enacted legislation forbidding recognition of same-sex marriage. *See generally* Marriage Law Project, *Bills Concerning Same-Sex Marriage, 1997 Legislative Update*, June 16, 1997 (available at http://www.pono.net).

[13]*See Constitutional Claims, supra* note 2 at 9-10, nn. 22-26, and *id.* at 56-57 nn. 252, 253 (identifying more than a dozen different lawsuits seeking marital status for same-sex unions). *See also* Storr v. Holcomb, 1996 WL 379613 (N.Y. Sup.Ct. 1996).

[14]*See* Universal Declaration of Human Rights, Article 16 ("Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family."); [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively Article 12 ("Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."); American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82 doc.6 rev.1 at 25 (1992) Article 17("the right of men and women of marriageable age to marry and to raise a family shall be recognized"); HabitatII Conference, Istanbul, Turkey, 3-14 June 1996, The Habitat Agenda (http://www.undp.org/u habitat/agenda/ch-2.html) ("Marriage must be entered into with the free consent of the intending spouses, and husband and wife should be equal partners. The rights, capabilities and responsibilities of family members must be respected."). *See also* Hong Kong Bill of Rights Ordinance, 30 I.L.M. 1310, *1318 (Effective June 8, 1991) ("The right of men and women of marriageable age to marry and to found a family shall be recognized.").

[15]Portland Oregonian, April 19, 1997, at A01 (1997 WL 4165366) (March 1996 Gallup poll shows Americans oppose same-sex marriage 68-to-27); Associated Press, Aug. 19, 1996 (Lou Harris Poll reports 63-64% of Americans oppose legalizing same-sex marriage; 10-11% favor); *supra* note 28 (70 percent of Hawaiians oppose legalizing same-sex marriage); Fresno Bee

In December, 1996, a trial court in Hawaii ruled that the state had no compelling reason to deny marriage licenses to same-sex couples, and ordered the state to issue marriage licenses to same-sex couples who apply for them.[16] That ruling has been appealed to the state supreme court, and the order has been stayed pending appeal. Just months after that ruling, the Hawaii legislature passed an amendment to the state constitution which, if ratified by the people of Hawaii in November 1998, will effectively overturn the basis for the court's ruling that the denial of same-sex marriage constitutes constitutionally impermissible sex discrimination.[17] The people of Hawaii overwhelming and consistently oppose legalizing same-sex marriage,[18] but they could be forced by their state courts to issue marriage licenses for same-sex marriages, at least temporarily.[19] There are movements to legalize same-sex marriage in a few European countries, but historically and to this day, same-sex marriage is legal in no jurisdiction.

II. Why S.J.R. No. 42 and S.C.R. No. 25 are Necessary and Prudent

The constitutional crisis that has led to these proposed resolutions today is about a radical judicial redefinition of marriage. That is what this whole controversy is all about.

May 25, 1997 at E6 (1997 WL 3904007) (1996 Los Angeles Times poll found Californians oppose legalizing same-sex marriage 60-to-31); *but see* Irish Times, Aug. 10, 1996, at 10 (1996 WL 11037747) (Germans favor legalizing same-sex marriage 48-to-42).

[16]Baehr v. Miike, No. 91 Civ. 1394 (Haw. Cir. Ct. Dec. 3, 1996), 23 FAM. L. REP. (BNA) 2001 (Dec. 3, 1996).

[17]Hawaii H.B. 117 (1997).

[18]Voters strongly oppose gay unions, Honolulu Star-Bulletin, Feb. 24, 1997, at 1 (currently 70% of those polled oppose legalizing same-sex marriage; 20% favor it; opposition has grown about 12% and support fallen 12% during four years).

[19]In *Baehr v. Lewin*, 852 P.2d 44 (1993), the Hawaii Supreme Court rejected the claim that the "right to marry" protected by the Hawaii Constitution extends to same-sex couples and held that there is no "fundamental constitutional right to same-sex marriage" because such relationship is not "rooted in tradition" or "at the base of all our civil and political institutions." *Id.* at 55, 57. However, a plurality concluded that Hawaii's marriage license law facially "discriminates based on sex against the applicant [same-sex] couples" on account of gender, in apparent violation of the state constitutional provisions protecting equality. *Id.* at 57-62. The December, 1996 ruling in *Baehr v. Miike* was on remand from this decision. If the Hawaii Supreme Court affirms the trial court decision in *Miike* before November 1988, same-sex marriage could be legalized before the people get to vote on the constitutional amendment. While the amendment, if passed, could effectively undo the supreme court decision, the same-sex couples who married in the interim could pose a significant political and legal dilemma. For a discussion of the *Baehr* case, *see* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. Rev. 1.

Last month, in *Brause v. Bureau of Vital Statistics*,[20] Alaska Superior Court Judge Michalski held that the privacy provision of the Alaska Constitution protects as a fundamental right the right of two persons of the same sex to marry, and that the denial of marriage licenses to same-sex couples constitutes sex discrimination, and that denial of same-sex marriage may only be upheld if it is justified under the very strict "compelling state interest" test. While that ruling is not a final ruling, it establishes a legal standard and principle as a matter of Alaskan constitutional law that seriously jeopardize Alaskan marriages, constitutional integrity, state legislative authority, interstate marriage recognition, and national harmony. It creates an enormous quagmire that needs to be promptly corrected.

A. The Importance of Exclusively Heterosexual Marriage

Marriage between a man and a woman is the foundation of our society. You can have marriage without society, but you cannot long have society without protecting and preserving the institution of marriage. The Supreme Court of the United States has repeatedly recognized this reality. Nearly 120 years ago, the Supreme Court said of marriage: "Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal."[21] More than a century ago the Court both glorified the legal status of marriage and the affirmed importance of legislative control of it when he noted that "[m]arriage, as creating the most important relation in life, [has] more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature."[22] In 1923, in Meyer v. Nebraska,[23] the Court acknowledged that "without doubt" among the liberties protected by the fourteenth amendment was the right "to marry, to establish a home ...." In 1942, in Skinner v. Oklahoma,[24] the Court declared that "[m]arriage and procreation are fundamental to the very existence and survival of the race." Twenty-three years later, the Court repeated this viewpoint with even greater emphasis in Griswold v. Connecticut. [25]

> We deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system. Marriage is the coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony of living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

In 1967, the Court struck down a Virginia anti-miscegenation statute in Loving v. Virginia, noting: "Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. ... To deny this fundamental freedom on so unsupportable a basis as the

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[20]Civil No. 3AN-95-6562-CI (Anchorage Super. Ct., Feb. 27, 1998).

[21]Reynolds v. United States, 98 U.S. 145, 165 (1878).

[22]Maynard v. Hill, 125 U.S. 190, 205-6 (1888).

[23]262 U.S. 390, 393 (1923).

[24]316 U.S. 535, 541 (1942).

[25]381 U.S. 479, 486 (1965).

racial classification embodied in these statutes ... is surely to deprive all the State's citizens of liberty without due process of law."[26] Four years later, in Boddie v. Connecticut,[27] the Court emphasized that "marriage involves interests of basic importance in our society." In 1977, in Zablocki v. Redhail,[28] the Court invalidated a state law restricting marriage of indigent support-obligated father of child receiving public assistance "reaffirming the fundamental character of the right to marry." In numerous other cases in recent years, the Court has reiterated and enhanced the fundamental importance and preferred status of marriage.[29]

Three things are undeniable from this long line of decisions of the U.S. Supreme Court. First, it is clear that for a long time the Court has been absolutely convinced, and it remains convinced, that marriage is of fundamental, critical importance to our society. Second, it is clear that the Court agrees that protecting marriage is essential to our constitutional form of government. Third, it is absolutely certain that the relationship that the Court was talking about as marriage in all of these cases was the exclusively heterosexual marriage relationship of a man and a woman.

