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## ARTICLE

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# THE ALASKA MARRIAGE AMENDMENT: THE PEOPLE'S CHOICE ON THE LAST FRONTIER

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*This Article examines the Marriage Amendment to the Alaska Constitution, which states: "To be valid or recognized in this State, a marriage may exist only between one man and one woman." It begins by tracing the origins of the amendment in Alaska's Defense of Marriage Act, which defines marriage as the relationship of one man and one woman, and the Brause v. Bureau of Vital Statistics case, which held that the Defense of Marriage Act was presumptively unconstitutional under the equal protection and due process clauses of the Alaska Constitution. Then, the passage of the Marriage Amendment in the Legislature and through popular ratification is narrated. Next, the constitutionality of the Marriage Amendment is analyzed with respect to*

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*the Alaska and the United States Constitutions. The Article concludes that the Marriage Amendment is constitutional and a valid exercise of democratic self-government.*

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## I. INTRODUCTION

They were the most unexpected judicial decision and state constitutional amendment of 1998: Judge Peter Michalski's decision in *Brause v. Bureau of Vital Statistics*<sup>1</sup> in February, followed by the passage of the Marriage Amendment by the Legislature in May and the voters in November.<sup>2</sup> While all eyes were on Hawaii<sup>3</sup> and

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1. No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

2. See S.J. Res. 42, 20th Leg., 2d Legis. Sess. (Alaska 1998). The final version of the Amendment approved by the Legislature proposed to add a new section to article I of the Alaska Constitution that reads as follows: "Section 25. Marriage. To be valid or recognized in this State, a marriage may exist only between one man and one woman. No provision of this constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex." The proposed amendment passed the House by a vote of 28-12, see House J. 3785, 20th Leg., 2d Legis. Sess. (Alaska 1998), and the Senate passed the amendment 14-6, Senate J. 4157, 20th Leg., 2d Legis. Sess. (Alaska 1998). Between approval and ratification, the Alaska Supreme Court struck the second sentence from the Marriage Amendment. See *Bess v. Ulmer*, Nos. S-8811, S-8812, S-8821, Preliminary Opinion and Order, at 8 (Alaska Sept. 22, 1998), *aff'd*, *Bess v. Ulmer*, Nos. S-8811, S-8812, S-8821, 1999 WL 619092 (Alaska Aug. 17, 1999). On November 3, 1998, the one-sentence version of the Marriage Amendment was ratified by the people by a vote of 68% to 32%. See Cheryl Wetzstein, *Gays Can't "Marry" 2 States Say*, WASH. TIMES, Nov. 5, 1998, at A16. For a more extensive narrative and analysis of this process, see *infra* Sec. III.

Vermont,<sup>4</sup> where the battle over same-sex “marriage”<sup>5</sup> had been raging, Alaska suddenly became close to ground zero in the national marriage debate.<sup>6</sup>

On February 27, 1998, Anchorage Superior Court Judge Peter Michalski held in *Brause v. Bureau of Vital Statistics*<sup>7</sup> that under the Alaska Constitution, each person has a “fundamental right” to choose his or her “life partner,” whether that partner is of the same or opposite sex.<sup>8</sup> His unprecedented decision provoked an extraordinary reaction: the introduction and passage of a state constitutional amendment defining marriage as a relationship between a man and a woman.<sup>9</sup> The Marriage Amendment was challenged between its passage and the November general election, and the Alaska Supreme Court allowed a modified version to proceed to a vote.<sup>10</sup> On November 3, 1998, the Alaska Marriage Amendment passed by a vote of sixty-eight to thirty-two percent.<sup>11</sup>

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3. A plurality of the Hawaii Supreme Court held in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), that the State’s marriage statute constituted sex discrimination under the Hawaii Constitution and was subject to strict scrutiny. Four years of fierce debate ensued, including a trial court ruling in which the judge held the marriage statute unconstitutional. See *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). The Constitution of Hawaii was amended to read, “The legislature shall have the power to reserve marriage to opposite-sex couples.” HAW. CONST. art. I § 23. The Hawaii Supreme Court has not issued a final decision in *Baehr*. For a lengthy review of events in Hawaii, see David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning, and Constitutionality*, 20 U. HAW. L. REV. (forthcoming special edition).

4. See *Baker v. State*, No. S1009-97 (Vt. Super. Ct. Dec. 17, 1997); *appeal pending*, No. 98-32 (Vt. 1999). As of August 1999, no decision had been issued in this case.

5. We put the term same-sex “marriage” in quotation marks to reflect our belief that same-sex unions are not marriages, a belief we realize some readers will not share. For a discussion of the substantive issues behind our beliefs, see David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1 (1997).

6. For an overview of that debate, see David Orgon Coolidge & William C. Duncan, *Definition or Discrimination? State Marriage Recognition Statutes in the “Same-Sex Marriage” Debate*, 32 CREIGHTON L. REV. 3 (1998); David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201 (1998).

7. No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

8. See *id.*

9. See S.J. Res. 42, 20th Leg., 2d Legis. Sess. (Alaska 1998).

10. See Preliminary Opinion and Order, *Bess v. Ulmer*, Nos. S-8811, S-8812, S-8821 (Alaska Sept. 22, 1998).

11. See Defendants’ Second Motion for Summary Judgment, Exhibit A (copy of Lieutenant Governor’s Certificate of Election), *Brause v. Bureau of Vital Sta-*

The three of us are not neutral bystanders in this debate. We support the Alaska Marriage Amendment, and one of us serves as Counsel for the Legislature in defending the amendment. We share with our opponents, however, and all thoughtful observers and concerned citizens, a desire to examine its context, meaning, and implications for marriage and constitutional law.

This Article will address three questions. First, what are the origins of the Marriage Amendment? In Section II, we look at the history of Alaska's marriage law and the *Brause* decision. Second, what can be learned from the passage of the Marriage Amendment? In Section III, we offer a narrative of the passage of the Marriage Amendment, from initial introduction to post-passage developments, looking for clues as to its intended meaning. Third, is the Marriage Amendment constitutional? In Section IV, we consider a variety of constitutional arguments that may be made for and against the Marriage Amendment, especially in light of the United States Supreme Court's decision in *Romer v. Evans*,<sup>12</sup> which struck down a Colorado constitutional amendment that classified on the basis of homosexual, lesbian or bisexual orientation. We conclude that given current trends, the Marriage Amendment is likely to be held to be fully consistent with both the Alaska Constitution and the Constitution of the United States.

## II. THE ORIGINS OF THE MARRIAGE AMENDMENT

The Alaska Marriage Amendment originated as a reaction to Judge Michalski's decision in *Brause v. Bureau of Vital Statistics*.<sup>13</sup> However, neither the *Brause* decision nor the Legislature's response transpired in a vacuum. In this section, we examine events preceding the Marriage Amendment, including *Brause* itself.

