- How does the criminal activity of compulsive or pathological gamblers compare with that of less serious gamblers or nongamblers?
- What proportion of crimes committed by compulsive or pathological gamblers is linked to their gambling activities?
- What proportion of compulsive or pathological gamblers uses alcohol, illegal drugs, or other substances to excess? How does that affect the nature and extent of their gambling, as well as their criminal activity?

This Research for Practice is based on a study that addressed those questions. Researchers interviewed arrestees in jail in two U.S. cities—Las Vegas, Nevada, and Des Moines, Iowa. They initially contacted 3,332 arrestees. Completed interviews and urine samples were provided by 2,307 (69 percent) of those contacted. Ninety percent of those who were interviewed and provided urine samples also answered questions that probed their gambling behavior and its relationship to their crimes. The interviews for this study were conducted between fall 1999 and winter 2001.

Las Vegas was chosen because it probably has more residents and visitors who gamble than any other major metropolitan area in the United States. If a relationship exists between gambling and crime and/or drug and alcohol use, it should be clearly recognizable in Las Vegas. Des Moines, on the other hand, represents a more typical midsize U.S. city. Both Las Vegas and Des Moines participate in the Arrestee Drug Abuse Monitoring (ADAM) Program, which was operating in 35 U.S. cities when the research was conducted. ADAM collects data that allow researchers to develop national and local profiles of drug use among people who have been arrested and jailed for whatever reason.

Classifying gambling types

For the purpose of this study, the arrestees who were interviewed were divided into five types based on their answers to a series of questions designed to determine the nature and extent of

their gambling: nongamblers and low-risk, at-risk, problem, and compulsive or pathological gamblers. Gamblers are classified by types based on a set of 10 criteria developed by the American Psychiatric Association (APA) and published in APA's *Diagnostic and Statistical Manual (DSM-IV)*. These criteria are preoccupation (e.g., reliving past gambling experiences or planning future ventures), tolerance (needing to wager more money to generate the same "buzz"), lying, withdrawal (restless or irritable when attempting to cut down or stop gambling), escape, chasing (returning to get even for a previous day's losses), loss of control, illegal acts, risked relationships, and bailout (relying on others to provide money to relieve a desperate financial situation caused by gambling). Gamblers must meet at least five of these criteria to be classified as pathological.

The overwhelming majority of Americans fall into the nongambler or low-risk groups. Most either do not gamble at all or do not gamble seriously enough to have social, legal, or economic problems as a result of their gambling. In general, low-risk gamblers are those who meet few if any of APA's criteria. They tend to gamble for social or recreational purposes, usually betting such small amounts that they rarely suffer significant losses. Thus, they have little or no reason to turn to crime to finance their gambling.

Defining problem gambling. Compulsive or pathological gamblers, the subject of this study, are those who sooner or later suffer heavy losses (often $100 or more at a

How Big Is Gambling?

There is no doubt about gambling's reach today. What once appeared to be largely confined to casinos, the quiet off-track bookie, bingo halls, and the occasional Friday night poker game has become a national pastime. By 1993, more than half of all Americans reported having gambled in a casino at least once. By 1996, Americans were wagering $47.6 billion a year—more money than movies, sporting events, theme parks, cruise ships, and the recording business generated combined. By 1997, nearly 500 gambling sites were on the Internet.

The number of States with legalized gambling has mushroomed. In 1978, only two States—Nevada and New Jersey—had casinos. That number grew to 27 by 1998. Twenty-three States now have Indian-owned casinos on tribal reservations within their boundaries. Seven States now permit betting on riverboat casinos. Additionally, State-run lotteries operate in 37 States and the District of Columbia. In fact, only Hawaii and Utah have no form of legalized gambling. As States and localities seek solutions to burgeoning budget deficits, legalized gambling may become even more pervasive.

time), borrow or steal money or write bad checks to pay gambling debts, avoid or cannot pay their nongambling bills, and lie to their families, friends, and therapists about the extent of their gambling. Not only do they lie, but compulsive or pathological gamblers often rely on others to bail them out of their gambling debts. They have risked and sometimes lost friendships, marriages, jobs, and careers because of gambling. They may have tried to curtail or stop their gambling, but failed. Although the numbers have differed over the years as research methodologies and definitions have changed, the most recent studies show that about 2.5 million Americans are pathological gamblers. Another 3 million Americans are problem gamblers. The lifetime prevalence rate for pathological and problem gambling is estimated as 1.2 percent and 1.5 percent, respectively.

Challenging stereotypes. Compulsive gamblers are often perceived by the public as largely middle-class men whose gambling habits lead them to steal from their families, friends, and/or employers to finance their activities. They are seen as unfortunate individuals who commit such white-collar crimes as larceny, theft, embezzlement, and fraud when their gambling losses become too great to pay through their regular sources of income. Although many compulsive or pathological gamblers fit this image, surveys of the general population paint a somewhat different picture. In fact, general surveys show that pathological gamblers are most likely to be nonwhite males, who are young, less well educated, and unmarried.

Again, although many arrestees who are compulsive or pathological gamblers fit the two images described above, the study found some differences. Unlike the general population, women arrestees are as likely to have gambling problems as men. Marital status and educational attainment also seem to make little or no difference. Arrestees start gambling at a later age than pathological gamblers in the general population, especially men. Male pathological gamblers typically begin gambling as teenagers and then slowly, often over a decade or more, develop a serious gambling habit. Women who become

compulsive or pathological gamblers generally begin gambling later than men, usually in their 20s. Once they become serious gamblers, however, women develop a dependency quickly, typically within 5 years. Both men and women arrestees who are compulsive or pathological gamblers tend to be from lower social and economic classes than those identified in general surveys, more often exhibit sociopathic traits, and frequently start as criminals and only later become gamblers.

Odds are there's a link

As noted earlier, compulsive or pathological gamblers represent only a small percentage of the general population. Yet those who meet APA's definition for pathological gambling accounted for slightly more than 1 in 10 arrestees surveyed in Las Vegas and about 1 in 25 in Des Moines. Together, 14.5 percent of arrestees in Las Vegas and 9.2 percent of those in Des Moines were either problem or pathological gamblers—three to five times the percentage in the general population.

Perhaps more telling, more than one-third of the compulsive or pathological gamblers arrested (34.6 percent in Las Vegas and 37.5 percent in Des Moines) had been arrested on at least one felony count. Surprisingly, though, pathological gamblers were no more likely to be arrested for property or other white-collar crimes (larceny, theft, embezzlement, and fraud) than nongamblers and low-risk and at-risk gamblers. Nor were they more likely to be arrested on drug charges, including selling illegal drugs. Rather, they were most likely to be arrested for such offenses as probation or parole violations, liquor law violations, trespassing, and other public order offenses.

Link to robbery, assault. Still, more than 30 percent of pathological gamblers who had been arrested in Las Vegas and Des Moines reported having committed a robbery within the past year, nearly double the percentage for low risk gamblers. Nearly one-third admitted that they had committed the robbery to pay for gambling or to pay gambling debts. In addition, about 13 percent said they had assaulted someone

to get money; one in four assaults reported by pathological gamblers was directly or indirectly related to gambling. By comparison, low-risk, at-risk, or problem gamblers reported committing gambling-related robberies infrequently.

Drug dealing. Although they were no more likely to have been arrested on drug charges, compulsive or pathological gamblers were significantly more likely to have sold drugs than arrestees who fit the other gambling types. More than one-third of pathological gamblers said they had sold drugs, compared to 19.2 percent of problem gamblers, 20.2 percent of at-risk gamblers, and 16.1 percent of low-risk gamblers. The differences in those numbers were even greater among gamblers who reported having sold drugs specifically to fund their gambling or pay gambling debts. One in five pathological gamblers who had been arrested admitted having sold drugs to finance their gambling, compared to 4 percent among problem gamblers and less than 2 percent among at-risk gamblers.

Using speed. Not surprisingly, a significant proportion of compulsive or pathological gamblers tested positive for one or more illegal drugs. Arrestees' urine samples were screened for hallucinogens such as marijuana, opiates such as heroin, cocaine, and methamphetamine ("speed"). Overall, 60 percent of arrestees interviewed in Las Vegas and 56 percent of those in Des Moines had at least one illegal drug in their urine samples. But pathological gamblers were no likelier to test positive for drugs than were other gambler types. Nor were there any significant differences in which drugs were found, with one exception. Pathological gamblers were more likely to test positive for methamphetamine, a drug taken as an "upper" to keep users alert and awake during hours- or even days-long gambling binges. Beyond drugs, nearly two-thirds of the pathological gamblers reported that they drank alcohol to the point of dependence. In fact, only 3.3 percent of all arrestees interviewed for this study who were pathological gamblers reported no drug or alcohol problems.

Again, not surprisingly, the study found a relationship between pathological gambling and crime and/or drug

and alcohol use. More than 43 percent of those interviewed who acknowledged pathological gambling and substance use also said they had committed an assault during the previous year. Nearly 40 percent had committed more than one theft in the past year, four times the number of arrestees without either a gambling or a substance use problem. Approximately 38 percent of arrestees with both gambling and substance use problems reported having sold drugs, nearly eight times the number of those with no gambling or substance use problem.

Pathological gamblers reported that, on average, they committed their first crime around age 21, developed an alcohol problem by about 23 or 24, and began to have gambling problems in their mid- to late 20s. Gambling began after the onset of criminal and substance problems, not before. Nonpathological gamblers who said they had similar substance use problems and criminal activity reported a similar average age of onset for each of those problems. Men who were pathological gamblers were more likely to have committed a serious crime at an earlier age than women who were pathological gamblers. Also, only 13 percent of pathological gamblers who admitted having a gambling problem said they sought treatment. And only 10 percent said they attended Gamblers Anonymous or similar meetings.

Policy implications

A number of conclusions and policy recommendations can be drawn from the study findings. Arrestees who report that they are or can be defined by their responses to interviews or questionnaires as compulsive or pathological gamblers are drawn disproportionately from the social and economic fringes of society. As legalized gambling spreads to States and localities that do not now permit gambling or have it only on a small scale, these jurisdictions must prepare to deal with the social ills engendered by problem gambling.

Criminals and those who use alcohol and illegal drugs to excess appear to be at greater risk for becoming compulsive or pathological gamblers. Few are likely to receive or seek treatment for

their addictions. Gambling, especially when accompanied by substance use, is a prime motivation for many but not all of their crimes.

States and localities may identify individuals with a gambling problem by using existing psychological tests (or abbreviated versions of such tests suitable to intake interviews) to screen arrestees. Today, however, few States or localities have screening programs in detention centers, jails, or prisons. Arrestees are often booked and released shortly thereafter. If at least some arrestees with a real or potential gambling problem can be identified, they can be offered treatment. Early treatment might help reduce the number who become repeat offenders.

States and localities also may want to develop treatment programs in detention centers, jails, and/or prisons. Such programs might include group therapy sessions similar to those offered by Gamblers Anonymous. Such sessions could be incorporated into existing programs for illegal drug or alcohol use. To reduce the chances of relapses once prisoners are released, States and localities may develop referral systems that offer former arrestees and inmates the names of agencies and programs that offer continued treatment and support.

Finally, being behind bars is likely to worsen the gambling habits of many compulsive or pathological gamblers. Although it is officially banned, gambling is difficult to control in prisons and jails. It is a diversion from the monotony of jail. As a result, jailed arrestees and prison inmates may accrue significant gambling debts behind bars that can only be paid off by committing further crimes after their release. Authorities could provide increased attention to gambling behaviors in detention centers, jails, and prisons.

