SJR

20

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 2/14/06

FURTHER: Finance

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: _____

Judiciary Committee considered SENATE JOINT RESOLUTION NO. 20

SJR 20 CONST. AM: BENEFITS & MARRIAGE

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

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

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

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

CS Senate Bill:
[ ] Same Title
[ ] New Title

SCS House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC.	AMEND
		X		
		X		
	X			
	X			
CHAIR: Ralph Seekins	✓			

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SJR20
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: OOG
Title: Constituti al Amendment relating to marriage
RDU: Elections
Component: Elections
Sponsor: Senate Judiciary Committee
Requester: Senate Judiciary Committee
Component No.: 21

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual	1.5					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**1.5**	**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	1.5					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**1.5**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

If this amendment appears on the 2006 ballot, the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58 is $1.5. Should the addition of this question require printing an 8 1/2 by 18 inch ballot the cost will increase to $22.0.

Prepared by: Whitney Brewster, Director — Phone 465-2644
Division: Division of Elections — Date/Time 2/14/2006, 2:45pm
Approved by: Whitney Brewster, Director — Date 2/14/2006
Agency: Office of the Lt. Governor, Division of Elections

(Revised 9/7/2005 OMB)

February 15, 2006

Alaska Legislature:

I am Cindy Boesser, a resident of Juneau since 1959. I am fortunate to be able to be married, am birthmother to one, and stepmother to another child.

I would like to testify against House Joint Resolution No. 32. I see it as being blatantly discriminatory against a minority of Alaskan Residents. It is unthinkable to suggest putting such an amendment in the great Constitution of the State of Alaska, even if 99 % of the voters approved it.

I went to college in North Carolina. My first English paper I titled, "20th Century Woman in 19th Century State". One attitude I found particularly backward was that many fellow students still didn't believe in interracial marriage. Not only were they squeamishly uncomfortable with the idea, they firmly believed, on a biblical basis, that it was "wrong". I ask you to consider, would it have been acceptable to put a resolution to the North Carolina legislature stating that "no other union is similarly situated to a marriage between people of the same race and, therefore, a marriage between people of the same race is the only union that shall be valid or recognized in this State and to which the rights, benefits, obligations, qualities, or effects of marriage shall be extended or assigned."? I think not.

Now please honestly ask yourself if, at some point in history in North Carolina, the question of interracial marriage had been put on a ballot, would not the vast majority of residents have whole-heartedly endorsed it? They certainly would have! And would it have been the right thing to do? Most certainly not.

Why would it be wrong? Because we live in a country where equal rights are supposed to be guarantied for each and every minority group, no matter how unaccepting the majority is of them. For when the majority determines the rights of the minority, none of us is safe.

We learned that lesson in the South, with the white Christian majority righteously kicking and screaming to the bitter end. We learned it through the pain of our Japanese-Americans' wartime internment, with the zealously patriotic ethnic majorities heartlessly devastating our neighbors and friends, in the name of "God and our Country". We learned it in Alaska as the Original Peoples of this land were laid waste by the dominant majority's cultural destruction, in many cases by the missionaries.

It greatly saddens me to see an effort by so-called Christian legislators proposing such a hateful amendment to our constitution. The Jesus I know loved and accepted the outcasts of society. At this point in history, gay and lesbians are still outcasts. But they are my friends, my neighbors, my co-workers, my family. I love them. I see them in long-term, committed relationships. And I insist that they deserve to receive equal compensation for their labors, which means they must receive equal benefits.

Our State Constitution is not meant to reflect the majority prejudice of each era. It is meant to protect the rights of each and every of the citizens of the great State of Alaska, even the unpopular minorities.

Please take a good hard look at history as you consider this resolution.

Sincerely,

Cindy Boesser

Cindy Boesser
875 Basin Road
Juneau, Alaska 99801

Rev. Robert Buttcane
Spiritual Director
Unity Study Group of Juneau
119 Seward Street
Juneau, Alaska 99801

February 16, 2006

Senator Ralph Seekins, Chair
Senate Judiciary Committee
State Capitol
Juneau, Alaska 99811

RE: SJR 20

Dear Senator Seekins and members of the Senate Judiciary Committee:

I am a strong proponent of marriage and would point to a number of documented studies referenced on the US Department of Health and Human Services Marriage Initiative website (http://www.acf.hhs.gov/healthymarriage/index.html) to extol the benefits of marriage. In essence, research demonstrates that married couples in healthy, committed, long term relationships are more stable, have fewer health issues and are more prosperous and productive than their unmarried counterparts. By most measures, happy, health marriages make for happier, healthier lives for individuals, families, children, neighborhoods and communities.

I am one of a growing number of people in America that believe marriage should be considered the "gold standard" for those who wish to enter into a healthy, committed, long-term relationship. Where I might differ with other marriage proponents however, is in my belief that marriage, this "gold standard" of relationships, should be available to any and all persons who aspire to unite in a healthy, committed, long-term union.

With this in mind then, the first course of action this committee might consider with regard to SJR 20 is to amend the language of the resolution to give the people of Alaska an opportunity to repeal the Marriage Amendment, Article 1, section 25 of Alaska's Constitution. If one were to fully accept the notion that marriage is the "gold standard" of healthy, committed relationships then this legislature could take no higher course in support of marriage than to take the necessary steps to remove the constitutional and statutory restrictions we now have on marriage in Alaska.

Baring this course of action I would then urge members to oppose SJR 20. I believe over time Alaska will incur substantial costs to litigate the meaning and intent of the wording of this resolution. The wording in the resolution, "(marriage) is the only union that shall be valid or recognized...and to which the rights, benefits, obligations, qualities, or effects of marriage shall be extended or assigned," is nebulous and imprecise. What exactly are the "qualities or effects of marriage?" The wording of this resolution would seem to me to be an open invitation for endless litigation.

If this wording were ratified into our Constitution, would schools need to adjust their policies to redefine how an unmarried partner of a parent with a child in that school may or may not participate in that child's school activities? Would such a Constitutional provision interfere with an unmarried couples' ability to meet the challenges of care giving for their companion? Would it become illegal for a hospital to allow a person other than a spouse to participate in their partner's care and treatment because that is ordinarily a right or obligation assigned to married persons? Today some public and private organizations in Alaska currently extend health and other benefits to unmarried partners of their employees. Would these benefits be unlawful if the language of this resolution were written into our Constitution? If, because of such a Constitutional amendment an organization decided to stop providing benefits to unmarried partners of their employees isn't it fair to assume that some of those individuals will turn to state funded welfare and medical assistance programs to get their needs met? Could this proposed language be used by a municipality or some future legislature to make it a criminal offense for persons to engage in any form of public displays of affection unless they have a valid and lawful marriage license? These are just a few of the questions and circumstances that serve to illustrate the point that the wording of this resolution is ambiguous and would lead to more, not less, confusion and uncertainty.

Perhaps the most important argument against this resolution is its inherent conflict with the fundamental principle of our state's Constitution, that all people, ALL people, are equal and are entitled to equal opportunity, equal protection and equal process of law. This resolution is inconsistent with the value of equality Taken to its logical end the proponents of this resolution will never fully realize their objectives to limit certain privileges and opportunities to one defined group unless the idea of equality itself is extricated from our Constitution. Codifying inequality in our Constitution, laws and policies is contrary to my understanding of the equanimity we share as children of divine creation and goes against the most fundamental principle of our agreements of governance.

This resolution raises more questions than it would seem to answer, it is discriminatory and I urge you to find the courage and clarity to oppose the passage of SJR 20.

Sincerely,

Rev. Robert Buttcane

Rev. Robert Buttcane

February 16, 2006

Alaska Legislature
Senate Judiciary Committee

Testimony re: SJR 20 - Constitutional Amendment: Benefits & Marriage

Senators:

This bill invites comparisons to George Wallace in the schoolhouse door arguing that the people of Alabama have the right to be racist, if that's what the people of Alabama want. When you vote on it, you will, of course, have to deal with the political and personal ramifications of that, but that's not the point I want to focus on. I want to address something obvious that seems to have been overlooked.

You only need to look as far as your own children to see that this bill is bad for Alaska. My daughter was born in Alaska, graduated from McGill University with honors, and is working for a program that serves homeless and HIV individuals in San Francisco. She is applying for dual graduate studies in law and public health. She is exactly the kind of young professional that the State of Alaska has been working hard to attract and retain in our state. This bill says to her, "we don't care what you have to offer, if you want a domestic partner of the same sex, please take your education, skills and dedication elsewhere."

My son was born in Alaska and won prizes in the Alaska science fair for work on salmon genetics. Now he is on an AP track for math and science at a boarding school in Victoria, where he is also building a network of international relationships. He works summers as a lab assistant at the Auke Bay Lab. He represents exactly the skills and interests President Bush says he wants to promote in America. This bill says to him, "Alaska will not offer you a competitive employment opportunity unless you are straight, because your sexual orientation is more important to us than your ability."

One of these young people is straight; the other isn't. I don't think Alaska should write one of them off. This bill creates a strong economic incentive for thousands of GLBT Alaska youth to pursue their lives outside Alaska. Can we afford to turn our backs on all that talent? Is that the best way to deal with this issue?

Thank you,

Scott Miller
4010 Ridge Way
Juneau, Alaska 99801

SENATE JUDICIARY TESTIMONY
SJR 20
February 16, 2006

My name is Marsha Buck; I'm here representing PFLAG Juneau. PFLAG stands for Parents, Families, and Friends of Lesbians and Gays.

I am here to testify against SJR 20 as a mother who taught her daughters to tell the truth, to be honest, not to tell lies. You probably taught your children the same. Yet the resolution before us appears to be more political than honest. It does not fit what is important to Alaskan mothers.

The wording says it is about MARRIAGE but it is clear to me and will be clear to all Alaskans, that it is about eliminating the equal protection guarantees of our beloved Constitution. If it were really about marriage it would address the root causes of marriage failure in our country today, things like failure to be honest which includes adultery. Wouldn't it be interesting if this Resolution were to address THAT and say that rights and benefits could only be assigned if there were no lies told? But I digress.

This Resolution appears to wipe out equal protection guarantees of the Constitution that we Alaskans cherish. It does so by creating a huge group of 2nd class citizens in Alaska, among them couples and families who are like my daughter and her family. And I want you to know that my daughter and others like her who I am honored to know deeply go to church on Sunday, hold steady jobs, pay their taxes on time and save money into 401(K)s, place a high value on family and raising healthy children, and are monogamous. Are you saying by this Resolution that these things are not important to support? Are you saying that Alaska's Constitution should discriminate against hardworking family people like my daughter?

I have been voting in both urban and rural Alaska for almost 40 years now and when I vote for my legislators, I vote for Alaskans who will uphold our Constitution as they swear to do, who will participate in the political process with the equal protection of all represented citizens continuously in mind, and who are honest in the same way you and I teach our children to be honest. If you support this Resolution, aren't you saying you have an entirely different set of values in mind? I would ask you all to vote against SJR 20 here in Senate Judiciary.

My name is Mallory Story

My address 12069 Cross St

I am a sophomore at JDHS and a member of the Gay Straight Alliance and I ~~am against this bill~~. would ask you ~~to vote~~ No on this bill. not to support this resolution.

Growing up in Alaska I've always been proud of my State and I feel that it is always working towards being open and accepting of diversity and not a state where discrimination is tolerated. I feel that this bill is a step backwards from this direction. I do not believe that one type of family is better to bring up a child than another and I think this bill is biased and selective to one type of family. This bill would open up huge doors for numerous types of discrimination.

Thank you for allowing me to testify. ~~Please vote~~ I would request that you do not ~~vote against this bill~~. support this resolution.

My name is Joelle Ballam-Schwan

My address is 12090 Cross St

I am a student at JDHS and vice president of the Gay Straight Alliance, I am against this proposed resolution and ask you not to support it.

Not only am I a youth today but a human being. As a human being, at an early age I learned the difference between right and wrong. I learned that discrimination is always wrong and this resolution is discriminatory. I may not understand every legislative detail this proposed resolution entails, but I do know that it would be ~~it is~~ stating to us kids that it is legal to discriminate and practice bigotry. Webster defines bigotry as: "Behavior, attitude or act of intolerance." If it says we are allowed to do ***that*** in our CONSTITUTION than what is this telling me today as a youth? Thank you for listening.

February 16, 2006

We are Mark and Mildred Boesser, 79 & 80 years old, respectively
We have been married 57 years, have been Alaska residents since 1959.
We have raised 4 daughters, (now in their 50's) who work in Juneau –
and have grandchildren ranging in age from middle school to their
early twenties

Mildred is a retired teacher, and served on Juneau's first Human Rights Commission. I am 55 years a priest - 45 of them served in Alaska and am now designated as Archdeacon of SE Alaska for the Episcopal Church. ~~Diocese of Alaska.~~

Senate Joint Resolution #20

We come to ask you in all sincerity to reject (that is: vote "No" on) the House Joint Resolution No. 32 proposing an amendment to the Constitution of the State of Alaska relating to Marriage.

We assure you that we are aware of the values that accrue from a healthy marriage, complete with the benefits which support such an institution. Those of us who receive those benefits may sometimes forget how important they are and the difference it would make in our lives should they be taken away or were never there in the first place.

We are here today because this resolution appears to ~~be an attempt~~ want to put before the voting public an amendment which, if passed, would write discrimination into our Constitution.

Taking the Associated Press report (Matt Volz, Feb 14, 2006) at face value: "An amendment to the state constitution has been introduced in the Alaska Legislature with the aim of overturning a court ruling and banning benefits to the same sex partners of public employees," one can hardly miss the intent.

(The Alaska Supreme Court ruled in October that denying gay couples the same public employee benefits as married couples -- life and health insurance, plus retirement and death benefits, violates the Alaska Constitution equal-protection clause.)

The very idea of using the Alaska Constitution, - intended to guarantee basic human rights for all,- to intentionally remove the rights and benefits from one segment of the population, thereby making them 2nd class citizens....We can hardly believe it! It certainly sounds like ~~attempting to~~ codify discrimination against a particular group of people.

Our oldest daughter is 53 years old and has lived in a monogamous, faithful relationship for 26 years. She and her partner have held responsible jobs for over two decades, own their own home free and clear, pay all taxes due, and are the kinds of persons any family would be proud to call their own. They have lived all these years without consequential benefits given to married couples. The "catch 22" is that they are not allowed to be married in Alaska because they are lesbians. Regretably, that has already been written into the Constitution. That's not at issue here. Surely you see the irony. The proposed resolution says that benefits can only be given to married couples, but marriage is denied a significant number of Alaskan citizens, including our daughter.

Believe it: Mildred and I are thoroughly in favor of the institution of Marriage. But take it from us, there is no way that allowing benefits to these non-marriageable persons can hurt our marriage or yours, or anyone elses. To couch this resolution to make it sound as if the vote is about marriage is to terribly mislead the public on the basic issue of equal rights for all.

As far back as 1976 the National General Convention of the Episcopal Church expressed its conviction that homosexual persons are entitled to equal protection of the laws with all other citizens, and called upon our society to see that such protection is provided in actuality

In our view, this proposed amendment would go off in the exact opposite direction. We appeal to you to reject it.

Thank You.

hello. My name is Sonne Kyle-Olsen, I am 16 years old and I attend Juneau-Douglas Highschool.
I am an incredibly active member of my school's Gay-Straight Alliance, as well as president of the Sophomore Class. I love to be a part of our society, and everyday I'm learning something new, or I'm getting the opportunity to participate in ~~something~~ ~~intriguing~~. the community

recent'y, I've been paying a lot of attention to the proposed amendment of State Resolution No. 32 relating to Marriage.
As a youth, I am incredibly impressioned, and I feel that taking away the benefits of a gay marriage is putting the impression that being discriminatory is okay, and what k ad of society is that when you grow up believing arogance, biligerance and even violence is ay?
I grew up in Albequrque, New Mexico, where the state law is that gay marriges and couples do not recieve credibl rights, benefits, qualities, effects o obligations.
My mother had 3 gay best friends, 2 of whom were suffering HIV aids together, but couldn't receive medical insurance, or important life-saving medication, and they died, ~~leaving my mother to heartbreak~~.
Miguel and Bernardo would babysit me, and they were in the glow of their lives, and they loved me, and I adored them. To grow up without them because of a discriminative law, is painful. They were abused physically a id emotionally, and I don't think that this is appropriate. By passing this amendment, it's opening a window to allow what happened to my beloved f iends, happen to members of our gay community here in Juneau, or anyw ay in Alaska, or the US.
Just ask yourself this: by passing this amendment, is that making it okay for me, a youth, a future leader, a highschooler, a teenager, a daughter, a friend, to discriminate against gays and their benefits? Can we move as nation backwards from what "America home of the Free" initiated?

thank you.

Marriage Amendment

1998

Superior Ct. right to choose life mate

Benefits + privileges + duties

(Pre-opposed benefits were inseparable from the

Seperation of marriage status from marriage benefits.

Constitutionally required benefits to unmarried same-sex relationships.

Examples:

- Private employers will be required to extend the same benefits.
- implied covenant of good faith + fair dealing.

(Equal pay for equal work)

- Legislature is not making law...
- is not invading privacy...

California - domestic partner.

- do the people have the right to vote on this ~~[illegible]~~ matter?
-

- Amendment — Mono
  ↓ marriage

- must married
- cannot get married — must get benefits of marriage.
-

→ will of the people

→ will people vote it up or down?

Andrea Doll

morality?

- who told you that?

ACLU v. State & Municipality of Anchorage (10/28/2005) sp-5950

THE SUPREME COURT OF THE STATE OF ALASKA

ALASKA CIVIL LIBERTIES UNION, DAN CARTER and AL INCONTRO, LIN DAVIS and MAUREEN LONGWORTH, SHIRLEY DEAN and CARLA TIMPONE, DARLA MADDEN and KAREN WOOD, AIMEE OLEJASZ and FABIENNE PETER-CONTESSE, KAREN STURNICK and ELIZABETH ANDREWS, THERESA TAVEL and KAREN WALTER, CORIN WHITTEMORE and GANI RUTHELLEN, and ESTRA BENSUSSEN and CAROL ROSE GACKOWSKI,	) Supreme Court No. S- 10459) Superior Court No. 3AN-99-11179 CI) O P I N I O N) [No. 5950 - October 28, 2005]
Appellants,	
v.	
STATE OF ALASKA and MUNICIPALITY OF ANCHORAGE,	
Appellees.	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Stephanie Joannides, Judge.

Appearances: Allison E. Mendel, Mendel & Associates, Anchorage, Kenneth Y. Choe,

American Civil Liberties Union Foundation, New York City, New York, and Tobias B. Wolff, Davis, California, for Appellants. John B. Gaguine, Assistant Attorney General, and Bruce M. Botelho, Attorney General, Juneau, for Appellee State of Alaska. Neil T. ODonnell, Atkinson, Conway & Gagnon, Anchorage, for Appellee Municipality of Anchorage. James M. Gorski, Hughes, Thorsness, Gantz, Powell, Huddleston & Bauman LLC, Anchorage, for Amicus Curiae The Alaska Catholic Conference. Rebecca L. Maxey, Law Offices of Rebecca L. Maxey, L.L.C., Anchorage, and Jennifer Middleton, Lambda Legal Defense and Education Fund, Inc., New York City, New York, for Amicus Curiae Lambda Legal Defense and Education Fund, Inc. Kevin G. Clarkson, Brena, Bell & Clarkson, P.C., Anchorage, for Amici Curiae North Star Civil Rights Defense Fund, Inc. and Marriage Law Project.