B. Heterosexual Marriage Is Uniquely Beneficial to Society

Marriage is unique and uniquely beneficially to society and its members. Marriage is unique because the relationship between a man and a woman is different than the relationship between two persons of the same gender. Men and women are different, and thereby the relationship of two persons of opposite gender (in marriage) is different from other kinds of relations including same-sex relations that seek to imitate marital status.

Advocates of same-sex marriage are "trapped in a Kelsean dream,"[30] where they erroneously believe that they can create social order out of moral chaos by merely enacting positive laws. They embrace "the myth about the 'law-maker' and the 'legal system'" that is based upon an erroneous "impression of the origin, content and structure of law. . . . It hides the fact that the central elements of a legal order cannot be 'invented' by a law-maker, but must be rooted in a normative practice."[31] Shared normative values are "the basic element in what we call

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[26]388 U.S. 1, 12 (1967).

[27]401 U.S. 371, 376 (1971) (invalidating requirement that indigent parties pay divorce filing fees).

[28]434 U.S. 374, 383-386 (1978). *See also* Turner v. Saffley, 482 U.S. 578 (1987) (invalidating a state prison regulation permitting marriage by inmate only in case of pregnancy or child born out of wedlock).

[29]*See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977); Paul v. Davis, 424 U.S. 693, 713 (1976); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974); United States v. Kras, 409 U.S. 434, 444, 446 (1973);

[30]Anna Christensen, *Polycentricity and Normative Patterns*, in LEGAL POLYCENTRICITY: CONSEQUENCES OF PLURALISM IN LAW 235, 239 (Hanne Petersen & Henrik Zahle eds. 1995).

[31]*Id.* at 236.

society,"[32] and what we call law.

Advocates of same-sex marriage fallaciously believe that if they can get the label of "marriage" for their gay and lesbian relationships, they will magically acquire the socially and individually beneficial characteristics associated with marriage for millennia. That is very strange thinking.[33] Abraham Lincoln once lampooned the flaw of this thinking with a homespun story: He asked how many legs a dog would have if you counted a tail as a leg. To the response "five legs," Lincoln said, "No; calling a tail a leg doesn't make it a leg."[34]

The relationship between two persons of the same sex is fundamentally different from heterosexual "marriage" because men and women are fundamentally different. Marriage is unique. No other companionate relationship provides the same great potential for benefitting individuals and society as the life-time covenant union of a man and a woman. That is why only certain committed heterosexual unions are given the legal status of marriage. It is not the marriage certificate, label, or legal status that makes the heterosexual marital relationship uniquely beneficial to individuals and society, but it the nature of the relationships itself that is so valuable, and that is why such unions are given the preferred legal status (and label) of *marriage*. Pluralistic arguments for same-sex marriage are simply self-alienating.[35] Their thesis of relational equivalence is a simplistic notion that fails to recognize that "something more complex is going on than can be explained" by saying "my sexual preference is as good as your sexual preference."[36]

Same-sex unions do not match the contributions to society that are made by heterosexual marriages. The public purposes for which marriage has been created are best achieved by cross-gender unions; same-sex unions fail to promote those social interests in any comparable degree. Let me mention just a few examples. Heterosexual marriage provides, *inter alia*, (1) the best setting for the safest and most beneficial expression of sexual intimacy; (2) the best environment into which children can be born and reared (the profound benefits of dual-gender parenting to model intergender relations and show children how to relate to persons of their own and the opposite gender are lost in same-sex unions); (3) the best security for the status of women (who take the greatest risks and invest the greatest personal effort in maintaining families); (4) the strongest and most stable companionate unit of society (and thus the most secure setting for intergenerational transmission of social knowledge and skills); (5) a functional and historic social

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[32]*Id.*

[33]It is ironic that gay and lesbian critics who often chide their opponents for trying to "legislate morality" seek to radically transform the essential normative characteristics of their relationships by have the legislature (or judiciary) label them "marriages."

[34]*See generally* J. Bartlett, The Shorter Bartlett's Familiar Quotations 218d (1961) *cited in* Stephen A. Newman, *Baby Doe, Congress and the States: Challenging the Federal Treatment Standard for Impaired Infants*, 15 Am. J. L. and Med. 1, *15 (1989).

[35]Jeremy Waldron, Review Essay, *On the Objectivity of Morals: Thoughts on Gilbert's Democratic Individuality*, 80 CALIF. L. REV. 1361, 1376 (1992) (Moral relativism is self-alienating; a moral relativist is "a person who could not take his own side in an argument.").

[36]*See generally id.* at 1381.

stability that same-sex marriage would undermine; and (6) the best seedground for democracy and the most important schoolroom for self-government. From the perspective of these social interests underlying marriage, same-sex unions are not equivalent to heterosexual marriages.

C. The Opinion in Brause *is Seriously Flawed and Dangerously Radical*

Judge Michalski's opinion in *Brause* is very interesting and even thought-provoking. I think he writes well. But there are at least three serious flaws in Judge Michalski's opinion. First, the opinion is very radical, extremely out of the mainstream of law and experience. Never before has any court held that same-sex marriage is protected by a fundamental constitutional right. Even the Hawaiin courts in their controversial *Baehr* opinions unanimously rejected that claim, as has every other court (now dozens total) to consider similar claims. Nor has any court so abruptly and summarily concluded that equal protection in implicated by the historic limitation of marriage to opposite-sex couples.

Second, the opinion seems to overlook some very fundamental points. One point overlooked is precedent. Judge Michalski's offers none of the kinds of support or evidence for his dramatic conclusions that are considered elementary and essential in the legal profession. For instance, the opinion cites no textual or historical support for the conclusion that there is a fundamental right to same-sex marriage. It does not cite anything in the record of the drafting or the debates of the privacy provision to support that radical conclusion. There is no evidence cited in the opinion to show that the people of Alaska intended to create or protect a fundamental right to same-sex marriage when they adopted Article 1, Section 22 (the right to privacy). The reason no evidence is cited is because none exists. I can find absolutely nothing in the Alaska Constitution or history or cases interpreting it that supports the notion that the people of Alaska intended to create a fundamental right to marry persons of the same gender, or anything to suggest that they believed that limiting marriage to opposite-sex couples implicates gender discrimination.

Another flaw is the superficiality of the analysis. For example, the opinion overlooks a subtle but significant distinction between public toleration of private choices and private claims to public preferences. The right to privacy of the Alaska Constitution protects certain private conduct from public penalty, but never before has any court anywhere held that a right to privacy compels the public to confer benefits, privilege and public preferences on private choices. Judge Michalski's opinion erases the critical distinction between public and private.

In *Breese v. Smith*,[37] and *Ravin v. State*,[38] the two cases cited heavily by Judge Michalski, the Alaska Supreme Court recognized that the public could not reach out and penalize certain private choices (how long a student grows his hair and private possession of marijuana for personal use by an adult in a private home). Applying that principle to same-sex relations might support an argument that the state should not penalize some private sexual choices among consenting adults. However, that is very different than saying that the state must affirmatively confer a public status and valuable legal benefit like marriage upon mere private preferences. Judge Michalski's conclusion that the privacy provision requires Alaska to confer public legal status of marriage on same-sex couples is like saying that Alaska constitutionally must provide

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[37]501 P.2d 159 (Alaska 1972).