The National Institute of Justice is the research, development, and evaluation agency of the U S Department of Justice NIJ provides objective, independent, evidence-based knowledge and tools to enhance the administration of justice and public safety

NIJ is a component of the Office of Justice Programs, which also includes the Bureau of Justice Assistance, the Bureau of Justice Statistics, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime

HJR

7

Alaska State Legislature

Interim:
600 E. Railroad Ave
Wasilla, AK 99654

Phone: (907) 376-3725
Fax: (907) 376-4768

Session:
Alaska State Capitol, Rm 108
Juneau, AK 99801-1182

Phone: (907) 465-3743
Fax: (907) 465-2381
Toll Free: (800) 565-3743
Rep_Carl_Gatto@legis.state.ak.us

Representative Carl Gatto

Co-Chair, House Resources Committee
District 13 - Palmer

SPONSOR STATEMENT
HJR 7

"Proposing amendments to the constitution of the State of Alaska to avoid the use of personal pronouns and similar references that denote masculine or feminine gender in that document."

HJR 7 removes all masculine or feminine terms from the Constitution of the State of Alaska. This resolution deletes the terms "his," "him," and "himself" and replaces them with terms as "oneself," "Governor," "Governor-elect," "Lieutenant Governor," "Legislator," "members," "executive," "justice or judge," "voter," "person's," "auditor," and "accused." Other changes that occur make the sentences grammatically correct.

Some of our oldest and youngest states in the union such as New York and Hawaii have amended their constitutions to reflect gender neutrality. The framers of our constitution went to great lengths in the construction of the Constitution to recognize gender equality and it is in that spirit and as a continuation of their leadership that we seek to modify our constitution in recognition of the progress in our society and culture.

This resolution is before us now because it is time for us to recognize a significant moment in Alaska history, a time when we elected our first female Governor. The administration fully supports this effort.

I ask for your support.

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: HJR007-OOG-DOE-4-02-07
Bill Version: HJR 7
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: OOG

Title: Constitutional Amendment to avoid the use of personal pronouns and similar references...
RDU: Elections
Component: Elections

Sponsor: Representative Gatto
Requester: House State Affairs Committee
Component No.: 21

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual		1.5				
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	1.5	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	0.0	1.5	0.0	0.0	0.0	0.0

Estimate of any current year (FY2007) cost: 0 0

Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

If this amendment appears on the 2008 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 the printing of an 8-1/2 by 18-inch ballot, the cost will increase to $22.0.

Prepared by: Gail Fenumiai, Asst. Admin. Director — Phone 465-3885
Division: Division of Administrative Services — Date/Time 4/2/2007, 8:57am
Approved by: Whitney Brewster, Director — Date 4/2/2007
Agency: Office of the Lt. Governor, Division of Elections

(Revised 9/18/2006 OMB)

referral

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 4, 2007

SUBJECT: Does HJR 7, proposing amendments to the Constitution of the State of Alaska to avoid the use of personal pronouns and similar references that denote masculine or feminine gender in that document, constitute a "revision" of the state constitution? (Work Order No. 25-LS0429\A)

TO: Representative John Coghill Jr.

FROM: Jack Chenoweth
Assistant Revisor

The inquiry from Carol Beecher of your staff to Tam Cook asking for an answer to the above-captioned question has been referred to me for preparation of a response.

Any proposal for a constitutional amendment raises a question as to whether or not the proposed amendment would survive scrutiny under *Bess v. Ulmer*, 985 P.2d 979 (Alaska 1999). The decision in *Bess* established that the legislature's power to propose a change in the text of the state constitution is limited to amendments that are "few, simple, independent, and of comparatively small importance."[1] The legislature lacks authority, the court concluded, to propose changes to the document's "substance and integrity." Changes of that magnitude would have to be prepared and offered by a constitutional convention as revisions. The standard that the court fashioned relates that:

> . . . an enactment which is so extensive in its provisions as to change directly the "substantial entirety" of the constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof [while] even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also.

---

[1] The court prefaced its analysis by noting that, in its view, the framers' distinction between an amendment and a revision was intended to be substantive, and concluded that:

> a revision is a change which alters the substance and integrity of our Constitution in a manner measured both qualitatively and quantitatively.

Bess, 985 P.2d at 982.

> The process of amendment, on the other hand, is proper for those changes which are "few, simple, independent, and of comparatively small importance." The core determination is always the same: whether the changes are so significant as to create a need to consider the constitution as an organic whole.

Bess, 985 P.2d at 987 (notes omitted).[2]

The *Bess* standard spoke of evaluating an amendment's qualitative and quantitative effects.

Quantitatively, the material in the proposed amendment arguably fails at least part of the standard. The proposed changes are, admittedly, not clearly "few," nor, it may be contended, are they "independent." On the other hand, the material proposes changes that are "simple" -- the amendment is confined to a series of technical changes affecting singular masculine personal pronouns and a handful of gender-related terms. At least when compared to the much more significant questions of assigning powers among the branches of government, limiting the exercise of institutional authority, or providing protection of individual rights, for example, HJR 7 does not propose to make fundamental changes in the scheme or plan of operation of the state government. Indeed, in that context, the modifications set out are of relative unimportance.

Qualitatively, it is my observation that nothing in the accompanying document would "substantially alter the substance and integrity of the state Constitution as a document of independent force and effect." *Bess*, 985 P.2d at 987, quoting *Raven v. Deukmejian*, 801 P.2d 1077, 1087 (Cal. 1990) (note omitted). The material in the resolution is arguably wholly technical and not intended to make a substantive change in a matter of constitutional law.

On balance, I am satisfied that, if challenged, the court could conclude that the absence of qualitative change within the proposed amendments as set out and, despite the number of sections affected, the relatively insignificant incidental effect on the integrity of the document as a whole would allow the material to be treated through the amendment process rather than as a revision.

JBC:lmb
07-097.lmb

---

[2] The court's preliminary opinion in the *Bess* matter looked at the qualitative standard from a different perspective, indicating that changes that are "few and simple and independent" are permissible amendments while "sweeping change" requires revision. In that preliminary opinion, the court identified four factors that suggest that a particular proposal is a valid amendment: it (1) "is simple to express and understand"; (2) "is complete within itself"; (3) "relates to only one subject"; and (4) "does not substantially affect numerous other sections of the constitution . . . ." Preliminary Opinion and Order, at paragraphs 10 and 12. The four factors identified by the court in the preliminary opinion amount to a first effort to frame a quantitative analysis.

TOP STORY

THURSDAY, APRIL 03, 2003

States Balance He's And She's

By Kathleen Murphy, Staff Writer

Michigan's governor is a woman but the state constitution refers to Democrat Jennifer Granholm as "he."

Michigan Rep. Lisa Wojno, D-Warren, wants to change the constitution to gender-neutral language, following the lead of Rhode Island, Maine, Vermont, New York, California, Florida and Hawaii. New Hampshire lawmakers are also considering the change.

Women won the right to vote through the 19th Amendment to the U.S. Constitution in 1920, and many had secured full voting rights by constitutional action in states such as Colorado much earlier. But many state constitutions never envisioned that women would hold political office.

Making these constitutions more inclusive has been unwelcome in places where it's seen as political correctness run amok. Nebraska voters rejected adding gender-neutral language to the state constitution in 2000. Minnesota lawmakers considered the change in 2001 but didn't adopt it.

In New Hampshire, gender-neutral reform failed in 1998 and has met resistance this year. Critics said changing the constitution is unnecessary because legally it's already interpreted to include men and women. They said the constitution is a sacred historical document that shouldn't be reworded.

Theresa de Langis, executive director of the New Hampshire Commission On The Status Of Women, said women's role in state government is made invisible by the constitution's non-inclusive language.

"State constitutions are living historical documents that need to reflect the day and time in which they are protecting their citizens. Sexism in any form, just like racism and slavery, is wrong and should be struck from our governing documents," de Langis said.

New York voters approved gender-neutral language in 2001. In 170 places, "she" was added where there had only been a "he." Terms such as fireman and policeman were changed to firefighter and police officer. "Mankind" changed to "humankind."

New York's ballot measure overcame opposition from the Conservative Party which urged voters to reject it as frivolous "feel-good legislation" that accomplishes nothing.

New York Assemblywoman Sandy Galef, D-Ossining, a driving force behind the changes, said, "My response to people who said that was, what would happen, as a man, if the constitution was written all about women? Wouldn't you want it changed to reflect that there are men involved too in the state? Then they'd come along on board."

In Michigan, Rep. Wojno's gender-neutral resolution could be on the statewide ballot this year if two-thirds of the House and Senate approve it.

But Michigan's Gov. Granholm is more concerned with the state's bottom line than gender-neutral words.

Granholm press secretary Liz Boyd said, "We don't have a position on that as long as a change in the constitution doesn't cost us any money."

Contact Kathleen Murphy at kmurphy@stateline.org

ISSUES AND TOPICS

Issues: Politics

COMMENTS

There are no comments yet, would you like to add one?

April 2, 2007 E-MAIL ARTICLE PRINT ARTICLE

A document for all

Published April 2, 2007

OK, now here's a proposed amendment to the Alaska Constitution th . really shouldn't engender much controversy.

It's about gender.

The Alaska Constitution has many references to "him," "he," "himself" and "his."

"Her," "she," "herself" and "hers" don't exist in the Constitution.

It's time for some gender neutrality in the state's guiding document.

We can see the eyes rolling now. Surely there are more important issues for politicians to take up, you say. Yes, there are. But bringing gender neutrality to the Constitution, while not an issue simmering in a cauldron of female discontent, is one of those housekeeping matters that must be undertaken.

That's what House Joint Resolution 7 does. The resolution, sponsored by a Republican and a Democrat, is scheduled for its first hearing Tuesday morning.

The resolution has been referred to three committees, usually a sign that it's not high on the leadership's list of things to do. That's unfortunate. The election of Sarah Palin as Alaska's first female governor means that correcting the gender slant needs to take on a little more urgency.

Consider that a literal reading of the Constitution might suggest that Gov. Palin isn't qualified to be governor by virtue of being a woman.

Article III, Sec. 2 of the Constitution outlines the qualifications a person must have in order to become governor:

"The governor shall be at least thirty years of age and a qualified voter of the State. He shall have been a resident of Alaska at least seven years immediately preceding his filing for office, and he shall have been a citizen of the United States for at least seven years."

Hmm. Doesn't seem to be too much allowance for a woman governor in there.

The Constitution is full of outdated male references that would be rectified by legislative passage of House Joint Resolution 7 and a subsequent vote of approval by the public. Let's bring the Constitution into the modern day.

Associated Press national headlines
Deadly tsunami strikes western Solomons
Iranian radio reports 'positive changes'
Court denies appeal from Gitmo detainees
Truck bomb near Iraqi school kills 13
GOP '08 fundraising totals mark new high
Report: Airlines suffer more delays
Tribune accepts $8.2B offer from Zell
EMI, Apple to sell DRM-free songs online
Doohan's ashes to be blasted into space
It's No. 1 vs. No. 1 for national title

Associated Press Alaska headlines
Ethics bill ready for house debate
Cochran, Stiegler win U.S. slalom titles
Sunlight is destroying Alaska Native art...
Fort Yukon works to become municipal uti...
Groups lobby against oil and gas leasing...
Three Anchorage residents plead guilty t...
Man injured when fuel tank explodes
Prince William Sound spill barges lackin...
Iditarod seeks independent investigation...
Quinhagak fire victim identified

Articles in this category
- A document for all
- Letters to the Editor

HJR

9

HOUSE JUDICIARY COMMITTEE

STATE CAPITOL, ROOM 120
(907) 465-4990

COMMITTEE MEMBERS

Rep. Jay Ramras
Chairman
Room, 118
(907) 465-3004

Rep. Nancy Dahlstrom
Vice-Chairman
Room 409
(907) 465-3783

Rep. John Coghill
Room 214
(907) 465-3719

Rep. Bob Lynn
Room 104
(907) 465-4931

Rep. Ralph Samuels
Room 204
(907) 465-2095

Rep. Max Gruenberg
Room 110
(907) 465-4940

Rep. Lindsey Holmes
Room 405
(907) 465-4919

MEMORANDUM

Date: April 18, 2007

To: Representative Kevin Meyer
Co-Chairman House Finance Committee

From: Representative Jay Ramras
Chairman House Judiciary Committee

Re: Referral File HJR9

Attached please find the referral file for HJR9, which is composed of the following documents:

- CSHJR9(JUD) 25-LS0553\C
- Sponsor Statement
- Amendment #1 adopted by the House Judiciary Committee
- House Judiciary Committee Report
- Fiscal Note – GOV
- HJR9 (25-LS0553\A)
- Ballot Measure 2
- Legal Opinion, Kevin G. Clarkson, dated April 17, 2007
- Rep. Gruenberg memo to Leg. legal re: Requesting an opinion re: revision
- Jean Mischel legal opinion, dated April 2, 2007
- *ACLU v. SOA*, Supreme Court Opinion No. S-10459
- *Bess v. Ulmer*, 985 P.2d 979 (Alaska 1999)
- *Romer v. Evans, et al.*, 517 U.S. 620, 116 S.Ct. 1620
- Backup
- Letters of Support
- Letters of Opposition

ALASKA STATE HOUSE OF REPRESENTATIVES

Contact:
Interim Address:
3340 Badger Road
North Pole, AK 99705
(907)-488-5725
Fax# (907)-488-4271

Session

(907)-465-3719
FAX# (907)-465-3258
State Capitol
Room 204

REPRESENTATIVE JOHN COGHILL

HJR 9 Constitutional Amendment Relating to Marriage

SPONSOR STATEMENT

HJR 9 is offered in response to the Supreme Court ruling of October 28, 2005. The Court ruled that same sex couples are similarly situated making them equal to married couples with regard to receiving health benefits from public employment. The conclusion of the Court is that spousal limitations are unconstitutional.