Before: Fabe, Chief Justice, Matthews, Eastaugh, Bryner, and Carpeneti, Justices.

EASTAUGH, Justice.

I. INTRODUCTION

The State of Alaska and the Municipality of Anchorage offer valuable benefits to their employees spouses that they do not offer to their unmarried employees domestic partners. Essentially all opposite-sex adult couples may marry and thus become eligible for these benefits. But no same-sex couple can ever become eligible for these benefits because same-sex couples may not marry in Alaska.1 The spousal limitations in the benefits programs therefore affect public employees with same-sex domestic partners differently than public employees who are married. This case requires us to determine if it is reasonable to pay public employees who are in committed domestic relationships with same-sex partners less in terms of employee benefits than their co-workers who are married. In making this determination, we must decide whether the spousal limitations in the benefits programs violate the rights of public employees with same-sex domestic partners to equal rights, opportunities, and protection under the law.2

The Alaska Constitution dictates the answer to that constitutional question. Irrelevant to our analysis must be personal, moral, or religious beliefs held deeply by many about whether persons should enter into intimate same-sex relationships or whether same-sex domestic partners should be permitted to marry. It is the duty of courts to define the liberty of all, not to mandate [their] own moral code.3 Our duty here is to decide whether the eligibility restrictions satisfy established standards for resolving equal protection challenges to governmental action.

We do not need to decide whether heightened scrutiny should be applied here because the benefits programs cannot

withstand minimum scrutiny. Although the governmental objectives are presumably legitimate, the difference in treatment is not substantially related to those objectives. We accordingly hold that the spousal limitations are unconstitutional as applied to public employees with same-sex domestic partners, and we vacate the judgment below. We ask the parties to file supplemental memoranda addressing the issue of remedy.

II. FACTS AND PROCEEDINGS

The State of Alaska and the Municipality of Anchorage offer health insurance and other employment benefits to the spouses of their employees.4 These benefits are financially valuable to employees and their spouses. Only couples who are married are eligible to receive these benefits; unmarried couples are not eligible. The state and the municipality have offered some form of these employment benefits since 1955 and at least 1985, respectively.

The Alaska Civil Liberties Union and eighteen individuals who alleged that they comprised nine lesbian or gay couples (collectively, the plaintiffs) filed suit against the state and the municipality in 1999, complaining that these benefits programs violated their right to equal protection under the Alaska Constitution. They alleged that at least one member of each same-sex couple was an employee or retiree of the state or the municipality, that the eighteen individual plaintiffs were involved in intimate, committed, loving long-term relationships with same-sex domestic partners, and that, as gay and lesbian couples, they are excluded by state law from the institution of marriage. Members of eight of the couples asserted in affidavits that they are in committed relationships.5 Their amended complaint alleged that because they are prohibited from marrying each other by Alaska Constitution article I, section 25, they are ineligible for the employment benefits the defendants provide to married couples, resulting in a denial of the individual plaintiffs right to equal protection.

Article I, section 25 was adopted by Alaska voters in 1998. Commonly known as the Marriage Amendment, it provides: To be valid or recognized in this State, a marriage may exist only between one man and one woman. It effectively prohibits marriage in Alaska between persons of the same sex.6 The plaintiff employees consequently cannot enter into the formal relationship marriage that the benefits programs require if the employees are to confer these benefits on their domestic partners.

Put another way, the plaintiff employees and their same-sex partners are absolutely precluded from becoming eligible for these benefits. Although all opposite-sex couples who are unmarried are also ineligible for these employment benefits, by marrying they can change the status that makes them ineligible.

The plaintiffs did not challenge the Marriage Amendment in the superior court (nor do they on appeal). Instead, their amended complaint asked the superior court to declare that denying employment benefits to same-sex domestic partners violates, among other things, article I, section 1 of the Alaska Constitution, which states in part: This constitution is

> dedicated to the principle[] . . . that all persons are equal and entitled to equal rights, opportunities, and protection under the law.

All parties moved for summary judgment. The superior

court denied the plaintiffs motion and granted the defendants motion. The court first rejected plaintiffs assertion that it was necessary to apply heightened scrutiny in considering their equal protection challenge; the court reasoned that heightened scrutiny was unwarranted because the state and the municipality were discriminating between married and unmarried employees, not between opposite-sex and same-sex couples. The court also determined that the only right at issue was a right to employee benefits, which it ruled was not a fundamental right. Because the court found that no suspect class or fundamental right was involved, it applied the lowest level of scrutiny to the governmental action. The court ruled that the defendants had a legitimate interest in reducing costs, increasing administrative efficiency, and promoting marriage. It then ruled that granting benefits only to spouses of married employees bore a fair and substantial relationship to those interests.

The plaintiffs appealed. Briefing on their appeal was completed and oral argument took place before the United States Supreme Court decided Lawrence v. Texas.7 With our permission, the parties filed supplemental briefs discussing Lawrence.

III. DISCUSSION

A. Standard of Review

We review a grant or denial of summary judgment de novo.8 Summary judgment is only appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.9 Deciding the applicable standard of scrutiny in an equal protection challenge to an allegedly discriminatory statute presents a question of law.10 Likewise, identifying the nature of the challengers interest and assessing the importance of the governmental interest and the fit between that interest and the means chosen to advance it, present questions of law.11 We will apply our independent judgment to questions of law and adopt the rule of law most persuasive in light of precedent, reason, and policy.12 We apply our independent judgment when interpreting constitutional provisions or statutes.13 A constitutional challenge to a statute must overcome a presumption of constitutionality.14

B. Effect of the Marriage Amendment on Plaintiffs Equal Protection Arguments

The plaintiffs, in challenging the spousal limitations in the benefits programs, rely on article I section 1 of the Alaska Constitution, which guarantees the right to equal treatment. It states that all persons are equal and entitled to equal rights, opportunities, and protection under the law.15 Often referred to as the equal protection clause, this clause actually guarantees not only equal protection, but also equal rights and opportunities under the law.16

But Alaska Constitution article I, section 25, the Marriage Amendment, states that [t]o be valid or recognized in this State, a marriage may exist only between one man and one woman. It effectively prohibits same-sex domestic partners from marrying in Alaska and denies recognition in Alaska to foreign marriages between same-sex couples.17 We must decide as a threshold matter whether, as contended by the municipality and amici curiae North Star Civil Rights Defense Fund, Inc. and the Marriage Law Project, the Marriage Amendment precludes challenges

by same-sex couples to government policies that discriminate between married and unmarried couples.

We must give effect to every word, phrase, and clause of the Alaska Constitution.18 [S]eemingly conflicting parts are to be harmonized, if possible, so that effect can be given to all parts of the constitution.19

The Alaska Constitutions equal protection clause and Marriage Amendment can be harmonized in this case because it concerns a dispute about employment benefits. The Marriage Amendment effectively precludes same-sex couples from marrying in Alaska, but it does not explicitly or implicitly prohibit public employers from offering to their employees same-sex domestic partners all benefits that they offer to their employees spouses. It does not address the topic of employment benefits at all.20

Nor have we been referred to any legislative history implying that, despite its clear words, the Marriage Amendment should be interpreted to deny employment benefits to public employees with same-sex domestic partners.21 The Marriage Amendment could have the effect of foreclosing the present challenge only if it could be read to prohibit public employers from offering benefits to their employees same sex domestic partners. But nothing in its text would permit that reading, and indeed the state and the municipality implicitly assume on appeal that governments are free to offer employment benefits to their employees unmarried, domestic partners, including same-sex domestic partners.

Because the public employers benefits programs could be amended to include unmarried same-sex domestic partners without offending the Marriage Amendment, that amendment does not foreclose plaintiffs equal protection claims here. That the Marriage Amendment effectively prevents same-sex couples from marrying does not automatically permit the government to treat them differently in other ways. It therefore does not preclude public employees with same-sex domestic partners from claiming that the spousal limitations in the benefits programs invidiously discriminate against them.

The state equal protection clause cannot override more specific provisions in the Alaska Constitution.22 But the plaintiffs do not contend that the Marriage Amendment violates Alaskas equal protection clause. They argue not that they have a right to marry each other, but that the benefits programs discriminate against them by denying them benefits that the programs provide to others who, plaintiffs claim, are similarly situated.

Because the Marriage Amendment does not resolve this appeal, we turn to the merits of plaintiffs equal protection arguments.

C. Challenge to the Spousal Limitations Under the Equal Protection Clause of the Alaska Constitution

Article I, section 1 of the Alaska Constitution mandates equal treatment of those similarly situated; it protects Alaskans right to non-discriminatory treatment more robustly than does the federal equal protection clause.23 We have long recognized that [this clause] affords greater protection to individual rights than the United States Constitutions Fourteenth Amendment.24

To implement Alaskas more stringent equal protection standard, we have adopted a three-step, sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interest at stake 25

1. The benefits programs distinctions between same-sex and opposite-sex domestic partners

A person or group asserting an equal protection violation must demonstrate that the challenged law treats similarly situated persons differently.26 Absent disparate treatment of similarly situated persons, the law as applied to the aggrieved group does not violate the groups right to equal protection.27 We first consider whether, as the municipality contends, there is no evidence of differential treatment, making it unnecessary to engage in a sliding-scale analysis.28

The plaintiffs assert that the defendant governments treat same-sex and opposite-sex couples differently. The defendants argue that their programs differentiate on the basis of marital status, not sexual orientation or gender. The municipality asserts that all married employees can confer benefits on their spouses, and no unmarried employees can confer benefits on their partners. It therefore argues that it treats same-sex couples no differently than any other unmarried couples, and that there is consequently no basis for an equal protection claim. Several courts examining similar programs have reached this conclusion.29

We must therefore decide whether there is a classification that results in different treatment for similarly situated people.

We agree with the plaintiffs that the proper comparison is between same-sex couples and opposite-sex couples, whether or not they are married. The municipality correctly observes that no unmarried employees, whether they are members of same-sex or opposite-sex couples, can obtain the disputed benefits for their domestic partners. But this does not mean that these programs treat same sex and opposite-sex couples the same. Unmarried public employees in opposite-sex domestic relationships have the opportunity to obtain these benefits, because employees are not prevented by law from marrying their opposite-sex domestic partners.30 In comparison, public employees in committed same-sex relationships are absolutely denied any opportunity to obtain these benefits, because these employees are barred by law from marrying their same-sex partners in Alaska or having any marriage performed elsewhere recognized in Alaska. Same-sex unmarried couples therefore have no way of obtaining these benefits, whereas opposite-sex unmarried couples may become eligible for them by marrying. The programs consequently treat same-sex couples differently from opposite-sex couples.31

2. Intent to discriminate

The state argues that an intent to discriminate is, or should be, an essential element of a state equal protection claim in Alaska. Both defendants contend that there was no discriminatory intent, or evidence of animus against gays and lesbians. Plaintiffs respond that Alaskas equal protection clause does not require a showing of discriminatory intent.

We need not resolve this dispute here because we conclude that the benefits programs are facially discriminatory. When a law by its own terms classifies persons for different treatment, this is known as a facial classification.32 And when a law is discriminatory on its face, the question of discriminatory intent is subsumed by the determination that the classification established by the terms of the challenged law or policy is, itself, discriminatory.33

To determine whether the benefits programs make a facial classification, we must therefore examine the meaning of the term spouse. The United States Supreme Court, in Personnel Administrator v. Feeney, considered whether a state statute granting a hiring preference to veterans violated equal protection on the basis of gender.34 The Court concluded in part that the statute was gender-neutral because the definition of veterans in the statute ha[d] always been neutral as to gender and that Massachusetts ha[d] consistently defined veteran status in a way that ha[d] been inclusive of women who ha[d] served in the military 35

But unlike the neutral definition of veteran in Feeney, Alaskas definition of the legal status of marriage (and, hence, who can be a spouse) excludes same-sex couples.36 By restricting the availability of benefits to spouses, the benefits programs by [their] own terms classif[y] same-sex couples for different treatment.37 Heterosexual couples in legal relationships have the opportunity to marry and become eligible for benefits. In comparison, because of the legal definition of marriage, the partner of a homosexual employee can never be legally considered as that employees spouse and, hence, can never become eligible for benefits. We therefore conclude that the benefits programs are facially discriminatory.38

The next question is whether the disparate treatment is permitted under the sliding-scale analysis for equal protection challenges in Alaska.39

3. Sliding-scale analysis under the Alaska Constitution

Having resolved these preliminary issues by determining (1) that it cannot be said as a matter of law that the benefits programs do not treat public employees with same-sex domestic partners differently, and (2) that the benefits programs are facially discriminatory, we turn to the three-step, sliding-scale analysis applicable to equal protection challenges under the Alaska Constitution. This approach involves the following process:

> First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review . . . . Depending upon the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation.
>
> Second, an examination must be

> undertaken of the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.
>
> Third, an evaluation of the states interest in the particular means employed to further its goals must be undertaken. Once again, the states burden will differ in accordance with the determination of the level of scrutiny under the first stage of analysis. At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between means and ends must be much closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.[40]

The plaintiffs advance four alternative arguments to support their equal protection challenge to the spousal limitation in the benefits programs. The first three ask us to apply a heightened level of scrutiny because the programs allegedly (1) discriminate on the basis of sexual orientation; (2) discriminate on the basis of gender; or (3) significantly burden at least one of several important personal interests. The plaintiffs alternatively contend that the programs cannot withstand even the minimum level of scrutiny, either because the governmental interests advanced are not legitimate, or because the eligibility restrictions do not bear a fair and substantial relationship to advancing those interests.

Because we conclude that the benefits programs cannot survive minimum scrutiny, we need not address plaintiffs alternative arguments.

a. Nature of plaintiffs interests: level of scrutiny

The first step of our analysis requires us to determine what weight to give the individual interests affected by the benefits programs.41 Plaintiffs contend that the spousal limitations significantly burden important personal interests, such as the right to intimate association, and are therefore subject to heightened scrutiny. But because minimum scrutiny is sufficient to resolve this case, we do not need to decide whether the plaintiffs interests are important or whether a fundamental right is affected.42 Government action affecting an economic interest receives minimum scrutiny,43 and the employment benefits at issue here are undeniably economic.

b. The governmental interests and the relationship between those interests and the means chosen to advance them

The second step of the sliding-scale analysis requires us to consider the governmental interests advanced by a challenged law.44 Under minimum scrutiny, these interests need only be legitimate.45 The third step requires us to evaluate the means chosen to advance the interests identified from the second step. Minimum scrutiny requires a fair and substantial relation between the means (i.e., the classification) and the object of the legislation.46

The state and the municipality contend that they have three legitimate interests cost control, administrative efficiency, and promotion of marriage in limiting employment benefits to spouses and dependent children. We must therefore consider whether these interests are legitimate and, if so, whether the classification bears a fair and substantial relationship to those interests.

Cost control. The state and the municipality argue that cost control is a primary purpose of limiting the availability of benefits to spouses of married employees. The state explains that it must offer health insurance to attract and retain a qualified work force and that the legislature should be entitled to take reasonable measures to control the cost of that offering. As the number of program participants increases, so does the cost.

The state also asserts that the legislature wanted to limit participation to that small group in a truly close relationship with the employee. The municipality asserts that it decided to limit employee benefits to a small, readily ascertainable group of individuals closely connected to the employee. These assertions indicate to us that the governmental interest here is more specific than just cost control. Indeed, if the governments were interested in simply saving money, the companion goal of promoting marriage would seem to do the opposite. As the benefits programs succeed in convincing couples to marry or to stay married, the governments have to provide benefits to more people. This apparent tension between cost control and promotion of marriage can be harmonized by more appropriately describing the governments interest in cost control as an interest in controlling costs by limiting benefits to those people in truly close relationship[s] with or closely connected to the employee.

We assume that limiting benefit programs to those in truly close relationships with the employee is a legitimate governmental goal. But we do not see how an absolute exclusion of same-sex domestic partners from being eligible for benefits is substantially related to this interest. Many same-sex couples are no doubt just as truly close[ly] relat[ed] and closely connected as any married couple, in the sense of providing the same level of love, commitment, and mutual economic and emotional support, as between married couples, and would choose to get married if they were not prohibited by law from doing so. Although limiting benefits to spouses, and thereby excluding all same-sex domestic partners, does technically reduce costs, such a restriction fails to advance the expressed governmental goal of limiting benefits to those in truly close relationships with and closely connected to the employee.

Administrative efficiency. The state and the municipality argue that the need to efficiently administer the

benefits programs justifies the spousal limitations. They argue that marriage provides a bright-line distinction that is easily applied, and that allowing employees to designate beneficiaries other than spouses will make it more difficult to administer the programs. The director of the benefits section of the Alaska Division of Retirement and Benefits explained during deposition the potential administrative difficulties that could arise if employees were allowed to designate benefits recipients other than spouses. She discussed theoretical burdens of determining who other than a spouse might be eligible for coverage. The municipality anticipates difficulty in deciding how long a same-sex relationship must last, whether the partners must reside in the same house, whether the relationship must be of a sexual nature, and when the relationship ends.

We have recognized that administrative efficiency is a legitimate governmental interest.47 There is no doubt that making a less-clearly-defined (compared to spouses) category of persons eligible for employment benefits would create administrative burdens. But Alaskas Equal Protection Clause requires more than just a rational connection between a classification and a governmental interest; even at the lowest level of scrutiny, the connection must be substantial.48

It is significant that other agencies, political subdivisions, and states provide, or have provided, employment benefits to their employees same-sex domestic partners. The state does not dispute the plaintiffs contention that the University of Alaska does or did so and that it opted qualifying criteria.49 Likewise, other states50 and municipalities,51 including the City and Borough of Juneau,52 offer the same health benefits to domestic partners, per their eligibility standards, that they offer to married couples.

We do not assume, as plaintiffs assert, that the state and the municipality can simply adopt the methodology the University of Alaska adopted to administer its programs. The state has many more employees than the university. Nonetheless, that many other agencies, municipalities, and states offer employment benefits to their employees same-sex domestic partners suggests that the governments legitimate administrative concerns can be satisfied. The availability of these benefits elsewhere persuades us that administrative difficulties are not an insurmountable barrier to providing benefits if our constitution requires that they be provided. We therefore conclude that the absolute exclusion of same-sex couples is not substantially related to the goal of maximizing administrative efficiency.

