COMMENT

A NATIONAL MODEL FOR RECONCILING EQUAL PROTECTION FOR SAME-SEX COUPLES WITH STATE MARRIAGE AMENDMENTS: *ALASKA CIVIL LIBERTIES UNION EX REL. CARTER V. ALASKA*

ERIC J. LOBSINGER*

The Alaska Supreme Court chartered new territory in the controversy over the legal recognition of same-sex relationships in Alaska Civil Liberties Union *ex rel*. Carter v. Alaska. *By striking down provisions that limit state and municipal employee benefits to the spouses of employees, the court extended the state constitution's equal protection clause to include non-discrimination of same-sex couples under the shadow of a state marriage amendment that constitutionally defines marriage as an institution exclusively limited to one man and one woman. This Comment examines the decision of the Alaska Supreme Court and, despite reservations for elements of the court's rationale, suggests that the decision may serve as a model for at least temporary reconciliation between state marriage amendments and the need for equal protection for same-sex couples in other states.*

* LL.D. candidate, Kyushu University, Graduate School of Law, Fukuoka, Japan. LL.M., Kyushu University, 2004; J.D., Washington University in St. Louis, 2003; A.B., Washington University in St. Louis, 2000. The author would like to give special thanks to Minette J. F. Lobsinger for her helpful suggestions and comments.

I. INTRODUCTION

Within the last decade, the legal status of gays and lesbians has moved in conflicting, if not seemingly chaotic fashion in the United States. In 2003, the Massachusetts Supreme Court ordered the State to make provisions for same-sex marriage, thereby granting same-sex couples complete equality with opposite-sex couples.[1] In contrast, eighteen states have amended their constitutions since the mid-1990s, including thirteen states in 2004, to explicitly limit marriage between one man and one woman.[2] The opposite directions in which states have moved in respect to the legal recognition of same-sex couples may reflect the perceived deep social divisiveness that exists in contemporary American culture concerning gay and lesbian rights.[3] Indeed, the differing state approaches can be framed as a prime example of states serving as laboratories in new social experiments[4] and, in this case, social experiments in the forms of families and human relationships.

While such state-by-state experiments offer a competitive means of finding effective solutions to complex legal and political problems, widely varying approaches on questions concerning fundamental rights or the essential dignity of individuals may leave some people in the nation far worse off than others in significant ways. Fortunately, judicial review exists to identify fundamental

---

1. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

2. States that have amended their constitutions to define marriage as between one man and one woman are: Nebraska (2000), Nevada (2002), and Oregon (2004). States that have amended their constitutions to define marriage as between one man and one woman and have passed statutes to define marriage for the same purpose are: Alaska (1998/1996), Arkansas (2004/1997), Georgia (2004/1996), Kansas (2005/1996), Kentucky (2004/1998), Louisiana (2004/1999), Michigan (2004/1996), Mississippi (2004/1997), Missouri (2004/2001), Montana (2004/1997), North Dakota (2004/1997), Ohio (2004/2004), Oklahoma (2004/1996), Texas (2005/2003), and Utah (2004/1995). *See* Human Rights Campaign, "Statewide Marriage Laws," http://www.hrc.org/Template.cfm?Section= Your_Community& ContentID=19449 (last visited Mar. 28, 2006).

3. Evan Gerstmann, SAME SEX MARRIAGE AND THE CONSTITUTION 201–06 (2004) (describing how the general public is unpredictable in how it will view same-sex relationships in the future). The public's perception of same-sex relationships is still divided, and that social acceptance of same-sex marriage may be significantly less than legal acceptance of such unions. *Id.*

4. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (extolling one of the advantages of federalism: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country") (Brandeis, J., dissenting).

rights and protect such rights from majoritarian whims.[5] Decisions by couples on how to manage their family, marriage, and living arrangements, in particular, are some of the most personal and fundamental issues guaranteed by the Constitution, and thus cannot be limited by states unless absolutely necessary means are used to achieve compelling interests.[6] Private, consensual same-sex intimacy recently reached similar heights of constitutional protection in *Lawrence v. Texas.*[7]

A disconnect, consequently, has developed between a federal constitutional recognition of sexuality-related privacy and the surge in state constitutional amendments that explicitly refuse to recognize the sanctity and legal claims of same-sex couples. On October 28, 2005, however, the Alaska Supreme Court became the first court to bridge the growing gap between legal protection and non-protection of same-sex couples.[8] *Alaska Civil Liberties Union ex rel. Carter v. Alaska* is noteworthy because Alaska has statutory and constitutional provisions that define marriage as an institution limited to one man and one woman;[9] yet, the supreme court held that, according to the state constitution, the domestic same-sex partners of state and municipal employees were entitled to the same employee benefits offered to spouses of state and municipal employees.[10] Specifically, the court held "spousal limitations to be unconstitutional as applied to public employees with same-sex domestic partners."[11] In making such a ruling, the court was able to extend legal recognition, or at least equal legal protection, to same-sex couples in a limited but significant way, and yet remain faithful to a jurisprudence that constitutionally denies marriage status to same-sex couples. Because of its breakthrough analysis, rationale, and conclusion, *Carter* may very well serve as a guide for the pur-

---

5. "Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1789) (statement of James Madison).

6. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Moore v. E. Cleveland, 431 U.S. 494 (1977); Meyer v. Nebraska, 262 U.S. 390 (1923).

7. 539 U.S. 558 (2003).

8. *See* Alaska Civil Liberties Union *ex rel.* Carter v. Alaska, 122 P.3d 781 (Alaska 2005).

9. *See* ALASKA CONST. art. I, § 25; *see also* ALASKA STAT. §§ 25.05.011, .013 (2004).