### A. Alaska's Defense of Marriage Act

Before 1974, Alaska's marriage statute expressly restricted marriage to a union between one man and one woman. Alaska's marriage code specified that marriage could be entered into by "a male who is 21 years of age or older with a female who is 18 years of age or older."<sup>14</sup> In an effort to comply with a 1972 amendment

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tistics, No. 3AN-95-6562 CI (Alaska Super. Ct. Dec. 31, 1998); see also Liz Ruskin, *Limit on Marriage Passes in Landslide*, ANCHORAGE DAILY NEWS, Nov. 4, 1998, at A1.

12. 517 U.S. 620 (1996).

13. No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

14. Act of Apr. 13, 1963, ch. 58, § 1, art. I., 1963 Alaska Sess. Laws 54 (enacting ALASKA STAT. § 25.05.011: Civil Contract Requirement for Marriage). The statute was modified in 1970 to reduce the age at which a man could marry to 19.

to article I, section 3 of the Alaska Constitution that prohibited discrimination on the basis of sex, the age of consent for marriage was changed to nineteen for both sexes in 1974.<sup>15</sup> The revised statute also replaced the words “man” and “woman” with the word “person.”<sup>16</sup> Nothing in the legislative history suggests an attempt to allow persons of the same sex to marry.<sup>17</sup>

In early 1995, the Superior Court in Fairbanks heard a case challenging the University of Alaska-Fairbanks’ (“UAF”) policies limiting spousal benefits to the “husbands” or “wives” of its married employees.<sup>18</sup> Superior Court Judge Meg Greene set loose a firestorm when she ruled that UAF could not legally limit spousal benefits to husbands and wives.<sup>19</sup> Although not central to her decision, Judge Greene suggested that the gender-neutral marriage statute might allow for same-sex marriage.<sup>20</sup>

As a result, the Legislature became aware that the marriage statute could be misinterpreted. While courts in other jurisdictions have held that gender-neutral marriage codes do not necessitate same-sex marriage,<sup>21</sup> in light of Judge Greene’s ruling, the Legislature was not willing to entrust the marriage statute to the Alaska Judiciary. In 1996, the Legislature changed the marriage statute to accomplish two goals: (1) to clearly provide that for purposes of legal recognition and status, marriage in Alaska could exist only between one man and one woman; and (2) to clearly prevent any same-sex marriage, validly performed in another State, from being recognized in Alaska. As finally amended, the Alaska marriage statute read as follows: “Marriage is a civil contract entered into between one man and one woman that requires both a license and

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*See* Act of June 27, 1970, ch. 245, § 9, 1970 Alaska Sess. Laws 2; *see also* Alaska State Legislature, Legislative Research Agency, Memorandum on Legislative History of AS 25.05.011 (Mar. 8, 1995).

15. *See* Act of May 17, 1974, ch. 127, § 92, 1974 Alaska Sess. Laws 17.

16. *See id.* The statute was modified again in 1975 to reduce the age of consent to 18. *See* Act of Apr. 3, 1975, ch. 28, § 1, 1975 Alaska Sess. Laws 1. The Legislature retained the gender-neutral language without comment.

17. *See* 1995 Alaska Op. Att’y Gen. 663-95-0451 (Mar. 31, 1995), at 1995 WL 341035.

18. *See* *Tumeo v. University of Alaska*, No. 4 FA-94-43, 1995 WL 238359 (Alaska Super. Ct. Jan. 11, 1995).

19. *See id.*

20. *See id.* at 7 n.8.

21. *See, e.g.,* *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

solemnization.”<sup>22</sup> In addition, it provides that any same-sex marriage recognized in another jurisdiction is void in Alaska, and any contractual rights granted by such a marriage are unenforceable.<sup>23</sup>

B. The Trigger: *Brause v. Bureau of Vital Statistics*<sup>24</sup>

In 1995 two men, Jay Brause and Gene Dugan, relying on the then-gender-neutral marriage code, and in the wake of the Hawaii Supreme Court’s decision in *Baehr v. Lewin*,<sup>25</sup> submitted an application for a marriage license to the Alaska Bureau of Vital Statistics, Third Judicial District at Anchorage (hereafter “the Bureau”).<sup>26</sup> The Bureau denied the application.<sup>27</sup> Subsequently, Brause and Dugan sued the State seeking to have the interpretation of the marriage statute denying same-sex marriage declared unconstitutional, and to have the State permanently enjoined from denying marriage licenses to same-sex couples.<sup>28</sup>

Before an initial hearing was held, the Alaska Legislature amended the marriage statute to eliminate the gender-neutral language and restrict marriage to one man and one woman.<sup>29</sup> The plaintiffs then amended their complaint to ask for a declaration that this statute was also unconstitutional.<sup>30</sup> They argued that the failure of the State to issue them a marriage license denied them due process and infringed their right to privacy under the Alaska Constitution.<sup>31</sup> The Attorney General strongly disagreed.<sup>32</sup>

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22. ALASKA STAT. § 25.05.011(a) (LEXIS 1998).

23. *See id.* § 25.05.013(e).

24. No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

25. 852 P.2d 44 (Haw. 1993).

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

27. *See id.*

28. *See First Amended Complaint for Injunctive and Declaratory Relief, Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998). The Bureau denied the application based upon a standing order from the Third Judicial District’s Judge Karl Johnstone to the effect that marriages could only legally be entered into between one man and one woman.

29. *See ALASKA STAT.* § 25.05.013(e) (LEXIS 1998).

30. *See Second Amended Complaint for Injunctive and Declaratory Relief, Brause* (No. 3AN-95-6562 CI).

31. *See id.*; *see also* Plaintiffs’ Memorandum in Support of Motion for Partial Summary Judgment and for Declaration of the Law of the Case at 7-20, 23-34, *Brause* (No. 3AN-95-6562 CI); Plaintiffs’ Reply to Defendants’ Opposition to Defendants’ [sic] Motion for Partial Summary Judgment and Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment at 4-17, *Brause* (No. 3AN-95-6562 CI).