The people of Alaska in a constitutional amendment vote in November 1998 by a 68% margin thought the issue of marriage and its benefits for same-sex couples was settled. The plaintiffs in Brause v. Bureau of Vital Statistics treated marital status and marital benefits as inseparable, thereby recognizing that marriage is a special relationship is society and law.

AS 25.05.013(b) passed by the Alaska Legislature in 1996 prohibits any public employer from extending marriage benefits to same-sex partners so the constitutional language in HJR 9 is consistent with the will of the legislature, which is consistent with the 1998 vote of the people of Alaska.

AS 18.80.220(c) is a law ignored by the court. It is under "unlawful Employment Practices" which grants an exception to employers who "provide greater health and retirement benefits to employees who have a spouse or dependent children" enacted into law in 1996. My intent is to show the public good of a policy preserving marriage benefits as a societal value for the health of families in Alaska.

As a Representative Democracy it falls upon us to refer this to those who answer to the principle "All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole." Alaska Constitution, Article 1, Sec.2.

Amending our constitution is a weighty matter and should not be done lightly in my view. My interest is asking the people of Alaska if they agree with their Supreme Court, and if not, should we amend the constitution to better reflect the people's view. I appeal to you with Article 1, Section 2. This is our only recourse in answering this huge sociological question for those of us who disagree with the Court's conclusion.

The Constitution of the State of Alaska clearly states that "all political power is inherent in the people." In October of last year, The Alaska Supreme Court ruled in favor of granting employee benefits to same-sex couples, in effect undermining this Constitutional provision and establishing its own will as having precedent over the will of the people of Alaska.

By deliberately ignoring the clear message sent by Alaskan voters in 1998 when they overwhelming amended the Constitution to read that "a marriage may only exist between a man and a woman," the Supreme Court overstepped its bounds. The key to correcting this misdeed and reestablishing the constitutionally guaranteed series of checks-and-balances is the April 3rd Advisory Vote on Same Sex Benefits.

In a few weeks, the people of Alaska need to once again remind the Legislature that we will not tolerate judges legislating from the bench. A "Yes" vote on the April ballot will give legislators the extra push needed in order to again amend the constitution.

Some objections to the vote are based on three different ideas:

1. The advisory vote is estimated to cost one million dollars; the legislature can find a better purpose for the money.

The Supreme Court has ordered Alaskans to pay for a benefit that the majority of people disagree with philosophically. Once the state requires same-sex benefits for partners of state employees, it is only a few more legal steps until private businesses are forced to provide the same benefits lest they "discriminate". Such a broad-reaching policy decision deserves to be openly debated in a broad public venue – that debate costs money. I believe there is no better way for Alaska's money to be spent than by furthering the will of the people.

2. Objection to same-sex benefits is a result of religious bigotry.

The issue at hand is not the morality of homosexuality, but rather the court's deliberate misinterpretation of the will of the people of Alaska. The people voted that same sex unions are not the same as a marriage. Married couples commit to each other for life, and with that level of commitment, the state recognizes the married couple's right to benefits for spouses. The Court set no mandates for proof of commitment other than a state employee's designation on a form.

3. A special election will weary already skeptical voters.

Weariness is not an excuse for apathy. I am weary after every session, but the people elect me to support and defend the Constitution, and fighting for this advisory vote does exactly that. I am looking to the people of Alaska to once again cast a vote in defense of marriage and reclaim the rights usurped by the Supreme Court.

If Alaskans allow this decision to pass without objection, we will be setting a precedent that allows the Supreme Court to disregard the will of the people of Alaska.

STATUTE CITES FROM SPONSOR STATEMENT FOR HJR 9

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. ⏭18.80.220⏮. Unlawful employment practices; exception.

(⏭c⏮) Notwithstanding the prohibition against employment discrimination on the basis of marital status or parenthood under (a) of this section,

(1) an employer may, without violating this chapter, provide greater health and retirement benefits to employees who have a spouse or dependent children than are provided to other employees;

(2) a labor organization may, without violating this chapter, negotiate greater health and retirement benefits for employees of an employer who have a spouse or dependent children than are provided to other employees of the employer.

Adopt
offered by
Rep Coghill

Amendment # 1

Page 1, lines 8-9:

Delete:

"that shall be valid or recognized in this state and"

[redacted] HOUSE COMMITTEE REPO[redacted]

(7)

Date Referred to Committee: March 27, 2007 **FURTHER REFERRALS: Finance**

Date of Committee Action: April 17, 2007

The JUDICIARY Committee considered: **HJR 9**

HOUSE JOINT RESOLUTION NO. 9 **CONST. AM: BENEFITS & MARRIAGE**

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

Recommends it be replaced with [ ] HCS *or* [✓] CS *for* ~~HB~~ HJR9 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[✓] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
ADM		✓		

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	HOLMES		X		
	[illegible]		–		
	Coghill	✓			
	[illegible]	X			
	SAMUELS			X	
Chair:				X	
Chair:					

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HJR 9
(H) Publish Date: 3/27/07

Revision Date/Time (Note if correction):
Dept. Affected: OOG
Title: Constitutional Amendment relating to marriage
RDU: Elections
Component: Elections
Sponsor: Representatives Coghill, Harris, Kohring, et al
Requester: House State Affairs Committee
Component No. 21

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual		1.5				
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	1.5	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	0.0	1.5	0.0	0.0	0.0	0.0

Estimate of any current year (FY2007) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

If this amendment appears on the 2008 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 questions require the printing of an 8-1/2 by 18-inch ballot the cost will increase to $22.0.

Prepared by: Linda Perez, Administrative Director
Phone 465-3885
Division: Division of Administrative Services
Date/Time 3/22/07 4:25 PM
Approved by: Whitney Brewster, Director
Date 3/22/2007
Agency: Office of the Lt. Governor, Division of Elections

(Revised 9/18/2006 OMB)

Ballot Measure 2
Constitutional Amendment Limiting Marriage

BALLOT LANGUAGE

This measure would amend the Declaration of Rights section of the Alaska Constitution to limit marriage. The amendment would say that to be valid, a marriage may exist only between one man and one woman.

SHOULD THIS AMENDMENT BE ADOPTED?
Yes [ ]
No [ ]

Votes cast by members of the Twentieth Alaska Legislature on final passage:

House: 28 yeas, 12 nays, all members present
Senate: 14 yeas, 6 nays, all members present

LEGISLATIVE AFFAIRS AGENCY SUMMARY

This measure would add a new section about marriage to the state constitution. To be valid or recognized by the state, a marriage would have to be between one man and one woman.

FULL TEXT OF PROPOSED CONSTITUTIONAL AMENDMENT

[HOUSE CS FOR CS FOR SENATE JOINT RESOLUTION NO. 42 (RLS)]

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

> **Section 25. Marriage.** To be valid or recognized in this State, a marriage may exist only between one man and one woman.

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

STATEMENT IN SUPPORT

Do you believe that marriage requires both a man and a woman? Is this a reasonable question that you should be

allowed to decide? If so, vote "YES" on the Marriage Amendment.

llot Measure No. 2 reaffirms and protects existing Alaska law that states that marriage is a union of "one man and one woman." This is also the law in every state in the U.S. and in all other countries.

More than two-thirds of Alaskans agree with this definition of marriage. So do most of your elected representatives. An overwhelming majority of the U.S. Congress, including all three members of Alaska's delegation, has voted to preserve marriage as a union of one man and one woman.

But a small group of lawyers and liberal activists wants to change all that. In 1995, two Anchorage men who describe themselves as homosexuals sued the State of Alaska because they were not granted a marriage license. Last February, Anchorage Superior Court Judge Peter Michalski issued a preliminary ruling in their case. Judge Michalski ruled that Alaska's "one man, one woman" marriage law may be unconstitutional because it supposedly violates the "right to privacy." No judge in America has ever before issued such a bizarre ruling.

The state Attorney General then asked the Alaska Supreme Court to reconsider Judge Michalski's ruling, and they refused to do so. So here we are. The Legislature had no choice but to place this subject before you in the form of a Marriage Amendment.

Just remember: the people of Alaska did not pick this fight. Ballot Measure No. 2 does not "target" anybody or "deny" anybody their rights. You'll hear that, but don't believe it. All Alaskans are equal before the law. But that's not what this debate is about. This debate is about who should define marriage: the people, or a handful of non-elected judges.

The activists who want to change the meaning of marriage certainly have a right to make their case. They made it before the Legislature. They lost. But instead of waiting to fight another day, they filed two unsuccessful lawsuits ing to stop this amendment from even appearing on the ballot. They don't trust the voters of Alaska.

Most Alaskans believe that marriage is a natural institution that must be preserved. Marriage is recognized by Alaska civil law, but it was not created or "invented" by Alaska law. And it shouldn't be arbitrarily redefined by non-elected judges.

We urge you to vote "YES" on Ballot Measure No. 2 and protect the institution of marriage in our society.

Senator Loren Leman
Alaska State Legislature
(907) 258-8189

STATEMENT IN OPPOSITION

Three good reasons exist for Alaskans to VOTE NO on this proposed Constitutional amendment.

It would amend Alaska's Declaration of Rights and begin to tear away at citizens' rights, making exception to the liberties, including the right of privacy, protected by our Alaska Constitution.

It would deny some groups of Alaskan citizens rights enjoyed by other citizens.

would undercut a recent Superior Court finding which maintains the basic privacy rights of Alaska citizens.

1. We Should Not Tamper With The Alaska Constitution, Article I, Declaration Of Rights, By Proposing To Limit

Individual Liberties And Rights. Alaska's Constitution is one of the newest state constitutions and is considered a model document throughout the nation. The League of Women Voters of Alaska is extremely concerned about ballot measures, such as this one, which propose amendments to Alaska's Constitution that limit citizens' individual liberties and right to privacy.

Protect the minority from the tyranny of the majority. This is one of the most profound reasons why constitutions exist.

Ballot Measure 2 would, for the first time, write discrimination into our state Constitution. Voting NO on this measure protects the integrity of our Declaration of Rights in Alaska's Constitution against discriminatory amendments such as this. There is nothing in the Constitution that requires the State to recognize marriage between individuals of the same sex. The Constitution, as it stands now, treats all persons equally.