[38]537 P.2d 494 (Alaska 1974).

free Rogaine or tax deductions for Rogaine expenses because individuals have a private right to grow their hair as long as they want, or that Alaska must provide crop subsidies and tax breaks for persons who want to exercise their private right to grow and possess marijuana.

Moreover, the opinion announces a radical right of "choice of life partner" but does not announce any principled boundaries of that right. If the Alaska Constitution's right to privacy really confers a broad right to marry on two adults of the same sex, logically it would also protect the right to marry of two adults who are closely related (incest), or three adults (polygamy). Those private relations may be as meaningful and loving as homosexual relations. Thus, under the *Brause* decision laws forbidding incest and polygamy also would infringe upon this broad fundamental right to marry.

The analysis of the right to privacy also seems to confuse tolerance and preference. Relations and conduct may be legally categorized in at least three different ways -- as "prohibited," "tolerated" or "preferred."[39] Marriage is the classic example of a *preferred* relationship. It is one of the most highly-preferred, historically-favored relations in the law. Thus, the claim for same-sex marriage is not a claim for mere tolerance, but for special preference. The principle of tolerance or privacy does not justify legalization of same-sex marriage because marriage is much more than a *tolerated private* relation, it is a legally a *preferred public* status.

Similarly, the gender equality analysis in the opinion ignores the fact that there is a critical distinction between sexual differences and sexual discrimination. It does not violate gender equality for the government to provide pregnancy services only to women, or prostate cancer treatment only to men because only women can become pregnant, and only men can get prostate cancer. Likewise, it does not violate gender equality for the government to give marital status only to male-female couples, because only male-female couples can constitute a cross-gender union that is the essence of marriage. "[T]he Equal Protection Clause does not mean that the physiological differences between men and women must be disregarded.... The Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really exist."[40] Judge Michalski's opinion, moreover, overlooks the fact that heterosexual marriage is the oldest gender-equality institution in the law. The requirement that marriage consist of both a man and a woman emphasizes the absolute equality and equal necessity of both sexes for the most fundamental unit of society. It recognizes the indispensable and equal contribution of both genders to the basic institution of our society.[41]

D. Legalizing Same-Sex Marriage Would Create A National Crisis

The matter at issue in *Brause* is not only about how Alaska treats same-sex unions, but it is also about how Alaska treats other states and the federal government. Any resolution of the same-sex marriage debate in Alaska must take into account the effect that Alaska's action will

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[39]Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Social Privacy - Balancing the Individual and Society Interests*, 81 MICH. L. REV. 463, 546-547 (1983); Bruce C. Hafen & Jonathan D. Hafen, *Individual Autonomy, Student Rights, and the U.N. Convention on Rights of the Child" DeJure vs. De Facto Autonomy for Children* 69 ST. JOHN'S L. REV. 601, 653-656 (1995).

[40]450 U.S. at 481 (Stewart, J., concurring).

[41]*See Constitutional Claims, supra* note 2, at 83-88.

have on the 49 other states and the federal union. In many ways, possibly including operation of the Full Faith and Credit clause, Alaska's legalization of same-sex marriage will be manipulated in an effort to override other states' and Congress' strong marriage policies. Legalizing same-sex marriage would prompt a constitutional crisis as other states and the federal government seek to avoid having same-sex marriage imposed in those other jurisdictions. Alaska has a compelling state interest in not drastically redefining marriage in a way that imperils the interjurisdictional recognition of some Alaskan marriages, that produce divisive, coercive pressures on the other states that may severely strain its relations with sister states, and which could precipitate a constitutional crisis.

If Alaska were to legalize same-sex marriage, it would create a major deviation from the concept and definition of marriage accepted in all forty-nine of the other states. The disruption, conflicts and disharmonies that would arise between Alaska and the other states in the union are potentially devastating. Marriage and marital status play a role in literally *hundreds* of government laws and programs in each separate jurisdiction -- both state and federal.[42] "When the State defines a spouse it has the effect of pushing the first domino in a parade of dominos."[43]

The threat of being forced to recognize same-sex marriage is not a speculative or trifling concern. The other states have reacted with unusual alacrity to the situation. The seriousness of this potential crisis is underscored by legislation and executive decrees enacted last years. In the past three years, *Congress and more than half of the states have enacted laws barring recognition of same-sex marriage.*[44] The Defense of Marriage Act passed both houses of Congress by overwhelming, bi-partisan majorities, and was signed by President Clinton. Alaska has joined the majority of the states by enacting a similar state law refusing to recognize same-sex marriages.[45] Yet *Brause* raises the very specter of a serious national marriage recognition crisis that that Alaska legislation and that DOMA are designed to avoid.

Marriages valid in the state where performed that have been denied recognition by another

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[42]Congress identified more than 800 federal statutory provisions incorporate the terms "marriage," and over 3000 use "husband, "wife," "spouse," and the like. H. Rep. 104-664, 104th Cong. 2d Sess, on Defense of Marriage Act, July 9, 1996, at 10.

[43]Report of the Commission on Sexual Orientation and the Law in Hawaii (Dec. 8, 1995) at 6.

[44]Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (Sep. 21, 1996) (defining marriage for purpose of federal law as exclusively heterosexual, thus barring federal court or agency recognition of same-sex marriage in federal law, and expressly providing that each state may choose whether or not it will recognize same-sex marriages from other states); *See generally* Marriage Law Project, *Bills Concerning Same-Sex Marriage, 1997 Legislative Update*, June 16, 1997 (available at http://www.pono.net).

[45]1996 Alaska Sess. Laws 21 ("A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state.").

state when they are incompatible with a strong public policy of the second state are legion.[46] As another court recently noted, "no state is bound by comity to give effect in its courts to the marriage laws of another state, repugnant to its own laws and policy."[47] Thus, *Brause* jeopardizes the rights and interests of many Alaska citizens, and create years of costly, confusing litigation for both the people and for the state. Individuals rights to property interests, alimony, child support, custody, visitation, insurance benefits, inheritance, succession, public benefits would be insecure for years to come. Alaska's compelling interest in "minimizing the susceptibility of its own" marriages to nonrecognition in other states provides ample justification for immediate passage of S.J.R. No. 42. *Sosna v. Iowa*, 419 U.S. 393, 407 (1975).

Internationally, the position of nearly all nations appears to be that it would violate their strong public policy to recognize same-sex marriage, and in some nations that opposition to same-sex marriage could be so strong that same-sex marriages from Alaska could impair relations between the jurisdictions.[48] No nation in the world recognizes same-sex marriage. Even the nations that have allowed same-sex domestic partnership do not expect those domestic partnerships to be recognized abroad.[49] Same-sex marriage would be found incompatible with public policy in most of the nations of the world.[50] Marriages that "are incompatible with the public policy" of a country will not be recognized in that country, even if the marriage is deemed valid under the law of the state where celebrated or by the law of the parties' nationality or

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[46]*See, e.g.,* Metropolitan Life Insurance Co. v. Chase, 294 F.2d 500 (3d Cir. 1961); In re Estate of Levie, 123 Cal. Rptr. 445, 447 (Cal. App. 1975); Catalano v. Catalano, 170 A.2d 726, 728-729 (Conn. 1961); Laikola v. Engineered Concrete, 277 N.W.2d 653, 656 (Minn. 1979); Nelson v. Marshall, 869 S.W.2d 132 (Mo. App. 1993); Stein v. Stein, 641 S.W. 2d 856, 858 (Mo. App. 1982); Randall v. Randall, 345 N.W. 2d 319, 322 (Neb. 1984); Bucca v. New Jersey, 128 A.2d 506, 511 (N.J. Superior Court 1957); Rhodes v. McAfee, 457 S.W.2d 522, 524 (Tenn. 1970); Seth v. Seth, 694 S.W. 2d 459 (Tex. Ct. App. 1985); Farah v. Farah, 429 S.E.2d 626, 334-335 (Va. App. 1993); *see generally* Restatement (Second) Conflict of Laws § 283, Reporter's Note, comments j-k.