Promotion of marriage. The state and municipality assert that they have a legitimate interest in the promotion of marriage. To support this assertion, the municipality points to the ancient cultural and legal status of marriage and the place of a marriage between one man and one woman as the historic foundation of society. Amicus curiae Alaska Catholic Conference also contends that the promotion of marriage is a legitimate state interest. It cites in support several United States Supreme Court decisions that have recognized the right to marry as involv[ing] interests of basic importance in our society.53 The Supreme Court has also explained that marriage is a social relation subject to the states police power.54

We have never considered whether the promotion of

marriage is a valid governmental interest.

Plaintiffs argue that whether or not the promotion of marriage is a legitimate governmental interest, the state is not truly interested in promoting marriage, because, if it were, it would not have prevented gays and lesbians from entering into married relationships. This argument has little merit. The state rightly argues that just because the legislature did not want to promote same-sex marriage does not mean it did not have a sincere interest in promoting traditional marriage.

Plaintiffs also challenge the legitimacy of any interest in promoting marriage. They argue that the state and municipality may not assert an interest in promoting married relationships for its own sake. They claim that the government may not favor a class simply because it favors the class, and that discrimination is never a legitimate interest. That proposition is certainly correct, but the promotion of marriage in and of itself is not necessarily discriminatory. And it is not irrational. Among other things, it can encourage family stability (an undeniably valid public goal), as the Alaska Catholic Conference argues.

As to this issue, plaintiffs true challenge is to the decision to promote family stability among opposite-sex couples but not among same-sex couples. They argue that the social good from family stability in same-sex relationships is just as important and valuable as the social good from stable opposite-sex relationships. Assuming plaintiffs argument is correct, it would not establish that an interest in promoting marriage is not legitimate. Given the social benefits potentially inherent in marriage and the Supreme Courts statement that marriage is subject to state regulation,55 we conclude that the promotion of marriage is at least a legitimate governmental interest.

We accept the states contention that providing employment benefits to spouses of its employees may encourage persons to marry or stay married. Such benefits are financially valuable and their availability may be an important or even critical factor to persons deciding whether to marry. But the question here is whether the means chosen to advance the interest are substantially related to the governments interest.

The first part of the chosen means providing a benefit to spouses is directly related to advancing the marriage interest. But the second part of the chosen means restricting eligibility to persons in a status that same-sex domestic partners can never achieve cannot be said to be related to that interest. There is no indication here that denying benefits to public employees with same-sex domestic partners has any bearing on who marries. There is no indication here that granting or denying benefits to public employees with same-sex domestic partners causes employees with opposite-sex domestic partners to alter their decisions about whether to marry. There is no indication here that any of the plaintiffs, having been denied these benefits, will now seek opposite-sex partners with an intention of marrying them. And if such changes resulted in sham or unstable marriages entered only to obtain or confer these benefits, they would not seem to advance any valid reasons for promoting marriage. In short, there is no indication that the programs challenged aspect the denial of benefits to all public employees with same-sex domestic partners has any relationship

at all to the interest in promoting marriage. To repeat: making benefits available to spouses may well promote marriage; denying benefits to the same-sex domestic partners who are absolutely ineligible to become spouses has no demonstrated relationship to the interest of promoting marriage.

The municipality raises several other arguments that justify brief response. It asserts that it can properly limit eligibility because the Marriage Amendment sanctions the marriage relationship. We discussed above the effect of the Marriage Amendment and rejected a contention that it altogether forecloses plaintiffs equal protection claims. See Part III.B. Moreover, the marriage relationship sanctioned by the amendment cannot justify unequal treatment unless the means relate to the purpose. No one has suggested that the Marriage Amendment would permit the municipality to double the pay of only its married employees or permit it to hire only married persons.

The municipality seems to imply that accepting the plaintiffs arguments would require defendants to extend marriage benefits to members of other non-traditional marriages, such as persons in polygamous relationships. But polygamy is illegal in Alaska,[56] as are incestuous relationships.[57] Even though same-sex domestic relationships are not marriages in Alaska,[58] they are not illegal. And, following Lawrence v. Texas, they could not be made illegal.[59] Nothing we hold here would require public employers to extend to members of polygamous or incestuous relationships the employment benefits they provide to their employees spouses.

d. Equal protection conclusion

The governmental interests of cost control, administrative efficiency, and promotion of marriage are legitimate, but the absolute denial of benefits to public employees with same-sex domestic partners is not substantially related to these governmental interests.

In this case, because the programs at issue govern the governments actions in their specific capacities as public employers, rather than in their broader governmental capacities, the programs marital preferences would have difficulty meeting the means-to-end fit requirement unless they had a fair and substantial relationship to the governments roles as public employers. When the state or a political subdivision acts in this capacity, it is subject to the overarching principles set out in article I, section 1, and article XII, section 6, of the Alaska Constitution. Those sections guarantee all Alaskans the rewards of their own industry and require public employment to be based on merit.[60] Programs allowing the governments to give married workers substantially greater compensation than they give, for identical work, to workers with same-sex partners cut against these constitutional principles yet further no legitimate goal of the governments as public employers. However legitimate these programs broader policy goals may be, then, the means they employ would not be fairly and substantially related to furthering those goals.

We therefore conclude, applying minimum scrutiny, that the challenged programs violate the individual plaintiffs right to equal protection of the law.

D. Trombley v. Starr-Wood Cardiac Group Does Not Control Here.

The state argues that comments we made in Trombley v. Starr-Wood Cardiac Group, P.C.61 should be dispositive of the constitutional issues now before us.

Trombley did not address constitutional issues. The Trombleys appealed the dismissal of their malpractice claims arising out of Barbara Trombleys medical care. One issue was whether Dale Trombley could bring a loss-of-consortium claim. While Barbara was being treated, she was cohabiting with Dale Trombley but was married to Keith Bradick. Some months later she divorced Bradick and married Dale Trombley. The superior court rejected Dales consortium claim on summary judgment. In considering Dales appellate contention that an unmarried cohabitant could claim loss of consortium, we said that [w]hether spousal consortium claims should be extended to unmarried cohabitants as a general matter is not an easy issue to resolve. There are reasonable arguments on both sides.62 We did not decide whether, as a general matter, unmarried cohabitants could ever claim loss of consortium. We instead affirmed the denial of the consortium claim because one of the cohabitants was actually married to someone else when the alleged malpractice occurred.63

The state contends that it follows from our quoted characterization of the argument limiting consortium claims to legal spouses as reasonable that the legislatures choice in denying employment benefits to unmarried cohabitants must also be reasonable and hence constitutional. It asserts that both areas concern simply the right to receive money.

And of course, because they were not a same-sex couple, nothing prohibited Dale and Barbara from marrying as soon as Barbara divorced her prior spouse. Plaintiffs correctly observe that this court there analyzed distinctions between married heterosexual couples and unmarried heterosexual couples, who can marry. It did not analyze distinctions between heterosexual couples [and] lesbian and gay couples, who cannot marry. (Emphasis in original.) That we stated in dictum that it was reasonable not to allow consortium claims by unmarried cohabitants does not mean that the government can treat unmarried couples of the same sex differently than it treats unmarried couples of the opposite sex.

E. Remedy

Plaintiffs do not contend that finding an equal protection violation would require that the benefits programs themselves must end; they simply seek the same benefits and opportunities potentially available to opposite-sex couples. Only the spousal limitations in the programs are unconstitutional, and they are invalid only to the extent they deny benefits to persons who are absolutely precluded from becoming eligible for those benefits, even though their domestic relationship is not illegal.

Therefore, one possible remedy would be to give the state and the municipality a reasonable opportunity to adopt standards for making these benefits available to persons deemed eligible Many other public employers now have programs that may be useful models,64 and private employers may also.65 Having held unconstitutional the exclusion of same-sex couples from access to civil marriage, the Supreme Judicial Court of Massachusetts in Goodridge v. Department of Public Health, vacated the departments

summary judgment and remanded for entry of judgment consistent with its opinion. But it stayed entry of judgment on remand for 180 days to permit the legislature to take such action as it may deem appropriate in light of this opinion.66

Because the parties have not addressed the issue of remedy, or how the state and municipality may comply, we invite supplemental briefing on this issue.

IV. CONCLUSION

We conclude that the public employers spousal limitations violate the Alaska Constitutions equal protection clause. We therefore VACATE the judgment below. After hearing from the parties about the issue of remedy, we will REMAND. Until we resolve the issue of remedies, the disputed benefits programs remain in effect.

---

1 Alaska Const. art. I, 25.

2 Alaska Const. art. I, 1. As the issue is framed in this case, we need not reach any separate question of the independent right to benefits of a same-sex domestic partner of a public employee.

3 Lawrence v. Texas, 539 U.S. 558, 559 (2003) (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)).

4 The plaintiffs opening brief states that the benefits available for spouses of state employees include those provided by AS 39.20.360 (death benefits); AS 39.30.090 (life and health insurance); AS 39.35.450 (joint and survivor annuities); AS 39.35.535 (post-retirement health insurance); AS 14.25.010-.220 (benefits for retired teachers); and AS 22.25.010-.900 (benefits for retirees of state judiciary). These statutes do not expressly deny benefits to unmarried domestic partners, but each contains a clause expressly conferring them on an eligible employees spouse. The state refers to such clauses as spousal limitations. We will sometimes use that terminology in this appeal.

No party has identified a Municipality of Anchorage ordinance containing an equivalent spousal limitation, but it is undisputed here that an unmarried domestic partner of a municipal employee is not eligible for employment benefits.

We variously refer to the challenged state statutes and municipal benefit plans as benefits laws or benefits programs.

5 We use the phrases domestic partnership and committed relationship interchangeably to refer to relationships between adult couples who reside together in long-term, interdependent, intimate associations. We use the phrase domestic partners to refer to persons in these relationships. The phrase includes both same-sex and opposite-sex couples. For our purposes, domestic partners also includes all married couples.

6 Section 25 does not contain express words of prohibition, but it confers validity or recognition in Alaska

only on a marriage between one man and one woman. It therefore effectively prohibits marriage, or recognition of marriage, between persons of the same sex in Alaska.

AS 25.05.011(a), enacted in 1996, defines marriage. It provides in part: Marriage is a civil contract entered into by one man and one woman . . . .

7 Lawrence v. Texas, 539 U.S. 558 (2003).

8 City of Kodiak v. Samaniego, 83 P.3d 1077, 1082 (Alaska 2004); Powell v. Tanner, 59 P.3d 246, 248 (Alaska 2002).

9 Odsather v. Richardson, 96 P.3d 521, 523 n.2 (Alaska 2004).

10 See Reichmann v. State, Dept of Natural Res., 917 P.2d 1197, 1200 & n.6 (Alaska 1996); Sonneman v. Knight, 790 P.2d 702, 704 (Alaska 1990).

11 See Sonneman, 790 P.2d at 704-06.

12 Hickel v. Southeast Conference, 868 P.2d 919, 923 (Alaska 1994); Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1979).

13 Alaska Trademark Shellfish, LLC v. State, 91 P.3d 953, 956 (Alaska 2004); State, Commercial Fisheries Entry Commn v. Carlson, 65 P.3d 851, 858 (Alaska 2003).

14 Brandon v. Corr. Corp. of Am., 28 P.3d 269, 275 (Alaska 2001).

15 Alaska Const. art. I, 1.

16 See Alaska Const. art. I, 1; Malabed v. North Slope Borough, 70 P.3d 416, 420 (Alaska 2003) (We have long recognized that the Alaska Constitutions equal protection clause affords greater protection to individual rights than the United States Constitutions Fourteenth Amendment.); Schafer v. Vest, 680 P.2d 1169, 1172 (Alaska 1984) (Burke, C.J., concurring, noting that this textual difference from the Federal Constitution emphasizes that the framers meant all three guarantees).

17 See Alaska Const. art. I, 25.

Alaska voters adopted this amendment in 1998. See Office of the Lieutenant Governor, Alaska Constitution: Alaska Constitutional Amendment Summary, at http://www.gov.state.ak.us/ltgov/akcon/summary.html. The amendment took effect January 3, 1999. See Brause v. State, Dept of Health & Soc. Servs., 21 P.3d 357, 358 (Alaska 2001).

18 See Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 496 (Alaska 1988); State v. Ostrosky, 667 P.2d 1184, 1191 (Alaska 1983); Park v. State, 528 P.2d 785, 786-87 (Alaska 1974); Chester James Antieau, Constitutional Construction 2.06, at 18-20 (1982).

19 Antieau, supra note 18, 2.15, at 27; see also Ostrosky, 667 P.2d at 1190 (holding that constitutional amendment cannot, in turn, be challenged as unconstitutional under preexisting clauses in the same document).

20 Explicitly denying benefits to public employees with same-sex domestic partners would arguably offend the Federal Constitution. In Romer v. Evans, 517 U.S. 620 (1996), the United States Supreme Court struck down on federal equal protection grounds an amendment to the Colorado Constitution that repealed all local and statewide laws prohibiting discrimination based on sexual orientation. The Court explained that in addition to merely repealing state and local laws, the amendment prohibits all legislative, executive, or judicial action at any level of state or local government designed to protect the named class . . . . Id. at 624. The Court invalidated the amendment under the rational basis standard of judicial review, reasoning that the amendment could not satisfy even the minimal level of scrutiny. Id. at 632. It explained that the amendments disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. Id. at 633.

21 See Brooks v. Wright, 971 P.2d 1025, 1028 (Alaska 1999) (stating that court looks to plain language, purpose, and framers intent in interpreting constitution); Native Vill. of Elim v. State, 990 P.2d 1, 5 (Alaska 1999) (same); Arco Alaska, Inc. v. State, 824 P.2d 708, 710 (Alaska 1992) (same).

22 Cf. Bess v. Ulmer, 985 P.2d 979, 988 n.57 (Alaska 1999) ([A] specific amendment controls other more general [constitutional] provisions with which it might conflict.); Antieau, supra note 18, 2.16, at 27-28.

23 State, Dept of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 909 (Alaska 2001) (footnote omitted) (quoting Alaska Pac. Assurance Co. v. Brown, 687 P.2d 264, 271 (Alaska 1984)).

24 Malabed v. North Slope Borough, 70 P.3d 416, 420 (Alaska 2003); see also Stanek v. Kenai Peninsula Borough, 81 P.3d 268, 272 & n.15 (Alaska 2003).

25 Malabed, 70 P.3d at 420-21.

26 Alaska Inter-Tribal Council v. State, 110 P.3d 947, 966 (Alaska 2005); Lawson v. Helmer, 77 P.3d 724, 728 (Alaska 2003).

27 Lawson, 77 P.3d at 728; Brandon v. Corr. Corp. of Am., 28 P.3d 269, 275-76 (Alaska 2001).

28 Cf. Shearer v. Mundt, 36 P.3d 1196, 1199 (Alaska 2001).

29 Beaty v. Truck Ins. Exch., 8 Cal. Rptr. 2d 593, 596-97 (Cal. App. 1992); Hinman v. Dept of Pers. Admin., 213 Cal. Rptr. 410, 416 (Cal. App. 1985); Ross v. Denver Dept of Health & Hosps., 883 P.2d 516, 519 (Colo. App. 1994); Phillips v. Wisconsin Pers. Commn, 482 N.W.2d 121, 129 (Wis. App. 1992).

30 Some heterosexual couples, such as consanguineous couples, are also prohibited from marrying and are consequently prevented from obtaining benefits. But in those instances, the relationship itself is illegal, not merely the marriage. AS 11.41.450 classifies incest as a class C felony. No Alaska statute criminalizes homosexual relationships or homosexual conduct between consenting adults, nor could it. See Lawrence v. Texas, 539 U.S. 558 (2003). Moreover, as discussed below, just because some other, smaller group of people is also excluded does not mean that the plaintiffs here cannot have a valid claim.

31 See Tanner v. Oregon Health Scis. Univ., 971 P.2d 435, 442-43, 447 (Or. App. 1998) (determining that denial of employment benefits to unmarried domestic partners of employees had disparate impact on homosexuals).

32 John E. Nowak & Ronald D. Rotunda, Constitutional Law 14.4, at 711 (7th ed. 2004) (emphasis added).

33 Hamlyn v. Rock Island County Metro. Mass Transit Dist., 986 F. Supp. 1126, 1133 (C.D. Ill. 1997); see also Cook v. Babbitt, 819 F. Supp. 1, 14 (D.D.C. 1993) (I[illegible] cases where a law or regulation makes an explicit reference to a suspect characteristic, purposeful discrimination is self-evident, and the measure is subject to challenge on its face without any evidentiary inquiry into the motives of the relevant government actors.).

34 Personnel Admr v. Feeney, 442 U.S. 256 (1979).

35 Id. at 275.

36 Alaska Const. art. I, 25 (To be valid or recognized in this State, a marriage may exist only between one man and one woman.).

37 See Nowak & Rotunda, supra note 32, 14.4, at 711.

38 We recognize that the benefits programs became discriminatory only after the legislature acted in 1996 and 1998 and the electorate adopted the Marriage Amendment in 1998. But, in our view, allowing a discriminatory classification to remain in force is no different than giving it the force of law in the first place.

39 In the case of a facial classification, there is no problem of proof and the court can proceed to test the validity of the classification by the appropriate standard. Nowak & Rotunda, supra note 32, 14.4, at 711.

40 Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d

391, 396-97 (Alaska 1997) (quoting Alaska Pac. Assurance Co. v. Brown, 687 P.2d 264, 269-70 (Alaska 1984)).

41 Id. at 396.

42 Malabed v. North Slope Borough, 70 P.3d 416, 421 (Alaska 2003) (applying close scrutiny to enactment affecting important interest); State , Dept of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 909 (Alaska 2001) (observing that strict scrutiny is applied to enactments affecting fundamental rights).

43 Church v. State, Dept of Revenue, 973 P.2d 1125, 1130 (Alaska 1999).

44 Planned Parenthood, 28 P.3d at 909.

45 Matanuska-Susitna Borough, 931 P.2d at 396-97 (quoting Alaska Pac. Assurance, 687 P.2d at 269-70).

46 Planned Parenthood, 28 P.3d at 911 (quoting Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976)).

47 Wilkerson v. State, Dept of Health & Soc. Servs., 993 P.2d 1018, 1024 (Alaska 1999); State v. Albert, 899 P.2d 103, 115 (Alaska 1995).

48 See Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976) (approving of less speculative, less deferential, more intensified means-to-end inquiry for traditional rational basis test).

49 Under the universitys plan, an employee and the employees partner submit an affidavit stating that they are financially interdependent partners and meet certain criteria of commitment and dependency. They must meet eight criteria including: having an exclusive personal relationship with each other for at least the last twelve consecutive months and an intention to continue the relationship indefinitely; residing together at the same primary residence for at least the last twelve consecutive months and intending to reside together indefinitely; considering themselves members of each others immediate family; being responsible for each others common welfare; and sharing financial obligations. They must also attest that they meet at least five of a second set of eight criteria, including: jointly purchasing or leasing real property; jointly owning an automobile; sharing a joint bank or credit account; naming each other as life insurance beneficiaries; and naming each other as primary beneficiaries in each others wills. University of Alaska, Explanation of Availability of Benefits Based on Financially Interdependent Relationship, at http://info.alaska.edu/hr/ forms/PDF/B140-FIPExplanation.pdf (last visited June 13, 2003).