2. We Must Protect The Rights Of All Alaska's Citizens. The League of Women Voters of Alaska believes this proposed Constitutional amendment is in conflict with ARTICLE I, Sections 1, 2 and 22 of the Constitution as currently written. The Alaska Constitution, ARTICLE I, Declaration of Rights, provides:

Section 1. Inherent Rights. (reads in part) This constitution is dedicated to the principles that . . . all persons are entitled to equal rights, opportunities, and protection under the law . . .

Section 3. Civil Rights. No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin.

Section 22. Right to Privacy. The right of the people to privacy is recognized and shall not be infringed.

This ballot measure would weaken or abridge these critical sections of the Alaska Constitution. A NO vote would ensure that our liberties and right to privacy are protected.

3. The Checks And Balances Of Our Three-Part System Of Government (Legislative, Executive, Judicial) Must Be Preserved. A recent attempt to restrict marriage to "one man and one woman" has been found unconstitutional by a Superior Court ruling under Alaska's right to privacy law. The judicial process should be respected and the balance of powers should be maintained.

Vote No On Ballot Measure No. 2. The League of Women Voters promotes an open governmental system that protects individual liberties and right to privacy as established by Alaska's Constitution. Join us in protecting these rights for ALL citizens by voting NO on Ballot Measure No. 2.

League of Women Voters of Alaska
Wilda Hudson, President

Alaska Division of Elections Home Page

1998 Official Election Pamphlet Introduction Page

BRENA, BELL & CLARKSON, P.C.

ROBIN O. BRENA, OWNER
JESSE C. BELL, OF COUNSEL
KEVIN G. CLARKSON, OF COUNSEL
DAVID W. WENGEL, OF COUNSEL
ANTHONY S. GUBERNARO, OF COUNSEL
PAULA T. VRANA, OF COUNSEL

ATTORNEYS AT LAW

310 K STREET, SUITE 601
ANCHORAGE, AK 99501
TELEPHONE (907) 258-2000
FACSIMILE (907) 258-2001
WEB SITE BRENALAW.COM
EMAIL: *@BRENALAW.COM

MEMORANDUM

TO: Representative John Coghill

FROM: Kevin G. Clarkson

DATE: April 17, 2007

RE: HJR 9

ISSUE

You have asked that I provide an expert legal opinion regarding the constitutionality of HJR 9 under both the Alaska and United States Constitutions. HJR 9 proposes an Amendment to Art. I, Sec. 25 of the Alaska Constitution to add a single second sentence as follows:

> **Section 25. Marriage and related limitations.** To be valid or recognized in this State, a marriage may exist only between one man and one woman. **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.**

You have also asked that I provide my expert critique as to the validity of the legal opinions expressed in the April 2, 2007, Memorandum from Legislative Counsel Jean M. Mischel to Representative Max Gruenberg.

QUALIFICATIONS TO OFFER OPINION

In 1998 I was a co-author of the Alaska Marriage Amendment, now Art. 1, Sec. 25 of the Alaska Constitution. I was also counsel of record for the Alaska Legislature in Bess v. Ulmer, 985 P.2d 979 (Alaska 1999), retained specifically to defend the Alaska Marriage Amendment from the claim that it could not be presented to the people of Alaska for ratification because it constituted a revision to the Constitution that had not been passed through a constitutional convention under Art. XIII, Sec. 4.

OPINIONS

I. HJR 9 IS A PROPER AMENDMENT UNDER ART. XIII, SEC. 1 AND DOES NOT CONSTITUTE A REVISION UNDER ART. XIII, SEC. 4

Art. XIII, Sec. 1 of the Alaska Constitution provides that "Amendments to this constitution may be proposed by a two-thirds vote of each house of the legislature." Art. XIII, Sec. 4 of the Alaska Constitution provides that "Constitutional conventions shall have plenary power to amend or revise the constitution, subject only to ratification by the people." In Bess v. Ulmer, 985 P.2d 979 (Alaska 1999) the Alaska Supreme Court recognized that Article XIII makes a distinction between an "Amendment" to the Constitution and a "revision" of the Constitution. The Court concluded that Article XIII allows "Amendments" to the Constitution to be proposed to the people for ratification by either the Alaska Legislature or a constitutional convention, but that Art. XIII allows "revisions" to the Constitution to be proposed to the people for ratification only by a constitutional convention.

In Bess v. Ulmer the Court recognized that there are both quantitative and qualitative distinctions between an Amendment and a revision of the Constitution. 979 P.2d at 987 ("In deciding whether the proposal is an amendment or revision, we must consider both the quantity and quality of the proposed constitutional changes"). From a quantitative perspective a proposed constitutional change can be considered a revision if it directly affects a modification to numerous existing provisions of the Constitution so as to constitute a change of the "substantial entirety" of the Constitution. "[A]n enactment that is so extensive in its provisions as to change directly the 'substantial entirety' of the constitution by the deletion or alteration of numerous existing provisions may well constitute a revision." Id. From a qualitative perspective a proposed constitutional change, no matter how simple or short in language and number of insertions, may constitute a "revision" if it has the effect of creating a far reaching change in the nature of Alaska's basic governmental plan. Id. "[E]ven a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision. . . ." Id. The Court explained that "the core determination" in distinguishing an Amendment from a revision is whether the proposed constitutional change "is so significant as to create a need to consider the constitution as an organic whole." Id. In other words, when considering the proposed constitutional change, one must ask whether it is necessary at the same time to reconsider the entire structure of the Constitution.

Utilizing this test the Court concluded that the Marriage Amendment itself constituted an Amendment that was properly proposed by the Legislature for ratification by the people. Id. at 988. "Under our hybrid analysis, this proposed ballot measure is sufficiently limited in both quantity and effect of change as to be a proper subject for constitutional amendment." Id. The Court explained, "[f]ew sections of the Constitution are directly affected, and nothing in the proposal will 'necessarily or inevitably alter the basic governmental framework' of the Constitution." Id.

Here, HJR 9 is a proper Amendment just as was the Marriage Amendment itself. From a quantitative perspective HJR 9 only directly affects a change to one section of the Constitution, Art. I, Sec. 25. And, HJR 9 at most has the effect of indirectly altering the Court's interpretation of one

other provision of the Constitution, that being the Equal Protection provision of Art. I, Sec. 1. This was exactly the same quantitative effect of the Marriage Amendment itself that the Court ruled was a proper Amendment and not a revision in Bess v. Ulmer. From a qualitative perspective, HJR 9, just like the Marriage Amendment, would not "'necessarily or inevitably alter the basic governmental framework' of the Constitution." 985 P.2d at 988. In other words, considering HJR 9 does not require one to reconsider the entire structure of the Alaska Constitution as a whole.

The Legislative Legal Services Memorandum is incorrect both legally and factually in its claim that the Alaska Supreme Court deleted the second sentence of the Marriage Amendment in Bess v. Ulmer because the Court concluded that the sentence constituted a "revision" of the Constitution. The Court very clearly quoted the full two sentences of the Marriage Amendment in the section of its opinion where it concluded that the Amendment was a proper "Amendment" and not a revision. 985 P.2d at 988. The Court deleted the second sentence of the proposed Marriage Amendment only after concluding that the two sentences of the Amendment together were an Amendment, and only because the Court concluded that the second sentence added no substance to the Amendment. In other words, the Court concluded that the second sentence was mere surplusage. 985 P.2d at 988 n. 57. It is completely illogical and without basis to claim that the Court deleted the second sentence of the Marriage Amendment, a sentence that the Court expressly explained had no substantive significance or effect, and that constituted mere surplusage, because that meaningless second sentence was a revision of the Constitution. That conclusion would be complete nonsense, and the Court reached no such conclusion in Bess v. Ulmer.

The claim of Legislative Counsel that HJR 9 would effect Alaska laws regarding dissolution of marriage is incorrect. HJR 9 addresses the extension or assignment of the " rights, benefits, obligations, qualities, or effects of marriage." A marriage in Alaska exists only between a man and a woman. A divorce under AS 25.24 et. seq. can only occur between a married man and woman. Divorce decrees maintain some vestiges of legal rights between a man and a woman that were legally married. Nothing within the divorce laws has the effect of assigning the rights, benefits, obligations, qualities, or effects of marriage" to people who were never married and who do not qualify to marry under the Constitution's definition of marriage. The divorce laws assign legal obligations and rights based upon the fact of divorce, which can only occur between married men and women.

And, even if HJR 9 would modify Alaska's divorce laws, which it would not, this would still have no bearing whatsoever on whether HJR 9 is a proper Amendment to the Constitution. A revision is identified by the impact that it has on the terms and provisions of the Constitution itself, not based upon what lower statutory laws it may impact. Divorce in Alaska is based upon statutory law, it is not a constitutional law concept. In any vent, HJR 9 would have no impact upon Alaska's laws regarding the legal rights and obligations of formerly legally married men and women.

All of the arguments that Legislative Counsel has leveled at HJR 9 were in fact made with equal force at the Marriage Amendment itself. It was claimed in Bess v. Ulmer that the Marriage Amendment would have the effect of denying same sex couples some 150 legal rights and benefits attached to marriage. This argument had no impact upon the Marriage Amendment itself in Bess

v. Ulmer and it would have no impact upon HJR 9. If the Marriage Amendment itself, which restricted the relationship of marriage and all of the various attributes, rights and privileges of marriage to only unions between men and women, was an Amendment an not a revision, then there is no logical basis for claiming that the Court's conclusion would be any different regarding HJR 9.

II. HJR 9 DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

An equal protection attack on HJR 9 would assert that it makes classifications based on a biased category that adversely affects a group of citizens. Confronted with such a claim, a court would have to decide whether the law classifies on the basis claimed. If the law does classify on the basis claimed, a court would have to decide on the appropriate standard of review, then determine whether, despite using the biased category, the law should survive.

Laws that bear "a rational relation to some legitimate end" are usually upheld. However, laws that classify on the basis of a category such as race, sex, ancestry, or illegitimacy are subject to heightened scrutiny. This heightened scrutiny is strict or intermediate, depending upon the classification. In either case, the burden of proof shifts from the plaintiffs to the State - requiring the State to show how the law meets the heightened standard.

Equal protection attacks on HJR 9 would most likely be of two kinds: (1) that the Amendment discriminates based on sex, and should receive intermediate scrutiny, or (2) that the Amendment is based on "animus" toward gays, which fails even the rational basis test. Here I examine both claims, concluding that each should be rejected.

Is HJR 9 "Sex-Discrimination"? Laws that classify "based on sex" are treated by the Supreme Court as "quasi-suspect" classifications requiring "intermediate" or "skeptical" scrutiny. *United States v. Virginia* provides a two-part test for conducting this scrutiny. First, a law must be identified as "sex-based." Second, "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive' justification for that action." To be "exceedingly persuasive," according to Justice Ginsburg, means the following:

> The State must show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

The Justice adds, "[t]he heightened review standard our precedent establishes does not make sex a proscribed classification." She observes that, unlike distinctions based on race or national origin, "[p]hysical differences between men and women, however, are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" She continues: "'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."

It is clear from Justice Ginsburg's logic that a statute that disadvantages one sex over the

other is a sex-based classification that merits "skeptical scrutiny. It is not clear that Justice Ginsburg would see a Marriage Amendment or a marriage benefits amendment as such a law.

Since the Supreme Court has yet to address this question, we can only look at other courts for guidance. Only the Hawaii Supreme Court and one Alaska trial court have held that a marriage statute represents a sex-based classification that deserves heightened scrutiny. By defining the object of analysis as couples rather than individuals, these courts held the statutes to be sex discrimination. Both decisions have been overruled by amendments approved by their respective electorates. One other high court (the District of Columbia) and one appellate court (Washington) have held that a marriage statute does not classify based on sex. By defining the object of analysis as individuals rather than couples, these courts held that the statutes were based on the definition of marriage. Since women and men have the equal right to marry, the courts found no evidence of sex discrimination. Thus, intermediate scrutiny was appropriate. Here, women and men have equal rights to marriage benefits and so HJR 9 should not be found to constitute gender discrimination.