1. *Judge Michalski's Decision: A Critical Analysis.* Judge Peter Michalski of the Superior Court of Alaska issued his memorandum and order on February 27, 1998.<sup>33</sup> Judge Michalski accepted the plaintiffs' constitutional arguments:

The court finds that marriage, i.e., the recognition of one's choice of a life partner, is a fundamental right. The state must therefore have a compelling interest that supports its decision to refuse to recognize the exercise of this fundamental right by those who choose same-sex partners rather than opposite-sex partners.<sup>34</sup>

To come to this conclusion, Michalski had to reject the definition of marriage as a union of a man and a woman. He openly did so, claiming that he was not questioning the State's marriage requirements, but rather scrutinizing the State's *definition* of marriage.<sup>35</sup>

In his analysis, Judge Michalski first considered the plaintiffs' privacy claims. While noting that the case did not implicate traditional notions of privacy (the right to be let alone), Michalski held that the choice of whom one marries is a private matter that the State cannot interfere with by withholding recognition.<sup>36</sup> Michalski discounted the State's history and tradition arguments by separating the concept of marriage from its historical meaning. The opinion thus adopted the plaintiffs' novel notion that it is "the decision itself that is fundamental," and then stated that "whether the decision results in a traditional choice or . . . nontraditional choice" does not matter for purposes of constitutional protection.<sup>37</sup> Having separated marriage from its traditional definition and recast it as the *choice* of a life partner, Michalski found privacy protection for the choice and bootstrapped that protection into an obligation for the State to legally recognize that choice. Judge Michalski found that the privacy issue was dispositive, and only lightly discussed the plaintiff's equal protection claim.<sup>38</sup> He then ordered a trial for the

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32. See Memorandum in Support of Defendants' Cross-Motion for Summary Judgment, and in Opposition to Plaintiffs' Motion for Partial Summary Judgment and for Declaration of the Law of the Case, *Brause* (No. 3AN-95-6562 CI); Defendants' Memorandum in Reply to Plaintiffs' Opposition to Defendants' Cross-Motion for Summary Judgment, *Brause* (No. 3AN-95-6562 CI).

33. See *Brause* (No. 3AN-95-6562 CI).

34. *Id.* at \*1.

35. See *id.* at \*2.

36. See *id.* at \*4-5.

37. *Id.* at \*6.

38. The court accepted the plaintiffs' contention of sex-based classification as "obvious." See *id.*

State to show a compelling state interest for its ban on same-sex marriage.<sup>39</sup>

The analysis of the right to privacy in *Brause* confuses tolerance and preference. Relations and conduct may be legally categorized in at least three different ways - as “preferred,” “permitted,” or “prohibited.”<sup>40</sup> Marriage is the classic example of a *preferred* relationship. It is one of the most highly protected, historically favored relations in the law. Thus, the claim for same-sex marriage is not a claim for mere tolerance, but for special preference. The principles of tolerance or privacy do not justify legalization of same-sex marriage because marriage is much more than a *permitted, private* relation, it is a legally *preferred, public* status.

The *Brause* opinion misapplies the precedents upon which it relies. The court relies heavily on the Alaska Supreme Court’s decisions in the *Breese v. Smith*<sup>41</sup> and *Ravin v. State*<sup>42</sup> cases, but ignores the fact that the holdings in those cases must be stretched beyond recognition to justify a right to same-sex marriage. In *Breese*, a father sued the principal of an Alaska Junior High School for expelling his son for violating the school’s hair-length requirement.<sup>43</sup> The trial court found the requirement reasonable and dismissed the case, holding that the Alaska Constitution provided no right to have long hair at school.<sup>44</sup> The Alaska Supreme Court disagreed, but confined its decision to state constitutional issues, specifically equal protection<sup>45</sup> and the constitutional right to a public education.<sup>46</sup> The court found that article I, section 1 of the Alaska Constitution provided a general right “to be let alone,” although it did not label this as a right to privacy.<sup>47</sup> The court noted Alaska’s allegiance to such basic values as the preservation of maximum individual choice, protection of minority sentiments, and appreciation for divergent lifestyles.<sup>48</sup> Noting the particularly individual nature

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39. *See id.* The court did not say if “sexual orientation” merited heightened scrutiny.

40. *See, e.g.,* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 546-47 (1983).

41. 501 P.2d 159 (Alaska 1972).

42. 537 P.2d 494 (Alaska 1975).

43. *See Breese*, 501 P.2d at 161.

44. *See id.* at 164. Though the Alaska Constitution did not then have a privacy provision, the court addressed the issue of privacy. *See id.* at 164 n.11.

45. *See* ALASKA CONST. art. I, § 1.

46. *See id.* art. VII, § 1.

47. *Breese*, 501 P.2d at 168 (citing Erwin W. Griswold, *The Right to be Let Alone*, 55 NW. U. L. REV. 216 (1960)).

48. *See id.* at 169.

of personal appearance, the court held that the Alaska Constitution's protection of liberty extended to the right of a student to choose a hairstyle.<sup>49</sup> The court then held that the State had not shown a compelling interest in controlling hair length and invalidated the requirement.<sup>50</sup> Three years later in *Ravin*, the Alaska Supreme Court noted that the State requirement overturned in *Breese* potentially interfered with another constitutional right, the right to a public education.<sup>51</sup> Under the regulation, Breese could not have exercised his right to choose his hair length without jeopardizing his ability to have an education.<sup>52</sup>

The issues in *Brause* are easily distinguishable from those at issue in *Breese*. First, *Breese* involved a right to be let alone in what was an essentially private matter. The plaintiffs in *Brause* claimed that their request also involved a right to be let alone in making the private decision of whom to marry.<sup>53</sup> While the choice of a lifetime partner may arguably be a private one, the government's decision to recognize the marriage relationship has significant public consequences. Legally recognized marriage requires compliance with formalities prescribed by statute. In addition, the State provides certain accompanying benefits and legal obligations to the marriage relationship. All of this effectively prevents marriage from being a wholly private choice.<sup>54</sup>

Between the time of the Court's decision in *Breese* and the *Brause* case, the Alaska Constitution had been amended to include a specific right of privacy.<sup>55</sup> In *Ravin v. State*,<sup>56</sup> the Alaska Supreme Court offered a significant interpretation of the meaning of this

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49. *See id.* at 170.

50. *See id.* at 172.

51. *See Ravin v. State*, 537 P.2d 494, 502 (Alaska 1975).

52. *See id.* The scope of *Breese* was further clarified in a case challenging a court's contempt citation for an attorney who did not wear a coat and tie to court. *See Friedman v. District Court*, 611 P.2d 77 (Alaska 1980). In that case, the plaintiff argued that the *Breese* decision precluded the court from controlling an attorney's dress, but the Alaska Supreme Court held that the coat and tie requirement was reasonable. *See id.* at 78. This suggests that reasonableness might even save a regulation that affects an arguably private matter like appearance.

53. *See Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*4 (Alaska Super. Ct. Feb. 27, 1998).

54. In addition, *Breese* involved the interplay of two constitutional rights, privacy and education, in such a way that by denying one, the other would be infringed. *See Ravin*, 537 P.2d at 502. *Brause* involves no such mixture of intertwined rights. *See Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct., Feb. 27, 1998).

55. *See ALASKA CONST.* art. 1, § 22 (amended 1972).