50 E.g., Cal. Govt Code 22818, amended by 2005 Cal. Legis. Serv. 418 (West); Or. Admin. R. 101-015-0005(c); Wash. Admin. Code 182-12-260. A more complete list of states that

provide health benefits to domestic partners can be found in a database maintained by the Human Rights Campaign. The database can be accessed through the organizations website at http://www.hrc.org (last visited October 21, 2005).

51 According to the Human Rights Campaigns database, 130 cities and counties offer domestic partner benefits. As of October 21, 2005, the cities and counties included, for example, Atlanta, Broward County, Chicago, Denver, and New York City. See Atlanta, Ga., Code of Ordinances 2-858; Broward County, Fl., Code 16 1/2-156; Chicago, Ill., Municipal Code ch. 2-152-072; Denver, Co., Rev. Municipal Code 18.321(4)-18.328; New York City, N.Y., Administrative Code 3-244(f).

52 See http://www.juneau.lib.ak.us/cbj/risk_management/pdfs/2005/Enrollment Guide2005.pdf (last visited June 6, 2005).

53 Boddie v. Connecticut, 401 U.S. 371, 376 (1971); see also Loving v. Virginia, 388 U.S. 1, 12 (1967) (describing marriage as one of the vital personal rights essential to the orderly pursuit of happiness by free people); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (one of the basic civil rights of man); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (essential to the orderly pursuit of happiness).

54 Loving, 388 U.S. at 7; Maynard v. Hill, 125 U.S. 190, 205 (1888) (Marriage, as creating the most important relation in life, as having 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.).

55 See Loving, 388 U.S. at 7.

56 AS 11.51.140.

57 AS 11.41.450.

58 Alaska Const. art. I, 25.

59 Lawrence v. Texas, 539 U.S. 558, 567 (2003) (holding that states may not criminalize private, consensual homosexual relations).

60 Alaska Const. art. I, 1 (This constitution is dedicated to the principle[] that all persons have a natural right to . . . the enjoyment of the rewards of their own industry. . . .); Alaska Const. art. XII, 6.

61 Trombley v. Starr-Wood Cardiac Group, P.C., 3 P.3d 916 (Alaska 2000).

62 Id. at 923 (emphasis added).

63 Id.

64 See supra notes 49-52.

65 According to the Human Rights Campaigns database, 247 Fortune 500 companies offer domestic partner benefits. The database can be accessed through the organizations website at http://www.hrc.org (last visited October 21, 2005,.

66 Goodridge v. Dept of Pub. Health, 798 N.E.2d 941, 969-70 (Mass. 2003); see also Baker v. State, 744 A.2d 864, 886 (Vt. 1999). In Baker, the Vermont Supreme Court deferred to the prerogatives of the legislature to craft an appropriate means of addressing this constitutional mandate. It therefore left the current statutory scheme in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion. Id. at 887.

Title 25. MARITAL AND DOMESTIC RELATIONS

Chapter 25.05. ALASKA MARRIAGE CODE

Article 01. REQUIREMENTS FOR MARRIAGE

Sec. 25.05.011. Civil contract.

(a) Marriage is a civil contract entered into by one man and one woman that requires both a license and solemnization. The man and the woman must each be at least one of the following:

(1) 18 years of age or older and otherwise capable;

(2) qualified for a license under AS 25.05.171; or

(3) a member of the armed forces of the United States while on active duty.

(b) A person may not be joined in marriage in this state until a license has been obtained for that purpose as provided in this chapter. A marriage performed in this state is not valid without solemnization as provided in this chapter.

Sec. 25.05.013. Same-sex marriages.

(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.

Sec. 25.05.021. Prohibited marriages.

Marriage is prohibited and void if performed when

(1) either party to the proposed marriage has a husband or wife living; or

(2) the parties to the proposed marriage are more closely related to each other than the fourth degree of consanguinity, whether of the whole or half blood, computed according to rules of the civil law.

Sec. 25.05.031. Voidable marriages.

If either party to a marriage is incapable of consenting to it at the time of the marriage for want of marriageable age of consent or sufficient understanding, or if the consent of either party is obtained by force or fraud, or if either party fails to consummate the marriage, the marriage is

voidable but only at the suit of the party under the disability or upon whom the force or fraud is imposed.

Sec. 25.05.041. Matters insufficient to render marriage voidable.

(a) If a marriage is in other respects lawful and is consummated with the full belief on the part of the persons married, or either of them, that they have been lawfully joined in marriage, then the marriage is not voidable for any of the following reasons:

(1) the licensing officer did not have jurisdiction to issue the license;

(2) there was an omission, informality, or irregularity of form in the application for the license or in the license itself;

(3) either or both witnesses to the marriage were incompetent;

(4) the marriage was solemnized after the expiration date of the license;

(5) there were no witnesses to the marriage if the valid license was issued and if the solemnization of the marriage can be otherwise proven.

(b) If a license has been issued and the marriage solemnized as provided in this chapter and the parties to it have immediately thereafter assumed the habit and repute of husband and wife and have continued to cohabit as husband and wife for one year or until the death of either of them, the marriage shall not be void or voidable solely on the ground the license cannot be produced.

Sec. 25.05.051. Effect of existing former marriage.

If, during the lifetime of a husband or wife with whom a marriage is still in force, a person remarries and the parties to the subsequent marriage live together as husband and wife, and one of the parties to the subsequent marriage believes in good faith that the former husband or wife is dead or that the former marriage has been annulled or dissolved by a divorce or is without knowledge of the former marriage, then after the death or divorce of the other party to the former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, they are legally married from the time of removal of the impediment, and the issue of the subsequent marriage are the legitimate issue of both parents, whether born before or after the removal of the impediment.

Sec. 25.05.061. Marriage without license.

A marriage contracted after January 1, 1964, is void unless a license has first been obtained as provided in this chapter. If the parties to a marriage void for failure to obtain a license validate the marriage by complying with the requirements of this chapter, the issue of the void marriage are legitimate.

Sec. 25.05.171. Persons capable of consenting to marriage: Minimum ages, and consent of parents or guardian.

(a) A person who has reached the age of 16 but is under the age of 18 shall be issued a marriage license if the written consent of the parents, the parent having actual care, custody, and control, or a guardian of the underaged person is filed with the licensing officer issuing the marriage license under AS 25.05.111.

(b) A superior court judge may grant permission for a person who has reached the age of 14 but is under the age of 18 to marry and may order the licensing officer to issue the license if the judge finds, following a hearing at which the parents and minor are given the opportunity to appear and be heard, that the marriage is in the best interest of the minor and that either

(1) the parents have given their consent; or

(2) the parents are

(A) arbitrarily and capriciously withholding consent;

(B) absent or otherwise unaccountable;

(C) in disagreement among themselves on the question; or

(D) unfit to decide the matter.

About FRC
Blog
Press
Policy Areas
Legislation
Alerts
Publications
Subscriptions
Contribute
Events
Contact Elected Officials

Brochure

The Slippery Slope of Same-Sex "Marriage"

by: Timothy J. Dailey, Ph. D.

printer-friendly page
email this item
order brochure via U.S. mail: free
download brochure (.pdf)

Summary:
Advocates for same-sex marriage reject the definition of marriage as the union of a man and a woman. This makes it impossible to exclude virtually any relationship between two or more partners of either sex.

This pamphlet shows how homosexual marriage is not the equivalent of traditional marriage and demonstrates that gay marriage is not a civil rights issue or a matter of "discrimination."

Also discussed is the overwhelming rejection of same-sex unions by Americans, many of whom do not consider homosexual marriage to be a moral alternative to traditional marriage.

A Man and His Horse

In what some call a denial of a basic civil right, a Missouri man has been told he may not marry his long-term companion. Although his situation is unique, the logic of his argument is remarkably similar to that employed by advocates of homosexual marriage.

The man claims that the essential elements of marriage--love and commitment--are indeed present: "She's gorgeous. She's sweet. She's loving. I'm very proud of her. ... Deep down, way down, I'd love to have children with her."[1]

Why is the state of Missouri, as well as the federal government, displaying such heartlessness in denying the holy bonds of wedlock to this man and his would-be "wife"?

It seems the state of Missouri is not prepared to indulge a man who waxes eloquent about his love for a 22-year-old mare named Pixel.

The Threat to Marriage

The Missouri man and homosexual "marriage" proponents categorically reject the definition of marriage as the union of a man and a woman. Instead, the sole criterion for marriage becomes the presence of "love" and "mutual commitment." But once marriage is no longer confined to a man and a woman, it is impossible to exclude virtually any relationship between two or more partners of either sex--even non-human "partners."

To those who object to comparing gay marriage to widely-rejected sexual preferences, it should be pointed out that until very recent times the very suggestion that two men or two women could "marry" was itself greeted with scorn.

Of course, media stories on same-sex marriage rarely address the fact that redefining marriage logically leads to the Missouri man and his mare. Instead,

media reports typically focus instead on homosexual couples who resemble the stereotypical ideal of a married couple. Ignored in such reports is social science research indicating that such idealized "families" are utterly atypical among homosexuals.

In this pamphlet we will show the following:

1. Gay marriage threatens the institutions of marriage and the family.

2. Same-sex relationships are not the equivalent of traditional marriage

3. Gay marriage is not a civil rights issue

4. Americans overwhelmingly reject gay marriage

5. Gay marriage is not a moral alternative to traditional marriage.

6. Homosexuality is rightly viewed as unnatural.

The "Polyamory" Movement

> *"Sean has a wife. He also has a girlfriend. His girlfriend has another boyfriend. That boyfriend is dating Sean's wife."*
> description of "polyamory" relationship2

The movement to redefine marriage has found full expression in what is variously called "polyfidelity" or "polyamory," which seeks to replace traditional marriage with a bewildering array of sexual combinations between various groups of individuals.

"Polyamory" is derived from Greek and Latin roots, and is loosely translated "many loves." Polyamorists reject the "myth" of monogamy and claim to practice "harmonious love and intimacy between multiple poly partners."3 Stanley Kurtz describes the "bewildering variety of sexual combinations. There are triads of one woman and two men; heterosexual group marriages; groups in which some or all members are bisexual; lesbian groups, and so forth."4

The polyamory movement took its inspiration from Robert Heinlein's 1961 sci-fi novel, *Stranger in a Strange Land,* in which sexual possessiveness (as in marital exclusivity) is portrayed as an evil leading to societal ills such as murder and war. The book helped spawn a number of ill-fated sexual communes, such as San Francisco's Kerista community, in which members had sexual relations with each other according to a rotating schedule.

Anti-Marriage Activists

The Kerista commune collapsed in 1992, but the polyamory movement has taken hold in academia where, according to *First Things,* its proponents "are now so influential, if not dominant, in the academic field of marriage and family law." Scholars enamored with polyamory argue in favor of "a social revolution that would replace traditional marriage and family law."5

Kurtz concurs that the "gradual transition from gay marriage to state-sanctioned polyamory, and the eventual abolition of marriage itself, is now the most influential paradigm within academic family law." One prominent advocate of polyamory, David Chambers, professor of law at the University of Michigan, argues: "By ceasing to conceive of marriage as a partnership composed of one person of each sex, the state may become more receptive to units of three or more."6

The Frat House Concept of "Family"

This radical definition of marriage gives rise to bizarre conceptions of family that include virtually any relationship or social group. In 1990, a San Francisco task force on family policy led by lesbian activist Roberta Achtenberg defined the family as a "unit of interdependent and interacting persons, related together over time by strong social and emotional bonds and/or by ties of marriage, birth, and adoption."7

The "frat house with revolving bedroom doors" concept of marriage and the family poses dangers to children.

Polyamory advocates pay scant attention to the dangers posed to children being raised according to this "frat house with revolving bedroom doors" concept of marriage and the family. Yet, this nebulous, free-for-all model of the family looms ahead for our society unless a bulwark is created in the form of a constitutional amendment protecting marriage.

The slippery slope leading to the destruction of marriage as we know it draws ever closer with the decision of the Massachusetts Supreme Judicial Court to compel the state legislature to grant homosexual sex partners the legal status of married people. This decision has emboldened public officials in various localities to grant marriage licenses to homosexual couples, igniting a national debate on the question: What is marriage--and where do we draw the limits on who can marry?

Same-Sex Relationships are not the Equivalent of Marriage

A growing body of research indicates that in key respects homosexual and lesbian relationships are radically different than married couples.

-- **Relationship duration**: While a high percentage of married couples remain married for up to 20 years or longer, with many remaining wedded for life, the vast majority of homosexual relationships are short-lived and transitory. This has nothing to do with alleged "societal oppression." A study in the Netherlands, a gay-tolerant nation that has legalized homosexual marriage, found the average duration of a homosexual relationship to be one and a half years.8

-- **Monogamy versus promiscuity**: Studies indicate that while three-quarters or more of married couples remain faithful to each other, homosexual couples typically engage in a shocking degree of promiscuity. The same Dutch study found that "committed" homosexual couples have an average of eight sexual partners (outside of the relationship) per year.9

-- **Intimate partner violence:** homosexual and lesbian couples experience by far the highest levels of intimate partner violence compared with married couples as well as cohabiting heterosexual couples.10 Lesbians, for example, suffer a much higher level of violence than do married women.11

What about the Children?

In his exhaustive examination of human history, Giovanni Battista Vico (1668-1744), Professor of Rhetoric at the University of Naples, concluded that marriage between a man and a woman is an essential characteristic of civilization, and as such is the "seedbed" of society. Vico warned that chaos would ensue in the absence of strong social norms encouraging marital faithfulness and the loving care of children born to the union.

Since reproduction requires a male and a female, society will always depend upon

heterosexual marriage to provide the "seedbed" of future generations. The evidence indicates that homosexual or lesbian households are not a suitable environment for children.

Data from the 2000 U.S. Census and other sources indicates that only a small percentage of homosexual households choose to raise children.12 One reason for this is that the raising of children is inimical to the typical homosexual lifestyle, which as we have seen typically involves a revolving bedroom door. With the added problem of high rates of intimate partner violence, such households constitute a dangerous and unstable environment for children.

Homosexuals and lesbians are unsuitable role models for children because of their lifestyle. Dr. Brad Hayton observes that homosexual households "model a poor view of marriage to children. They are taught by example and belief that marital relationships are transitory and mostly sexual in nature. ... And they are taught that monogamy in a marriage is not the norm [and] should be discouraged if one wants a good 'marital' relationship."13

The Phony Comparison with Race

Many black Americans are understandably offended when gay activists, who have never been relegated to the back of a bus, equate their agenda with racial discrimination. In a statement supporting traditional marriage, several black pastors wrote:"We find the gay community's attempt to tie their pursuit of special rights based on their behavior to the civil rights movement of the 1960s and 1970s abhorrent."14

A majority of Black Americans reject the facile comparison of sexual behavior with an immutable characteristic such as race, and disagree with the oft-heard contention by gay activists that homosexuals are "born that way." A Pew Research poll found that by an overwhelming 61 to 26 percent margin, Black Protestants believe sexual orientation can be changed.15 The same poll reported that Black Americans oppose homosexual marriage by a 60 to 28 percent margin.16

Gay Marriage is not a Civil Rights Issue

Defining marriage as the union of a man and a woman would not deny homosexuals the basic civil rights accorded other citizens. Nowhere in the Bill of Rights or in any legislation proceeding from it are homosexuals excluded from the rights enjoyed by all citizens--including the right to marry.

However, no citizen has the unrestricted right to marry whoever they want. A parent cannot marry their child (even if he or she is of age), two or more spouses, or the husband or wife of another person. Such restrictions are based upon the accumulated wisdom not only of Western civilization but also of societies and cultures around the world for millennia.

Neither can gay activists appeal to a "natural rights" argument: i.e., no reasonable person would deny homosexuals and lesbians their self-evident right to marry. Harry Jaffa cogently replies that such arguments actually argue *against* homosexual marriage: "Nature and reason tell us that a Negro is a human being, and is not to be treated like a horse or an ox or a dog, just as they tell us that a Jew is a human being, and is not to be treated as a plague-bearing bacillus. But with the very same voice, nature and reason tell us that a man is not a woman, and that sexual friendship is properly between members of opposite-sexes, not the same sex."17

Upholding Traditional Marriage is not "Discrimination"

Discrimination occurs when someone is unjustly denied some benefit or

opportunity. But it must first be demonstrated that such persons deserve to be treated equally. For example, FAA and airline regulations rightly discriminate regarding who is allowed into the cockpit of an airline. Those who are not trained pilots have no rightful claim to "discrimination" because they are not allowed to fly an airplane.

On the other hand, discrimination would occur if properly credentialed pilots are refused hiring simply because of the color of their skin. In this case such individuals have been denied employment simply because of their race.

The issue of alleged discrimination was addressed by the Minnesota Supreme Court in *Baker v. Nelson*, when it rejected the argument that denying a same-sex couple the right to marry was the equivalent of racial discrimination. The court found: "In common sense and constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."

Similarly, in October 2003, a three-judge panel of the Arizona Court of Appeals ruled unanimously against two homosexuals who argued in a lawsuit that marriage is a fundamental right, and that prohibiting it for same-sex couples violates constitutional protections for due process. The court found that the state's ban on homosexual marriage "rationally furthers a legitimate state interest," and thus does not discriminate against homosexuals by depriving them of their constitutional rights.18 The court further noted: "Recognizing a right to marry someone of the same sex would not expand the established right to marry, but would redefine the legal meaning of 'marriage.'"

When gay activists and their supporters cry "discrimination!" they conveniently avoid the question of whether homosexual relationships merit being granted equality with marriage. Yet this question deserves our close examination, for the danger posed to our society by redefining marriage is no less than permitting unqualified individuals to fly airplanes.

Americans Reject Gay Marriage

Typical of polls on the subject, a Fox News poll conducted after the Massachusetts ruling found that Americans oppose same-sex marriage by an overwhelming 66 to 25 percent margin.19

A majority of Americans also support a constitutional amendment banning gay marriage. A Fox News/Opinion Dynamics poll in August 2003 reported that 58 percent of respondents favored amending the Constitution, with 34 percent opposed.20 A Zogby poll released in February 2004 found that, by a 51 to 43 percent margin, voters agreed that a constitutional amendment should be passed limiting marriage to a man and a woman.21 Similarly, a February 2004 Gallup poll found that 53 percent of respondents favored a constitutional amendment banning gay marriage, with 44 percent opposed.22

Homosexual marriage is a potent political issue, with opponents ever more dedicated to preserving the traditional definition of marriage. A follow-up Pew Research poll conducted in February 2004 found: "Gay marriage has surpassed other major social issues like abortion and gun control in its influence on voters. Four in ten voters say they would not vote for a candidate who disagrees with them on gay marriage, even if they agree with the candidate on most other issues." The poll reported that "voters oppose gay marriage by more than two to one (65 percent to 28 percent), a margin that has remained generally steady since October."23

Polls Cite Moral Objections to Homosexuality

A Pew Research poll released in November 2003 reported: "The most common reasons given for objecting to gay and lesbian marriage are moral and religious. ... More than eight in ten opponents of gay marriage (82 percent) say it runs counter to their religious beliefs, with 73 percent completely agreeing with that sentiment." 24

The poll found that the top two reasons for opposing gay marriage are that "The Bible says it is morally wrong/a sin" (28 percent), followed by the response that homosexual marriage is "against my religious beliefs" (17 percent).25 Unexpressed religious beliefs are reflected in the next two largest categories of responses. Sixteen percent of respondents based their opposition to gay marriage on the fact that the "definition of marriage is a man and a woman," followed by "It's just wrong/I just don't agree with it" (12 percent).