[47]Hager v. Hager, 3 Va. App. 415, 349 S.E.2d 908, 909 (1986), *citing* Toler v. Oakwood Smokeless Coal Corp., 173 Va. 425, 430, 4 S.E.2d 364, 366 (1939)); State v. Austin, 234 S.E.2d 657, 663 (W. Va. 1977). *See generally* Rhodes v. McAfee, 224 Tenn. 495, 457 S.W.2d 522 (1970); Seth v. Seth, 694 S.W.2d 459 Ct. App. Texas, 1985); Godt v. Godt, 1990 WL 123047 (Del. Super., Aug. 7, 1990); *see further* In re Estate of Jenkins, 133 Misc.2d 420, 506 N.Y.S.2d 1009 (1986); Anderson v. Anderson, 27 Conn.Supp. 342, 238 A.2d 45 (1967); Farah v. Farah, 429 S.E.2d 626 (Va. App. 1993).

[48]*See generally* Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 Family L. Q. 497-517 (Fall 1995).

[49]Marrianne Hojgarrd Pedersen, *Denmark: Homosexual Marriages and New Rules Regarding Separation and Divorce*, 30 J. Fam. L. 289, 290 (1991-92).

[50]Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, Family Law Quarterly, vol. 29, pp. 497-517 (Fall 1995).

domicile.[51] Thus, parties to Alaskan same-sex marriages would expect, but be denied rights based upon marital status in foreign nations, including property, succession, inheritance, insurance, employment benefits, pensions, etc., in other nations. Other Alaskan marriages might also would be viewed with suspicion as well, resulting in disadvantages for many Alaskans seeking benefits in other countries.

Alaska has a valid interest in not becoming the "Reno" of same-sex marriages. The potential detriment to the local economy (the public costs could easily overwhelm any minor increase in revenues), as well as the potential impact on Alaskan culture and on the environment in which to raise families are legitimate and substantial concerns.

Moreover, *Brause* compounds an already serious national constitutional crisis. Advocates of same-sex marriage argue that under the Full Faith and Credit Clause of the Constitution, art. IV, sec. 1, all states are obligated to give "full faith and credit" to public acts and records of sister states, and that includes marriages.[52] On the other side, opponents of same-sex marriage and supporters of the DOMA argue that the Supreme Court of the United States has never held that marriages must be given full faith and credit, but traditionally states have been permitted to decline to recognize marriages from other states that violate strong local public policy,[53] and that DOMA is constitutional under the last sentence of the Full Faith and Credit clause which specifically provides that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[54]

The point is not *which* position will ultimately be proven correct. Rather, the point is that a *serious* constitutional confrontation involving states, Congress, which overwhelmingly passed the Defense of Marriage Act, and the American judiciary is inevitable if Alaska legalizes same-sex marriage. In the confrontation, the judiciary will be asked to force states to recognize same-sex marriage over their own objections, and over the emphatic opposition of Congress. The only way to win that kind of confrontation is to avoid it.

Finally, Judge Michalski's February 27th opinion in *Brause* is not the end of the case.

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[51] *See* Lennart Palsson, Marriage in Comparative Conflict of Laws: Substantive Conditions 3 (Martinus Nijhoff Publishers 1981); *see also* Lennart Palsson, *Chapter 16, Marriage and Divorce*, in Vol. III, Private International Law, International Encyclopedia of Comparative Law 59 (1978).^

[52] *See* Hearing Before the Subcomm. on the Constitution of the Committee on the Judiciary, U.S. House of Representatives, 104 Cong., 2d Sess., on H.R. 3396, May 15, 1996 (Serial No. 69) at 202 (Rabbi David Sapperstein); Hearing Before the Committee on the Judiciary, United States Senate, 104 Cong., 2d Sess., on S. 1740, July 11, 1996 (S. Hrg. 104-553) at 42-47 (Prof. Cass R. Sunstein).

[53] *See generally*, Restatement (Second) Conflict of Laws § 283(2) (1981); Robert A. Leflar, American Conflicts Law § 221 (4th ed. 1986); 1 Lynn D. Wardle, Christopher L. Blakesley, & Jacqueline Y. Parker, Contemporary Family Laws § 2:03 (1988).

[54] Hearings Before the Subcommittee on the Constitution of the Judiciary Committee of the House of Representatives, May 15, 1996, at 158-180 (Prof. Lynn D. Wardle); Rep. Tom Campbell, *Perspective on Same-Sex Marriages*, L.A.Times, July 12, 1996, at B9.

Certainly I believe that the state has several very compelling justifications for not permitting same-sex marriage, and a court might (and I believe should) so rule. Thus, some might argue that the legislature should take no action until both the trial court and Alaska Supreme Court have rendered their final judgments. There are three deficiencies of that argument. First, as a practical matter, the *Brause* ruling casts an immediate and serious cloud on the issue of same-sex marriages and on other laws passed by the Alaska legislature. It will have precedential influence on other cases in Alaska (and, indirectly, elsewhere). It seriously implicates what the Alaska legislature is doing, what it should do, in passing new legislation, amending old laws, etc. The legislature need not wait another year or two to determine if laws it is now passing are unconstitutional. Second, *Brause* immediately sends a dramatic and terribly mistaken message about how marriage is understood in the Alaska Constitution. The legislature has responsibility for the state constitution as well as the court. As the people's representatives, the legislators have a duty to guard the values and policies that the people have embodied in the Constitution of Alaska. You need not wait to correct such a seriously flawed misreading of the will of the people of Alaska. The people deserve to be heard on this issue now. Third, if the legislature delays, it could be like waiting to close the barn door until after the animals have gotten out. If the legislature waits to begin the process of letting the people clarify their understanding of marriage, and the *Brause* decision is affirmed and same-sex marriage is legalized in Alaska by judicial interpretation of the state constitution, several months, possibly years, could pass before the process of constitutional amendment is completed and the same-sex marriage interpretation is overturned. During that time, same-sex couples will be marrying, and filing suits, demanding benefits, moving to other states and other countries, etc. After a few weeks, months or years of that, even a constitutional amendment rejecting same-sex marriage will not practically remedy all the confusion generated in the interim.

III. Proposed Resolutions Nos. 25 and 42 Are Constitutional

Undoubtedly opponents of these Resolutions will claim that they are unconstitutional under the U.S. Constitution. However, that is simply political jawboning. I will focus on S.J.R. No. 42, because it is the operative Resolution, but the analysis is equally applicable to S.C.R. 25.

One argument that might be asserted against these Resolutions is the claim that it violates federal equal protection for Alaska to deny same-sex marriage. But every court that has addressed this claim has rejected it.[55] Again, the reason is simple. Heterosexual marriage is a unique relationship, that makes unique contributions to society, and equal protection law does not require treating things are equal that are different. Is denial of same-sex marriage like denial of interracial marriage that was declared unconstitutional in *Loving v. Virginia*? No, it is not. Prohibiting marriage because of race is different that prohibiting homosexual marriage. Race is different than sexual preference. Race is immutable and passive; sexual relationship is active and a matter of decision and choice. As General Colin Powell put it: "Skin color is a benign non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral

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[55] *See* Wardle, *Constitutional Claims, supra note* 2, at 74-95.

characteristics. Comparison of the two is a convenient but invalid argument."[56] I agree totally with the judgment of the Supreme Court in *Loving* that racial classifications are totally irrelevant to any legitimate policy the state may have relating to marriage regulation, whereas sexual-behavior choices are of legitimate social concern, especially regarding marriage.