56. 537 P.2d 494 (Alaska 1975).

provision. The defendant was charged with illegal possession of marijuana.<sup>57</sup> Ravin attacked the statute criminalizing marijuana possession on the theory that it violated his constitutional right to privacy.<sup>58</sup> Ravin's argument was that the privacy provision of the Alaska Constitution and the right of privacy recognized in the U.S. Constitution protected a right to possess marijuana for personal use.<sup>59</sup> In examining Ravin's claims, the court noted the importance of the inviolability of the home as a major factor in the U.S. Supreme Court privacy decisions.<sup>60</sup> It also found that the Alaska Constitution's privacy provision was aimed at protecting the home,<sup>61</sup> and held that "citizens of the State of Alaska have a basic right to privacy *in their homes* under Alaska's constitution."<sup>62</sup> Having settled the issue of whether possession of marijuana at one's own home was protected by the right of privacy, the court turned to an analysis of the State's interest in preventing possession for personal use. Relying heavily upon scientific studies, the court concluded that the threat of marijuana possession was only of sufficient interest to the State if it involved marijuana use by a driver, and that there existed "no adequate justification for the State's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home."<sup>63</sup>

The *Ravin* case has been extensively relied upon and explained in subsequent cases. In the same year that *Ravin* was decided, the Alaska Supreme Court heard a challenge to another conviction for possession of marijuana.<sup>64</sup> In *Belgarde v. State*, the defendant was arrested for possession of marijuana in a public place in connection with a sale.<sup>65</sup> This difference was dispositive for the court, which noted that the *Ravin* decision had specifically allowed for prosecution based on the sale or public possession of marijuana.<sup>66</sup> *Ravin's* holding is limited by a private/public distinction: private, home possession of marijuana is constitutionally protected, but public possession, especially connected to the sale of

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57. *See id.* at 496.

58. *See id.* at 497.

59. *See id.*

60. *See id.* at 502-04.

61. *See id.* at 503-04.

62. *Id.* at 504 (emphasis added).

63. *Id.* at 511.

64. *See Belgarde v. State*, 543 P.2d 206 (Alaska 1975).

65. *See id.* at 207.

66. *See Ravin*, 537 P.2d at 511.

marijuana, is not.<sup>67</sup> The public/private distinction derives from *Ravin's* language that “[w]hen a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated.”<sup>68</sup>

Another important limitation on *Ravin's* holding is that there must not be an important State interest served by the challenged State action. In one case following *Ravin*, the court noted that the right to privacy did not extend to sexual acts with children.<sup>69</sup> Another example involved a challenge to a conviction for possession of cocaine.<sup>70</sup> The court noted that part of the justification for the *Ravin* decision was the relative harmlessness of marijuana as compared to cocaine, and that the greater State interest in regulating cocaine use justified prohibiting its possession.<sup>71</sup>

*Brause's* reliance on the *Ravin* opinion is misplaced. Like *Breese*, *Ravin* relies on the essentially private nature of the behavior for which protection is sought. Cases that have distinguished *Ravin* have involved public behavior, such as employee drug use and writing letters to the governor.<sup>72</sup>

*Brause* should have joined this line of cases. Unlike *Ravin*, *Brause* implicates public behavior and has public consequences. In *Ravin*, the defendant asserted a right to possess marijuana in his home for *personal* use, whereas in *Brause* the plaintiffs sought *public* recognition of their relationship (as a marriage). In addition, *Ravin* involved an activity that the court found to have little impact on society, whereas *Brause's* radical redefinition of marriage has the potential for significant impact on public life. While home marijuana use may be a private pastime that arguably triggers no State involvement, marriage is a fundamental societal institution in which the State has a great interest, and marital status is

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67. The importance of this distinction is strengthened by other cases where *Ravin* was unsuccessfully used to challenge convictions for possession of marijuana related to its sale. See, e.g., *Brown v. State*, 565 P.2d 179, 180 (Alaska 1977).

68. *Ravin*, 537 P.2d at 504. See also *Doe v. Alaska Superior Court*, Third Judicial Dist., 721 P.2d 617 (Alaska 1986) (rejecting a privacy claim asserted to prevent the production of a letter written to the governor, which was held to involve a public matter); *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989) (ruling that two employees discharged for not submitting to a drug test were not protected by *Ravin's* holding because *Ravin* involved a prosecution for activity taking place in the home).

69. See *Anderson v. State*, 562 P.2d 351 (Alaska 1977).

70. See *State v. Erickson*, 574 P.2d 1 (Alaska 1978).

71. See *id.* at 21.

72. See *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989); *Doe v. Alaska Superior Court*, Third Judicial Dist., 721 P.2d 617 (Alaska 1986).

inherently a public status that triggers extensive government benefits and protections.

2. *The Petition for Review.* After the *Brause* decision, the State immediately petitioned the Alaska Supreme Court for review. The State argued that popular disagreement with the court's decision, as well as the likelihood that a trial would be contentious and inflammatory, warranted immediate review.<sup>73</sup> The State argued that the lower court's decision was erroneous because it (1) constituted judicial legislation, (2) wrongly construed the Alaska Constitution as providing a right to same-sex marriage contrary to the history and intent of the constitution, and (3) blithely held that the marriage law constituted sex discrimination.<sup>74</sup>

The Supreme Court declined the Petition for Review.<sup>75</sup> In the meantime, the people and their elected representatives took matters into their own hands.

### III. THE PASSAGE OF THE MARRIAGE AMENDMENT

A constitution is a negotiated settlement between citizens of often deeply differing viewpoints. Together, the people of a geographic region strive to agree upon a charter for the political community that will govern them. This charter represents a people's fundamental judgment about government's proper structure and role, both in itself and in relationship to individual persons and social institutions.<sup>76</sup> The hope is then that, from this baseline, political issues can be adequately resolved *within* a constitutional framework, so that citizens and institutions are not consumed with constant debate and uncertainty about the legitimate and illegitimate powers of their government.

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73. See Petition for Review at 3-5, *Brause* (No. 3AN-95-6562).

74. See *id.* at 6-15.

75. See *High Court Declines Same-Sex Case*, ANCHORAGE DAILY NEWS, June 6, 1998, at D1 ("The Alaska Supreme Court has declined to review a judge's decision in an ongoing case challenging the state ban on same-sex marriage. Theoretically, that clears the way for a superior court trial on the challenge, but voters may decide the matter before the courts can.").

76. See, e.g., DONALD LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 13 (1988) ("Every constitution uses principles of design for achieving the kind of life envisioned by its authors, and the principles will vary according to that vision."); RICHARD D. PARKER, *HERE THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO* 109 (1994) ("[A]t the heart of constitutional argument is political controversy about democracy, about what it can be and what it should be.").

At times, however, the meaning of a constitutional order is itself called into question. For various reasons, founding principles become a matter of explicit debate in the political arena. At such moments, proposals are often set forward to amend the basic charter of a government.