Is it likely that the Supreme Court will follow the Hawaii Supreme Court and hold that an Amendment like HJR 9 is a form of sex discrimination? I think not. The amendment does not classify based on "physical differences" or "inherent differences" between men and women. Instead, it is based upon what Justice Ginsberg calls "a community composed of both [sexes]." The Justice rightly states that "the two sexes are not fungible." Marriage law, which is based upon this truth, is a unique legal category. In marriage, neither sex is disadvantaged; both are equally included. Marriage does not separate the sexes, but instead unites them. Distributing the benefits, rights and attributes of marriage on the same basis has no different effect.

As a matter of prudence, the Court would hesitate before casting a cloud upon marriage law and marriage benefits laws in nearly all states, if not overturning them outright. Such a decision would pre-empt the political process, similar to the effect of *Roe v. Wade*, in an area that has always been considered primarily a matter of decision-making for the States. Moreover, the Court would anticipate that if it strikes down such an Amendment, it might generate a national movement for a federal marriage amendment. By so doing, it may plunge the country into strife over marriage and damage its own credibility as a reliable interpreter of the Constitution.

Romer v. Evans and the Marriage Amendment. Apart from whether or not HJR 9 is a "sex-based classification," does it fail even rational basis review because it "targets" gays and lesbians based on "animus"? No.

Before 1996, rational basis review was fairly straightforward: laws bearing a rational relation to a legitimate governmental end were upheld. Yet in *Romer v. Evans*, the Court struck down a Colorado constitutional amendment ("Amendment 2") which classified on the basis of "homosexual, lesbian or bisexual orientation." The question, therefore, is squarely posed: is *Romer* a potential basis for overturning the Marriage Amendment? The simple answer is No.

The Court struck down Amendment 2 because, by its reading, Amendment 2 was "at once too narrow and too broad." It was too narrow because it characterized a class of people by a single trait. It was too broad because, on the basis of that single trait, it "then denie[d] them protection

across the board." Based on this combination of targeting plus potentially limitless breadth, the Court concluded that Amendment 2 could not possibly be justified by the State's alleged reasons (*i.e.*, conserving resources and associational privacy). Rather, Amendment 2 was "inexplicable by anything but animus toward the class that it affects." The majority opinion considered Amendment 2 not only irrational, but evil.

Romer is an insufficient basis for rejecting HJR 9. *Romer* has nothing to do with marriage laws or amendments. *Romer* is not a case about sexual orientation *per se*. Instead, it is about the irrationality of laws that broadly disable any narrowly targeted group. Legal scholars have opined that Colorado Amendment 2 was so broad in its impact upon a narrowly defined group, stripping that group of all legal rights in al facets of life, that it would have been unconstitutional if it had focussed upon plumbers or dentists instead of homosexuals.

According to Professor Richard Duncan, constitutional law Professor at the University of Nebraska Law School, marriage laws and marriage benefits laws define marriage and who obtains marriage benefits, rather than disadvantage homosexuals. In Duncan's view, these statutes should easily pass rational basis review because they rationally advance at least these legitimate purposes: (1) encouraging public morality, (2) encouraging childbirth within marriage, (3) encouraging dual-gender parenting, (4) educating children, and (5) avoiding slippery slope marital redefinitions. A Marriage Amendment like HJR 9 is a valid exercise of democratic self-government.

Finally, HJR 9, unlike Colorado Amendment 2, represents no animus toward homosexuals and it does not identify a single class of individuals and deny them legal rights across the board in society. HJR 9 addresses only the topic of marriage benefits.

Representative Max F. Gruenberg, Jr.

Alaska State Legislature
State Capitol – Session (January – May)
Phone: (907) 465-4940 Fax: (907) 465-3766
716 W. 4th Avenue – Interim
Phone (907) 269-0123 Fax: (907) 269-0124

Facsimile Transmittal Sheet

TO: Leg Legal **DATE:** 3/22/07

FAX:

PHONE:

FROM: Max Gruenberg 465-4940
Norman A. Cohen 465-5159

MESSAGE: **Total Number of Pages w/Cover Sheet 3**

HJR 9 may constitute a revision of the Constitution as opposed to a simple amendment.

A quick review of constitutional provisions shows possible impact on the following sections:

Article 1, Sections 1, 3, 5, 7, 15, and 22
Article 12, Section 7

Our concern is raised based upon two aspects of the wording of the proposed amendment: paragraph (1) the word "union" and the phrase the "rights, benefits, obligations, qualities, or effects."

In addition to these constitutional provisions, a quick review of the statutes shows a number of sections that would be affected by the proposed amendment. See Exhibit "A" attached.

In light of the decision in Bess v. Ulmer, 985 P.3d 979 (Alaska 1999), please provide a legal opinion as to whether HJR 9 would constitute a revision of the Alaska Constitution or an amendment that the legislature has the authority to adopt for voter approval.

Thank you very much.

Rights and Liabilities of Alaska residents that could be affected by passage of HJR 9.

Sec. 03.09.010 - Board of Agriculture and Conservation

Chapter 04.06 - Alcoholic Beverage Control Board

Chapter 06.26 - Alaska Trust Company Act

Chapter 08.66 - Buyer's Agents

Chapter 10.13 - BIDCOs

Chapter 11.41 - Offenses Against the Person

Chapter 12.55 - Factors in aggravation and mitigation

Chapter 13.12 - Inheritance

Chapter 13.26 - Guardians and Guardian ad litems

Chapter 13.41 - Disposition of Community Property Rights

Chapter 13.52 - Health Care Decisions

Chapter 14.25 - Teacher's Retirement

Chapter 16.05 - Fish and Game license fees

Chapter 17.37 - Medical Uses of marijuana

Chapter 21.42 - The Insurance Contract

Chapter 21.45 - Life Insurance

Chapter 21.48 - Group Life Insurance

Chapter 21.51 - Health Insurance Policies

Chapter 22.25 - Judicial Retirement and Death Benefits

Chapter 23.10 - Employment Practices and Working Conditions

Chapter 23.30 - Workmen's Compensation

Chapter 24.60 - Legislative Ethics

Chapter 25.23 - Adoption

Chapter 25.25 - Interstate Family Support

Chapter 26.05 - Military Affairs retirements

Chapter 34.15 - Conveyances

Chapter 34.77 - Community Property

Chapter 38.08 - Homesites

Chapter 38.09 - Homesteads

Chapter 39.26 - Rights of State Employees

Chapter 39.35 - Public Employment Retirement

Chapter 39.50 - Public Official Financial Disclosure

Chapter 42.40 - Alaska Railroad

Chapter 43.23 - Permanent Fund Dividends

Chapter 44.33 - Child Care Facilities

Chapter 47.10 - Child in need of aid

Chapter 47.12 - Delinquent Minors

Chapter 47.24 - Protection of Vulnerable Adults

Chapter 47.25 - :Public Assistance

Chapter 47.31 - Mental Health Treatment

Chapter 47.32 - Centralized Licensing

Chapter 47.45 - Older Alaskans

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 2, 2007

SUBJECT: Proposed constitutional amendment to art. I, sec. 25, related to marriage analyzed under *Bess v. Ulmer*
(HJR 9 (Work Order No. 25-LS0553\A))

TO: Representative Max Gruenberg
Attn: Norman Cohen

FROM: Jean M. Mischel
Legislative Counsel

You have asked for an analysis of HJR 9 under *Bess v. Ulmer*, 985 P.2d 979 (Alaska 1999). You have also asked whether the resolution (1) revises the Alaska Constitution, necessitating the convening of a constitutional convention, or (2) amends the constitution, allowing for legislative and voter approval. You have provided a list of possible revisions to the constitution resulting from the proposed amendment to art. I, sec. 25, and a lengthy list of other laws potentially affected by the broad terms used in HJR 9 such as "union" and the phrase "rights, benefits, obligations, qualities, or effects" of marriage. In my opinion, the breadth of the language used in HJR 9 makes it more likely to be construed by a court as a revision rather than an amendment thus requiring a constitutional convention.

HJR 9 proposes to amend art. I, sec. 25 of the Alaska Constitution as follows:

> **Section 25. Marriage and related limitations.** To be valid or recognized in this State, a marriage may exist only between one man and one woman. **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.**

A constitutional amendment may be proposed by vote of two-thirds of the legislature and take effect after approval by a majority of the voters under art. XIII, sec. 1, Constitution of the State of Alaska. A constitutional amendment may also be proposed by a constitutional convention and take effect after ratification by the voters under art. XIII, sec. 4. A constitutional revision may *only* be proposed by a constitutional convention and take effect after ratification by the voters under art. XIII, sec. 4.

The Alaska Supreme Court was not able, in the *Bess* case, to precisely describe the difference between a constitutional amendment and a constitutional revision except to say that "changes that are 'few and simple and independent' can be considered amendments, whereas 'sweeping change' requires the revision process." *Id.* at 983 (citations omitted). In upholding the first sentence of art. I, sec. 25 (same-sex marriage ban) as an amendment and invalidating the then proposed second sentence as a revision, the *Bess* Court acknowledged that the first sentence potentially changed one constitutional section (the equal rights clause) and that it was not clear whether the right to privacy might also be affected. The court reasoned that "the content of the sentence is simple to express and understand. It relates to only one subject and does not substantially affect numerous other sections of the constitution." *Id.* at 987. The potential effect on other provisions in the constitution resulting from the adoption of the retained sentence in art. I, sec. 25 alone was not enough to invalidate the amendment; the effect must be substantial both qualitatively and quantitatively to constitute a revision.

At the same time, the *Bess* Court found that since the proposed second sentence may have been interpreted to permit prosecution of individuals involved in marriage-like relationships and might inhibit religiously sanctioned same-sex marriages, the sentence may have attempted to revise the constitution. The deleted second sentence provided:

> No provision of this constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex.

The Court also noted in its preliminary opinion, attached to the published opinion, that the appellees characterized the second sentence as surplusage and they conceded that the Court has the power to delete the second sentence. Therefore, the Court ordered the deletion of the second sentence stating, "We do not believe that language which is surplusage should be part of the constitution." *Id.* at 995.

This second sentence is similar (though obviously not identical) in its intent to the language in HJR 9 and therefore could draw the same type of challenge as the one that succeeded at the Alaska Supreme Court in *Bess v. Ulmer*.

There are a number of constitutional sections that appear to be affected by HJR 9 -- equal protection (art. I, sec. 1), civil rights (art. I, sec. 3), due process (art. I, sec. 7), privacy rights (art. I, sec. 22), and perhaps the retirement protections (art. XII, sec. 7) to the extent benefits have accrued. There are also plausible, but not necessarily convincing, arguments that could be made that other sections are affected. Additionally, because of the extremely broad phrasing used in HJR 9 as "limitations to marriage" HJR 9 appears to affect numerous rights, benefits and effects that are completely unrelated to marriage or same sex employment benefits.

The equal protection (art. I, sec. 1) and due process (art. I, sec. 7) clauses of the Alaska constitution generally require that persons who are similarly situated be treated equally unless the state has some interest in treating them differently that can withstand a sliding

scale of judicial scrutiny that depends on the importance of the right at issue. As you know, the Alaska Supreme Court held in *ACLU v. State*, 122 P.3d 781, 794 (Alaska 2005), that disparate treatment of same-sex domestic partnerships, subject to the court's "minimum scrutiny," was not "substantially related" to enumerated governmental interests involving promotion of marriage, administrative efficiency, and cost control. Since HJR 9 is apparently intended to overturn the result in *ACLU v. State*, it appears that HJR 9 is intended to substantially affect equal protection rights. It may also affect art I, sec. 22 of the state constitution (relating to privacy) and may therefore be invalidated under *Bess v. Ulmer* on the basis of these two apparently substantial effects alone.