Another argument that might be raised is that S.J.R. No. 42 is unconstitutional under *Romer v. Evans*. Two years ago, the Supreme Court of the United States struck down Amendment 2 to the Colorado Constitution in *Romer*. That amendment was intended to generally prohibit the enactment of laws giving special preferences to persons on the basis of homosexual behavior. But it was drafted very broadly and the Supreme Court struck down the amendment. But it did so on grounds and logic that clearly distinguish S.J.R. No. 42. First, the Colorado amendment classified and discriminated in law on the basis of "homosexual, lesbian or bisexual orientation," and not solely on the basis of conduct, behavior or relationship. How someone feels or thinks or believes, including one's feelings or beliefs regarding sexual attraction, interest, or orientation, is not a permissible basis for legal discrimination; to legally classify persons on the basis of their "orientation" status is constitutionally forbidden.[57] By contrast, S.J.R. No. 42 does not discriminate on the basis of any "orientation" but it is conduct (marriage) and action (actual same-sex relationships) that are the permissible basis for distinguishing heterosexual marriage from same-sex unions.

Second, Colorado Amendment Two did not merely deny legal preference to persons with homosexual orientation, but it denied them basic protections of the law. The Supreme Court held that the Colorado amendment did not merely "put[] gays and lesbians in the same position as all other persons,"[58] as the supporters said they intended, but it arguably stripped them from even basic civil rights protections. The Colorado amendment arguably forbade specific protection of any kind for gays and lesbians,[59] and the Court noted that it could be construed to "deprive[] gays and lesbians even of protection of general laws."[60] Thus, police protection, fire protection, access to public libraries, and other basic protections arguably might have been denied gays and lesbians.

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[56]*See* Gen. Colin L. Powell, Letter to Representative Patricia Schroeder, May 8, 1992, in David F. Burrelli, HOMOSEXUALS AND U.S. MILITARY PERSONNEL POLICY, Jan. 14, 1993, at 25-26; *see also Gays in the Military, Hearing of the Military Forces and Personnel Subcomm. of the House Armed Serv. Comm.* (Statement by Joint Chiefs of Staff Chairman Colin Powell), FED. NEWS SERV. July 21, 1993, at 26. *See also* Baker v. Nelson, 191 N.W.2d 185, 197 (Minn. 1971) ("[I]n commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."). A *Wall Street Journal* article recently observed that "many African-Americans and Hispanics rejected the argument that gays are another minority group just like themselves, struggling for equal rights." Dennis Farney, *Shaky Ground*, WALL ST. J., Oct. 7, 1994, at A1, A6.

[57]116 S.Ct. at 1623.

[58]*Id.* at 1624.

[59]*Id.* at 1626.

[60]*Id.*

There is a tremendous and constitutionally significant difference between depriving persons of potentially all protection of the laws, as Colorado Amendment Two apparently did, and merely refusing to extend one specific, unique legal status (marriage) to same-sex relations, as S.J.R. No. 42 does.

Third, similarly, the form of the Colorado amendment was open-ended. It did not focus solely on the specific areas of abuse that the voters had been concerned about. It was an "across the board" prohibition of legal protection.[61] The "sweeping and comprehensive" Colorado rule singled out gays and lesbians, and no others, for comprehensive non-protection status.[62] While the amendment's alleged purpose to prevent certain special advantages for gays and lesbians was not improper, "[t]he breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them."[63] S.J.R. No. 42, by contrast, focuses specifically upon one particular legal relationship and on that relationship only. It is precise, specific, and exact as to the subject and kind of legal protection that is set aside for exclusive protection.

Fourth, the Supreme Court said that Colorado Amendment did not survive mere rational basis scrutiny. Despite the intention of its backers, the Court stated that: "We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective."[64] By contrast, protecting the institution of heterosexual marriage has repeatedly been recognized not merely as a legitimate purpose of legislation, but an essential and important duty of the legislature. In light of the history of the unique legal and social importance of heterosexual marriage, it would require extraordinary intolerance to argue that S.J.R. No. 42's purpose to preserve the unique legal status of heterosexual marriage is irrational.

Fifth, the Supreme Court emphasized that the Colorado amendment was really motivated by "animus" against gays, lesbians and bisexuals. In other words, it was invidious in its motive as well as its potential effect.[65] S.J.R. No. 42, by contrast, avoids any negative language or intent. It does not degrade or denigrate any class. It is positive and emphasizes the contributions and importance of conventional marriage to society, without condemning or punishing any class of alternative relationships.

Finally, the same day the Supreme Court announced the *Romer* decision, it also rendered another decision that underscored how important it is to protect each state's ability to decide important legal policy issues for itself without having other states impose their policies extraterritorially upon co-equal sovereign states. In *BMW of North America, Inc. v. Gore*,[66] the Court discussed whether Alabama courts could impose punitive damages upon a defendant for

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[61] *Id.* at 1628.

[62] *Id.* at 1625.

[63] 116 S.Ct. at 1628.

[64] 116 S.Ct. at 1628.

[65] *Id.* at 1627-1628.

[66] BMW, Inc. v. Gore, 116 S.Ct. 1589 (1996). This case is discussed *supra*.

doing something in other states that was legal in those states but illegal in Alabama.[67] It is impermissible, wrote Justice Stevens for the Court, for one state to"impose its own policy choice on neighboring States. See Bonaparte v. Tax Court, 104 U.S. 592, 594, 26 L.Ed. 845 (1881) ('No State can legislate except with reference to its own jurisdiction.... Each State is independent of all the others in this particular')."[68] The court emphasize the need for each state "to respect the interests of other States . . . ."[69] The Court emphasized that"*these principles of state sovereignty and comity*" forbid one state giving its laws and legal policy extraterritorial effect that "*infring[es] on the policy choices of other States,*" because the Constitution requires each state "[t]o avoid such encroachment."[70]

One of the reasons for enacting S.J.R. No. 42 is to avoid interstate conflict over recognition of same-sex marriages from Alaska. If protection of state sovereignty is required for mere state economic regulations, it is even more important that one state not legislate a radical redefinition of marriage and then impose it on the other states. Since the very day the Court decided *Romer* it also validated one of the core principle upon which S.J.R. No. 42 is based - the importance of protecting state sovereignty in setting its own legal policies from extraterritorialism of other state's contradictory laws - I do believe that S.J.R. No. 42 is valid under *Romer*.

Conclusion

I believe that S.J.R. No. 42 and S.C.R. No. 25 are generally well-considered and well-crafted. I believe that they are necessary and prudent. While some fine-tuning may be appropriate, some careful amendment may be considered, the thrust and focus of these Resolutions are important and timely. I recommend that this committee, this chamber, and this legislature enact S.J.R. No. 42 and S.C.R. No. 25 and submit the proposed Amendment of S.J.R. No. 42 to the people forthwith.