10. *Carter*, 122 P.3d at 794.

11. *Id*. at 783–84.

suit of rights of same-sex couples in the other seventeen states that constitutionally limit marriage to one man and one woman.

II. HISTORY OF SAME-SEX LITIGATION AND LAW IN ALASKA

The possibility of extending equal benefits to domestic partners of same-sex public employees was first raised in 1995 by a superior court when policies that limited benefits to spouses of employees were challenged.[12] Relying in part on Alaska's then gender-neutral marriage statute that used the word "person" rather than "man" and "woman,"[13] the superior court held that the University of Alaska-Fairbanks could not legally limit spousal benefits to husbands and wives.[14] During the same time, same-sex plaintiffs Jay Brause and Gene Dugan brought suit against the Alaska Bureau of Vital Statistics in order to have their application for a marriage license approved, relying on the then gender-neutral marriage statute.[15]

In sharp reaction to the litigation, the state legislature drafted a new marriage statute, which still stands today. The statute in part reads:

> Marriage is a civil contract entered into by one man and one woman that requires both a license and solemnization.[16]
>
> 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.[17]
>
> A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage.[18]

---

12. Tumeo v. Univ. of Alaska, No. 4 FA-94-43, 1995 WL 238359, at *1 (Alaska Super. Ct. Jan. 11, 1995).

13. The wording of the marriage statute was revised in 1974 from "man" and "woman" to "person" and the age of consent was changed to nineteen for both men and women, 1974 Alaska Sess. Laws 17, most likely to comply with a 1972 amendment to Alaska's constitution that prohibits sex discrimination, ALASKA CONST. art. I, § 3.

14. *Tumeo*, 1995 WL 238359, at *7.

15. Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (Alaska Super. Ct. Feb. 27, 1998).

16. Act of May 7, 1996, ch. 21, § 1(a), 1996 Alaska Sess. Laws 1 (codified at ALASKA STAT. § 25.05.011(a) (2004)).

17. Act of May 7, 1996, ch. 21, § 2(a), 1996 Alaska Sess. Laws 2 (codified at ALASKA STAT. § 25.05.013(a) (2004)).

18. Act of May 7, 1996, ch. 21, § 2(b), 1996 Alaska Sess. Laws 2 (codified at ALASKA STAT. § 25.05.013(b) (2004)).

With the new marriage statute, Brause and Dugan amended their complaint to ask for a declaration that the marriage statute was unconstitutional.[19] The superior court found that under the equal protection amendment of Alaska's constitution,[20] choosing one's life partner, regardless of whether the partnership is traditional or nontraditional, is a fundamental right.[21] Moreover, the court determined that the prohibition on same-sex marriage was a classification based on gender.[22] The superior court then ordered a trial requiring the State to show a compelling state interest in prohibiting same-sex marriage.[23]

Brause v. Bureau of Vital Statistics ignited a movement for amending the state constitution to explicitly define marriage as only between one man and one woman. The supreme court declined the State's petition for review,[24] which spurred the legislature to pass the marriage amendment less than three months after *Brause*.[25]

As soon as the marriage amendment passed through the legislature, litigation commenced to prevent the measure from being

---

19. *See* Kevin G. Clarkson et al., *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213, 218 n.30 (1999).

20. ALASKA CONST. art. I, § 1 ("This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.").

21. Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) ("However, just as the 'decision to marry and raise a child in a traditional family setting' is constitutionally protected as a fundamental right, so too should the decision to choose one's life partner and have a recognized nontraditional family be constitutionally protected. It is the decision itself that is fundamental, whether the decision results in a traditional choice or the nontraditional choice Brause and Dugan seek to have recognized. The same constitution protects both.").

22. *Id.* at *5 ("That this is sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious.").

23. *Id.* at *6.

24. *See* Clarkson, *supra* note 19, at 224 n.75.

25. *Brause* was decided on February 27, 1998. 1998 WL 88743. The marriage amendment passed through a final vote in the House on May 11, 1998, *see* H. Journal 3785, 20th Leg., 2d Sess. (Alaska 1998), preceded by passage in the Senate on April 16, 1998, *see* S. Journal 3300, 20th Leg., 2d Sess. (Alaska 1998).

placed on the ballot of a state-wide referendum.[26] Aware of the time table for the referendum, the supreme court granted expedited consideration to the challenge against the marriage amendment, as well as challenges to two other referendum measures.[27] The supreme court decided to permit the measure on the referendum,[28] provided that the second sentence of the marriage amendment would be deleted.[29] Finally, on November 3, 1998, voters were presented with the proposed amendment: "To be valid or recognized in this State, a marriage may exist only between one man and one woman."[30]

Voters approved the marriage amendment by a rather large margin of 68% to 32%.[31] By approving the marriage amendment, Alaska became the first state to adopt a marriage amendment that explicitly limits marriage to just one man and one woman.[32]

After approval of the amendment, the Legislature moved for the *Brause* case to be dismissed as moot.[33] The arguments by the plaintiffs in *Brause* evolved to challenge the prohibition against same-sex couples from receiving the same legal benefits and protections of married couples.[34] The superior court dismissed the case for lack of standing.[35] The supreme court subsequently reviewed the case and affirmed the lower court's procedural decision,[36] but not without also providing some interesting analysis that questioned the merits of the State's substantive arguments.

---

26. *See* Clarkson, *supra* note 19, at 236 n.141.

27. Bess v. Ulmer, 985 P.2d 979, 982 (Alaska 1999).

28. The plaintiffs alleged that the Marriage Amendment amounted to a revision rather than an amendment, and thus required approval by Convention. *Id.* at 981. For the court's discussion, *see id.* at 982.