A Barna Research poll, also released in November 2003, confirmed that Americans consider homosexual behavior to be morally objectionable. Only 30 percent of respondents agreed that "having a sexual relationship with someone of the same sex" was morally acceptable. By comparison, the respondents considered "getting drunk" (35 percent), "using profanity" (36 percent), sex outside of marriage (42 percent), cohabitation (60 percent), and gambling (61 percent) all to be more acceptable than homosexuality.26

It is outside the scope of this pamphlet to discuss the biblical and theological understanding regarding homosexual behavior. See the FRC booklet "Keeping the Churches Marriage Friendly: How the Bible and Tradition Refute the 'Gay Theology' (available at www.frc.org or by calling 1 800-225-4008).

The Validity of Moral Arguments

The oft-repeated mantra "you can't legislate morality"--the contention that moral arguments have no place in formulating public policy--is absurd. It is the duty of legislators to evaluate the *right* legislation needed to correct some *wrong* or *injustice*, or promote some *positive* or *good* result. Many of the same people who wish to exclude religiously informed moral arguments from the debate about marriage are little troubled by the use of moral and religious arguments when discussing other issues such as racial discrimination, capital punishment, or the war in Iraq.

The conviction that human sexuality is rightfully expressed within marriage between a man and a woman is deeply rooted in our history and Judeo-Christian beliefs. Over a century ago, In *Maynard v. Hill* (1888), the U.S. Supreme Court recognized that the understanding of marriage springs from the fundamental morality of a people. The Court described marriage as "creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution."

Similarly, in *Baker v. Nelson* (1971), the Minnesota Supreme Court affirmed the Judeo-Christian roots of the definition of marriage:"The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."

Homosexuality is Unnatural

The advocates of anti-marriage and anti-family sexuality face yet another foe: divinely created nature itself. According to the above-mentioned Pew Poll, the next most frequent reason given for opposing gay marriage is that "homosexuality is not natural/normal" (9 percent). This response is followed by "the purpose of marriage is to have children" (4 percent), which also recognizes a purposeful--and thus "natural"--design for human sexuality.

In his epistle to Christians living in Rome, the Apostle Paul speaks of an undeniable "law" regarding normative human behavior that is written on the hearts of mankind "to which their own conscience also bears witness." Those who would reject this law find themselves in opposition to the Divine intent for mankind, a reality that every culture from the dawn of civilization has either recognized--or failed to acknowledge at its peril.

The power of the innate realization that there is something fundamentally "unnatural" about homosexuality--even among those who consider themselves non-religious--should not be underestimated, and may well provide the vital motivation that will turn back the seemingly invincible juggernaut of the gay agenda.

The Gay Agenda vs. Nature

In their 1989 book, *After the Ball: How America Will Conquer its Fear and Hatred of Gays in the '90s,* homosexual activists Marshall Kirk and Hunter Madsen presented a strategy for achieving the full acceptance of homosexuality in American culture. Kirk and Madsen write: "In any campaign to win over the public, gays must be portrayed as victims in need of protection so that straights will be inclined by reflex to adopt the role of protector."

That this strategy has met with considerable success is undeniable. But wait! The subtitle of Kirk and Madsen's book reveals the confident presumption that America would conquer its (purported) fear and hatred of gays *in the '90s.*

Yet America did not, as expected, embrace the homosexual agenda with open arms. When queried regarding homosexuality as a *behavioral lifestyle*--as opposed to a civil rights issue--many Americans continue to register strong negative reactions.

A *Public Perspectives* survey found that 69 percent of those surveyed report being "very much" or "somewhat" bothered by seeing a person "kissing someone of the same sex in public."27 This hesitancy is not limited to those holding to traditional morality. No less than the liberal icon *Glamour* magazine reported the results of a readership poll in which 59 percent of the respondents were "put off" by a lesbian kiss shown on network television.28

This "*ick* factor," far from irrational, is rooted in the subconscious realization of what is normal and what is not, and which forms an inescapable part of our being. And it may be that by underestimating the power of this innate understanding, gay activists have made their greatest tactical error.

A Coming Spiritual Revival?

Camille Paglia, a self-confessed radical lesbian and atheist feminist, addresses this fundamental miscalculation of gay activism, which, "encouraged by the scientific illiteracy of academic postmodernism, wants to deny that there is a heterosexual norm. This is madness." Paglia warns that eventually "the insulting disrespect shown by gay activists to religion ... would produce a backlash."29

Paglia notes:"History shows that massive spiritual revivals are a fundamental, recurrent element in culture." She further warns that "there may unfortunately be deep, slow-moving forces at work like those that led to Christianity's triumph over cosmopolitan, sexually permissive, but ethically weak late-paganism during the Roman Empire."30

Gay Marriage: A No Show in History

Some scholars claim that marriage between homosexuals has been commonly practiced and accepted by various peoples throughout history. One prominent advocate of this view, William Eskridge, contends that same-sex unions and even "marriages" have been common in other times and cultures.

Responding to Eskridge, professors Peter Lubin and Dwight Duncan point out that the so-called "evidence" for homosexual marriage comes primarily from small, isolated pre-literate tribes. Lubin and Duncan point out that "a great many of the primitive societies deemed by Eskridge to be tolerant of [same-sex marriage] ... have also been known to engage in other practices, such as cannibalism, female genital mutilation, massacre or enslavement of enemies taken in war, and other practices which was once held to be the duty of the civilized to extirpate."31

Furthermore, what Eskridge takes for homosexual marriage are actually male bonding rituals that he mistakenly eroticized. Alleged examples from ancient Rome, such as Nero and Elagabalus, only reveal the degree to which homosexuality was held in contempt by Roman society. In referring to Nero's homosexuality, Tacitus wrote that the emperor "polluted himself by every lawful or lawless indulgence, [and] had not omitted a single abomination which could heighten his depravity." This hardly constitutes an endorsement of homosexuality in ancient Rome.

Lubin and Duncan summarize: "There is no 'rich history of same-sex marriage' that [Eskridge] has 'uncovered,' that was 'suppressed in recent Western history, and is only now coming to light.' The 'resistance' to same-sex marriage is not limited to 'Western culture' with its age-old 'anti-homosexual hysteria and bigotry,' but extends to almost every culture throughout the world."32

On the face of it, theories about the supposed widespread practice of homosexual marriage throughout history lack merit, given the biological imperative of families consisting of husbands and wives producing children, which is a basic requirement for the preservation of any culture or society.

How Does Gay Marriage Harm Your Marriage?

One might as well ask, "How does *my* printing counterfeit $20 bills hurt *your* wallet?" Or to use another example, can you imagine a building where every carpenter defined his own standard of measurement? A man and a woman joined together in holy matrimony is the time-tested "yardstick" for marriage. One cannot alter the definition of marriage without throwing society into confusion any more than one can change the definition of a yardstick.

Homosexual marriage is an empty pretense that lacks the fundamental sexual complementariness of male and female. And like all counterfeits, it cheapens and degrades the real thing. The destructive effects may not be immediately apparent, but the cumulative damage is inescapable. The eminent Harvard sociologist, Pitirim Sorokin, analyzed cultures spanning several thousand years on several continents, and found that virtually no society has ceased to regulate sexuality within marriage as defined as the union of a man and a woman, and survived.33

A Federal Marriage Amendment: Protection against Judicial Tyranny

Given the strong public opposition to homosexual behavior, it is hardly surprising that no state has voted to extend full marriage rights to gay and lesbian couples. Having failed to achieve their agenda through the democratic process, homosexual activists are now focusing on advancing their agenda through the courts as well as through "civil disobedience" such as the illegal issuance of marriage licenses by public officials in San Francisco and elsewhere.

There is growing danger of activist judges disregarding marriage laws passed by a

majority of the population and enshrined in centuries of legal precedence, and imposing homosexual marriage on the nation. States' "Defense of Marriage" laws will help to protect against counterfeit marriage. But such statutes can be overturned in state courts on the argument that they violate state constitutional equal protection and due process clauses.

Amending state constitutions to bar gay marriage will also offer some protection. However, observers fear that the U.S. Supreme Court could overturn state constitutional amendments on the basis of the equal protection and due process clauses in the U.S. Constitution. Robert Bork writes: "One of the last obstacles to the complete normalization of homosexuality in our society is the understanding that marriage is the union of a man and a woman. ... Many court watchers believe that within five to ten years the U.S. Supreme Court will hold that there is a constitutional right to homosexual marriage, just as that court invented a right to abortion. The chosen instrument will be the Equal Protection Clause of the 14th Amendment."34

A constitutional amendment defining marriage as the union of a man and a woman offers the ultimate protection against the agenda of gay and lesbian activists such as Paula Ettelbrick, former legal director of the Lambda Legal Defense and Education Fund, who unabashedly states: "Being queer means pushing the parameters of sex, sexuality, and family, and ... transforming the very fabric of society."35

We enjoy the blessing of living in a nation that has enshrined democratic principles--but this privilege also entails the obligation to make our voices heard in the political process. Those who value the family have a God-given duty to become involved in what is shaping up as the preeminent moral issue of our day:protecting the very institution of marriage.

Our elected representatives must be put on notice that they face an historic choice between catering to the demands of a well-heeled, powerful cadre of homosexual activist organizations determined to radically alter the definition and nature of marriage, or listening to the voice of people across the nation who seek to preserve marriage as the wellspring of society and culture for themselves and their families for generations to come.

Written by Timothy J. Dailey, Ph.D., Senior Fellow, Center for Marriage and Family Studies at Family Research Council

notes

1 Melinda Roth, "All Opposed, say 'Neigh'" *Riverfront Times- Missouri* (December 15, 1999).

2 Sondi Bruner, "Bob and Carol and Ted and Alice ... Carol and Ted and Bob and Alice," *Vancouver Sun* (February 14, 2004): F1.

3 Ibid.

4 Stanley Kurtz, "Beyond Gay Marriage," *The Weekly Standard* 8 (August 4-11, 2003): 28.

5 "The Marriage Amendment; Editorial" *First Things* 136 (October 1, 2003): 1048.

6 Kurtz, "Beyond Gay Marriage," 29.

7 Roberta Achtenberg, et al., "Approaching 2000: Meeting the Challenges to San

Francisco's Families," the Final Report of the Mayor's Task Force on Family Policy, City and County of San Francisco, June 13, 1990, p. 1.

8 Maria Xiridou, et al, "The Contribution of Steady and Casual Partnerships to the Incidence of HIV Infection among Homosexual Men in Amsterdam," *AIDS* 17 (2003): 1031.

9 Ibid.

10 "Extent, Nature, and Consequences of Intimate Partner Violence," *U.S. Department of Justice: Office of Justice Programs* (July, 2000): 30. Cp. "Violence Between Intimates," *Bureau of Justice Statistics Selected Findings*, November 1994, p. 2.

11 Ibid.

12 "PCT 14: Unmarried-Partner Households by Sex of Partners" (U.S. Census Bureau: Census 2000 Summary File 1). Cp. Dan Black et al., "Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources," *Demography* 37 (May 2000): 150.

13 Bradley P. Hayton, "To Marry or Not: The Legalization of Marriage and Adoption of Homosexual Couples," (Newport Beach: The Pacific Policy Institute, 1993), p. 9.

14 Cheryl Wetzstein, "Blacks Angered by Gays' Metaphors," *Washington Times* (March 3, 2004): 3.

15 "Religious Beliefs," p. 7.

16 Ibid, 12.

17 Harry Jaffa, *Homosexuality and the Natural Law* (Claremont, CA: The Claremont Institute for the Study of Statsmanship and Political Philosophy, 1990): 19.

18 "Court Upholds State's Ban on Same-Sex Marriage" *Associated Press* (October 8, 2003).

19 Dana Blanton, "Fox News/Opinion Dynamics Poll: Majority Opposes Same-Sex Marriage," (November 21, 2003).

20 "Attitudes about Homosexuality and Gay Marriage," *AEI Studies in Public Opinion* (American Enterprise Institute Compilation:February 13, 2004): 31.

21 "Bush Leads in Red States, Kerry Ahead in Blue States" *Zogby Poll* (February 18, 2004).

22 "The Gallup Poll: Homosexual Relations" *The Gallup Organization* (February 9-12, 2004).

23 "Gay Marriage a Voting Issue, but Mostly for Opponents," *The Pew Research Center for the People and the Press* (February 27, 2004): 1.

24 Religious Beliefs Underpin Opposition to Homosexuality," *The Pew Forum on Religion and Public Life* (November 18, 2003):13.

25 Ibid.

26 "Morality Continues to Decay," *Barna Research* (November 3, 2003).

27 Kenneth Sherrill and Alan Yang, "From Outlaws to In-Laws: Anti-Gay Attitudes Thaw," *Public Perspectives* 11 (January/February 2000): 28.

28 Bonnie Fuller, "Editor's Letter" *Glamour* (February, 2000): 28.

29 Camille Paglia, "I'll Take Religion over Gay Culture," *Salon.com* (June 23, 1998).

30 Camille Paglia, "Men and Their Discontents," *Salon.com* (October 14, 1997).

31 Peter Lubin and Dwight Duncan, "Follow the Footnote or the Advocate as Historian of Same-sex Marriage," *Catholic University Law Review* 47 (Summer 1998): 1300.

32 Ibid., 1324.

33 Pitirim Sorokin, *The American Sex Revolution,* (Boston:Peter Sargent Publishers, 1956): 77-105.

34 Robert Bork, "Stop Courts from Imposing Gay Marriage," *Wall Street Journal* (August 7, 2001): 14.

35 Paula Ettelbrick, quoted in "Since When is Marriage a Path to Liberation?" by William B. Rubenstein, *Lesbians, Gay Men, and the Law* (New York: The New Press, 1993), pp. 398, 400.

Additional Resources

Battle for Marriage "Family" Packet – Set of 5 Brochures
Battle for Marriage "Family and Friends" Packet - Set of 25 Brochures
Battle for Marriage "Church" Packet – Set of 100 Brochures

More Brochures

Publicly Honoring God: Justice Antonin Scalia on the Ten Commandments - download pamphlet (.pdf)

Getting It Straight

Judicial Activism and the Threat to the Constitution - download pamphlet (.pdf)

Family Policy Rev... The Child Care "C..." and its Remedies

Contact FRC

FAMILY POLICY LECTURES

Marriage and Procreation: On Children As The First Purpose of Marriage - October 20, 2004

by: Dr. Allan C. Carlson, Ph. D.

printer-friendly page
email this item
order family policy lecture
u.s. mail: free
download audio (.mp3) free

Summary:
The debate over same-sex "marriage" often centers on what the primary purpose of marriage is. In this lecture, Dr. Carlson cites procreation as that purpose and draws on sources both ancient and modern for support of his argument.

When Massachusetts officials facing the court case *Goodridge* v. *Department of Public Health* set out to defend that state's marriage law from a challenge by seven homosexual couples, their major line of defense was procreation. Making babies, the state argued, was the first purpose of marriage. By definition, same-sex partners could not create a child as a couple. This was important, the argument continued, because children usually do best when growing up with their two natural parents. Moreover, requiring fertility tests before marriage by opposite-sex couples would be cumbersome and overly intrusive. It was better to let all otherwise qualified opposite-sex couples to marry than to go down that troubling regulatory path.

And the initial trial court, let us remember, agreed with the state. The judge ruled that the primary purpose of marriage, under Massachusetts law, was in fact procreation. Accordingly, the court concluded that the state could reasonably distinguish between homosexual claimants to marriage and those heterosexual couples that were at least "theoretically ... capable" of procreation without relying on "inherently more cumbersome" non-coital reproductive methods.[1]

Even Evan Wolfson, the acknowledged leader of the "gay marriage" movement, has agreed that:

> At first glance, the "basic biology" argument seems to make some sense. After all, it doesn't take more than a fourth-grade health class education to know that men's and women's bodies in some sense "complement each other" and that when a man and a woman come "together as one flesh" it often leads to procreation.[2]

But of course, the trial court decision did not survive appeal to the Massachusetts Supreme Judicial Court. This higher court, on a 4-3 vote, dismissed the procreation argument, pointing to opposite-sex couples in which the woman was over childbearing age or otherwise infertile. Could the state "rationally" tell them that they could not marry? It could not. Indeed, the court noted that, under state law, even those "who cannot stir from their death bed may marry," provided they were of the opposite sex. Moreover, infertility is not grounds for divorce, and so by inference it is not a bar to marriage, either. In addition, the court noted that Massachusetts law

protects the parental rights of homosexuals and allows same-sex couples to adopt children. It was irrational for the state to enable "gay parenting" while also denying the children involved the benefits of "family stability and economic security" found in a marital home.

Evan Wolfson also moves on to dissect the procreation argument, finding it "riddled with holes." If procreation is the purpose of marriage, he argues, then the marriages of Bob and Elizabeth Dole, John and Teresa Heinz Kerry, and Pat and Shelley Buchanan should all be declared invalid. So should the marriage of the father of our country, George Washington, to Martha, which produced no children. Another same-sex activist, Dale Carpenter, argues that if there were any merit to the procreation argument:

> We would require prospective married couples to sign an affidavit stating that they are able to procreate and intend to procreate. If in, say, 10 years they had not procreated, we could presume they are unable or unwilling to do so and could dissolve the marriage as unworthy of the unique institution.

He adds that since no one has really proposed this, or anything like it, it is clear that the defenders of marriage "do not take the narrow procreationist view of marriage very seriously." Instead, he says, the traditionalists impose another rule: "Nobody is required to procreate in order to marry, except gay couples." Such discrimination, he implies, could not survive a test by the "equal protection clause" of the Fourteenth Amendment.[3] Indeed, that usually faithful, conservative Supreme Court justice, Antonin Scalia, in his 2003 dissent in *Lawrence* v. *Texas*, noted:

> If moral disapprobation of homosexual conduct is 'no state interest' for purposes of proscribing [private adult sex], what justification could there possibly be for denying the benefits of marriage to homosexual couples? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.[4]

It is fair to conclude, I think, that the procreation argument is in serious trouble.

My purpose here is to examine the bond between marriage and procreation. Where did this linkage come from? Why is it no longer self-evident? What earlier developments weakened the procreative nature of marriage? And is it possible to salvage this appeal to procreation in the same-sex marriage debate?

Sex And Civilization

Turning to the first question--where did the bond between marriage and procreation come from?--my answer is simple: It is no less than the foundation for what we might call the "unwritten sexual constitution of our civilization."