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[67]BMW had repainted parts of a new car that had suffered some paint damage while being transported from Germany to the United States, and then sold the car as a new car in Alabama without disclosing that it had been partially repainted at a cost of $601.37. That was lawful in other states, but a recent Alabama case made it improper there. The plaintiff introduced evidence that that lowered the resale price of the car about 10% and the jury awarded the buyer $4,000 in compensatory damages (10% of the car's price). BMW had sold about 1,000 such repainted cars in the United States, including 14 cars in Alabama. The jury mathematically awarded $4,000,000 in punitive damages, reduced on appeal to $2,000,000. The Supreme Court reversed and remanded, 5-4, noting that the award was so grossly excessive as to violate due process, in part because the award appeared to be based on out-of-state conduct that was lawful where it occurred and had no impact in Alabama.

[68]116 S.Ct. at 1596-97.

[69]*Id.* at 1597 (citing Healy v. Beer Institute, 491 U.S. 324, 335-336 (1989); Edgar v. MITE Corp., 457 U.S. 624, 643 (1982).

[70]*Id.* at 1597-98 (emphasis added).

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JAY BRAUSE and GENE DUGAN,

Plaintiffs,

vs.

BUREAU OF VITAL STATISTICS, ALASKA DEPARTMENT OF HEALTH & SOCIAL SERVICES, and the ALASKA COURT SYSTEM,

Defendants.

Case No. 3AN-95-6562 CI

JNR
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MEMORANDUM AND ORDE.

Plaintiffs Jay Brause and Gene Dugan are men who sought and have been denied a license to marry each other by the State of Alaska. They subsequently filed a complaint against the Bureau of Vital Statistics, the Alaska Department of Health and Social Services, and the Alaska Court System. Plaintiffs' action seeks a declaration establishing that the relevant statutes prohibiting same-gender marriage violate Alaska's Constitution, and an injunction that prevents the state from applying or enforcing the statutes. The parties both move for summary judgment. The plaintiffs seek a ruling on the level of scrutiny to be applied in review of the Marriage Code; the defendants move for complete summary judgment. The parties agree that the decisions before the court are purely issues of law.

The plaintiffs' present motion for summary judgment seeks a decision that the Code's prohibition implicates the privacy and equal protection provisions of the Alaska Constitution, thus

requiring a showing of a compelling state interest to withstand plaintiffs' claim that the Code's ban on same-sex marriage is unconstitutional.

The court finds that marriage, i.e., the recognition of one's choice of a life partner, is a fundamental right. The state must therefore have a compelling interest that supports its decision to refuse to recognize the exercise of this fundamental right by those who choose same-sex partners rather than opposite-sex partners.

STATEMENT OF FACTS

On August 4, 1994, Mr. Brause and Mr. Dugan completed and filed an application for a marriage license. The Office of Vital Statistics denied the application. Presiding Judge Karl Johnstone had previously issued a policy directive stating that "a marriage license shall not be issued for the purpose of marrying two persons of the same sex" since "marriage between two persons of the same sex is not contemplated by our statutory scheme." The parties agree that the directive correctly interpreted the Marriage Code as it existed at the time and that it is consistent with recent amendment of the Code.

Except for being of the same sex, plaintiffs have met all statutory requirements for obtaining a marriage license.

DISCUSSION

The current provision of the Alaska Marriage Code, A.S. 25.05.011(a), states: "Marriage is a civil contract entered into

by one man and one woman that requires both a license and a solemnization." A.S. 25.05.013 adds:

> (a) A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state.
>
> (b) A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage.

Brause and Dugan argue that the statutory ban on same-sex marriage violates the Alaska Constitution's guarantee of the right to privacy and equal protection.

The plaintiffs' motion challenges the very definition of marriage found in the Code. Though that definition contains notions with which many are familiar, for example, that marriage means the union of one man and one woman, that is not the end of the inquiry. Indeed, it is the definition of marriage itself which the court must test as a result of plaintiffs' challenge. It is not enough to say that "marriage is marriage" and accept without any scrutiny the law before the court. It is the duty of the court to do more than merely assume that marriage is only, and must only be, what most are familiar with. In some parts of our nation mere acceptance of the familiar would have left segregation in place. In light of Brause and Dugan's challenge to the constitutionality of the relevant statutes, this court cannot defer to the legislature or familiar notions when addressing this issue.

Before addressing the privacy and equal protection claims

presented, it is useful to first review the basic role of the state in marriage.

The state issues marriage licenses, solemnizes marriages and keeps a docket of applications for marriage licenses available for public review. The state also distributes basic information to applicants about the effects alcohol, drugs and battering can have upon a fetus. Other than that, the state does not become involved, except to require that the applicants be at least 18 years of age or, if minors, have the proper consents or be on active duty with the armed services. The Marriage Code now specifically prohibits same-sex marriage, bigamy and marrying anyone closer than one's first cousin. Applicants for marriage are under a duty to swear that the contemplated marriage meets the requirements of the law, give their names, relationship, occupations, ages (and, where appropriate, guardians), and give descriptions of any prior marriages and their dissolutions. The issuing officer has a duty to issue the license if "all requirements are met and there is no legal objection to the contemplated marriage, and neither party is under the influence of intoxicating liquor or otherwise incapable of understanding the seriousness of the proceeding . . ." A.S. 25.05.111. The license is to issue after a three day waiting period and is good for three months thereafter. A.S. 25.05.091; A.S. 25.05.121.

This description of the state's role in marriage focuses on the establishment of the marriage itself and is not inclusive, nor is it intended to be, of the many rights and consequences

established by the state on behalf of those who are married. Once married, the state provides benefits and imposes duties that are significant and valuable to society as well as to the individual members of the marriage. For a list of statutory benefits of marriage, see the appendix to plaintiffs' reply brief identified as "Revised Exhibit 4." Further evidence of the importance of marriage and the issuance of marriage licenses is found in A.S. 25.05.331 which makes it a misdemeanor to willfully and wrongfully refuse to issue a license.

Once the role of the state in creating and acknowledging marriages is recognized, the next step is to determine whether the state is infringing constitutionally protected rights in the way it exercises its power over marriage. The court must now test the legal definition of marriage to determine whether the definition itself, a definition that excludes persons of the same sex who want to marry, is constitutional. As further discussed below, the same principle that requires the state to have a compelling purpose before it can dictate choices related to personal appearance, requires the state to have a compelling purpose before it can define marriage to exclude partners of the same sex.

A. Right to Privacy

Alaska amended its Constitution in 1972 to explicitly guarantee the right to privacy. Article I, Section 22 reads in part: "The right of the people to privacy is recognized and shall not be infringed." Brause and Dugan contend that, insofar as the

above cited statutes prevent same-sex marriage, they violate Alaska's guarantee of the right to privacy.

Brause and Dugan cite two primary cases for their argument that a prohibition of same-sex marriage implicates an Alaskan's constitutional right to privacy. In Breese v. Smith, 501 P.2d 159 (Alaska 1972), the Alaska Supreme Court invalidated a high school hair length limitation and stated that the core of the concept of liberty is the right to control one's personal appearance or, more broadly, the right to be let alone. 501 P.2d at 166-67. Because the hair length requirement implicated such an important right, the Supreme Court required the school to show a compelling interest for its existence. When the school was unable to do so, the limitation was struck down.

Secondly, Brause and Dugan cite Ravin v. State, 537 P.2d 494 (Alaska 1974). The court in Ravin recognized a fundamental right to privacy in one's home and declared unconstitutional a state statute that prohibited marijuana possession by an adult for personal use in the home.