In addition, HJR 9 may violate the federal equal protection clause. In footnote 20 of the ACLU opinion, Alaska's court cited *Romer v. Evans*, 517 U.S. 620 (1996), as an example of the constitutional risk involved in using broad statutory language to prevent legislative, executive, or judicial action extending legal protection to homosexual people as a class. The language of the Colorado provision struck down by the U.S. Supreme Court in *Romer* was broader than the language proposed in HJR 9 but HJR 9 may spark federal equal protection challenges for some of the same reasons.

I don't know what the sponsors intended by the use of the term "union," which has many meanings and could affect implementation of many current laws and constitutional protections outside of the context of marriage. A court will generally look to the common meaning, legislative intent, and to voter understanding in order to define broad or ambiguous terms.

The context in which the term is used may limit the term to "marriage," but even this interpretation does not resolve the questions involving those persons who were formerly married and have continuing benefits, obligations, and rights of the marriage even though they are no longer legally married or the question of the possible application to private employment benefits.

The language proposed not only affects same sex relationships but may have a discriminatory effect on those persons who were bound by a "union" that at one time was a legal marriage, but that no longer is a marriage. HJR 9 may interfere with rights and obligations of a former spouse, widow, or children of a marriage that no longer exists but that under current law has remaining rights and effects. Under current statutes, for example, the effect of a decree of legal separation "modifies the parties rights and responsibilities as married persons only to the extent specified in the decree of separation" under AS 25.24.460. The effect of a judgment decreeing a divorce or dissolution is to "restore the parties to the state of unmarried persons" under AS 25.24.180 and 25.24.240, but the divorce decree may still require that certain rights or benefits of marriage be given to formerly married, but now unmarried, persons. The rights, benefits, and obligations of a legal separation, divorce, or dissolution contained in a court decree, including property and child support rights, are, it seems to me, all called into question by HJR 9's broad prohibitions.

Furthermore, courts have awarded property rights (on death or separation) to a person who has lived in a "common law" type of marriage or other type of "domestic partnership" under the theories of *quantum meruit*, partnership, and fairness. These theories could be applied to relationships that were heterosexual, homosexual, or asexual (e.g. two maiden ladies who have shared a home for decades, but have no sexual relationship). Those awards may be prohibited under the resolution if they are found to assign benefits, rights, and obligations of marriage.

Voter understanding of the terms used seems to have the most influence in a judicial review of a proposed constitutional amendment. In *Miller v. Safeway*, 102 P.3d 282 (Alaska 2004), for example, the Alaska Supreme Court found in a case challenging a private corporation's privacy intrusions, that the state constitutional right to privacy applied only to governmental actions. The court reviewed the legislative history and the voter pamphlet supporting the constitutional amendment. Although the legislative history supported the plaintiff's view that the right to privacy applied to private and public persons, the court relied on the voters' intent. In another case, *Luedtke v. Nabors Alaska Drilling*, 768 P.2d 1123, 1130 (Alaska 1989) (quoting *Davis*, 533 P.2d 222 (Cal. 1975)), the court acknowledged the possibility of drawing the opposite conclusion with respect to California's constitutional privacy right on the basis of statements made to California voters with respect to that state's privacy amendment that it would protect them against unwarranted intrusions by businesses and government.

The appellants in the *Bess* case argued that the first sentence of the marriage amendment affected three sections of the constitution: equal rights (art. I, sec. 1), civil rights (art. I, sec. 3), and privacy (art. I, sec. 22). The court flatly rejected the notion that the civil rights section was affected. It determined that whether the privacy section was affected was unclear and that the first sentence only "potentially" affected the equal protection section. The court then upheld the first sentence of the marriage amendment as a valid legislative proposal because it found the proposal did not "substantially affect numerous other sections of the constitution" and was otherwise clear.

I think this illustrates that the court is not going to readily agree that a proposal affects another section of the constitution unless the connection between the proposal and the section is fairly direct. It also illustrates that the court may be willing to tolerate merely potential or limited effects on other sections of the constitution. What is critical, apparently, is determining the number of sections that are substantially affected by a proposal.

The answer depends on how a court would evaluate the quantity and quality of change proposed. The "quality" of change criteria is quite plastic; the court has said that a "simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision. . . ." Based on the decision in the *Bess* case and the breadth of language used in HJR 9 as discussed, I suspect that a court would find the changes proposed in this resolution are sweeping, affect several existing constitutional protections and therefore appear to be a revision of the constitution rather

than an amendment. I cannot, however, rule out the possibility that a court could reach the opposite conclusion.

If I may be of further assistance, please advise.

JMM:ljw
07-176.ljw

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, Appellants, v. STATE OF ALASKA and MUNICIPALITY OF ANCHORAGE, Appellees.	Supreme Court No. S-10459 Superior Court No. 3AN-99-11179 CI OPINION [No. 5950 - October 28, 2005]

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. O'Donnell, 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

---

[1] Alaska Const. art. I, § 25.

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

---

[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)).

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

---

[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 employee's "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."

"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

---

[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 . . . ."

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*.

---

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

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 challenger's 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]

---

[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, Dep't 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 Comm'n v. Carlson*, 65 P.3d 851, 858 (Alaska 2003).

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

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

---

[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 Constitution's equal protection clause affords greater protection to individual rights than the United States Constitution's 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, Dep't of Health & Soc. Servs.*, 21 P.3d 357, 358 (Alaska 2001).

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 Constitution's 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]

---

[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 amendment's

(continued...)

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.

---

[20](...continued)
"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).

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 Alaska's 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 › 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 Constitution's Fourteenth Amendment."[24]

"To implement Alaska's 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

---

[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, Dep't 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).

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 group's 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]

---

[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. Dep't of Pers. Admin.*, 213 Cal. Rptr. 410, 416 (Cal. App. 1985); *Ross v.* (continued...)

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

---

[29](...continued)
Denver Dep't of Health & Hosps., 883 P.2d 516, 519 (Colo. App. 1994); *Phillips v. Wisconsin Pers. Comm'n*, 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.

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 Alaska's 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

---

[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) ("In 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.").

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*, Alaska's 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 employee's "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

---

[34] *Personnel Adm'r 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.

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 state's interest in the particular means employed to further its goals must be undertaken. Once again, the state's 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

---

[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.

> 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]

---

[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) (continued...)

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

---

[42](...continued)
(applying "close" scrutiny to enactment affecting "important" interest); *State, Dep't 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, Dep't 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)).

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 Alaska's 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]

---

[47] *Wilkerson v. State, Dep't 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 (continued...)

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 adopted qualifying criteria.[49] Likewise, other states[50] and municipalities,[51] including the City and Borough of Juneau,[52] offer the same health

---

[48](...continued)
rational basis test).

[49] Under the university's plan, an employee and the employee's 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 other's immediate family; being responsible for each other's 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 other's 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. GOV'T 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 organization's website at http://www.hrc.org (last visited October 21, 2005).

[51] According to the Human Rights Campaign's 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
(continued...)

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

---

(...continued)
CODE § 18.321(4)-18.328; NEW YORK CITY, N.Y., ADMINISTRATIVE CODE § 3-244(1).

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

importance in our society."[53] The Supreme Court has also explained that "marriage is a social relation subject to the state's 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.

---

[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.").

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 Court's 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 state's 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

---

[55] *See Loving*, 388 U.S. at 7.

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

---

[56] AS 11.51.140.

[57] AS 11.41.450.

[58] Alaska Const. art. I, § 25.

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

---

[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.

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 Trombley's 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 Dale's consortium claim on summary judgment. In considering Dale's 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

---

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

62 *Id.* at 923 (emphasis added).

63 *Id.*

argument limiting consortium claims to legal spouses as "reasonable" that the legislature's 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 department's 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 Constitution's 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.

---

[64] *See supra* notes 49-52.

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

[66] *Goodridge v. Dep't 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.

Senator Dyson Defends Alaska Marriage Amendment
Calls Supreme Court Decision Disappointing - Plans Corrective Legislation
Released: October 28, 2005

(**Anchorage**) - In an amazing opinion released today, the Alaska Supreme Court ruled that the 70% of Alaskans who approved the "Alaska Marriage Amendment" in 1998, created a cause of discrimination.

"This ruling reveals how out of touch some of our courts are with the people of Alaska," said Sen. Fred Dyson (R- Eagle River). "Similar lawsuits have challenged 'Defense of Marriage Acts' in other states. The people in those states have quickly passed additional constitutional language amendments to make it clear that the courts may **NOT** confer benefits that the people, through their elected officials, do not intend to confer. We are putting together constitutional amendment language similar to that of Virginia and Ohio and plan to have it ready for the legislature's consideration by the beginning of the legislative session in early January."

"In a representative democracy, the people must be able to define basic family relationships as the U.S. Congress did over 100 years ago when they made Polygamy illegal for states entering the union. We are engaged in a great cultural war in our country with traditional family values under attack on every front. The People of Alaska drew a clear line in the sand with overwhelming support for the definition of traditional marriage in our constitution. Now I believe they will rally to support a further clarifying amendment that makes it very clear that they meant what they said and a court that is hard of hearing will not thwart them."

The lawsuit, brought by the ACLU and several gay and lesbian couples, claims that because they no longer can apply the "remedy" of getting married, they can now not apply for spousal benefits from employer benefit programs, and are thus discriminated against. The court acknowledges that heterosexual "couples" are also precluded from some benefits programs, but decided that they have a remedy by marrying. The court declined to comment on "plural" marriages where an employee may have several "intimate, committed relationships". Offering spousal benefits to same sex couples is, and always has been, an option in Alaska, but that was not enough for these plaintiffs and this court.

# # #

http://www.akrepublicans.org/dyson/24/news/dyso20051028O1p.php

Return to Previous Page | Print This Page

985 P.2d 979
(Cite as: 985 P.2d 979)

C
Bess v. Ulmer
Alaska,1999.

Supreme Court of Alaska.
Howard BESS, Darlene Bess, Jay Brause, and Gene Dugan, Appellants,
v.
Fran ULMER, Lieutenant Governor of the State of Alaska, and State of Alaska, Appellees.
The Alaska Legislature, acting by and through the Alaska Legislative Council, Representative Pete Kelly, and Senator Loren Leman, Appellants,
v.
Fran Ulmer, in her official capacity as the Lieutenant Governor of the State of Alaska, Appellee.
Elizabeth A. Dodd, Victor "Vic" Fischer, Katherine T. "Katie" Hurley, Ernest E. Line, George Rogers, and Jean Rogers, Appellants,
v.
Fran ULMER, Lieutenant Governor of the State of Alaska, Sandra Stout, Director of Division of Elections, and the State of Alaska, Appellees.
Nos. S-8811/S-8812/S-8821.

Aug. 17, 1999.

Citizens groups challenged three ballot propositions to "amend" the state Constitution, alleging they were "revisions" for which a constitutional convention was required. The Superior Court, Third Judicial District, Anchorage, Sen K. Tan, J., granted summary judgment for the state defendants. Citizens groups appealed. After issuing a preliminary opinion, the Supreme Court, Matthews, C.J., held that: (1) as a matter of first impression, both the quantity and the quality of the proposed constitutional changes are considered when determining whether the changes are a constitutional "amendment" or instead a "revision"; (2) ballot proposition to limit the rights of prisoners to those afforded by the federal Constitution was a "revision"; (3) ballot proposition providing that same-sex marriages would not be valid or recognized by the state was an "amendment"; (4) ballot proposition removing from executive branch and assigning to neutral body the power to reapportion state legislative districts was an "amendment"; and (5) surplus language would be deleted from ballot proposition for constitutional amendment on same-sex marriages.

Preliminary opinion reaffirmed.

Compton, J., dissented in part and filed an opinion.

West Headnotes

[1] Appeal and Error 30 ⇐893(1)

30 Appeal and Error
30XVI Review

30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
In a case involving a question of law, the appellate court reviews the grant of summary judgment de novo and adopts the rule of law that is most persuasive in light of precedent, reason, and policy.