Constitutional crises have often centered upon the courts. Sometimes these crises have been occasioned when a court *upholds* a law, such as in *Plessy v. Ferguson*.<sup>77</sup> Other times fundamental debates are triggered when a court *overturns* a law, as in *Roe v. Wade*,<sup>78</sup> when the Supreme Court struck down State legislation restricting abortion, or in *Brown v. Board of Education*,<sup>79</sup> when the Court overturned the “separate but equal” doctrine. It is even possible for a court to trigger a widespread crisis without fully adjudicating a case. That is one way of describing what happened when Judge Michalski issued his opinion in *Brause*. Technically, that opinion did not officially decide the fate of Alaska’s marriage law, but only set a novel standard to be used by the trial court in its consideration of the marriage statute.<sup>80</sup>

From the point of view of those who supported Judge Michalski’s opinion, the court was boldly and legitimately exercising its role as supreme interpreter of the Alaska State Constitution.<sup>81</sup> To opponents of the decision, however, the Court, whose only role was to interpret the Alaska Constitution, had exceeded the constitutional order.<sup>82</sup> The people would have to take matters into their own hands to correct the court’s misguided and illegitimate effort to impose an unprecedented social experiment. The people would have to clarify the genuine meaning of the Alaska Constitution,

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77. 163 U.S. 537 (1896).

78. 410 U.S. 113 (1973).

79. 347 U.S. 483 (1954).

80. See *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998); see *infra* Part III.D.

81. See, e.g., *Letters From the People (Judge Just Followed the Law)*, ANCHORAGE DAILY NEWS, Apr. 6, 1998, at B7.

82. See Mary Ann Pease & Karsten Rodvik, *Preventing Redefinition of Marriage Doesn’t Hurt Anyone*, ANCHORAGE DAILY NEWS, Oct. 18, 1998, at H4. Professor Mary Ann Glendon of Harvard has described “the habits and attitudes of judges with grandiose visions of judicial authority, practitioners eager to blaze new trails to the nation’s crowded courthouses, and legal scholars yearning to be philosopher-kings and -queens.” MARY ANN GLENDON, *A NATION UNDER LAWYERS* 282-83 (1994).

thereby reasserting themselves as the authors of their Constitution.<sup>83</sup>

Framed in this way, the debate over same-sex marriage and the Marriage Amendment would become a debate not only about *what* marriage is, but also a debate about *who* should decide the answer: the people of Alaska or their courts?

In a matter as weighty as an amendment to a Constitution, a careful analysis of the process, content, and intent behind the amendment is critical. Where a state constitutional amendment is involved, it obviously may be challenged on federal constitutional grounds.

With the decision of the U.S. Supreme Court in *Romer v. Evans*,<sup>84</sup> the possibility of overturning state constitutional amendments arguably related to controversies over homosexuality has come to the fore. *Romer* overturned Colorado's Amendment 2, which invalidated local "sexual orientation" anti-discrimination ordinances. The Court characterized Amendment 2 as motivated by "animosity" towards homosexual persons.<sup>85</sup> Because Amendment 2 neither served a valid purpose nor advanced it by legitimate means, the Court concluded that the amendment failed even rational basis review.<sup>86</sup>

As Section IV discusses in detail, opponents of the Alaska Marriage Amendment cite *Romer* for the proposition that the Marriage Amendment must likewise be invalidated under the Federal Constitution. Amendment supporters argue that *Romer* is inapplicable.

This section examines each stage of the amendment process to explore whether *Romer* applies to the Marriage Amendment. We conclude that the amendment process demonstrates that the goal of the Marriage Amendment is to reaffirm marriage, against *Brause*, without animus toward any class of Alaska citizens. The process of considering the Marriage Amendment involved substantial public debate in which both sides were truly heard and fairly represented.

#### A. Approval by the Legislature

An amendment to the Alaska Constitution requires a two-thirds vote by each chamber of the Legislature, and approval by a

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83. See ALASKA CONST. art. I, § 2: "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."

84. 517 U.S. 620 (1996).

85. *Id.* at 634. For the text of Amendment 2, see *infra* note 264.

86. See *id.* at 624.

majority of the voters at the next general election.<sup>87</sup> While the requirements are basic, the journey from introduction to ratification can be anything but simple. Here we narrate the progress of the amendment through the topsy-turvy legislative process.

1. *The Senate.* The reaction to Judge Michalski's decision in *Brause* was extraordinarily swift. On March 2, 1998, the first business day following Judge Michalski's decision, the Senate Health, Education and Social Services Committee (the "HESS Committee") introduced two resolutions. The first, S.C.R. 25,<sup>88</sup> urged an appeal and an expeditious decision in the *Brause* case.<sup>89</sup> Senate Majority Leader Robin Taylor stated that:

[i]t is apparent that our Judiciary needs further clarification on fundamental values. Marriage has been the foundation of civilization for thousands of years and in cultures around the world. Marriage is the most important social institution in our society. The state has a . . . principle interest in preserving and protecting the special status of marriage, regardless of religious beliefs.<sup>90</sup>

Taylor's statement also announced that the HESS Committee would be introducing a resolution proposing an amendment to the Alaska Constitution. As introduced, S.J.R. 42 read as follows:

Section 15. Marriage Contract. Each marriage contract in this State may be entered into only by one man and one woman. The legislature may, by law, enact additional requirements relating to marriage.<sup>91</sup>

The Senate Judiciary Committee scheduled a hearing for March 9. The lead sponsor of the resolution, Senator Loren Leman, Vice-Chair of the HESS Committee, issued a statement on the eve of the hearing. Describing the flaws of *Brause*, as he saw them, he concluded that "[b]ecause recognition of same-sex marriages raises the most profound cultural and legal issues, it is only appropriate that the issue be decided by voters, as S.J.R. 42 will allow. It is not appropriate for one unelected and unaccountable judge to set social policy for the entire State of Alaska."<sup>92</sup>

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87. See ALASKA CONST. art. 13, § 1.

88. S.C.R. 25, 20th Leg., 1st Legis. Sess. (Alaska 1998).

89. See Senate J. 2705, 20th Leg., 1st Legis. Sess. (Alaska 1998). The Resolution passed the Senate Judiciary Committee 4-1 on March 10th, and passed the Senate 20-0 on March 12th. See Senate J. 2807, 2847, 20th Leg., 1st Legis. Sess. (Alaska 1998).

90. Press Release of the Office of the Majority Leader (Mar. 2, 1998) (on file with authors).

91. S.J. Res. 42, Senate J. 2701, 20th Leg., 1st Legis. Sess. (Alaska 1998).

92. Senate Committee on Health, Education, and Social Services, Sponsor Statement - Senate Joint Resolution 42 (Mar. 9, 1998).