29. *Id.* at 988. The court required the second sentence ("No provision of this constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex.") to be deleted because the court was concerned that it was verbal surplusage and that it could unintentionally "seriously interfere with important rights" in the future. *Id.*

30. ALASKA CONST. art. I, § 25.

31. Clarkson, *supra* note 19, at 244.

32. Although it is commonly believed that Hawaii also adopted a constitutional amendment prohibiting marriage for same-sex couples, this is not so—the constitutional amendment that was approved on November 3, 1998, in Hawaii reads, "The Legislature shall have the power to reserve marriage to opposite-sex couples." HAW. CONST. art. I, § 23.

33. Clarkson, *supra* note 19, at 244 n.203.

34. *See* Brause v. Alaska, 21 P.3d 357, 358 (Alaska 2001).

35. *Id.*

36. *Id.*

One of the plaintiffs' claims was that Alaska Statute section 25.05.013(b), a provision of the new marriage statute, denied them, as a same-sex couple, "at least 115 separate rights which are afforded to people who are able to marry," such as "'the denial of health coverage, forms of insurance, equal protection in pension and retirement plans, as well as testamentary and property rights.'"[37] According to the majority opinion, the State defended Alaska Statute section 25.05.013(b) as being "purely symbolic," "lacking in 'independent legal significance.'"[38] Additionally, the State argued that individual statutes based on marital status, not Alaska Statute section 25.05.013(b), actually provide marital benefits, suggesting that each of those statutes are what ought to be challenged under a sliding scale test rather than the merely symbolic section 25.05.013(b) provision.[39]

Although the court may have reasonably denied the plaintiffs standing due to a lack of demonstrated harm, the court analyzed the State's arguments on the merits. This analysis revealed remarkably shaky ground for the State. Assuming Alaska Statute section 25.05.013(b) is purely symbolic, symbolism seems to be a rather weak justification for denying same-sex couples the purported 115 separate rights which are afforded to people who are able to marry.

Furthermore, in *Bess v. Ulmer,* the court had struck verbal surplusage from the marriage amendment by eliminating a sentence.[40] The court stated, "Of special concern is the possibility that the sentence in question might be construed at some future time in an unintended fashion which could seriously interfere with important rights."[41] The plaintiffs in *Brause* challenged Alaska Statute section 25.05.013(b) precisely because of the statute's interference with a number of rights. The State's questionable defense of Alaska Statute section 25.05.013(b) on the grounds of symbolism, and the retreat behind individual statutes that materialize rights and benefits based upon marital status appears to have been a significant concession by the State that its marriage statutes, in spite of the marriage amendment, are not entirely justified in the face of the rights demanded by same-sex couples.

The dissenting opinion in *Brause* followed the plaintiffs' arguments further by suggesting that section 25.05.013(b) may be unconstitutional because it permits disparate treatment between

37. *Id.* at 360.
38. *Id.*
39. *Id.*
40. 985 P.2d 979, 988 (Alaska 1999).
41. *Id.*

same-sex couples and opposite-sex couples, not just between married and unmarried couples. Specifically, under section 25.05.013(b), same-sex couples would never receive benefits that are given to unmarried opposite-sex couples.[42] The dissent examined what unmarried opposite-sex domestic partners may be entitled to under the workman's compensation scheme.[43] Section 25.05.013(b) would bar same-sex partners from receiving those same benefits because of the restrictions the statute places on same-sex couples as a class, at least when the statute is not read narrowly. However, as the dissent was primarily concerned with issues of ripeness and standing, it left the substantive issues only partially addressed and not fully conclusive.[44]

III. *CARTER V. ALASKA*

A. The Setting of the Case

Carter followed in 1999, on the heels of *Brause*.[45] In fact, in the ripeness arguments raised in *Brause*, the State identified the eventual plaintiffs in *Carter* as individuals with potentially proper standing, in contrast to the plaintiffs in *Brause*.[46] Unlike the plaintiffs in *Brause*, the plaintiffs in *Carter* could easily specify benefits that were held back from them and their same-sex domestic partners but that were extended to married couples.

The plaintiffs in *Carter* were comprised of the Alaska Civil Liberties Union and nine same-sex couples, with at least one member of each couple being an employee or retired employee of the state or the Municipality of Anchorage.[47] The plaintiffs' complaint was "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 pro-

---

42. *Brause*, 21 P.3d at 363–64 (Bryner, J., dissenting).

43. *Id.* at 364–65 (comparing the benefits claims of same-sex couples and the possible required benefits for unmarried opposite-sex couples in *Burgess Construction Co. v. Lindley*, 504 P.2d 1023 (Alaska 1972)).

44. *Brause*, 21 P.3d at 365–66. The dissent's dissatisfaction with the court's failure to address the larger substantive issues is evident. *Id.* at 365 ("But in my view the court overstates the difficulty of deciding the constitutional question presented. There is certainly ample case law from other jurisdictions to guide this court's decision on the merits.").

45. Alaska Civil Liberties Union *ex rel.* Carter v. Alaska, 122 P.3d 781, 784 (Alaska 2005).

46. *See Brause*, 21 P.3d at 360.

47. *Carter*, 122 P.3d at 784.

tection."[48] The plaintiffs did not challenge the marriage amendment; rather, they challenged the manner by which state and municipal employee benefits were restricted to spouses. Thus, the plaintiffs argued that the public employee benefits programs violated the equal protection guarantee of article I, section 1 of the Alaska Constitution.[49]

B. The Superior Court

Since there was no factual disagreement, all parties moved for summary judgment in the superior court. The superior court rejected the plaintiffs' request to apply heightened scrutiny because: 1) the defendants did not discriminate between same-sex and opposite-sex couples, but rather between married and unmarried couples, which does not involve a suspect class; and 2) the only right at issue involved employee benefits, which is not a fundamental right. Consequently, the superior court applied the lowest level of scrutiny and deferred to the defendants' stated interests of cost reduction, administrative efficiency, and the promotion of marriage.[50] The plaintiffs then appealed to the supreme court.