[2] Constitutional Law 92 ⇐5

92 Constitutional Law
92I Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k5 k. In General. Most Cited Cases

Constitutional Law 92 ⇐7

92 Constitutional Law
92I Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k7 k. Legislative Powers and Proceedings. Most Cited Cases

Constitutional Law 92 ⇐8

92 Constitutional Law
92I Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k8 k. Conventions to Revise Constitution. Most Cited Cases
The Constitution can be neither revised nor amended, except in the manner prescribed by itself, and the power which it has conferred upon the legislature in reference to proposed amendments, as well as to calling a convention, must be strictly pursued. Const. Art. 13, §§ 1, 4.

[3] Constitutional Law 92 ⇐8

92 Constitutional Law
92I Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k8 k. Conventions to Revise Constitution. Most Cited Cases
The Framers' decision to narrow the alternatives for adopting revisions to the Constitution by making constitutional conventions the sole permissible procedure demonstrates not only their awareness of the distinction between revisions and amendments, but also their desire to give the distinction substance, thereby ensuring that it would be observed by future generations of Alaskans. Const. Art. 13, §§ 1, 4.

[4] Constitutional Law 92 ⇐8

92 Constitutional Law
92I Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k8 k. Conventions to Revise

Constitution. Most Cited Cases
One purpose of requiring a constitutional convention for revisions of the Constitution is to promote stability, and another purpose is to provide a specialized body of citizens whose sole purpose is to consider the Constitution as an organic whole, and to make the appropriate and necessary changes. Const. Art. 13, § 4.

|5| Constitutional Law 92 ⇐8

92 Constitutional Law
92I Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k8 k. Conventions to Revise Constitution. Most Cited Cases

Constitutional Law 92 ⇐9(.5)

92 Constitutional Law
92I Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k9 Submission to Popular Vote
92k9(.5) k. In General. Most Cited Cases
In deciding whether a proposed change to the Constitution is an amendment that can be submitted to the voters, or instead a revision that requires adoption at a constitutional convention before ratification by the voters, the court must consider both the quantity and quality of the proposed constitutional changes. Const. Art. 13, §§ 1, 4.

|6| Constitutional Law 92 ⇐8

92 Constitutional Law
92I Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k8 k. Conventions to Revise Constitution. Most Cited Cases
An enactment which is so extensive in its provisions as to change directly the substantial entirety of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a "revision" thereof for which a constitutional convention is required, while even a relatively simple enactment may accomplish such far reaching changes in the nature of the basic governmental plan as to amount to a revision also. Const. Art. 13, § 4.

|7| Constitutional Law 92 ⇐5

92 Constitutional Law
92I Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k5 k. In General. Most Cited Cases
The process for "amendment" of the Constitution, which does not require a constitutional convention, is proper for those changes which are few, simple, independent, and of comparatively small importance. Const. Art. 13, §§ 1, 4.

|8| Constitutional Law 92 ⇐8

92 Constitutional Law
921 Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k8 k. Conventions to Revise Constitution. Most Cited Cases

Constitutional Law 92 ⇐9(.5)

92 Constitutional Law
921 Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k9 Submission to Popular Vote
92k9(.5) k. In General. Most Cited Cases
The core determination of whether a proposed change to the Constitution is an amendment that can be submitted to the voters, or instead a revision that requires adoption at a constitutional convention before ratification by the voters, is always the same: whether the changes are so significant as to create a need to consider the Constitution as an organic whole. Const. Art. 13, §§ 1, 4.

[9] Constitutional Law 92 ⇐8

92 Constitutional Law
921 Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k8 k. Conventions to Revise Constitution. Most Cited Cases

Constitutional Law 92 ⇐9(.5)

92 Constitutional Law
921 Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k9 Submission to Popular Vote
92k9(.5) k. In General. Most Cited Cases
Ballot proposition to change the state Constitution, to limit rights of prisoners to those afforded by the federal Constitution, was not an "amendment" but instead a "revision" for which a constitutional convention was required; qualitatively, the change would substantially alter the substance and integrity of the state Constitution, and quantitatively, the change would potentially alter as many as eleven separate sections of the state Constitution. Const. Art. 13, §§ 1, 4.

[10] Constitutional Law 92 ⇐8

92 Constitutional Law
921 Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k8 k. Conventions to Revise Constitution. Most Cited Cases

Constitutional Law 92 ⇐9(.5)

92 Constitutional Law
921 Establishment and Amendment of Constitutions
92k4 Amendment and Revision of

State Constitutions
92k9 Submission to Popular Vote
92k9(.5) k. In General. Most Cited Cases
A ballot proposition proposing to change the state Constitution, to provide that same-sex marriages would not be valid or recognized by the state, was an " amendment" rather than a "revision" for which a constitutional convention was required; quantitatively, few constitutional sections would be directly affected, and qualitatively, the change would not necessarily or inevitably alter the basic governmental framework of the Constitution. Const. Art. 13, §§ 1, 4.

|11| Constitutional Law 92 ⇨8

92 Constitutional Law
92I Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k8 k. Conventions to Revise Constitution. Most Cited Cases

Constitutional Law 92 ⇨9(.5)

92 Constitutional Law
92I Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k9 Submission to Popular Vote
92k9(.5) k. In General. Most Cited Cases
Ballot proposition to change the state Constitution, removing from executive branch and assigning to neutral body the power to reapportion state legislative districts, was an "amendment" rather than a "revision" for which constitutional convention was required; qualitatively, the change did not deprive the executive branch of a foundational power, and quantitatively, the number of other constitutional provisions that would be affected was minimal. Const. Art. 6, § 1 et seq.; Art. 13, §§ 1, 4.

|12| Constitutional Law 92 ⇨76

92 Constitutional Law
92III Distribution of Governmental Powers and Functions
92III(C) Executive Powers and Functions
92k76 k. Nature and Scope in General. Most Cited Cases
The intent of the Framers in giving the reapportionment power to the executive branch was primarily to prevent the abuse or neglect of that power in the hands of the legislature, rather than to safeguard a uniquely executive function. Const. Art. 6, § 1.

|13| Constitutional Law 92 ⇨5

92 Constitutional Law
92I Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k5 k. In General. Most Cited Cases

Constitutional Law 92 ⇐8

92 Constitutional Law
921 Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k8 k. Conventions to Revise Constitution. Most Cited Cases
In general, changes to the Constitution that are few, simple, and independent can be considered an "amendment," whereas sweeping change is a "revision" for which a constitutional convention is required. Const. Art. 13, §§ 1, 4.

[14] Constitutional Law 92 ⇐8

92 Constitutional Law
921 Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k8 k. Conventions to Revise Constitution. Most Cited Cases

Constitutional Law 92 ⇐9(.5)

92 Constitutional Law
921 Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k9 Submission to Popular Vote
92k9(.5) k. In General. Most Cited Cases
In determining whether a ballot measure for a purported constitutional "amendment" is actually a "revision" for which a constitutional convention is required, respect for the legislature and the electoral process requires that courts should decline to order a measure removed from the ballot except in clear cases. Const. Art. 13, §§ 1, 4.

[15] Constitutional Law 92 ⇐9(1)

92 Constitutional Law
921 Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k9 Submission to Popular Vote
92k9(1) k. Method of Submission and Form of Ballots. Most Cited Cases
In a ballot proposition proposing to change the state Constitution, to provide that same-sex marriages would not be valid or recognized by the state, language having the effect of providing for harmonization with other constitutional provisions was mere surplusage that might be construed in an unintended fashion at some future time, and thus, deletion of the language was required. Const. Art. 13, § 1.

[16] Constitutional Law 92 ⇐9(1)

92 Constitutional Law
921 Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k9 Submission to Popular Vote
92k9(1) k. Method of Submission and Form of Ballots. Most

985 P.2d 979
(Cite as: 985 P.2d 979)

Cited Cases
Language which is surplusage in a ballot proposition to amend the Constitution should not be part of the Constitution. Const. Art. 13, § 1.

[17] Constitutional Law 92 ⇐8

92 Constitutional Law
92I Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k8 k. Conventions to Revise Constitution. Most Cited Cases

Constitutional Law 92 ⇐9(.5)

92 Constitutional Law
92I Establishment and Amendment of Constitutions
92k4 Amendment and Revision of State Constitutions
92k9 Submission to Popular Vote
92k9(.5) k. In General. Most Cited Cases
Three ballot propositions to change the state Constitution with respect to prisoners' rights, marriage, and state legislative reapportionment procedures lacked a substantial relationship to each other and were proposed for separate and independent approval, and thus, consideration of the propositions in the aggregate was not required when determining whether the measures were revisions for which a constitutional convention was required. Const. Art. 13, § 4.

Preliminary Opinion and Order

Robert H. Wagstaff, Law Offices of Robert H. Wagstaff, Anchorage, for Appellants Bess, Brause and Dugan.
James L. Baldwin, Assistant Attorney General, Bruce M. Botelho, Attorney General, Juneau, for Appellee State of Alaska.
Kevin G. Clarkson, Brena, Bell & Clarkson, P.C., Anchorage, for Appellee Alaska Legislature.
Allison E. Mendel, Mendel & Associates, Anchorage, for Appellants Dodd, Fischer, Hurley, Line and Rogers.
Jay Alan Sekulow, John P. Tuskey, American Center for Law and Justice, Virginia Beach, Virginia; Kevin Theriot, American Center for Law and Justice-Florida, Panama City, Florida; Robert B. Flint, Hartig, Rhodes, Norman, Mahoney and Edwards, Anchorage, for Amicus Curiae American Center for Law and Justice.

Before: MATTHEWS, Chief Justice, COMPTON, EASTAUGH, FABE, and BRYNER, Justices.

OPINION
MATTHEWS, Chief Justice.

I. *INTRODUCTION*

Citizen groups challenged three ballot propositions to amend the Alaska Constitution because the propositions were revisions not amendments; revisions can

only be accomplished through a constitutional convention. In an expedited Preliminary Opinion and Order we held that Legislative Resolve No. 59 (relating to prisoners' right's) is a revision, and struck it from the ballot.[FN1] Legislative Resolve No. 71 (limiting marriage) and Legislative Resolve No. 74 [FN2] (relating to apportionment) are amendments, and therefore could appear on the ballot, though we disallowed a portion of No. 71. This opinion reaffirms and amplifies our Preliminary Opinion and Order.[FN3]

FN1. Appellant Bess challenged Legislative Resolve No. 59 in briefs to the superior court and to this court. The State and Legislative defendants did not respond to the argument that the resolve, considered individually, constituted a revision.

FN2. Appellant Bess challenged Legislative Resolve No. 74 in briefs to the superior court and to this court. The State and Legislative defendants again failed to respond to the challenge.

FN3. Our Preliminary Opinion and Order is attached as an appendix. It has been edited.

***982** II. *FACTS AND PROCEEDINGS*

The superior court granted summary judgment in favor of the State defendants and the Legislative Council, entering final judgment on September 8, 1998. This court granted expedited consideration and heard oral argument on the case on September 18, 1998. On September 22, 1998, we issued a Preliminary Opinion and Order, striking Legislative Resolve No. 59 (restricting the rights of Alaska prisoners to those guaranteed by the federal constitution), allowing in part and deleting in part Legislative Resolve No. 71 (limiting marriage to the union of one man and one woman), and allowing Legislative Resolve No. 74 (transferring the power of reapportionment from the Executive branch to a Redistricting Board).

III. *STANDARD OF REVIEW*

[1] The parties agree that there are no material issues of fact before the court. Because the present case involves a question of law, we review the grant of summary judgment de novo and "adopt the rule of law that is most persuasive in light of precedent, reason, and policy." [FN4]

FN4. *Guin v. Ha.* 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

IV. *DISCUSSION*

[2] We based our expedited Preliminary Opinion and Order on the fact that the Constitution of the State of Alaska can be changed in only two ways-amendment and revision-and that a separate procedure must

be followed for each. To amend the Constitution, the proposed change must be passed by a two-thirds vote of each legislative house and then approved by a majority of the voters.[FN5] The Constitution may be revised by constitutional convention. [FN6] By holding that Legislative Resolve No. 59 was a revision, and as such inappropriate as a ballot measure, we adopted the view that the Constitution "can be neither revised nor amended, except in the manner prescribed by itself, and the power which it has conferred upon the legislature in reference to proposed amendments, as well as to calling a convention, must be strictly pursued." [FN7]

FN5. *See* Alaska Const. art. XIII, § 1.