The first witness at the hearing was John Gaguine, the Assistant Attorney General handling the *Brause* litigation for the Department of Law.<sup>93</sup> He came with no prepared statement, and no comments to make on the revised version of the resolution. The Chairman asked him, “In other words, is this something appropriate to place on the ballot, and is it something that the people of the state should vote on, and is it in conflict with any provisions of the constitution?” Gaguine was reticent: “I do not want to speak for the Administration on this. As I said, I’m just here litigating it.” But then he added, in simple terms, what would be repeated and debated by many witnesses and citizens later that day and in the coming months: “This amendment, it seems to me, would moot the litigation, and I think that’s the intent of it.”<sup>94</sup>

The lead witness in support of S.J.R. 42 was Lynn D. Wardle, Professor of Law at Brigham Young University and Secretary-General of the International Society of Family Law. He surveyed the worldwide legal status of same-sex couples, noted the unprecedented (and in his opinion flawed) nature of *Brause*, contrasted *Brause* with the traditional understanding of marriage in American law, and defended the constitutionality of the resolution.<sup>95</sup>

Testimony was subsequently received from across the State.<sup>96</sup> Ten citizens opposed the Marriage Amendment, and two supported it.<sup>97</sup> Opponents claimed the Amendment was an attack on

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93. Gaguine’s testimony can be found in the Draft Verbatim Testimony on S.J.Res. 42 before the Senate Judiciary Committee on March 9, 1998, Tape 98-15, Side A (Alaska 1998) at 4-6.

94. *Id.* at 5-6 (question by Chairman Taylor and Response by Asst. Attorney General Gaguine).

95. *See id.* at 6-11 (live testimony of Professor Wardle); *see also* Written Statement of Professor Lynn D. Wardle in Support of S.J.R. No. 42 and S.C.R. No. 25, Submitted for Alaska Senate Judiciary Committee Hearing on March 9, 1998, 20th Legis., 1st Legis. Sess. (Alaska 1998) (on file with authors, also submitted as Exhibit 4 to the Alaska Legislature’s Brief).

96. A large crowd had gathered, both in the hearing room, and in the Legislative Information Offices (“LIOs”) across the State, where citizens hoped to offer testimony by teleconference. Senator Ellis, an opponent of the resolution, insisted that Chairman Taylor make time for them to be heard. The Chairman counted about 30 witnesses signed up at the hearing room, plus “on the LIOs it looks like probably another 30 to 40 on top of that.” Draft Verbatim Testimony on S.J.R. 42 before the Senate Judiciary Committee on March 9, 1998, Tape 98-15, Side A at 11-12 (Alaska 1998) (Exchange between Senators Ellis and Taylor) (on file with authors).

97. *See* Draft Verbatim Testimony on S.J.R. 42, *supra* note 96, at 12. Those testifying against the amendment were Donald Cecil and Sara Beosser from the Statewide Committee for Equality; Marsha Buck, co-chair of Parents, Families,

homosexuals, that it was unnecessary, and that it would limit constitutional rights.<sup>98</sup> They described Alaska as a land of “freedom” and the state constitution as the guarantor of privacy.<sup>99</sup> Most opponents concluded by urging the Legislature to leave the question to the courts.<sup>100</sup>

Following the testimony, the Committee adopted the following revised version of the resolution on a 4-1 vote, over the strong objections of Senator Ellis, who insisted that not enough people had testified, and that in any case, the issue belonged in the courts.<sup>101</sup>

Section 25. Marriage. To be valid or recognized in this State, a marriage may exist only between one man and one woman. No provision of This [sic] Constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex. Additional requirements related to marriage may be established to the extent permitted by the Constitution of the United States and the Constitution of the State of Alaska.<sup>102</sup>

On March 10, the Senate Judiciary Committee reported out the proposed text and sent it to the Senate Finance Committee.<sup>103</sup> Finance referred the resolution to a subcommittee, which subsequently held two public hearings via teleconference for persons unable to testify in person.<sup>104</sup>

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and Friends of Lesbians and Gays; Pam Northrip and Wilson Valentine from the Commission for Human Rights; Peter Pinney, Ellen Twiname, Michael Jones, Rev. Howard Bess, and Elizabeth Dodd. Those testifying in favor of the amendment were: Michael Johnstone from Caruso Ministries and Tom Gord from Christian Coalition of Alaska. *See id.* at 12-35.

98. *See id.*

99. *See id.* at 17.

100. *See id.*

101. *See* Draft Verbatim Testimony on S.J.R. 42, *supra* note 96, Side B at 39-44. Senators Parnell, Pearce, Miller and Taylor voted “yes,” and Senator Ellis voted “no.” *See id.* at 44. The revised version was adopted as presented in the hearing.

102. *Id.* at 36.

103. *See* Senate J. 2807, 20th Leg., 2d Legis. Sess. (Alaska 1998).

104. *See* Proposing an Amendment to the Constitution of the State of Alaska Relating to Marriage: Hearing on S.J.R. 42 Before the Senate Fin. Comm., 20th Legis., 2d Legis. Sess., Mar. 24, 1998, 9:15 a.m., Verbatim Transcript, Tape 98-93, Side A at 2 (Alaska 1998) (on file with authors). The Subcommittee included Senators Adams, Donley, Phillips and Torgerson. It held hearings on March 31 at 1:00 p.m. (for South Central Alaska) and 7:00 p.m. (for Sitka, Kodiak and Haines), and April 1 at 7 a.m. (for Barrow, Bethel, Delta Junction, Dillingham, Fairbanks, Kotzebue, Nome and Unalakleet). At the first public hearing held on the afternoon of March 31, the Subcommittee took testimony by remote from Homer, Kenai, and Mat-Su. *See* Minutes, Senate Fin. Subcomm., Mar. 31, 1998, 1:00 p.m., Verbatim Transcript (on file with authors). Thirty speakers spoke in favor of the

It is interesting to note that Howard Bess and Elizabeth Dodd both spoke in opposition to the amendment during these hearings.<sup>105</sup> After the Amendment passed, both filed suit to en-

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Amendment. Of these, 29 spoke as individuals, and one spoke on behalf of an organization (Guardians of Family Rights). Sixteen speakers spoke against the amendment. Of these, 15 spoke as individuals and one spoke on behalf of an organization (Alaska Civil Liberties Union). The hearing resumed on the evening of the 31st and included testimony from Sitka and Juneau. *See* Minutes, Senate Fin. Subcom., Mar. 31, 1998, 7:00 p.m., Draft Verbatim Transcript (on file with authors). At this session, 23 speakers spoke in favor of the Amendment, 22 speaking as individuals and one speaking on behalf of an organization (the Knights of Columbus). Forty-four speakers opposed the amendment, 37 speaking as individuals and seven speaking for organizations (the Committee for Equality; Southeast Alaska Gay and Lesbian Alliance; Parents and Friends of Lesbians and Gays; National Association of Social Workers; Juneau Human Rights Commission; Alaska Women's Lobby; and the Alaska Civil Liberties Union). The final hearing on the morning of April 1 received remote testimony from Fairbanks, Dillingham, Barrow and Delta Junction. *See* Minutes, Senate Fin. Subcomm., Apr. 1, 1998, 7:00 a.m., Draft Verbatim Transcript at 1-3 (on file with authors). This session included nine speakers in support of the amendment, all speaking as individuals, and 29 speakers against the amendment, 28 speaking as individuals and one speaking on behalf of an organization (Parents and Friends of Lesbians and Gays).