C. The Supreme Court

1. Issue and Holding. The supreme court took up the case and resolved to answer the substantive issue: Is the spousal limitation for the benefits program of public employees a violation of the state constitution's guarantee of "equal rights, opportunities, and protection under the law" for same-sex couples?[51] The court held that the spousal limitation did indeed violate the constitution's equal protection clause.[52] As such, the court ordered the parties to file supplemental memoranda to address the matter of remedy.[53]

2. Difference in Treatment. To reach its holding, the court first examined whether the spousal limitation treated the plaintiffs differently from other similarly situated persons. The superior court held that the State's employee benefits program differentiated between married and unmarried couples, but that all unmarried couples, whether same-sex or opposite-sex, were treated

48. *Id.*
49. For the court's presentation of the plaintiffs' complaint, see *id.* at 784–85.
50. *Id.*
51. *Id.* at 783 (quoting ALASKA CONST. art. I, § 1).
52. *Id.* at 783–84.
53. *Id.*

equally. This position is consistent with previous opinions by other courts that have addressed the issue.[54] In reversing this position, however, the supreme court held that the more appropriate comparison is between same-sex couples and opposite-sex couples, regardless of their marital status.[55] This, the court found, was the most appropriate point of comparison for legal analysis because opposite-sex couples have the opportunity to enter into marriage, and thus become eligible for the spousal employment benefits.[56] Same-sex couples, on the other hand, are absolutely barred from marrying because of the marriage amendment.[57]

The court cited one case, *Tanner v. Oregon Health Sciences University*,[58] in framing spousal limitations for public employees as discriminatory treatment against same-sex couples.[59] The choice in citing *Tanner* is curious because *Tanner* reasoned that denying employee benefits to unmarried domestic partners had a "disparate impact" on same-sex couples even though the program in question was facially neutral.[60] Disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[61] Because it determined that the spousal limitation for the employee benefits program was facially neutral, the court in *Tanner* concluded that discriminatory treatment could only lie in disparate impact. In *Carter*, the court referred to the *Tanner* decision and its conclusion regarding disparate impact,[62] but the court determined that the defendants' benefits programs were facially discriminatory.[63]

Indeed, the court relied on the programs' facial discrimination in order to rebut the defendants' claim that the spousal limitations

---

54. *Id.* at 787 (citing Beaty v. Truck Ins. Exch., 8 Cal. Rptr. 2d 593 (Cal. Ct. App. 1992); Hinman v. Dep't of Pers. Admin., 213 Cal. Rptr. 410 (Cal. Ct. App. 1985); Ross v. Denver Dep't of Health & Hosps., 883 P.2d 516 (Colo. Ct. App. 1994); and Phillips v. Wisconsin Pers. Comm'n, 482 N.W.2d 121 (Wis. Ct. App. 1992) as cases in which same-sex couples were included in the category of unmarried couples merely for purposes of determining discrimination).

55. *Id.* at 788.

56. *Id.*

57. *Id.*

58. 971 P.2d 435, 442–43 (Or. Ct. App. 1998).

59. *Carter*, 122 P.3d at 788.

60. 971 P.2d. at 443.

61. Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003) (citing Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)).

62. *See Carter*, 122 P.3d at 788 n.31.

63. *Id.* at 788–89.

lacked discriminatory intent.[64] Citing federal precedent and theory of constitutional law, the court concluded that "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.'"[65]

Framing spousal limitations for employee benefits as facially discriminatory is a significant departure from the analysis in *Tanner* and may indicate a new direction by which courts evaluate provisions that disadvantage same-sex couples. The court appeared to be aware of this departure when it contrasted its stance with previous cases that found a lack of differential treatment between same-sex couples and unmarried opposite-sex couples in employee benefits cases.[66] Although the court never explicitly referred to same-sex couples as a class, the court willingly accepted the plaintiffs' argument that the proper method of measuring equal treatment is not simply between married and non-married couples, but between same-sex couples and opposite-sex couples. By rejecting the measurement of equal treatment through classification systems that are merely incidental to same-sex couples, the court appears to have echoed sentiments expressed by a Vermont court in *Baker v. State*.[67] In *Baker*, the court found gender discrimination to be an inadequate method of measuring the treatment of same-sex couples. It ultimately compared same-sex couples to opposite-sex couples in holding that Vermont must provide equal rights to same-sex couples and opposite-sex married couples.[68] Similarly, a recent Massachusetts decision in *Goodridge v. Department of Pub-*

---

64. *Id*.

65. *Id*. at 788 (citing Hamlyn v. Rock Island County Metro. Mass Transit Dist., 986 F. Supp. 1126, 1133 (C.D. Ill. 1997)). The court also cited JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (4th ed. 2004) and *Cook v. Babbitt*, 819 F. Supp. 1 (D.D.C. 1993). *Id*.

66. *Id.* at 787 (citing Beaty v. Truck Ins. Exch., 8 Cal. Rptr. 2d 593 (Cal. Ct. App. 1992); Hinman v. Dep't of Pers. Admin., 213 Cal. Rptr. 410 (Cal. Ct. App. 1985); Ross v. Denver Dep't of Health & Hosps., 883 P.2d 516 (Colo. Ct. App. 1994); and Phillips v. Wisconsin Pers. Comm'n, 482 N.W.2d 121 (Wis. Ct. App. 1992) as cases in which same-sex couples were included in the category of unmarried couples merely for purposes of determining discrimination).