FN6. *See id.* at § 4. Amendments may also be accomplished by convention. *See id.*

FN7. *McFadden v. Jordan*, 32 Cal.2d 330, 196 P.2d 787, 789 (1948) (quoting *Livermore v. Waite*, 102 Cal. 113, 36 P. 424, 425 (1894)).

The objective of this opinion is to elucidate the distinction between amendatory changes and revisory changes, to provide some guidance for future endeavors to change the Constitution.

The Framers of the Alaska Constitution distinguished between a revision and an amendment. Like scholars and other framers in other states, they intended this distinction to be substantive. We conclude that a revision is a change which alters the substance and integrity of our Constitution in a manner measured both qualitatively and quantitatively.

A. *Revision and Amendment*

The Framers of Alaska's Constitution explicitly contemplated the importance of the differentiation between amendments and revisions and between their respective fields of application.[FN8] In debating the text of article XIII, section 4, one constitutional convention delegate stated "[t]here is a big difference between revisions, which implies rewriting the constitution, and making amendments to specific articles or sections of the constitution." [FN9] Although no precise definition of the terms was reached by the Framers (perhaps because such a task is not possible), there was consensus that "amendment" contemplated a simple change, whereas "revision" would encompass broader and more comprehensive changes.[FN10] The Framers also understood that "[r]evision includes amendment ***983** but amendment does not include revision." [FN11] In recognition of these distinctions, the Framers fashioned more stringent procedures for adopting revisions than for adopting amendments.

FN8. *Cf. Adams v. Gunter*, 238 So.2d 824, 831 (Fla.1970) (quoting *McFadden*, 196 P.2d at 796-98) (noting "differentiation ... between [the] two procedures and between their respective fields of application.").

FN9. 2 Proceedings of the Alaska Constitutional Convention (PACC) 1247 (January 5, 1956).

FN10. *See id.* at 1274-77.

FN11. *Id.* at 1275.

As first proposed to the convention, article XIII allowed revisions and amendments to be adopted by two successive legislatures.[FN12] Delegates offered changes during floor debate distinguishing between revisions and amendments. Delegate Cooper proposed a change allowing revisions to be adopted by a two-thirds vote of two successive legislatures, a constitutional convention, or a three-fourths affirmative vote of a single legislature.[FN13] Under this proposal, amendments were to be adopted by a popular, three-fifths majority vote.[FN14] As ultimately passed, article XIII retained procedural distinctions for adopting revisions and amendments, but specified constitutional conventions as the only available avenue for revisions.

FN12. 6 PACC App. V at 21-22 (December 9, 1955).

FN13. 2 PACC at 1242.

FN14. *Id.*

[3] The Framers' decision to narrow the alternatives for adopting revisions by making constitutional conventions the sole permissible procedure demonstrates not only their awareness of the distinction between revisions and amendments, but also their desire to give the distinction substance, thereby ensuring that it would be observed by future generations of Alaskans.

Scholars have also concluded that a distinction exists between the two methods of constitutional change. Judge John A. Jameson, in his *Treatise on Constitutional Conventions*, wrote that the legislative process of amending a constitution should be confined to "changes which are few, simple, independent, and of comparatively small importance," whereas a constitutional convention is required for "a general revision of a Constitution, or even for single propositions involving radical changes as to the policy of which the popular mind has not been informed by prior discussion."[FN15]

FN15. Judge John A. Jameson, *A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding* § § 540, 574(c) (Chicago, Callaghan and Company, 4th ed. 1887).

985 P.2d 979
(Cite as: 985 P.2d 979)

Judge Jameson's examples of topics properly considered "amendments" include changes designed to address "a doubt ... as to the construction to be put upon a particular clause[,] ... or a new distribution among the agencies of government of their constitutional powers ... to facilitate the transaction of business, or to render public operations more safe or more economical." FN16

FN16. *Id.* at § 540.

[4] One purpose of requiring a constitutional convention for revisions of the constitution is to promote stability.
Some political thinkers have interpreted the written constitution in the American political system as a stabilizing element which operates to retard change or requires a more deliberate selection of what changes society deems desirable, hence acceptable. As a document embodying the fundamental political beliefs of the people and an accepted general arrangement of governmental powers, there is indeed good reason to examine searchingly any major changes proposed in the basic structure and philosophy.[FN17]

FN17. Public Administration Service, 3 *Constitutional Studies: Constitutional Amendment and Revision* 1 (November 8, 1955).

Another purpose is to provide a specialized body of citizens whose sole purpose is to consider the constitution as an organic whole, and to make the appropriate and necessary changes.
[C]omplete revisions or even alterations of a very thorough character should be made by conventions expressly chosen for that purpose. Legislatures will usually have their time taken up with other matters and be unable to devote sufficient time to [the] subject, and the election of a body for the one purpose concentrates public attention ***984** upon questions of a constitutional character.[FN18]

FN18. Walter F. Dodd, *The Revision and Amendment of State Constitutions* 261-62 (1910).

According to Judge Jameson, constitutional changes of a magnitude which can only be accomplished by a revision are not a task for the legislature:
The legislature is a body chosen for temporary purposes. It is a mirror of political passions and interests, and, with the best intentions, cannot be expected to be free from bias, even in questions of the highest moment. It is composed, moreover, in general, of politicians rather than of statesmen.... But, when a Convention is called, it is sometimes possible to secure the return of such men.
It is not necessarily because such a body is recognized to be, as it is, the most important ever assembled in a State, but because the measures it is expected to

mature bear less directly on the interests of parties or of individuals. Party management, therefore, is not usually so much directed to the seeking of control of a Convention as of a legislature. Besides, the proper function of the latter body, that of municipal legislation, being one of the highest vested by the sovereign in any governmental agency, it cannot but be inexpedient, on a general view, that there should be added to it that of organic legislation, requiring different and higher gifts, and wider experience and study, thus threatening to unsettle the balance of the Constitution.[FN19]

FN19. Jameson, *Constitutional Conventions* at § 539.

The case law of other states which have similar constitutional provisions that distinguish between amendments and revisions is in accord with the scholarly writing. The courts have held that constitutions which provide for both pro cesses of amendment and revision express a distinction of substance. FN20 The Supreme Court of Florida described one aspect of the distinction by stating that amendments "originate in the legislature and the people have the choice only of acceptance or rejection of the ones the legislature submits," while in the case of revision "[t]he people's delegates, elected for the purpose, ... weigh proposed provisions, debate their merits, [and] decide what should become and what should not become the organic law." FN21 The same court later held that the power to amend the constitution (as distinct from the power to revise it) "includes only the power to amend any section in such a manner that such amendment if approved would be complete within itself, relate to one subject and not substantially affect any other section or article of the Constitution or require further amendments to the Constitution to accomplish its purpose." FN22

FN20. *See, e.g., Jackman v. Bodine*, 43 N.J. 453, 205 A.2d 713, 725-26 (1964); *Holmes v. Appling*, 237 Or. 546, 392 P.2d 636, 638-39 (1964).

FN21. *Rivera-Cruz v. Gray*, 104 So.2d 501, 503-04 (Fla.1958). *See also State v. Manley*, 441 So.2d 864, 877 (Ala.1983) (Torbert, C.J., concurring) ("The people of this State, through their Constitution ..., have decreed that they reserve, in revising or replacing the Constitution, a role much more active than merely passing upon a proposal someone else has written.").

FN22. *Adams v. Gunter*, 238 So.2d 824, 831 (Fla.1970).

B. *California's Resolution of the Issue*

As the Framers of the Alaska Constitution

did not sufficiently define the difference between the two concepts for our purposes, and because Alaska has not before had occasion to address the deceptively simple question of the distinction between revisory and amendatory changes, it is helpful to look to the law of California, a state which has considered the issue carefully over a period of nearly one hundred years. A line of California Supreme Court cases, beginning with *Livermore v. Waite*,[FN23] has outlined the parameters of the procedures for constitutional change in that state. The *Livermore* court described the importance of adhering to strict procedures for revising and amending the California Constitution.

FN23. 102 Cal. 113, 36 P. 424 (1894).

Under the first of these methods the entire sovereignty of the people is represented in the convention. The character and extent of a constitution that may be framed by that body is freed from any limitations ***985** other than those contained in the constitution of the United States. If, upon its submission to the people, it is adopted, it becomes the measure of authority for all the departments of government,-the organic law of the state,-to which every citizen must yield an acquiescent obedience .... The legislature is not authorized to assume the function of a constitutional convention, and propose for adoption by the people a revision of the entire constitution under the form of an amendment.... The very term "constitution " implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicated the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.[FN24]

FN24. *Id.* at 426.

The California Supreme Court relied heavily on *Livermore* when it decided *McFadden v. Jordan* [FN25] more than a half-century later. *McFadden* concerned a proposed "amendment" to the California Constitution. The amendment was designed to add a new article, composed of two hundred and eight subsections, totalling more than twenty-one thousand words.[FN26] The court rejected the proposed amendment because it was so " far reaching and multifarious" as to amount to a revision.[FN27]

FN25. 32 Cal.2d 330, 196 P.2d 787 (1948).

FN26. *Id.* at 790.

FN27. *Id.* at 788.

The proposal is offered as a single amendment but it obviously is multifarious. It does not give the people an opportunity to express approval or disapproval severally as to each major change suggested; rather does it, apparently, have the purpose of aggregating for the measure the favorable votes from electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accepting the remainder. Minorities favoring each proposition severally might, thus aggregated, adopt all. Such an appeal might well be proper in voting on a revised constitution, proposed under the safeguards provided for such a procedure, but it goes beyond the legitimate scope of a single amendatory article. There is in the measure itself no attempt to enumerate the various and many articles and sections of our present Constitution which would be affected, altered, replaced or repealed.[FN28]

FN28. *Id.* at 796-97.

Four cases on the same topic followed *McFadden.*[FN29] In three of those cases the California Supreme Court decided that challenged proposals to amend the state constitution were not impermissible revisions.[FN30] *Amador Valley v. State* [FN31] concerned Proposition 13, which proposed a new article, dramatically changing California's system of property taxation. [FN32] After discussing *Livermore* and *McFadden,* the court went on to state that the method for distinguishing between amendments and revisions "must be both quantitative and qualitative in nature." [FN33]

FN29. These cases are: *Legislature of the State of California v. Eu,* 54 Cal.3d 492, 286 Cal.Rptr. 283, 816 P.2d 1309 (1991); *Raven v. Deukmejian,* 52 Cal.3d 336, 276 Cal.Rptr. 326, 801 P.2d 1077 (1990); *Brosnahan v. Brown,* 32 Cal.3d 236, 186 Cal.Rptr. 30, 651 P.2d 274 (1982); *Amador Valley Joint Union High School Dist. v. State Board of Equalization,* 22 Cal.3d 208, 149 Cal.Rptr. 239, 583 P.2d 1281 (1978).

FN30. *See Eu,* 286 Cal.Rptr. 283, 816 P.2d at 1318; *Brosnahan,* 186 Cal.Rptr. 30, 651 P.2d at 288-89; *Amador Valley,* 149 Cal.Rptr. 239, 583 P.2d at 1284-89.

FN31. 22 Cal.3d 208, 149 Cal.Rptr. 239, 583 P.2d 1281 (1978).

FN32. *Id.* 149 Cal.Rptr. 239, 583 P.2d at 1283.

FN33. *Id.* 149 Cal.Rptr. 239, 583 P.2d at 1286.

For example, an enactment which is so extensive in its provisions as to change ***986** directly the "substantial entirety" of