105. *See* Minutes, Senate Fin. Subcomm., Mar. 31, 1998, 1:00 p.m., Verbatim Transcript at 26-27.(Alaska 1998); Mar. 31, 1998, 7:00 p.m., Verbatim Transcript at 41-42 (Dodd and Alaska Civil Liberties Union) (Alaska 1998). Opponents of the amendment were much more likely to base their arguments on the perceived motivation of those with whom they disagreed. Among the many arguments made in favor of the amendment were the following: by definition, marriage is between a man and a woman; the redefinition of marriage should be left to the people of Alaska to decide; the recognition of same-sex marriage might have a slippery-slope effect leading to recognition of relationships such as polygamy; children are benefited by traditional marriage; the amendment was necessary to correct judicial activism; and allowing same-sex marriage in Alaska would create conflict with the laws of other states. Among the arguments voiced by the opposition were: same-sex couples should have access to the benefits of marriage; the amendment would be divisive, creating an atmosphere of hatred, and would constitutionalize discrimination; the amendment violates church/state separation principles; the courts should be free to rule on the issue; the amendment would infringe privacy rights; the ban on same-sex marriage is analogous to discredited anti-miscegenation statutes; permitting same-sex marriage would benefit the economy; the Legislature should wait until the Alaska Supreme Court decides the *Brause* case; the motivations for a couple entering same-sex marriage are similar for a heterosexual couple; and homosexual couples should be permitted to order their lives the same way heterosexual couples do. It is important to note that "religious" arguments were made on both sides (besides arguments by opponents that the amendment was motivated by religious sentiments).

join the Alaska Legislature from placing S.J.R. 42 on the ballot. The lawsuit contended that the ballot item violated regulations on how items should appear on a ballot and that the amendment would violate the 14th Amendment of the U.S. Constitution.<sup>106</sup>

On April 2, the full Finance Committee scheduled a final hearing to act on the resolution. Senator Leman attempted to respond to public criticisms. “To begin with,” he stated, “it was repeatedly suggested that the motivation behind this resolution is to discriminate against homosexuals, to deny them rights and protections they deserve under the law. This is not true.”<sup>107</sup> Insisting that a response to *Brause* was the issue, and nothing more, the Senator argued:

Judge Michalski is attempting to redefine something that is impervious to redefinition . . . Gravity exists. We cannot eliminate gravity by passing a law. Our species was created with two genders. We cannot change that reality by passing a law . . . Judge Michalski and I have at least one thing in common: neither of us can redefine marriage. I accept that reality. He does not. And that is why we are here today.<sup>108</sup>

During the meeting, Michael Pauley, staff aide to Senator Leman, explained the Judiciary Committee’s revised version of the resolution.<sup>109</sup> Before a final vote on the text, Senator Adams made the following passionate and colorful statement against the Marriage Amendment:

[The resolution] lacks, I believe . . . respect and compassion for people in the State of Alaska. I am a married man, six kids, and a Quaker. And I listened to the testimony from some of the religious groups. But I believe that before we pass something like this . . . we should wait for the Courts to take it . . . I thought we took a sworn oath of office that we would protect the Constitution. That every Alaskan should have equal protection, equal treatment. . . . I play poker once a week. I play cribbage. I go to the horse races. So, I love to gamble. After one hundred and twenty-one days I like to drink. But I do not pass that on to the people. And, as a normal human being . . . I do lust for certain

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106. See Complaint for Declaratory Judgment and Permanent Injunction, *Bess v. Ulmer*, Nos. S-8811, S-8812, S-8821, 1999 WL 619092 (Alaska 1999); Complaint for Declaratory Judgment and Permanent Injunction, *Dodd v. Ulmer*, No. 3AN-98-8113 CIV, 1999 WL 619092 (Alaska 1999).

107. Remarks of Senator Loren Leman re: S.J.R. 42, Senate Fin. Comm. 1 (Apr. 2, 1998) (on file with authors).

108. *Id.* at 3.

109. Minutes, Senate Fin. Comm., Apr. 2, 1998, Tapes 98-109, Side B and 98-110, Side A, at 4-6 (Alaska 1998) (remarks of Michael Polley [sic]) (on file with authors).

things. A new car, and perhaps something beautiful of the opposite sex. So, there is nobody that is perfect in the Legislature. An[d] why are we trying to pass on morality? I think morality should not be a Legislative matter and we're trying to do this. And I think that is wrong.<sup>110</sup>

Following these remarks, the Senate Finance Committee voted 6-1 to support the resolution.<sup>111</sup>

On April 16, the resolution came to the Senate floor. Senator Lemman repeated his previous arguments.<sup>112</sup> He also added a personal note: “[I]n light of the messages that I have received, and the suggestion by some that I don’t understand their lifestyle, that somehow I’m motivated by hate or fear, I just want to share something from my own past, and from my own family.”<sup>113</sup> He then disclosed that several members of his extended family, and friends of his, are homosexual. He also mentioned an acquaintance who had been homosexual “but he abandoned that lifestyle.”<sup>114</sup> He stated that “even when we disagree with the moral choices that another person makes, our relationship can still be rooted in love. However, it is false compassion to suggest that tolerance requires us to publicly recognize and sanction and confer special benefits on homosexual relationships.”<sup>115</sup> The Senator closed by quoting Judge Kleinfeld from the Ninth Circuit: “The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary.”<sup>116</sup>

There were other moments, however, when the debate threatened to descend into outright farce. Senator Ellis (D-Anchorage) proposed an amendment that would have added the Ten Com-

110. *Id.* at 10 (remarks of Senator Adams).

111. The words “The Legislature may enact” were added to the front of the third sentence, and “may be established” were deleted from the end of the sentence. *See id.* at 9. In addition, the proposed location of the amendment was shifted from art. 12 to art. 1, placing the amendment in the section on basic rights. *See id.* at 3. Senators Torgerson, Parnell, Donley, Phillips, Pearce, and Sharp voted “Yes.” Senator Adams voted “No.” *See id.* at 11. The resolution was officially reported out on April 6. *See* Senate J. 3158, 20th Leg., 2d Legis. Sess. (Alaska 1998).

112. Senate Floor Statement in Support of S.J.R. 42, Senator Loren Lemman (R-Anchorage), Thursday, Apr. 16, 1998, Juneau, Alaska 3 (on file with authors).

113. *Id.*

114. *Id.*

115. *Id.* at 4.