67. 744 A.2d 864 (Vt. 1999).

68. The Vermont Supreme Court held that statutes limiting marriage to opposite-sex couples were facially neutral and did not constitute gender discrimination. *Id*. at 880. The court then compared the rights and privileges enjoyed by married couples with the lack of legal recognition and protection for similarly situated same-sex couples. *Id*. at 883–84. The court then ordered the legislature to make provisions for its decision. *Id.* at 887.

lic Health[69] directly compared the lack of legal protection and recognition of same-sex couples with that of opposite-sex married couples, rather than attempting to fit the analysis through gender discrimination or any other means of measuring equal treatment.[70]

Thus, the court in *Carter* appears to have affirmed a trend in the relatively new line of cases involving the rights of same-sex couples. Moreover, in explicitly treating spousal limitations on employee benefits as facially discriminatory against same-sex couples, the court may have taken the judiciary's awareness of the legal needs of same-sex couples to new heights. The court's analysis is remarkable considering that Alaska has a constitutional provision that clearly limits marriage to one man and one woman.[71] It remains a curiosity, however, that the court flirted with the concept of disparate impact[72] before ultimately concluding that the employee benefits program was facially discriminatory "disparate treatment."[73] This is particularly strange in light of the fact that disparate impact theory is an equal protection assessment tool for otherwise facially neutral regulations, not for facially discriminatory regulations.[74]

3. The Three-Part Sliding Scale. Once the *Carter* court concluded that the employee benefits program treated similarly situated people differently through facial discrimination, it employed a three-part sliding scale to determine whether the unequal treatment could withstand constitutional scrutiny.[75] The three-part sliding scale examined: 1) the weight of the constitutional interest at stake; 2) the government's purpose in light of the applicable level of review required; and 3) the relationship between the stated interests and means to obtain them.[76] In addressing the first part, the court found that employment benefits are "undeniably economic"

---

69. 798 N.E.2d 941 (Mass. 2003).

70. *See id.* at 961 n.21 (declining to consider whether sexual orientation is a suspect classification). *See also* Gerstmann, *supra* note 3, at 61–63 (critiquing the use of gender discrimination in the pursuit of equality for same-sex couples).

71. ALASKA CONST. art. I, § 25.

72. Alaska Civil Liberties Union *ex rel.* Carter v. Alaska, 122 P.3d 781, 788 n.31 (Alaska 2005) (citing Tanner v. Oregon Health Scis. Univ., 971 P.2d 435, 442–43, 447 (Or. 1998)).

73. *Id.* at 789.

74. For an elaboration of the U.S. Supreme Court's distinctions between disparate impact and disparate treatment, see *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52–53 (2003), and *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 335–36 n.15 (1977).

75. *Carter*, 122 P.3d at 789–90.

76. *Id*.

and thus ought to receive minimum scrutiny.[77] Because the court held that the program could not survive even minimum scrutiny, it did not address the heightened scrutiny arguments.[78] Consequently, it is unclear how the court would respond to non-economic same-sex issues. If discriminatory treatment cannot survive minimal scrutiny, though, it is difficult to imagine very many cases in which discriminatory treatment between same-sex and opposite-sex couples could survive heightened scrutiny.

For the second part of the three-part test, the court examined the defendants' interest in the spousal limitations. Because the issue was declared an economic matter, the State and Municipality were required only to show legitimate interests.[79] The defendants claimed to have three legitimate interests: 1) cost control, 2) administrative efficiency, and 3) promotion of marriage.[80] These interests were measured using the third part of the three-part sliding scale, under which the connection between the defendants' interest and the means used must be substantially related, not just rationally related.[81] By utilizing a level of scrutiny that is more stringent than rational basis review, the court applied the higher standards of Alaska's equal protection clause,[82] which is similar to the rational review "plus" that has been employed in Supreme Court analysis for cases involving the Equal Protection Clause of the U.S. Constitution.[83]

The court dealt with the interest of cost control in a rather creatively dismissive fashion. In assessing the defendants' claim that the legislature intended to "limit employee benefits to a small, readily ascertainable group of individuals closely connected with the employee" for the purpose of cost control,[84] the court altered the defendants' argument by suggesting that the defendants actually intended to save costs by limiting benefits to those in "truly close relationships" with employees.[85] This virtually made the spousal limitation impossibly related, much less substantially related, to cost control. The court justified reformulating the State's

---

77. *Id*. at 790.

78. *Id*.

79. *Id*.

80. *Id*.

81. *Id*.

82. *Id.* at 791 n.48 (citing Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976)). *See* ALASKA CONST. art. I, § 1; ALASKA CONST. art. XII, § 6.

83. *See* Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring); Romer v. Evans, 517 U.S. 620, 632–36 (1996).

84. *Carter*, 122 P.3d at 790 (quotations omitted).