Nearly two thousand years ago, what would become Western Christian civilization began to take form in a time of great sexual disorder. The moral and family disciplines of the old Roman Republic were gone, replaced by the intoxications of empire. Slave concubinage flourished in these years. Divorce by mutual consent was easy and common. Adultery was chic and widespread. Homosexuality was a frequent practice, particularly in man-boy sexual relations. There was a callous disregard for infant life, with infanticide a regular practice. Caesar Augustus, worried about the plummeting Roman birthrate, even implemented the so-called "Augustan Laws" in 18 B.C., measures that punished adultery, penalized childlessness, and showered benefits on families with three or more children. These laws may have slowed, but did not reverse, the moral and social deterioration.

Out of this chaos, the fathers of the Christian Church crafted a new sexual order between 50 and 300 AD. Procreative marriage served as its foundation. Importantly, they also built this new order in reaction to the Gnostic heresies which threatened the young Church; indeed, which threatened all human life.

The Gnostic idea rose independently of Christianity, but I am concerned here with so-called Christian Gnosticism. The Gnostics drew together myths from Iran, Jewish magic and mysticism, Greek philosophy, and Chaldean mystical speculation. More troubling, they also appealed to the freedom from the law as proclaimed by Christ and Paul. In this sense, they were antinomians; that is, they believed that the Gospel freed Christians from obedience to any law, be it scriptural, civil, or moral. The Gnostics claimed to have a special *gnosis*, a unique wisdom, a "secret knowledge" denied to ordinary Christians. They appealed to unseen spirits. They denied nature. They developed a melange of moral and doctrinal ideas. But virtually all Gnostics did share two views: they rejected marriage as a child-related institution, and they scorned procreation.

This heresy posed a grave challenge to the early Christian movement. Indeed, the Epistles are replete with warnings against Gnostic teachings. In 1 Timothy 4, for example, Paul writes that "some will depart from the faith by giving heed to deceitful spirits and doctrines of demons ... who forbid marriage." In Jude 4 we read that admission into the Christian community "has been secretly gained by ... ungodly persons who pervert the grace of our God into licentiousness." 2 Peter tells of false prophets corrupting the young Church, "irrational animals, creatures of instinct, ... reveling in their dissipation, carousing with you. They have eyes full of adultery, insatiable souls." Similar warnings or admonitions are found in 1 Corinthians (5:1-8; 6:12-13), Romans (6:1; 8:2), Philippians (3:18), Galatians (5:13), 2 Timothy (3:6, 7), Ephesians (5:5-7), and Revelation (2:14, 15). Simon Magus, described in Acts 8, was most probably a Gnostic, evidenced by his use of magic.

Relative to sex, Gnosticism took two forms. One strand emphasized total sexual license, endless sexual experimentation. Claiming the freedom of the Gospel, these Gnostics indulged in adultery, homosexuality, and ritualistic fornication. Church father Clement described abuse of the Eucharist by the Gnostics in the church of Alexandria:

> There are some who call Aphrodite Pandemos [physical love] a mystical communion. ... [T]hey have impiously called by the name of communion any common sexual intercourse. ... These thrice-wretched men treat carnal and sexual intercourse as a sacred religious mystery, and think that it will bring them to the Kingdom of God.[5]

Other Gnostics of this sort taught that "marrying and bearing [children] are from Satan"; that sexual intercourse by "spiritual men," in and of itself, would hasten the coming of the Pleroma, or the fullness of the divine hierarchy of the eons; and that the true believer should have every possible sexual experience.

In marked contrast to this polymorphous perversity, the other Gnostic strand totally rejected sexuality. Tatian, for example, led a faction called the Encratites, or "the self-controlled." They saw marriage as corruption and fornication, and demanded lifelong abstinence. In the heretical *Gospel According to the Egyptians*, Salome asks: "How long shall men die?" Jesus is said to answer:"As long as you women bear children." From this, these Gnostics concluded that they could defeat death by ceasing proc-reation. They also celebrated androgyny, since a being without sexual identity could obviously not be procreative. The heretical *Gospel of Thomas* has Jesus saying: "Every woman who makes herself male enters the Kingdom of Heaven." The evil of the world denied the bearing of children; the celibate alone would enjoy the Kingdom of God. Considering these two Gnostic forms, historian John Noonan summarizes:

> The whole thrust of the antinomian [Gnostic] current was to devalue marriage, to deprive marital relations of any particular purpose, and to value sexual intercourse as experience [alone].[6]

Within the broad context of a Roman civilization sliding into family breakdown and sexual hedonism, the young Christian Church also faced this infiltration of life-denying, socially destructive ideas into its own ranks. For Christian leaders, the great question became: Just what is marriage for?

Christian Marriage

Answers came from several sources. The Church fathers noted, for example, the fierce hatred shown by the Gnostics to the Hebrew Scriptures. From Judaism, accordingly, the Church fathers could see children as a divine blessing for their parents and for the community as a whole. As told in Deuteronomy:

> And because you harken to these ordinances, and keep and do them, the Lord your God will keep with you the covenant and the steadfast love which he swore to your fathers to keep; he will love you, bless you, and multiply you; he will also bless the fruit of your body. ... You shall be blessed above all peoples; there shall not be male or female barren among you. ...[7]

Genesis was also filled with promises from God to the patriarchs that their wives should be fruitful and that the Lord "will multiply your descendants as the stars of heaven and as the sand which is upon the seashore."[8] Throughout the centuries, the Jewish sages had declared that "one without children is considered as though dead." Another early source stated that "he who does not engage in procreation is as if he diminished the divine image."[9]

Another Jewish inspiration may have been the small, ascetic Essene community, now famed for compiling the Dead Sea Scrolls. According to the first-century historian Josephus, members of this order entered marriages "not for self-indulgence, but for the procreation of children."[10]

Still another source may have been Philo, a Jew trained in Greek philosophy, who expressed revulsion over pagan Roman pleasure-seeking. "Like a bad husbandman," he wrote, "[the homosexual] spends his labor night and day on soil from which no growth at all can be expected." The sexual act was for procreation, Philo insisted. Seeking a consistent sexual standard, he even reached a novel conclusion, condemning marriage to women known to be sterile.[11]

Another source for early Christian leaders was the Stoic ideal. Also revolted by the sexual excesses of first-century Rome, the Stoics, including philosophers such as Epictetus and Musonius Rufus, summoned reason to control human desires and behavior. Moderation in all things, including sexuality, was their goal. They also held that there was a *natural law* which gave purpose to human life and which revealed acts unworthy of human beings. Sexual intercourse in marriage, the Stoics concluded, found its clear and natural purpose in the propagation of the human race. However, intercourse only for pleasure was suspect. As the first-century Stoic Seneca declared:

> All love of another's wife is shameful; so too, too much love of your own. A wise man ought to love his wife with judgment, not affection. Let him control his impulses and not be borne headlong into copulation. Nothing is fouler than to love a wife like an adulteress. ... Let them show themselves to their wives

> not as lovers, but as husbands.[12]

Or, as another Stoic text explained: "We have intercourse not for pleasure, but for the maintenance of the species."[13]

It is clear that these Stoic teachings had a particularly strong effect on Clement of Alexandria. Indeed, according to John Noonan, Clement's influential work on the purposes of Christian marriage was simply "a paraphrase" of the Stoic, Musonius Rufus.[14]

And of course, these early Christian leaders also drew on the Gospels and the letters of Paul. The orthodox Gospel texts showed Jesus attending the wedding feast at Cana and performing there his first miracle, turning water into wine. Jesus also condemned adultery and divorce. In 1 Timothy 2:15, Paul taught that "woman will be saved through bearing children." And in Ephesians 5, he equated the marital love of husband and wife to the bond between Christ and his Church:

> Wives, be subject to your husbands, as to the Lord. For the husband is the head of the wife as Christ is the head of the Church. ... Husbands, love your wives, as Christ loved the Church and gave himself up for her. ... "For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one." This is a great mystery. ...[15]

All of these sources led the early Church fathers to one conclusion: the purpose of marriage is procreation. While also celebrating lifelong chastity, they refused to abandon the need for children. As Justin explained in the mid-second century: "We Christians either marry only to produce children, or, if we refuse to marry, are completely continent." Two centuries later, John Chrysotom taught that "there are two reasons why marriage was instituted: that we may live chastely and that we may become parents." In the year 400, Augustine, the Bishop of Hippo, wrote *The Good of Marriage*. He argued that God desired man's perpetuation through marriage. Offspring, he insisted, were the obvious and first "good" of marriage (the other two being fidelity and symbolic stability or sacrament). As Augustine explained:

> What food is to the health of man, intercourse is to the health of the human race, and each is not without its carnal delight which cannot be lust if, modified and restrained by temperance, it is brought to a natural use [i.e., procreation].

Augustine also insisted that the act of procreation included "the receiving of [children] lovingly, the nourishing of them humanely, the educating of them religiously."[16]

A Lasting Morality

In this way, the bond of marriage to procreation became the social and moral foundation for emerging Western Christian civilization. The sexual disorders of the late Roman Empire and the anti-human fanaticism of the Gnostics faced defeat by a new marital morality. And, as articulated by Augustine in the year 400, this moral order lasted for another 1,500 years. Even the tremors of the Protestant Reformation in the sixteenth century probably did more to strengthen than weaken this powerful tie between procreation and marriage. Martin Luther, for example, believed that God's words in Genesis 1:28, "Be fruitful and multiply," represented more than a command; they were, he said, "a divine ordinance which it is not our prerogative to hinder or ignore."[17] This led him to reject celibacy as a special spiritual state and to encourage even priests, monks, and nuns to marry and have children. As Luther wrote:

> We were all created to do as our parents have done, to beget and rear children. This is a duty which God has lain upon us, commanded, and implanted in us, as is proved by our bodily members, our daily emotions, and the example of all mankind. [18]

It is true that Protestantism did inject more passion and intimacy into the marital bond than was considered seemly by the early Church fathers. Still, these emotions remained tightly bound to procreation. Consider, for example, this poem written by Anne Bradstreet, a Puritan wife, to her husband Simon, who--ironically--was among the founders of the Massachusetts Bay Colony in 1630. It is titled "A Letter to Her Husband, Absent upon Publick Employment":

> I like the earth this season, mourn in black,
> My Sun is gone so far in's Zodiack,
> Whom whilst I 'joy'd, nor storms, nor frosts I felt,
> His warmth such frigid colds did cause to melt.
> My chilled limbs now nummed lye forlorn;
> Return, return sweet Sol from Capricorn;
> In this dead time, alas, what can I more
> Than view those fruits which through thy heat I bore. [19]

The "fruits" referred to here are, of course, their children, the offspring of Christian marital ardor and love.

Closer to our time, attitudes toward birth control revealed the continuing strength of the bond between marriage and procreation. Even in the late-nineteenth century, the free-love feminists then emerging in New England refused to endorse birth control. According to the feminist historian Linda Gordon:

> The basis for this reluctance lies in their awareness that a consequence of effective contraception would be the separation of sexuality from reproduction. A state of things that permitted sexual intercourse to take place normally, even frequently, without the risk of pregnancy inevitably seemed to nineteenth-century middle class women to be an attack on the family. [20]

As late as 1917, the "unwritten sexual constitution of our civilization"--crafted nearly two thousand years before--remained intact. No less a body than the Massachusetts Supreme Judicial Court ruled that year in favor of a law prohibiting the distribution of contraceptives. As the Massachusetts court reasoned:

> [The law's] plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women. [21]

On Contraception

However, this appeal to "a virile and virtuous race of men and women," and implicitly to the tight bond between marriage and procreation, would unravel over the balance of the twentieth century. This story could be told many ways. I want to focus simply on two episodes, one in America, one in another Western land--specifically, the

legalization of contraception here and the disappearance of the concept of illegitimacy in Sweden.

Regarding the first, Evan Wolfson writes in his new book, *Why Marriage Matters*:

> To hear the opponents of gay equality today, one would not know that for decades the law of the land ... has been to recognize that marriage is not just about procreation--indeed it is not necessarily about procreation at all.[22]

In this statement, he is unfortunately correct. The U.S. Supreme Court's 1965 ruling in *Griswold* v. *Connecticut* stands in ever sharper relief as a profound break in American, and Western, history. At issue was a Connecticut law prohibiting the use of contraceptives. Authored by Justice William O. Douglas, the Court's opinion overturned this measure. In doing so, the Court also claimed to discover, for the first time, "penumbras" around and "emanations" from the Bill of Rights, new legal spirits which created "zones of privacy" hitherto unknown (curiously, such strange language would have been familiar to a first-century Gnostic). Almost cynically, given what came later, the Court appealed to "the sacred precincts of marital bedrooms" and to "the notions of privacy surrounding the marriage relationship" to justify its decision. Indeed, the opinion concluded:

> 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 a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred. ... [I]t is an association for as noble a purpose as any involved in our prior decisions.[23]

In truth, *Griswold* represented a direct assault on our civilization's unwritten sexual constitution. As Wolfson correctly states, "The Court recognized [in *Griswold*] the right not to procreate in marriage." Indeed, only six years later, in the case *Eisenstadt* v. *Baird*, the Supreme Court appealed to the same "penumbras" and "emanations" from the Bill of Rights to the same "right of privacy" in order to declare marriage largely empty of meaning:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[24]

With this decision, the "penumbras" and "emanations" of the Constitution denied the substance of both marriage and the natural law. In 1973, the same secret knowledge led the Supreme Court to overturn the abortion laws of all 50 states, creating a new "right to abortion" (again, a right that would surely have pleased the baby-hating Gnostics). In 1992, the Court appealed to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" in its reaffirmation of abortion rights.[25] This language is very close to a definition of the Gnostic idea. And in the 2003 *Lawrence* v. *Texas* decision, the Court summoned the same "penumbras" and "emanations" to find a right to uninhibited sexual expression, a right to sodomy (yet again, the Gnostics would have understood and been pleased).

On Illegitimacy

The decline and fall of the concept of "illegitimacy" also points to the disappearance of the bond between marriage and procreation. The cultural and legal term, "illegitimate birth," obviously sought to use fear and shame to help confine sexual relations and childbearing to marriage. It was also part and parcel of our civilization's unwritten sexual constitution. And yet, most of us are bothered by the term today. To the contemporary way of thinking, it punishes innocent children for the mistakes of their parents. Even so, the concept proved highly resilient ... until the end of the twentieth century.

There were earlier attempts to banish the term. During the French Revolution, the Law of 12 Brumaire (November 2, 1793) intended to sweep away all laws that distinguished between legitimate and illegitimate children. "There are no bastards in France!" the revolutionaries triumphantly declared in 1794. And yet the change was opposed in the countryside, and never really enforced by the courts. The law was repealed in 1803. In 1918, the Bolshevik revolutionaries in Russia also abolished "illegitimacy," with the new Soviet Family Law Code stating:

> Birth itself shall be the basis of the family. No differentiation whatsoever shall be made between relationship by birth in or out of wedlock.

This was part of the larger Communist project to eliminate marriage and the natural family altogether. As Nicolai Bukharin told the 1924 Congress of the Communist Party of the Soviet Union: "The family is a formidable stronghold of all the turpitudes of the old regime." It had to go. Divorce on request by either spouse and the equation of cohabitation with marriage were other parts of the Communist project. The law also imposed a duty of support on unmarried fathers. And yet, these reforms did not work. Child abandonment grew common. Vagrant children filled the land. In the end, even the political monster Joseph Stalin acknowledged failure. A new Family Code, introduced in 1944, specified that only a registered marriage created rights and duties between husband and wife, parent and child. The idea of "illegitimacy" returned.[26]

However, a far more successful project to abolish "illegitimacy" occurred in Sweden during the last three decades of the twentieth century. It succeeded only by simultaneously deconstructing marriage *and* substituting a massive welfare state for the home.

Back in 1915, Sweden had already removed the terms "legitimate" and "illegitimate" from its legal codes, inserting "born in/out of wedlock" instead. While of moral, symbolic, and long-term importance, the change had no immediate impact. Into the early 1960s, Swedish family life remained relatively strong and vital. It was only during Sweden's so-called "Red Years," 1967-76, that real changes occurred. Under heavy feminist influence, the Democratic Socialist government set out to abolish the roles of husband and wife, to make divorce easy, to eliminate marriage as an economic unit, and to raise the status of cohabitation to equality with marriage. Notably, in 1976--at the very end of this radical reform--the government deleted the terms "born in/out of wedlock" from all its statutes. This fully severed the legal bond between marriage and procreation. To make this work, the Social Democrats also had to expand the welfare state, with government now supplying most of the support and care of children once given by families, from universal health insurance to massive day care subsidies to state child allowances to school meals. With the home so dismantled, and with procreation already unrelated to marriage, it was an easy and logical step to extend marriage-like "registered partnerships" to same-sex couples in 1995.[27]

Both the leveling "right of privacy" in America and the triumph of socialism over the

home in Sweden contributed to the successful repeal of the sexual constitution of Western civilization, which had rested on the fundamental bond of marriage to procreation.

The New Gnostics

So where are we now? It is important to realize that the opponent we now face is something at once new and different, and as old as time. The Gnostic idea is back, in new guise. It shapes everything from modern feminist theology (consider Elaine Pagel's bestselling *Beyond Belief: The Secret Gospel of Thomas*),[28] to popular literature (*The Da Vinci Code*, nearly one hundred weeks on the *New York Times* best-seller list, is an openly Gnostic text), even to--as I have implied--the reasoning of our highest court. Nothing that is natural, traditional, cultural, religious, social, or moral is safe from the Gnostic idea. And no appeal to nature, to history, to civilization, or to human experience of any kind can prevail against the "special knowledge" of the modern antinomians who dominate our Supreme Court.

Can we still defend the purpose of marriage as procreation? No, not in the current constitutional climate. It is now clear that the "right of privacy," conceived by the Supreme Court nearly four decades ago, is the enemy of both marriage and procreation separately, and is especially hostile when they are united. It is also clear that we lost the key battles in defense of this union decades ago, long before anyone even imagined same-sex marriage. And we lost these battles over questions that--to be honest--relatively few of us are really prepared to reopen. How many are ready to argue for the recriminalization of contraception? How many want to argue for a strict legal and cultural imposition of the word *illegitimate* on certain little children? One might imagine a new effort to repeal the equal protection clause of the Fourteenth Amendment tied to language that denies the existence of "the right of privacy." But even before facing the enormous political issues so raised, it would be unlikely to work. The Supreme Court has made clear that the subversive "right of privacy" is older and more fundamental than the Constitution itself and that it "emanates" from the "penumbra" of the Bill of Rights. Mere words--even of a new amendment--are unlikely to contain these "penumbras" and "emanations."

Instead, we are left for now with strictly political options: the raw exercise of influence. Bills that would strip the federal courts of jurisdiction over marriage, and the proposed Federal Marriage Amendment, are two ways in which firewalls could be built around the already battered institution of marriage, protecting it from further depredations by the "right of privacy." I favor both approaches--whichever might work politically. Of course, there is no guarantee that a future Supreme Court might not rule that the "right of privacy" and the "equal protection" clause trump these innovations as well, so bringing on a constitutional crisis. All the same, both efforts are worth pursuing.