The plaintiffs' contention that their privacy is violated by a refusal of the State of Alaska to recognize and allow their marriage may not instinctively conform to common connotations of privacy, since, after all, they seek public recognition of a same-sex marriage. Privacy is commonly understood to mean seclusion, secrecy, or being left to one's personal affairs. These connotations of privacy may seem to make plaintiffs' claim of violation of privacy self-defeating, as the making public of a

relationship is not what one thinks of as the right to be let alone. Here Brause and Dugan claim a right to state recognition of their relationship. What they seek is clearly a public act and important for its public nature as much as for the other legal consequences which attend it.

Griswold v. Connecticut, 381 U.S. 479 (1965), demonstrates how government regulation can intrude improperly into the personal zone of intimacy protected by privacy. There the Supreme Court found that the state's prohibition of the distribution of information regarding contraceptives interfered with the right of marital partners to make intimate personal decisions about conceiving children and practicing birth control. The Court struck down the law for being an impermissible encroachment on the right to privacy. However, in Alaska, the history of the cases interpreting the right to privacy demonstrate that very public conduct may also be protected by the right to privacy, and that the right to privacy reaches beyond simple protection from government intrusion into one's intimate affairs.

Breese is an example of how government regulation improperly encroached on the exercise of the right to privacy and the public ramifications of that right. The Court held that hair length requirements of a public school interfered with the fundamental right of the student to determine his own personal appearance. According to the Court, the government could not interfere with the fundamental right to determine one's personal appearance - a right protected by privacy - without demonstrating a compelling state

interest. Though how one looks is a very public fact, the decision about one's personal appearance is personal, and therefore protected by the right to privacy.

At stake here is whether same-sex marriage can be denied by the state without violating fundamental rights, including the fundamental right to privacy. It is undisputed that marriage between persons of opposite gender is a fundamental right. See, e.g., Griswold; Loving v. Virginia, 388 U.S. 1 (1967). The question presented by this case is whether the personal decision by those who choose a mate of the same gender will be recognized as the same fundamental right. Clearly, the right to choose one's life partner is quintessentially the kind of decision which our culture recognizes as personal and important. Though the choice of a partner is not left to the individual in some cultures, in ours it is no one else's to make. Indeed, the marriage license and the marriage ceremony themselves make clear that this must be a choice freely made by the individual. Certainly the choice of a life partner is as important and personal as the choices involved in determining one's personal appearance.

When the Supreme Court of Hawaii in Baehr v. Lewin, 852 P.2d 44 (Hawaii 1993), addressed same-sex marriage, it noted that:

> [W]e do not believe that a right to same sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . .

852 P.2d at 57.

The Hawaii court could reach such a conclusion because of the question it chose to ask. It is self-evident that same-sex marriage is not "accepted" or "rooted in the traditions and collective conscience" of the people. Were this not the case, Brause and Dugan and the plaintiffs in Baehr would not have had to file complaints seeking precisely this right. The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions.

Here the court finds that the choice of a life partner is personal, intimate, and subject to the protection of the right to privacy. Failure of the state to provide public recognition of that private choice, whether it is the choice of a life partner of the opposite sex or of the same sex, is analogous to the unwillingness of the school in Breese to allow the presence of a student who made a personal choice to wear long hair.

Government intrusion into the choice of a life partner encroaches on the intimate personal decisions of the individual. This the Constitution does not allow unless the state can show a compelling interest "necessitating the abridgment of the . . . constitutionally protected right." Breese at 501 P.2d at 170.

B. Equal Protection

Brause and Dugan also assert that the relevant statutes deny them their rights as Alaskans to equal protection under the laws. Article I, Section 1 of the Alaska Constitution provides:

> Inherent Rights. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal right, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Article I, Section 3 goes on to prohibit the denial of civil rights on the basis of certain classifications:

> Civil Rights. No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin.

Whether a law violates the equal protection guarantees of the Alaska Constitution is determined by using the "sliding scale" test explained in State Dep't of Revenue v. Cosio, 858 P.2d 621, 629 (Alaska 1993):

> [W]e apply a sliding scale under which the applicable standard of review for a given case is to be determined by the importance of the individual right asserted and by the degree of suspicion with which we view the resultant classification scheme. As the right asserted becomes more fundamental or the classification scheme employed becomes more constitutionally suspect, the challenged law is subjected to more rigorous scrutiny at a more elevated position on our sliding scale.

[Citations omitted].

Brause and Dugan argue that the statutes prohibiting same-sex marriage should be at the highest end of the sliding scale, and therefore require the most rigorous scrutiny, because they implicate the fundamental right to marry and because the classification scheme is based on sex.

1. The Fundamental Right to Choose One's Life Partner

There is no dispute that the right to marry is recognized as fundamental. Today the court has recognized that the personal choice of a life partner is fundamental and that such a choice may include persons of the same sex. When the United States Supreme Court first characterized the right to marry as fundamental in Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942), it linked the right to marry to the right to procreate, being faced, as it was, with a case involving the sterilization of prisoners. Similarly, in Zablocki v. Redhail, 434 U.S. 374 (1977), the court was faced with a law that required a marriage applicant to prove he was up to date on his child support for children of his previous marriage before he could obtain a marriage license. The court focused on the decision to marry and have children as deserving of at least the protection allowed a woman in deciding whether to seek an abortion or to raise a child in illegitimacy:

> Surely, a decision to marry and raise a child in a traditional family setting must receive equivalent protection.

434 U.S. at 386.

The court thus recognizes that procreation has been an important part of the U.S. Supreme Court's decisions that have found the right to marry fundamental. However, just as the "decision to marry and raise a child in a traditional family setting" is constitutionally protected as a fundamental right, so too should the decision to choose one's life partner and have a recognized nontraditional family be constitutionally protected.

It is the decision itself that is fundamental, whether the decision results in a traditional choice or the nontraditional choice Brause and Dugan seek to have recognized. The same constitution protects both.

Thus, today's decision finds a person's choice of life partner to be a fundamental right. The consequence of this decision is that any limitations on this right are subject to the strict scrutiny standard established by the Alaska Supreme Court.

2. Classification Based on Sex

The court, having found the decision to choose one's life partner to be a fundamental right, has concluded that the strict scrutiny test applicable to fundamental rights applies to its review of the State's prohibition of same-sex marriages.

Were the right to choose one's life partner not fundamental, the court would need to determine whether the Code raised classification issues. Were this issue not moot, the court would find that the specific prohibition of same-sex marriage does implicate the Constitution's prohibition of classifications based on sex or gender, and the state would then be required to meet the intermediate level of scrutiny generally applied to such classifications. That this is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious.

CONCLUSION

Having found that the Marriage Code implicates constitutional provisions, the court grants the plaintiffs' motion for summary judgment. The state's motion for summary judgment is denied.

The parties are directed to set necessary further hearings to determine whether a compelling state interest can be shown for the ban on same-sex marriage found in the Alaska Marriage Code.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 27th day of February, 1998.

Peter A. Michalski

PETER A. MICHALSKI
Superior Court Judge

I certify that on:

2-27-98

a copy of the above was mailed to each of the following at their addresses of record.

R. Wagstaff
E. Lakey
AG-Cosgrove

Newby

Secretary/Clerk

AMENDMENT

OFFERED IN THE SENATE

TO: CS for SJR 42 [work draft 0-LS1655\E]

Page 1, lines 6-11:

Delete all material and insert:

Section 25. Marriage. To be valid or recognized in this State, a marriage may exist only between one man and one woman. No provision of this Constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex. Additional requirements related to marriage may be established to the extent permitted by the Constitution of the United States and the Constitution of the State of Alaska.