85. *Id*. at 791.

and Municipality's cost control claim by concluding that cost control was incompatible with the defendants' interest in promotion of marriage, since promoting marriage would drive up costs for the defendants under the spousal limitation scheme.[86]

Although the court may be correct in noting that cost control and promotion of marriage are logically inconsistent interests, there appears to be little reason why the court had to alter the defendants' position in order to find that cost control fails under the third part of the three-part sliding scale. Surely by providing benefits to same-sex domestic partners of employees, the State and Municipality would not be spending significantly more in benefits than by limiting the benefits to spouses of employees. Also, since the court identified the substantial connection required under Alaska's equal protection clause, which exceeds that required under simple rational review,[87] the court could have concluded that the expected insignificant increase in spending would not be substantial enough to justify discriminatory treatment. In fact, the court acknowledged that even under its altered argument of cost control, the exclusion of same-sex domestic partners of employees does technically reduce costs for the State and Municipality, but nonetheless fails to be substantially related.[88] Undoubtedly, the court could have reached the same conclusion without altering the defendants' argument. Moreover, the court comes across as unfairly lacking a sense of balance by rejecting alternative arguments. The court recognized logically inconsistent, but alternative arguments presented by the plaintiffs,[89] so it is unclear why it felt the need to alter the logically inconsistent arguments made by the defendants and consequently reduce the defendants' cost control argument to a far too vulnerable straw-man.

The second interest the defendants claimed was administrative efficiency—the desirability of a bright-line distinction between those eligible for benefits and those ineligible.[90] Although it agreed with the State and Municipality that the lack of formal recognition of same-sex couples creates difficulties in administrating benefits to domestic same-sex partners of employees, the court nonetheless held that the means be substantially related to the interests, and concluded that the State and Municipality could devise a system to administer the benefits.[91] The court cited other jurisdictions that

86. *Id*.
87. *Id*. at 791–92.
88. *Id*. at 791.
89. *See id*. at 789–90.
90. *Id*. at 791.
91. *Id*. 791–93.

have successfully devised administrative procedures for distributing benefits to unmarried domestic same-sex partners in order to pragmatically illustrate that governmental agencies can indeed treat same-sex partners equal to opposite sex partners and that the lack of a bright-line distinction is not insurmountable.[92]

The court's use of examples in which employee benefits have been extended to employees' domestic same-sex partners has a certain appeal in negating the defendants' claim that the spousal limitations are substantially related to administrative efficiency. At the end of its discussion of administrative efficiency, however, the court added that "administrative difficulties are not an insurmountable barrier to providing benefits *if our constitution requires that they be provided*."[93] It is unclear what the court meant to say by qualifying its assessment of administrative difficulties with constitutional requirements, particularly since such constitutional requirements—in terms of the administrative efficiency interest—are determined by whether the administrative difficulties are an insurmountable barrier. The court's reasoning seems circular in that it essentially holds that the lack of a bright-line distinction is not truly an administrative difficulty—and thus not a constitutionally valid reason to deny benefits to same-sex partners—if the constitution requires providing benefits to same-sex partners. It is not altogether clear why the court added this circular argument when it made a rather empirically persuasive case that administrative efficiency did not necessitate spousal limitations.

The third interest offered by the defendants for retaining the spousal limitations was the promotion of marriage.[94] The court agreed with the State and Municipality that "the promotion of marriage is at least a legitimate governmental interest."[95] What the court did not agree with, however, was the claim made by the defendants that a connection exists between limiting benefits to spouses and the promotion of marriage.[96] In ruling on what was arguably the defendants' least persuasive interest, the court held that "making benefits available to spouses may well promote marriage; denying benefits to the same-sex domestic partners who are abso-

---

92. The court cited the benefits programs at the University of Alaska, in states including California and Washington, and in a number of cities. *Id*.

93. *Id*. at 792 (emphasis added).

94. *Id*.

95. *Id*. at 793. In *Lawrence v. Texas*, Justice O'Connor not only found that marriage is a legitimate state interest, but also, interestingly, that "preserving the traditional institution of marriage" is a "legitimate state interest." 539 U.S. 558, 585 (2003) (O'Connor, J., concurring).

96. *Carter*, 122 P.3d at 793.

lutely ineligible to become spouses has no demonstrated relationship to the interest of promoting marriage."[97]

4. Other Matters and Dicta. Besides the issues raised under the three-part sliding scale, the court also addressed a number of other matters that were not directly related to the facts of *Carter* but may provide guidance as to how the court views same-sex issues in general. One of these matters is the signal the court gave on how it may treat any future state constitutional amendments that attempt to go beyond limiting marriage to one man and one woman.[98] On the one hand, the court tried to harmonize Alaska's marriage amendment and equal protection clauses by narrowly interpreting the marriage amendment as pertaining to marriage and nothing else.[99] Nonetheless, the court hinted that a constitutional amendment that attempts to exclude same-sex domestic partners from employee benefits would likely be found unconstitutional under the U.S. Constitution in light of *Romer v. Evans*.[100] Thus, under the guidance of *Romer*, the court interpreted the marriage amendment narrowly.[101] This suggests that the court may be willing, at some point, to expand the equal protection clause of the Alaska Constitution to require some form of legal recognition and protection for same-sex relationships short of actual marriage, such as those that exist in Vermont.[102] A civil union provision that guaran-

---

97. *Id*. The Colorado Supreme Court similarly rejected the claim that reducing discriminatory practices against homosexuals would undermine opposite-sex marriage by turning heterosexuals away from opposite-sex marriages. Evans v. Romer, 882 P.2d 1335, 1347 (Colo. 1994), *aff'd sub nom.* Romer v. Evans, 517 U.S. 620 (1996).

98. *Carter*, 122 P.3d at 786 n.20.

99. *Id.* at 786 (noting that the marriage amendment does not generally exempt same-sex couples from the equal protection clause of Alaska's constitution).

100. *Id*. at 786 n.20 (citing Romer v. Evans, 517 U.S. 620 (1996)).

101. *Id*. at 787.