Outside The Box

Are there other political acts that would reconnect procreation and marriage? Perhaps, if we are prepared to think "outside the box." For example, we could turn one of our opponents' key arguments back on them. Perhaps we should restrict some of the legal and welfare benefits of civil marriage solely to those married during their time of natural, procreative potential: for women, below the age of 45 or so (for men, in the Age of Viagra, the line would admittedly be harder to draw). The idea is not without recent political precedence. Back in 1969, Representative Wilbur Mills--the then-chairman of the House Ways and Means Committee--wanted to respond to complaints by unmarried adults that existing tax law unfairly favored the married. It was true that the existing practice of "income splitting" by married couples on their joint tax returns, in the context of high marginal tax rates, did give a strong tax benefit to marriage. Importantly, though, Mills stated that he wanted to preserve this "marriage bonus" for the young and fertile, while still helping those whom he labeled (in now-archaic language) as "spinsters." Accordingly, he proposed maintaining the

benefits of income splitting only for married persons under the age of 35. (This approach, I note in passing, went nowhere. The Nixon administration and Congress chose instead to reduce the benefits of income splitting for all married persons; and they so unwittingly created the "marriage penalty" with which we still grapple today.)

Another, and perhaps more realistic way to rebind marriage and procreation would be, counter-intuitively, to take some of the benefits currently attached to marriage and reroute them instead through children. Allow me one practical example here. Whatever the future, it is likely that most households with two or more children will continue to be married-couple, natural-parent homes. These are still, and always will be, the places most open to what we once called "a full quiver." We could encourage them by tying retirement benefits to family size: that is, the more children that a couple brought into the world, the higher their later monthly Social Security benefit. Or, we could create a new tax credit against payroll taxes: rebating, say, 20 percent of the current 15.3 percent tax facing parents for each child born. Again, these ideas would indirectly favor child-rich homes; and most of these, in the American context, would predictably contain a married couple.

These approaches are admittedly tangential. However, bolder steps are all but impossible until we see profound changes in the membership and thinking of our highest court and until we as a people actually want to restore the unwritten sexual constitution of our civilization, including the hard parts. It may be that the first requirement--changing the court--will prove easier to achieve than the second.

Notes

END NOTES

1. Quotations from: Johanna Grossman, "Are Bans on Same-Sex Marriage Constitutional?" at: *http://writ.news.findlaw.com/grossman/2003.1120.html* (10/4/2004).

2. Evan Wolfson, *Why Marriage Matters: America, Equality, and Gay People's Right to Marry* (New York: Simon and Schuster, 2004) 75.

3. Dale Carpenter, "Gay Marriage and Procreation," *Bay Area Reporter* (March 18, 2004).

4. *Lawrence v. Texas* (02-102) 41 S.W. 3rd 349 (2003).

5. In John T. Noonan, *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (Cambridge, MA: Harvard University Press, 1986) 64.

6. Noonan, *Contraception*, 8.

7. *Deuteronomy* 7: 12-14; all Bible texts cited are from the Revised Standard Version of 1952.

8. *Genesis* 22:17.

9. *Babylonian Talmum Nedarim* 64b and 63b. Cited in Lewis D. Solomon, *The Jewish Tradition, Sexuality and Procreation* (Lanham, MD: University Press of America, 2002) 89-91.

10. Josephus, *The Jewish War*, edited and translated by H. St. John Thackery (Cambridge, MA: Harvard University Press, 1961): 2.120, 160.

11. Philo, *The Special Laws* 3.36; quoted in Noonan, *Contraception*, 54.

12. Seneca, *Fragments*, ed. Friedrich G. Haase (Leipzig: Teubner, 1897); no. 84.

13. *The Nature of the Universe*, section 44; in Richard Harder, editor, *Ocellus Lucanus* (Berlin: Weidman, 1926).

14. Noonan, *Contraception*, 48.

15. *Ephesians* 5:22-23, 25, 31-32.

16. Augustine, *On Genesis According to the Letter* 9.7, CSEL 28: 276; in Noonan, *Contraception*.

17. Martin Luther, *The Estate of Marriage* [1520], in *Luther's Works. Vol. 45: The Christian in Society* (Philadelphia: Muhlenburg Press, 1962): 18.

18. Martin Luther, *An Exhortation to the Knights of the Teutonic Order That They Lay Aside False Chastity and Assume the True Chastity of Wedlock* [1523], in *Luther's Works, Vol. 45*: 155.

19. Found in: Harrison T. Meserole, *Seventeenth-Century American Poetry* (New York: New York University Press, 1968): 32-33.

20. Linda Gordon, *Woman's Body, Woman's Right* (London and New York: Penguin Books, 1974 [1999]): 107.

21. *Commonwealth* v. *Allison*, 227 Mass. 57, 62, 116 N. E. 266 (1917).

22. Wolfson, *Why Marriage Matters*, 79.

23. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

24. *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

25. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

26. Jenny Teichman, *Illegitimacy: An Examination of Bastardy* (Ithaca, NY: Cornell University Press, 1982) 153-61.

27. Teichman, *Illegitimacy*, 168-71; and D. Bradley, "Marriage, Family, Property and Inheritance in Swedish Law," *International and Comparative Law Quarterly* 39 (April 1990) 373-84.

28. Elaine Pagels, *Beyond Belief: The Secret Gospel of Thomas* (Westminster, MD: Random House, 2003). See also: Rosemary Radford Ruether, *Christianity and the Making of the Modern Family* (Boston: Beacon Press, 2000).

AT THE PODIUM

Same-Sex "Marriage" Is Not a Civil Right

by: Mr. Peter Sprigg

Summary:
Homosexual activists continue to hitch their caboose to the civil rights train, but the fact is, same-sex marriage is not a civil right. Today's homosexual activists are seeking not to fulfill, but to overturn, the principles of family that were enshrined in nature from the beginning of the human race.

Mr. Sprigg delivered the following remarks at a "Defend Maryland Marriage" rally at the State House in Annapolis, Maryland, on January 27, 2005.

Good afternoon. My name is Peter Sprigg and I serve as the senior director of policy studies at the Family Research Council in Washington, D.C. I am also a proud resident of Montgomery County, Maryland.

In addition, I am the author of *Outrage: How Gay Activists and Liberal Judges Are Trashing Democracy to Redefine Marriage*, a book published last year. Today I'd like to share with you just a few points that I made in my book.

The first point is that same-sex marriage is not a civil rights issue. Without exception, every adult in Maryland already has a right to marry. But everyone also has restrictions on whom they may marry--again, without exception. No one is permitted to marry a child, a close blood relative, a person who is already married, or a person of the same sex. These restrictions apply equally to everyone--there is no discrimination involved.

Nevertheless, homosexual activists continue to hitch their caboose to the civil rights train--something which is offensive to a majority of African Americans. We ban discrimination based on race in this country for the specific reason that race is a characteristic which is inborn, involuntary (you can't choose it), immutable (you can't change it), and innocuous (it harms no one). Plus, race appears in the Constitution. The choice to engage in homosexual behavior is none of the above. The laws which once limited one's marriage partner on the basis of race were designed to build walls and to keep blacks and whites apart. But restricting one's choice of a marriage partner by gender preserves marriage as an institution that builds bridges to bring men and women together to create future generations and serve the health of society.

But even if same-sex marriage is not a legal right, some people ask, what harm would be done by letting same-sex couples marry? I sometimes find it hard to believe people can ask that question in light of the devastation we've seen from other changes in family structure in the last 35 years. The research we've done at the Family Research Council shows several things: homosexuals are much less likely than heterosexuals to enter into long-term relations in the first place; if they do have a partner, they are less likely to remain sexually faithful; and they are much less likely to remain committed for a lifetime. These problems--an unwillingness to

commit to marriage, a lack of fidelity, and a lack of permanence--exist among heterosexuals as well. But the experience of the Scandinavian countries shows that opening marriage to same-sex couples would make these problems worse, not better, throughout the population.

I know that many people here have come with your pastors and in church groups, and are motivated in part by your religious convictions. This leads some people to charge that we are trying to impose a religious definition of marriage on civil society. But defining marriage as the union of male and female is not something unique to Christian theology, biblical teaching, or even a Judeo-Christian worldview. In fact, until the last blink of an eye in human history, there has never been any civilization, any religion, or any culture that has treated homosexual relationships as the full equivalent of heterosexual marriage. Marriage is not simply a religious institution, nor is it merely a civil institution. Instead, marriage is a natural institution, whose definition as the union of a man and a woman is rooted in the order of nature itself.

Individuals may choose to marry for all kinds of private reasons, but the reason marriage is a *public* institution is because it brings together men and women for the purpose of reproducing the human race and keeping a mother and father together to cooperate in raising to maturity the children they produce. The public interest in such behavior is great, because thousands of years of human experience and a vast body of contemporary social science research both demonstrate that married husbands and wives, and the children they conceive and raise, are happier, healthier, and more prosperous than people in any other living situation.

In fact, I would suggest that the argument in favor of same-sex marriage can only be logically sustained if one argues that there is no difference between men and women--that is, if one argues not merely that men and women are equal in value and dignity, a proposition with which I'm sure we all agree, but that males and females are identical and thus able to serve as entirely interchangeable parts in the structure of marriage. The contention is absurd on its face. Thus, "same-sex marriage" is a contradiction in terms.

Finally, let's be clear about one thing. This debate has not arisen because there's been a large groundswell of public support for same-sex marriage, for no such groundswell exists. We are sometimes accused of being "divisive" for opposing same-sex marriage, but nothing could be further from the truth. In fact, there are few political issues on which Americans are so united as they are in believing that marriage is the union of one man and one woman. The only reason this debate is taking place at all is because small groups of homosexual activists have gone to court in an attempt to gain from a small band of judges what they know they could never win through the democratic process. They did it in Vermont and succeeded; they did it in Massachusetts and succeeded; and they are trying to do it in Maryland as we speak. Will they succeed? Not if we can help it!

During the civil rights movement--the real civil rights movement--people like Thurgood Marshall, whose statue is before us, went to court to fulfill the principles of liberty that were enshrined in our Constitution from the beginning of our nation. But today's homosexual activists are seeking not to fulfill, but to overturn, the principles of family that were enshrined in nature from the beginning of the human race. They will not succeed as long as government of the people, by the people, and for the people is alive in the state of Maryland.

Peter Sprigg is the author of Outrage: How Gay Activists and Liberal Judges Are Trashing Democracy to Redefine Marriage *(Washington, D.C.: Regnery Publishing, 2004).*

PD0580

More At the Podiums

Family Policy Review - Family Tax Equity

Family Policy Review - The Child Care 'Crisis' and Its Remedies

Order: The Bible, The Church, and Homosexuality download booklet (.pdf)

Judicial Activism and the Threat to the Constitution download pamphlet (.pdf)

Contact FRC

Address: 801 G Street, NW, Washington, D.C. 20001

ALASKA STATE LEGISLATURE
SENATE JUDICIARY COMMITTEE
February 21, 2006

TESTIMONY OF KEVIN G. CLARKSON, ESQ.
REGARDING SJR 20

INTRODUCTION

I would like to thank the Chairman of the Committee, Senator Seekins, and the members of the Committee, Senators Terio, Huggins, French and Guess, for the opportunity to speak today regarding SJR 20, a proposed amendment to the Alaska Constitution to preserve the benefits and privileges of marriage to married couples. By way of introduction, I was legal counsel for the Alaska Legislature in 1998 in the litigation related to whether the Marriage Amendment, Art. I, Section 25 of the Alaska Constitution, would remain on the general ballot so that the People of Alaska could vote to ratify it. I was also one of the primary drafters of the Marriage Amendment.

HISTORICAL BACKGROUND

In order to understand the present significance of SJR 20 it is essential to understand the history that has lead up to its introduction. The Marriage Amendment, Art. I. Section 25, was ratified by the People, on a vote of 68%-32%, in response to a decision of the superior court in Anchorage in a case called Brause v. Bureau of Vital Statistics, 1998 WL 88743 (Alaska Super. Ct. 1998). On February 28, 1998 a superior court judge ruled that there was a fundamental right to "choose your life mate" protected by the Alaska Constitution and that this right included the right to marry someone of the same sex.

The Plaintiffs in the Brause case sought marriage as a doorway to the benefits and privileges that the law bestows upon married couples. The same sex couple Plaintiffs in Brause argued repeatedly that there were some 115 benefits and privileges available to married couples under Alaska law and they sought to use access to marriage as a doorway by which they could access these same benefits and attach them to their same sex relationship. The Brause litigation treated marital status and marital benefits as being inseparable. In Brause the Plaintiffs specifically sought benefits *based on* marital status. In fact, the superior court's ruling in Brause treated marital status and benefits as being inseparable. "Once married," the superior court noted, "the state provides benefits and imposes duties that are significant and valuable to society as well as to the individual members of the marriage." Brause, 1998 WL 88743 at * 2. Put another way, the court's ruling treated the benefits and duties of marriage as being entirely consequent upon marital status.

The Marriage Amendment presupposed this context. The Marriage Amendment was specifically designed to close marital status as a doorway by which same-sex couples, or any combination of opposite sex individuals other than "one man and one woman," might access the benefits and privileges of marriage. The Marriage Amendment as it was originally introduced in the Legislature as SJR 42 contained three sentences:

> 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.

The third sentence of the Marriage Amendment was dropped during the legislative process.

Before the popular vote, a group of citizens including the Alaska Civil Liberties Union challenged the constitutionality of the proposed amendment in two actions. Bess v. Ulmer, Case No. 3AN-98-7776 Civil (Alaska Super. Ct. 1998); and Dodd v. Ulmer, Case No. 3AN-98-8114 Civil (Alaska Super. Ct. 1998). The Alaska Supreme Court consolidated the cases and allowed the Amendment to proceed to a vote, with one change. The second sentence of the Marriage Amendment was deleted, rightly or wrongly, by the Alaska Supreme Court at the conclusion of the litigation because the Court viewed the sentence as being "superfluous." See Bess v. Ulmer, 985 P.2d 979, 995 (Alaska 1999).

The first sentence was presented to the People for ratification and it was ratified by a vote of 68%-32%. See Liz Ruskin, Limit on Marriage Passes in Landslide, Anchorage Daily News, November 4, 1998, § A, p. 1.

Following ratification of the Marriage Amendment, the Brause case did not end. Confirming that their primary focus in that case was the benefits and privileges that are attached to marriage and not marriage itself as a status, the Plaintiffs in Brause continued their quest in that case to receive the 115 benefits and privileges that are attached to marriage. Because marriage status had been foreclosed to them by way of the Marriage Amendment, the Brause Plaintiffs sought to require the State to give them the benefits and privileges of marriage outside of marriage. The Brause Plaintiffs' claims were dismissed, however, because their claims for marriage benefits and privileges were not ripe. See Brause v. Bureau of Vital Statistics, 21 P.3d 357, 358 (Alaska 2001).

Another case, the ACLU v. State litigation, began shortly after the Marriage Amendment was ratified. In this new case the ACLU and eighteen individuals who alleged that they comprised nine lesbian or gay couples (hereafter referred to collectively as "the ACLU") filed suit against the State of Alaska and the Municipality of Anchorage. The ACLU complained that the state and the municipality maintained employee benefits programs that offer valuable benefits to their employee's spouses that are not offered to the same sex partners of lesbian and gay employees. The ACLU effectively argued that when nearly seventy percent of Alaskans voted to ratify the Alaska Marriage Amendment they voted to command government to give marriage benefits to same sex couples, just as if they were married. The ACLU also argued that those same Alaskans' vote was part of an invidious discriminatory scheme against lesbian and gay people. According to the ACLU, because the Marriage Amendment was created as part of an invidious discriminatory scheme, and because it forecloses the option of marriage to same sex couples, the Alaska Constitution had to be interpreted to command government to treat same sex couples just as if they were married. The ACLU argued that public employees with same sex partners were being singled out and treated

differently due to "sexual orientation" or "gender," because unlike an unmarried male/female couple who can choose to get married if they want to, the same sex couple "can't get married." And so, the Amendment that was designed to end the constitutional debate in Alaska over same sex marriage, became the force of the claim that same sex couples must be treated "just as if they are married," even though they are not. Most Alaskan's heads were spinning upon hearing this argument.

The superior court dismissed the ACLU's claims. See ACLU v. State, 3AN-99-11179 Civil (Alaska Super. Ct. 1999). The superior court reasoned that public employees with same sex partners are denied marriage benefits simply because they are not married. The court concluded that no sexual orientation discrimination existed because same sex couples are treated exactly the same as every unmarried heterosexual couple, who also do not qualify for marital benefits. Finally, the superior court concluded that no gender discrimination existed because men and women equally receive marital benefits for their spouses. The ACLU appealed to the Alaska Supreme Court and on October 28, 2005 the Supreme Court reversed the superior court's decision. ACLU v. State, 122 P.3d 781 (Alaska 2005).

The Alaska Supreme Court rejected the argument that the marriage Amendment foreclosed any claim that the Alaska Constitution mandated the extension of marriage benefits to same sex partners. ACLU, 122 P.3d at 786-87. The Court reasoned that:

> The Marriage Amendment could have the effect of foreclosing the present challenge only if it could be read to prohibit public employees from offering benefits to their employees' same-sex domestic partners . . . That the Marriage Amendment effectively prevents same-sex couples from marrying does not automatically permit the government to treat them differently in other ways.

Id. Because the Marriage Amendment did not foreclose the legislative and executive branches of government from voluntarily choosing to extend benefits to same sex partners, the Court concluded that the Marriage Amendment stood as no barrier to the ACLU's claim that the Alaska Constitution commanded the legislative and executive branches of government to extend benefits to same sex partners. The Court did not address one other possible interpretation of the Marriage Amendment which would have been short of the extreme of "forbidding" any voluntary legislative or executive extension of benefits and that, instead, would have simply forbid any judicially commanded extension of the benefits under the guise of interpreting some other provision of the Alaska Constitution. Id.

In fact, the Court, like the ACLU, used the Marriage Amendment as the driving force for its decision that the Alaska Constitution commands government to treat unmarried same sex couples just as if they are married, even though they are not. Id. at 787-88. The Court explained:

> We agree with the [ACLU] . . . that the proper comparison is between same-sex couples and opposite sex couples, whether or not they are married. The municipality correctly observes that no unmarried employees, whether they are members of same-sex or opposite-sex couples, can obtain the disputed benefits for their domestic partners. But this does not mean that these programs treat same-sex and opposite-sex

> couples the same. Unmarried public employees in opposite-sex domestic relationships have the opportunity to obtain these benefits, because employees are not prevented by law from marrying their opposite-sex domestic partners. In comparison, public employees in committed same-sex relationships are absolutely denied any opportunity to obtain these benefits because these employees are barred by law from marrying their same-sex partners in Alaska or having any marriage performed elsewhere recognized in Alaska. Same-sex unmarried couples therefore have no way of obtaining these benefits, whereas opposite-sex unmarried couples may become eligible for them by marrying. The programs consequently treat same-sex couples differently from opposite-sex couples.