CS FOR SENATE JOINT RESOLUTION NO. 42( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISI ATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

A RESOLUTION

Proposing an amendment to the Constitution of the State of Alaska relating to marriage.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** Article I, Constitution of the State of Alaska, is amended by adding a new section to read:

Section 25. Marriage. Marriage is a unique social institution based on the union of one man and one woman. To be valid or recognized in this State, a marriage contract may be entered into only by one man and one woman. No provision of this Constitution may be interpreted to require the State to recognize marriage between individuals of the same sex. Additional requirements relating to marriage may be enacted by law to the extent permitted by the Constitution of the United States.

* Sec. 2. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

Alaska State Legislature

Senator Gary Wilken, Chairman
Senator Loren Leman, Vice Chairman
Senator Lyda Green
Senator Jerry Ward
Senator Johnny Ellis

State Capitol
Room 510
Juneau, Alaska 99801
(907) 465-3762

Senate Committee on
Health, Education and Social Services
Sponsor Statement – Senate Joint Resolution 42

Senate Joint Resolution 42 proposes an amendment to the state constitution that defines marriage as a union between one man and one woman. When approved by voters, SJR 42 will protect the definition of marriage in current statute. That statute was declared to be potentially unconstitutional by Superior Court Judge Peter Michalski in a Feb. 27 ruling in the case of *Brause and Dugan vs. State of Alaska*. In a decision rich with ironies, Judge Michalski concluded that the state's "failure... to provide *public* recognition" of a person's homosexual relationship is contrary to the state constitution's right to *privacy* [emphasis added]. Michalski's ruling applies the "strict scrutiny test" to the state's law, meaning that the state cannot deny marriage licenses to same-sex couples unless it can prove a "compelling governmental interest." The compelling interest test is an exceedingly difficult legal burden.

The court's ruling ignores the clear public policy statement made by the Legislature in 1996 when it passed Senate Bill 308 by overwhelming margins. Introduced by the Senate HESS Committee, SB 308 reaffirmed the "one man, one woman" definition of marriage that has been operative in Alaska since statehood and also under the territorial government. The laws of all 50 states currently limit marriage to individuals of opposite sex. If the court orders the state to recognize homosexual marriages, thousands of same-sex couples can be expected to travel to Alaska and obtain marriage licenses. Many of these couples will then return to their home states and seek to have their unions recognized under the "full faith and credit clause" of the U.S. Constitution, which generally provides that rights acquired under the public acts or judicial proceedings of one state must be held valid in other states. This will precipitate multiple constitutional crises across the country as dozens of state governments are forced to confront the issue.

If a court orders recognition of homosexual marriages, it will place Alaska in conflict with federal law in incredibly diverse ways. In 1996 the U.S. Congress approved and President Clinton signed into law H.R. 3396, now Public Law 104-199. Known as the "Defense of Marriage Act," this law specifies that marriage under federal law means a union *only* of one man and one woman. According to the U.S. House Judiciary Committee, the word "marriage" appears in more than 800 sections of federal statutes and regulations, and the word "spouse" appears 3,100 times. In the administration and enforcement of these laws, the federal government defines marriage as a union of "one man and one woman" – regardless of what Alaska law states. The I.R.S. will probably not recognize joint tax returns filed by homosexual "married" couples, nor will these couples be eligible for the leave benefits provided by the Family & Medical Leave Act of 1993. Hundreds of other programs and benefits are also implicated, and an explosion of litigation can be expected to result.

Because recognition of same-sex marriages raises the most profound cultural and legal issues, it is only appropriate that the issue be decided by voters, as SJR 42 will allow. It is not appropriate for one unelected and unaccountable judge to set social policy for the entire state of Alaska.

Prepared by Mike Pauley, Staff Aide to Senator Loren Leman, Vice-Chair Senate HESS Committee (465-3841)
Last Update: March 9, 1998

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SJR42
1998 LEGISLATIVE SESSION

Revision Date (Note if correction) _____ Dept. Affected Office of the Governor
Title Const. Amend: Relating to marriage BRU Elective Operations
Component General and Primary
Sponsor Senate HESS Committee
Requester Senate Judiciary Committee Component Serial No. #22

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual	3.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	3.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	3.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	3.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This figures includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58, and the programming costs for counting votes cast on the measure. However, only four measures can be printed on a single ballot card. If this measure requires printing an additional ballot card, the costs will increase by $56.0.

Prepared by Gail Fenumiai Phone 465-3935
Division Division of Elections Date 3/6/98
Approved by C Lt. Governor Fran Ulmer Date 3/6/98
Agency Office of the Lieutenant Governor

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NASW ALASKA CHAPTER
National Association of Social Workers

Executive Director
Angela M. Salerno, ACSW

March 9, 1998

Senator Robin Taylor, Chair
Judiciary Committee
Alaska State Senate

RE: SJR 42

Dear Chairman Taylor:

The National Association of Social Workers (NASW) asserts that discrimination and intolerance against any group is damaging to the social, emotional, and economic well-being of the affected group and of society as a whole. It is the position of NASW that same-gender sexual orientation should be afforded the same respect and rights as opposite-gender orientation.

NASW opposes attempts to amend the Alaska State Constitution to ban same-gender marriage. Our constitution guards civil rights including marriage, a civil institution. Same-gender couples must be afforded the same legal and economic benefits extended to married opposite-gender couples such as spousal and dependent support benefits, benefits associated with health and other insurance and retirement, income-tax rates benefits, inheritance, child custody and property rights, as well as the simple recognition and equality to enter into a valid marriage contract.

Marriage is an intimate association for which citizens must be afforded the right to privacy. Amending the constitution is an inappropriate effort to restrict the privacy and freedom of Alaskans.

Finally, the referendum demanded by SJR 42 serves no practical purpose for Alaskans, and can only create an atmosphere of hatred and division. We urge you not to pass SJR 42 from committee.

Sincerely,

John Waters

John Waters, LCSW
President, NASW Alaska Chapter

318 4th Street, Juneau, AK 99801 • (907) 586-4438 • FAX: (907) 586-4439 • naswak@alaska.net

NATIONAL ASSOCIATION OF SOCIAL WORKERS ALASKA CHAPTER
318 4th Street, Juneau AK 99801
586-4438 Fax: 586-4439
naswak@alaska.net

NASW Alaska Policy Statement

Lesbian, Gay and Bi-Sexual Issues

The National Association of Social Workers (NASW) asserts that discrimination and prejudice against any group is damaging to the social, emotional, and economic well-being of the affected group and of society as a whole. It is the position of NASW that same-gender sexual orientation should be afforded the same respect and rights as opposite-gender orientation. NASW recognizes that homosexuality and homosexual cultures have existed throughout history. Homosexuals have been subject to long-standing social condemnation and discrimination. Toward the elimination of this prejudice, NASW recommends legal and political action to:

- work toward implementation of domestic partnership legislation at local, state, and national levels that includes lesbian and gay people.
- encourage adoption of laws that recognize inheritance, insurance, child custody, property, and other rights in lesbian and gay relationships.
- see election of self-identified lesbian, gay and bisexual candidates in all political jurisdictions.

as well as antidiscrimination efforts which:

- seek repeal of, and actively campaign against, any laws allowing discriminatory practices against lesbian, gay and bisexual people.
- encourage broadening of affirmative action statements in state government, social agencies, universities, professional associations, and funding organizations to include sexual orientation.
- work toward implementation of antidiscrimination personnel policies that cover lesbian, gay and bisexual people within the state of Alaska.
- increase public awareness of the discrimination experienced by lesbian, gay and bisexual people and of the contributions to society made by lesbian, gay and bisexual people.