102. The text of Alaska's marriage amendment is relatively limited in scope compared to the text of similar amendments of other states. *Compare* ALASKA CONST. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman.") *with* UTAH CONST. art. I, § 29 ("Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.") *and* TEX. CONST. art. I, § 32 ("Marriage in this state shall consist only of the union of one man and one woman. This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage."). Nebraska's broadly worded marriage amendment ("Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil un-

tees equal legal protection and recognition of same-sex couples would not conceptually run afoul of Alaska's marriage amendment, especially in light of the constitutional analysis provided in *Carter*.

In spite of the broad potential *Carter* may have in expanding equal rights to same-sex couples, the court stated that its decision should not be interpreted so as to require the extension of the same rights to polygamous or consanguineous relationships.[103] The court distinguished same-sex relationships from incestuous relationships by noting that incest is prohibited by state statute while homosexual conduct is legal and cannot be criminalized post-*Lawrence v. Texas*.[104] Presumably, the court distinguished polygamy from same-sex relationships on the same grounds,[105] even though the court never directly explained its different treatment of polygamy from same-sex relationships. Cautioning against interpreting its holding to require the extension of equal protection to consanguineous and polygamous relationships, the court echoed the same reservations expressed in *Goodridge v. Department of Public Health*.[106] This desire to distinguish incestuous and polygamous relationships is no doubt moved in part by influential members of the legal community who fear that recognizing equal protection for same-sex relationships will necessarily, in principle, lead to the recognition of equal protection for other non-traditional relationships.[107] Al-

---

ion, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska," NEB. CONST. art. I, § 29) was recently struck down by a federal district court for violating the U.S. Constitution's First Amendment, Equal Protection Clause, and Bill of Attainder Clause. Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980, 997, 1005, 1008 (D. Neb. 2005). Perhaps this signals stricter judicial scrutiny over state marriage amendments that go beyond limiting marriage to one man and one woman.

103. *Carter*, 177 P.3d at 793 ("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.").

104. *Id.* at 788 n.30 (citing ALASKA STAT. § 11.41.450 (2004)); *see also* Lawrence v. Texas, 539 U.S. 558 (2003).

105. Polygamy is a Class A misdemeanor (Unlawful Marrying). ALASKA STAT. § 11.51.140 (2004).

106. 798 N.E.2d 941, 969 n.34 (Mass. 2003).

107. *See, e.g.*, Lawrence v. Texas, 539 U.S. at 599 (Scalia, J., dissenting) (warning that the striking of a Texas sodomy statute would mean that no other restrictions on sexual activity could survive rational basis review); George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 419, 440 (2004) (presenting the traditional argument that same-sex relationships ought not to be given legal protection because polygamy and incest will then have to be legally accepted as well); Samford Levinson, *Thinking About Polygamy*, 42 SAN DIEGO L. REV. 1049, 1054 (2005) (suggesting grave philosophical difficulties in distinguish-

though this Comment will not attempt to address the wider issues of non-traditional relationships beyond same-sex relationships,[108] it is curious to note that the courts in both *Carter* and *Goodridge* felt the need to bring up polygamy and incest,[109] even though the facts or analysis had nothing to do with polygamy or incest. It could be that the decisions in *Carter* and *Goodridge* were fundamentally grounded in conservative views on marriage and familial relationships, in spite of the recognition of same-sex couples; or perhaps the courts were keen not to frighten the general public by inviting all various forms of challenges to marriage-related statutes simultaneously.

A final matter to which the court drew attention, but that was not part of the central holding of the case, was the different levels of legal expectations the court placed on same-sex couples and unmarried opposite-sex couples.[110] In referring to a case where a loss of consortium claim was brought by an unmarried opposite-sex cohabitant, the court emphasized that the denial of the consortium claim was reasonable because the opposite-sex cohabitants had the opportunity to marry and thus to be eligible for loss of consortium claims.[111] However, same-sex couples cannot legally marry. For this reason, the rationale supporting the one case example where a loss of consortium claim was denied to an individual in an unmarried opposite-sex couple could not be used to deny same-sex couples financial claims that are owed to them.[112]

5. Remedy. The court invited the parties to provide supplemental briefing on the issue of remedies and permitted the disputed program to remain in effect until resolution of the issue.[113] In this matter, the court suggested that the State and Municipality look to other state and local governments, as well as private em-

---

ing claims for equal rights for polygamists from claims for equal rights for same-sex couples); Brett H. McDonnell, *Responses to* Lawrence v. Texas*: Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 359 (2004) (criticizing, in sympathy with rights for same-sex couples, the lack of support given to efforts to decriminalize consensual adult incest).

108. For a fairly analytical, but ultimately inconclusive, examination of the legal issues surrounding polygamy and incest, see Gerstmann, *supra* note 3, at 99–111.

109. For references in the *Carter* case, see *supra* notes 103–04. *See also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 n.34 (Mass. 2003).

110. Alaska Civil Liberties Union *ex rel.* Carter v. Alaska, 112 P.3d 781, 794 (Alaska 2005).

111. *Id*. (referring to Trombley v. Starr-Wood Cardiac Group, 3 P.3d 916 (Alaska 2000)).

112. *Id*.

113. *Id*. at 795.

ployers who offer benefits to domestic same-sex partners of employees, as useful models for implementing a sufficient benefits program.[114] The court also cited *Goodridg*e as an example in which the legislature was given time to take appropriate action to meet the holding of the court.[115]

IV. REFLECTIONS AND APPLICATIONS

The incredible irony of *Carter* is that the marriage amendment possibly ensured that the court would examine the difference in treatment between same-sex and opposite-sex couples, rather than between married and unmarried ones. Without the marriage amendment, there would not have been an absolute need for the court to treat same-sex couples as their own class. This is so because, as unmarried couples, same-sex couples may still have theoretically possessed the opportunity to marry, and thereby, to avail themselves of spousal benefits. Even with the existence of the Defense of Marriage Act,[116] the court could still have refused to assess disparate treatment between same-sex couples and opposite-sex couples by deciding to address the merit of the issue only at the point of a constitutional challenge against the Defense of Marriage Act.