Id. at 788. In other words, the governments' employee benefits programs that denied marriage benefits to unmarried same-sex couples were discriminatory and in violation of the Equal Protection Clause of the Alaska Constitution only because the Marriage Amendment forecloses marriage to same-sex couples.

Put another way, according to the Alaska Supreme Court, the Marriage Amendment required the Court to command government to extend marriage benefits to unmarried same-sex partners. Id. The Court put this very conclusion into words in footnote 38 of its Opinion:

> We recognize that the benefits programs became discriminatory only after the legislature acted in 1996 and 1998 and the electorate adopted the Marriage Amendment in 1998.

Id. at 789 n. 38. Thus, apparently, according to the Alaska Supreme Court, when 68% of Alaskans voted to ratify the Marriage Amendment in 1998 they voted to command government to treat unmarried same-sex couples just as if they are married, even though they are not.

FUTURE IMPACTS OF ACLU v. State

Although ACLU v. State technically addresses only employment benefits in the context of public employment, State, Borough, or Municipal, the impact of the decision stretches much further. Based upon the logic of ACLU v. State, virtually every distinction in Alaska law and public policy between married couples and unmarried same-sex partners is bound to eventually fall to an equal protection challenge under the Alaska Constitution. There is no logical basis upon which to limit the reach of the ACLU v. State decision to simply public employment benefits. Effectively, the Alaska Supreme Court decision is a first step in the direction of constitutionally mandated domestic partnerships in Alaska just as was imposed upon the State of Vermont by the Vermont Supreme Court in Baker v. State, 744 A2d 864, 886-89 (Vt 1999). If Alaska Supreme Court believes that unmarried same-sex partners are unconstitutionally discriminated against because the government denies them the employment benefits that are extended to married men and women, it appears a foregone conclusion that the Court will believe that the state unconstitutionally discriminates against same-sex partners when it denies them other benefits and privileges of marriage, including, but not necessarily limited to, (1) the right of intestate succession; (2) the privilege of not being required to testify against a spouse; (3) the right to receive workers' compensation benefits on the death of a

partner; (4) the right to maintain a legal action for loss of consortium, or a wrongful death action for the death of a partner; and/or (5) the right to receive spousal support on the dissolution of a relationship.

Furthermore, the logic of the ACLU v. State decision reaches into private employment as well as public employment. Under Alaska law, every private employment contract between employer and employee contains an implied covenant of good faith and fair dealing. Charles v. Interior Regional Housing Auth., 55 P.3d 57, 62 n. 29 (Alaska 2002); Holland v. Union Oil Co. of Ca., Inc., 993 P.2d 1026, 1032 (Alaska 2000); Belluomini v. Fred Meyer of Alaska, Inc., 993 P.2d 1009, 1012-13 (Alaska 1999). One of the things that the implied covenant requires is that employers treat "like employees alike." Charles, 55 P.3d at 62 n. 29; Holland, 993 P.2d at 1032; Fred Meyer, 993 P.2d at 1012-13. The legal concept of treating "like employees alike" is much akin to the equal protection concept of not discriminating between "similarly situated individuals." Thus, it requires no stretch of logic to predict that the Alaska Supreme Court will conclude that a private employer violates the implied covenant of good faith and fair dealing when that private employer extends employment benefits to the spouses of its married employees but not to the same-sex partners of its "like" gay or lesbian employees.

SJR 20

SJR 20 is designed to allow the People of Alaska the opportunity to address the ACLU v. State decision that was issued by the Alaska Supreme Court, and to allow the People decide whether they agree or disagree with the Court's interpretation of the meaning and effect of the Marriage Amendment. SJR 20 would add a second sentence to Art. I, Section 25 that would state:

> No other union is similarly situated to a marriage between a man and a woman and, therefore, a marriage between a man and a woman is the only union that shall be valid or recognized in this state and to which the rights, benefits, obligations, qualities, or effects of marriage shall be extended or assigned.

The first phrase of SJR 20 is designed to eliminate the fundamental basis for any equal protection claim in any context that involves comparing married couples to unmarried same-sex partners. The following language of SJR 20 simply confirms that marriage benefits and privileges, qualities, effects and obligations, are limited to marriage relationships as previously defined by the Alaska Constitution. The word benefits is designed to address such things as employment benefits. The word privileges is designed to address such things as the spousal privilege as to court testimony. The words qualities and effects are designed to address any of the various legal qualities and effects of marriage under Alaska law. The word obligations is intended to address such obligations as spousal support in a divorce context.

Nothing in SJR 20 would prohibit private employers from voluntarily deciding to extend marriage like benefits to employees with same-sex partners.

I will provide additional information regarding benefits and marriage amendments in other states by a separate memorandum.

Eagle Forum Alaska
Alaska Eagle Forum Education Foundation
Mrs. Debbie Joslin, President

P.O. Box 377
Delta Jct, AK 99737
907-895-4565 (Ph/FAX)
joslin@wildak.net

Testimony for SJR20
February 22, 2006

Debbie Joslin
President, Eagle Forum Alaska

My name is Debbie Joslin and I represent the 1,000 plus members of Eagle Forum Alaska. I live in Delta Junction. I wish to thank the members of the Senate Judiciary Committee for introducing SJR20.

Since the beginning of history, marriage between one man and one woman has been recognized as special and unique. The people of Alaska thought we had made ourselves quite clear on this subject in 1998 when we voted overwhelmingly to adopt the marriage amendment as part of our state constitution. The Alaska Supreme Court has once again undermined the will of the people in their October 2005 decision. The court's ruling to mandate the state to pay spousal benefits to same-sex partners of state employees shows no regard for the meaning and spirit of the law. The Supreme Court is supposed to be upholding our constitution but has instead chosen to attempt a rewrite by legislating from the bench.

Thank you again for introducing SJR20 to protect the rights of the people of Alaska. The meaning of the amendment in 1998 was very clear to everyone but the Supreme Court so now we are forced to spell out in capital letters that MARRIAGE IS FOR ONE MAN AND ONE WOMAN AND MARRIAGE IS SPECIAL AND UNIQUE FROM ANY OTHER RELATIONSHIP. Passing SJR20 will allow the people of Alaska to clarify what we said in 1998 for those who did not understand.

Please pass SJR20.

Thank you.

Debbie Joslin

Testimony on SJR 20 to: Senate Judicial Committee

February 21, 2006

Chairman Seekins and Members of the Senate Judicial committee,

Thank you for the opportunity to address you on this very important issue.

As a very senior citizen, I find my memory is not what it used to be. As a consequence, I will read my testimony and not attempt to rely on my compromised powers of recall.

When I retired in 2001 after serving 10 years as Alaska's Director of Public Health, I had fully assumed that I would no longer testify at any future legislative hearings. I was compelled to break my silence because of the significant consequences of the issue before you today.

I am pleased to see the familiar faces of some highly respected legislators before whom I have had the pleasure of testifying on past issues.

As a physician and administrator of public health, much of my career has been directed to the mitigation or the prevention of pain. On reviewing SJR20, I see it as a weapon that has already instigated much pain and will continue to do so against many productive and valued citizens of Alaska if enacted.

As a professional, I was trained to identify and analyze the cause of a problem and to evaluate the consequence of any intervention. Will the treatment or prevention cause greater harm or provide significant benefits?

The present problem appears to stem from conclusion of some citizens that a certain life style needs to be punished. The punishment, conforming to the analogy of treatment or prevention, is to amend our State Constitution to take away health and other benefits freely granted to couples who conform to the long accepted concept of a male/female marriage.

The outcome of such punishment is severe pain. The rights, benefits, obligations, qualities, or effects of a same sex relationship are denied to many "good" Alaskans because they did "not conform".

We all have been targets of such discrimination at times. I personally experienced negative outcomes when a small cluster of individuals, with authority, displaced my family from our home in Oregon and confined us for three years behind guarded barbed wire fences. It was of no significant consequence to these authorities that my two brothers of military age volunteered to serve in the US army. They were subsequently involved in combat against Japan in WWII. The final resolution of this issue was an apology from the President of the USA and the US legislature assuring that this would

not happen again. This final action was equated to a form of treatment but even more as an act of prevention.

I've heard that one of the justifications for SJR20's existence is to allow the people to vote on this issue. We have learned from the past that this is not always the correct solution. My family and others in a similar situation were not protected from discriminatory action by our elected and appointed officials but neither would we have gained from a vote of the people. People throwing rocks and bricks through storefront windows and families of soldiers dying on the front-lines could not be expected to put the protection of minority rights at the top of their priorities. We have supported laws and have elected citizens to look after the rights of the minority. Discrimination against Blacks in the South, and Native American rights on traditional lands are only a few examples of situations resolved by official action and not the vote of the total public. Alaska commercial fishing rights would most likely be significantly restricted if left to the vote of a public heavily represented by sports fisherman and environmentalists. We have laws, elected officials, boards, commissions, and committees to help bring about reason in these uneven situations.

What we have before us today is an opportunity for prevention. File this proposed piece of legislation in the wastebasket and avoid promoting an action that causes great pain and injury to a fine group of people already suffering from bigotry and significant discrimination.

Thank you for listening to me.

Peter Nakamura, MD MPH
Retired Citizen of Alaska.

Jonathon H Lack
6954 Fairweather Drive
Anchorage, AK 99518
907 441 7086
lack@ak net

February 21, 2006

The Honorable Gretchen Guess
State Senator
State Capital Building
Juneau, AK 99801

In Re: SJR 20

Dear Senator Guess:

I am a family lawyer practicing law in Anchorage, Alaska In addition to representing individuals going through divorce, my practice includes the representation of non-married couples going through custody disputes or who have co-mingled their finances and have now decided for one reason or another to separate.

The current divorce code, with slight exception, is utilized to divide the assets of unmarried cohabitating couples who decide to separate. SJR 20 would leave these couples with no avenue to have the State Court system to resolve their dispute. The unmarried homemaker could be left with no access to the courts to recover support or an equitable share of the joint property Additionally, Alaska law currently allows the courts to consider the period of premarital cohabitation and the financial decisions during that period in dividing an estate SJR 20 could end this practice.

I hope you will consider the effect of this proposed Constitutional Amendment on the many unmarried Alaskan couples who will be left without legal recourse should SJR 20 pass and be approved by the voters of Alaska

Unfortunately, I am unable to participate in the hearing set for 8 30 am today because of a conflict with my court schedule. However, I would be happy to discuss the content of this legislation with you or any other member of the committee at your convenience.

Sincerely yours,

Jonathon H Lack

Alaska State Legislature

Please enter into the record my testimony to the SJUD
committee name

committee on SJR 20, dated 2-21-06.
bill/subject

2 PAGES including this one

Signed: Kevin Dougherty
Testifier

(SELF)
Representing (Optional)

18903 Monastery Rd.
Address

Eagle River, AK 99577
Phone No.

PUBLIC TESTIMONY TO THE ALASKA LEGISLATURE
ON SENATE JOINT RESOLUTION 20

I wish to respectfully go on record in strong **support of SJR 20**. SJR 20, and its companion House version, are essential Alaska public policy r[illegible]onses **in the Defense of Marriage** for Alaska families.

As a retired Alaska attorney, I offer the following observations regarding the flaws in the ACLU v. State decision:

1. The Court used a reductionist theory and legal fiction to redefine *marriage* into a newly created term "*domestic partnership*". Yet *marriage* has historically had a broader and more complex definition than mere *domestic partnership* both in law and public policy. Most Alaskans also know the difference as a matter of common sense.
2. The Court failed to consider A.S. 18.80.220 (e) [which permits employers to provide greater health and retirement benefits for employees who have spouses and dependent children versus "domestic partners'] and the public policy debate in the late 1990's on that "gay benefits" debate. Then-Governor Knowles and the Alaska Legislature strongly approved that protective section .220(e). While this statute does not trump constitutional arguments it certainly should have been reconciled.
3. Quite unusually, the Court cited a private website as reliable authority. See footnotes 50 and 51 of the ACLU decision. Reliance on an "interested advocacy website" is unprecedented and lacks an unbiased source.

Our Alaska Legislature should permit *the people* of Alaska to vote on this important initiative to assure that *democratic* principles determine public policy. SJR 20 is absolutely essential to protect Alaska families access to health insurance. The ACLU decision threatens the economic viability of health plans by the serious problem of:
A). Adverse selection

B). Unreliable enrollment standards.

Finally, the SJR 20 is vital to provide viable health insurance for *Alaskan children* and to permit parents the option of staying home to raise children. Our Alaska children deserve viable health insurance – and the protection of SJR 20.

Thank you,

Kevin Dougherty

Joe Michel

From: Glen Biegel [gbiegel@ak.net]
Sent: Tuesday, February 28, 2006 8:23 AM
To: Sen. Ralph Seekins
Subject: 022806 Legislative Presentation

Attachments: LegislativePresentation.doc

LegislativePresentation.doc (3...

Attached you will find my legislative presentation. If possible, please distribute to the members of the judiciary committee for the 8:30 am meeting.

Thanks
Glen

Absolute Power:

The Argumentation of the Supreme Court is wrong and sets a precedent for unlimited Judicial Power:

1. A Same Sex Committed Domestic Partnerships (SSCDP) is equivalent to marriage in many critical respects.
2. The marriage amendment prevents SSCDP from becoming a marriage but not from receiving benefits.
3. These couples would marry if allowed and therefore be eligible for additional benefits if not prevented from doing so by the marriage amendment.
4. Since the marriage amendment does not address benefits and these couples could be given benefits legislatively or administratively. It is therefore facially discriminatory to pay SSCDP differently than married couples.

Each step is an improper use of **judicial** authority and lacks any reasonable understanding or recognition of the need for judicial restraint. In brief, the marriage amendment allows our state and city governments to differentiate between married and unmarried people, i.e. to recognize them. If prevents the court from recognizing any other relationship as equivalent to marriage. It prevents the court from ruling that a SSCDP would become married if allowed. This rumination is meaningless due to the constitution. The ruling fails to understand original intent, precedent and ignores legislative intent and enacted legislation to arrive at the ruling they wished.

The Supreme Court Ruling: ACLU vs State of Alaska and Municipality of Anchorage (S-10459), quotes from the text of the ruling:

> **"This case requires us to determine If it is reasonable to pay public employees who are in committed domestic relationships with same-sex partners less in terms of employee benefits than their coworkers who are married." Page 3**
>
> **Many same-sex couples are no doubt just as "truly closely related" and "closely connected" as any married couple, in the sense of providing the same level of love, commitment, and mutual economic and emotional support, as between married couples, and would choose to get married if they were not prohibited by law from doing so. Page 19**

There are no references to 'committed domestic relationships' or 'same-sex couples' in current Alaska Statute. They are constructs exclusively of the Alaska State Courts.

State of Alaska Marriage Amendment states:
Constitution of the State of Alaska, Article 1 Section 25 - Marriage.

> **To be valid or recognized in this State, a marriage may exist only between one man and one woman.**

What is the meaning of 'recognized in this State' other than to prevent the citation of a 'committed domestic relationship with same-sex partners' in the Supreme Court Case.

Let me illustrate the absurdity of this position with the following unconstitutional law that would be necessary to implement the important revelations of the ruling:

The State of Alaska recognizes same sex partners in **committed domestic relationships** as being engaged in **si-marriage**. **Si-married** couples are recognized as equivalent to married couples in every way except that they shall be called **si-married** and not married. All rights, benefits and legal status recognized for married couples shall be recognized for **si-married** couples. All legislation that refers to marriage shall be amended to recognize marriage and **si-marriage**. All legislation that refers to married couples shall be amended to recognize married and **si-married** couples. All references in law to spouses or husband and wife shall be amended to recognize **si-spouses** and **si-partners**.

Obviously, this legislation would be problematic in regards to the Constitution. but would mirror the ruling.

Judy Stewart

From: shelly woz [shelly_woz@yahoo.com]
Sent: Tuesday, February 28, 2006 9:54 AM
To: LIO Anchorage; LIO Juneau
Subject: Email Testimony for SJR 20

I was on hold for the teleconference for a long time and had to get back to work. I just wanted to state my opposition to SJR 20. This resolution would force me to try to explain to the twelve year old and nine year old I'm raising with my partner why their government is trying to legislate against their family. This resolution, if passed, would force me to try to explain irrational hate and fear to the youngest members of my family.

There are many theocratic reasons why people will support this resolution. But, I would like to remind the committee that we live in a democracy not a theocracy, and as you know, a theocracy is government ruled by or subject to religious authority; whereas a democracy is defined by the principles of social equality and respect for the individual within a community.

The timing of this resolution, the timing of the hate speech, legislation and fear mongering regarding homosexual people always tends to gear up when we are running up to elections- whether they be local- state- or federal. I'm making a plea, an honest plea- please stop playing politics with my family. Please stop using my life to divide our communities our state and our nation. And I know that a great deal of supporters of this resolution take issue with being called Nazi's- as anyone would. But, I think it is important to remind the committee that Jews, Catholics, Gypsy's as well as Gays and Lesbians were legislated against and then systemically persecuted. And while I would NOT call anyone on the committee a Nazi; I think it is important to recognize that there are real historical examples of governmental persecution that scare people-that the possibility that it COULD happen is real SIMPLY b/c it has. I would suggest the committee examine why the parallels are being drawn by some.

And, on a personal note, I would like to say hello to Senator Seckins who was on my number one rated morning show in Fairbanks on Wolf 98.1fm when he was running against John Davis. And I was openly gay at that point in my life and I'm fairly certain that the Senator knew that, b/c after all it is Fairbanks.

Thank you for your time,
Michelle R. Wozniak
8405 Jupiter Drive
Anchorage, AK 99507

222 Seward Street, Suite 210
Juneau, Alaska 99801

Telephone (907) 586-2200

DIXIE A. HOOD, M.A.
Marriage, Family & Child Counselor

February 28, 2006

Judiciary Committee
State of Alaska Legislature

Chair and Members,

I am a Licensed Marriage and Family Therapist in private practice in Juneau. I have been a resident of Alaska for more than 30 years.

As a citizen, I am alarmed and offended that our representative democracy at the State level, as at the national level, is being undermined in so many ways through political opportunism.

Proposing an amendment to our state constitution which would further deprive many Alaskans of their civil rights is unjust and totally contrary to the ideals of our democracy.

For hundreds of years, women and Blacks in the United States were denied equality by laws determined by the majority.

I'm old enough to remember World War II and the Nazis condemnation of Jews, gypsies and homosexuals.

I participated in the civil rights movement of the 1960's. I have continued as an advocate for civil rights on behalf of women, the elderly, gays and persons with disabilities.

Putting civil rights up for a popular vote is shameful. There have been scientifically valid surveys of public opinion measuring support for the Bill of Rights. When these historic statements were not identified as amendments to the U.S. Constitution, the majority of American subjects sampled were opposed to them!

Discrimination based on self-interest, ignorance or righteousness is all too common in this day and age. It has no place in Alaska.

I urge you all to stand up for our highest aspirations as a democratic society. Stop this proposal to deny rights and benefits based on marital status.

Yours truly,
Dixie A. Hood