With marriage absolutely barred against same-sex couples as a consequence of the marriage amendment, however, the ineligibility of a domestic same-sex partner of an employee to become a "spouse" under the employee benefits program became a critical issue under equal protection clause analysis. In this sense, the marriage amendment, together with the equal protection clause and the benefits program's spousal limitation, virtually forced the court to hear the case by categorizing the plaintiffs as same-sex couples.[117]

Because of the way the marriage amendment actually assisted the plaintiffs in *Carter* by assuring them status as same-sex couples, rather than merely unmarried couples, *Carter* may offer a way forward for other states with marriage amendments to reconcile de-

---

114. *Id*.

115. *Id*.

116. Act of May 7, 1996, ch. 21, 1996 Alaska Sess. Laws 1 (codified at ALASKA STAT. §§ 25.05.011(a), .013(a), .013(b) (2004)).

117. *But see* Clarkson, *supra* note 19, at 244–45 (predicting that the Amendment would trump all claims brought by same-sex couple plaintiffs and that same-sex couples would not be able to attain benefits reserved for married couples because courts would follow the distinction of married couple and unmarried couple and, consequently, find no suspect classification).

mocratically chosen marriage amendments[118] with a real need for legal recognition and protection of same-sex couples. Although the decision in *Carter* most likely fails to satisfy completely those who are most adamant about denying legal recognition to same-sex relationships and those who insist on nothing less than full marriage equality for same-sex couples, for the time being at least, *Carter* provides a middle ground that permits states with marriage amendments to retain their amendments while simultaneously securing important rights for same-sex couples, especially since the rationale in *Carter* is open for extension to all rights and privileges short of actual marriage.

Applying the rationale of *Carter* in individual state legal environments naturally would produce varying results, with some states being more protective of same-sex couples than others. Besides different constitutional equal protection doctrines, states have widely varying statutes and regulations affecting homosexuals.[119] Despite the diverse legal patchwork that exists throughout the United States, *Carter* is a useful model for other states largely because it represents the first decision by a state supreme court to extend equal employment benefits to same-sex domestic partners of public employees in a state with a marriage amendment. Additionally, taking into consideration that Alaska was the first state in the republic to ratify a marriage amendment and that a high per-

118. The weight that should be given to state constitutional amendments in terms of assessing democratic mechanics in conflict with important, recognized individual rights has been given much discussion in the context of marriage amendments. *See, e.g.*, Teresa Stanton Collett, *Restoring Democratic Self-Governance Through the Federal Marriage Amendment*, 2 U. ST. THOMAS L.J. 95 (2004); Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871 (1999).

119. States that have an executive order or governor's policy prohibiting discrimination against public employees based on sexual orientation and gender identity are Kentucky (2003), Indiana (2004), and Pennsylvania (2003). States that have an executive order, administrative order, or personnel regulation prohibiting discrimination against public employees based on sexual orientation are Alaska (2002), Arizona (2003), Colorado (2002), Delaware (2001), Louisiana (2004), Michigan (2003), Montana (2000), and Virginia (2006). States that have a law or policy that provides state employees with domestic partner benefits are California (1999), Connecticut (2000), Illinois (2004), Iowa (2003), New Jersey (2004), New Mexico (2003), New York (1995), Oregon (1995), Rhode Island (2001), Vermont (1994), and Washington (2001), as well as the District of Columbia (2001). *See* Human Rights Campaign, "Laws and Policies Affecting State Employees," http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=16306 (last visited Mar. 29, 2006).

centage of Alaskans approved of it,[120] the court in *Carter* moved Alaska significantly along in recognizing and protecting limited yet significant rights for same-sex couples.

An illustration of how *Carter* might provide guidance to other state courts in dealing with the struggle between a marriage amendment and equal protection of same-sex couples is the current debate in Oregon. In 2004, Oregon added a marriage amendment to its constitution.[121] The quick ratification of the amendment mooted litigation challenging state statutes that made no provision for same-sex marriages.[122] In holding the litigation to be moot, the Oregon court did not address the issue of marriage benefits because the plaintiffs did not properly bring the issue before the court.[123] Following the lead of the plaintiffs in *Carter*, same-sex couples may have reasonable opportunity to bring a case for marriage benefits[124] in light of Oregon's relatively broad equal protection clause.[125]

V. CONCLUSION

The Alaska Supreme Court in *Carter* handed over a remarkable decision in terms of its context, timing, and circumstances. Although the decision was not without some questionable lines of reasoning, the holding was able to carefully navigate between respect for the state's marriage amendment and recognition that same-sex couples are entitled to equal protection. At a time when many states have, in the last couple of years, adopted marriage amendments, it is now more critical than ever for courts to be able to reconcile majoritarian democracy with equal protection for all individuals. Significantly, *Carter* recognized the identity of same-sex couples as such, rather than attempting to fit same-sex couples into an incidental characteristic or category. This permitted the court to address the issues affecting same-sex relationships far more squarely, honestly, and respectfully than has been the norm.

---

120. *See* Clarkson, *supra* note 19, at 244.

121. OR. CONST. art. XV, § 5(a) ("It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.").

122. Li v. Oregon, 110 P.3d 91, 102 (Or. 2005).

123. *Id*.

124. Oregon already provides state employees with domestic partner benefits. *See supra* note 119.

125. "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." OR. CONST. art. I, § 20.

Perhaps it is those features, more than anything else, which will help reunite our fractured and polarized society.