116. *Id.* (quoting *Compassion in Dying v. Washington*, 79 F.3d 790, 858 (9th Cir. 1996) (Kleinfeld, J., dissenting), *rev’d by Washington v. Glucksberg*, 521 U.S. 702 (1997)).

mandments to the Constitution. He explained that just as a Ten Commandments Amendment would be inappropriate, so would a Marriage Amendment.<sup>117</sup> His proposal was rejected. The Marriage Amendment bill then passed by the margin of fourteen Republicans versus six Democrats.<sup>118</sup> Having met the magic number of fourteen votes, the proposal was approved.<sup>119</sup>

2. *The House.* The House received the proposed Amendment on April 18 and, as in the Senate, referred it to the Judiciary and Finance Committees.<sup>120</sup> On April 27, the House Judiciary Committee held a marathon hearing at which Senator Leman and 103 live and remote witnesses testified.<sup>121</sup>

In his opening presentation, Senator Leman emphasized “the great impact that this could have if Alaska engages in redefining what marriage is, it would have an impact on federal law and also it

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117. See Senate J. 3297-98, 20th Leg., 2d Legis. Sess. (Alaska 1998).

118. See Senate J. 3300, 20th Leg., 2d Legis. Sess. (Alaska 1998). The Senators voting yes were Donley, Green, Halford, Kelly, Leman, Miller, Parnell, Pearce, Phillips, Sharp, Taylor, Torgerson, Ward, and Wilken. Voting no were Adams, Duncan, Ellis, Hoffman, Lincoln, and Mackie. Senator Adams then moved for reconsideration. See *id.* On the following day, the Senate passed the resolution again by the same margin and transmitted it to the House. See *id.* at 3334, 3346.

119. Liz Ruskin of the *Anchorage Daily News* summed it up with typical journalistic flair: “After two hours of passionate debate that turned from the Bible to barnyard animals, the Alaska Senate voted Thursday for a constitutional ballot measure that would ban same-sex marriage.” Liz Ruskin, *Senate: 1 man, 1 woman, Marriage-defining ballot measure OK'd*, ANCHORAGE DAILY NEWS, Apr. 17, 1998, at A1.

120. See House J. 3071, 20th Leg., 2d Legis. Sess. (Alaska 1998).

121. See House Judiciary Standing Committee, Apr. 27, 1998, 1:18 PM, Draft Verbatim Transcript, Tapes 98-71 Side B to 98-74, Side A. In total, 78 citizens testified against the resolution, and 24 testified in support of it. See *id.* at 2-15. The Witness Register allowed citizens to sign up as testifying “in support of,” “in opposition to,” or “on” the proposed Amendment. Only six persons signed “on,” and the transcript clearly shows that three were in favor of the Amendment, and three were against it. Of the 79 opponents, 10 represented organizations (Alaska Civil Liberties Union, Parents and Friends of Lesbians and Gays (“P-FLAG”) Juneau, P-FLAG Fairbanks, the Alaska State Chapter of Social Workers, the Committee for Equality, the Southeast Alaska Gay and Lesbian Alliance, the Alaska Women’s Lobby, the University of Alaska-Southeast student government, the Social Action Committee of the Unitarian-Universalist Fellowship of Fairbanks, and Alaska State League of Women Voters). Eighteen of these opponents also expressed religious opinions or identified themselves by religious affiliation. In contrast, of the 24 supporters, only one represented an organization (Tom Gordy, a Baptist minister representing Christian Coalition of Alaska). Ten expressed religious views.

could have an impact on the other states.”<sup>122</sup> He was questioned about the timing of the amendment in relationship to the ongoing *Brause* case. Representative Ethan Berkowitz asked, “Do you feel that there is an inability [on the part of the State] to make a compelling case?” Senator Leman answered “no,” but added that he was wary of “the judges who, there may be a few of them, they [sic] may come to different conclusions.” If judges go awry, he continued, “the only way that we can regain the voice of the people is to take this to the people.”<sup>123</sup>

Representative Berkowitz added, “[I]t seems to me that we might be jumping the gun a little bit in this case since the courts haven’t made a final determination.”<sup>124</sup> Representative Eric Croft addressed a similar question to the Senator: “[Imagine] Judge Michalski moved that the compelling interest test was met and that there was no right [to same-sex marriage] under the Alaska Constitution. Should we still have this on the ballot?”<sup>125</sup> Senator Leman responded to both questions by arguing that if the Marriage Amendment were passed now, the *Brause* case would be over. However, without a Marriage Amendment, the *Brause* case could drag on, and it would not be completed without appeals and the expenditures of massive time, energy and money. Even then, he argued, a Marriage Amendment could still be necessary.<sup>126</sup>

Between April 30 and May 10, the Marriage Amendment moved from the House Judiciary Committee to the House floor with only one further revision.<sup>127</sup> On the eve of the third reading, the House substitute text read as follows:

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122. *Id.* at 16 (statement of Sen. Leman).

123. *Id.* at 17. (exchange between Rep. Berkowitz and Sen. Leman).

124. *Id.* (statement of Rep. Berkowitz).

125. *Id.* at 19 (question of Rep. Croft).

126. *See id.* at 18-20 (responses of Sen. Leman).

127. On April 30, the House Judiciary approved the Marriage Amendment on a 4-1 vote. *See* House J. 3360, 20th Leg., 2d Legis. Sess. (Alaska 1998). Representatives Green, Porter, Rokeberg and James voted “Yes,” and Representative Croft voted “No.” *See id.* It was then referred to the House Finance Committee, which quickly and unanimously approved it on May 5. *See id.* at 3518. The Committee Members included Representatives Therriault, Hanley, Mulder, Martin, Davis, and Kelly. *See id.* From there it proceeded to the House Rules Committee. On May 8th, a motion to withdraw the resolution from committee failed 34-1, with 5 absent. *See id.* at 3657. On May 9, the Rules Committee first put it on the House calendar, then returned it to committee and revised it by deleting the third sentence. *See id.* at 3704. The revised version was unanimously approved by Rules Committee and put back on the House calendar for the next day. *See id.* at 3730-31 (Committee members Williams, Porter, Phillips, and Kott voting affirma-

Section 25. Marriage. To be valid or recognized in this State, a marriage may exist only between one man and one woman. No provision of this constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex.<sup>128</sup>

The final debates on the House floor took place on May 11. Representative Con Bunde complained that the issue had caused him to lose sleep. He expressed the concern that having the Marriage Amendment on the ballot would create a “political shouting match.” While not willing to endorse same-sex marriage, he said that he opposed the amendment because it was about “fear and hate.”<sup>129</sup> Representative Scott Ogan told of a homosexual relative and reassured other members that while he was voting without malice, he was voting for the amendment.<sup>130</sup>

Representative Joe Green also mentioned a positive experience he had had with a same-sex couple, but argued that it was wrong to confuse the traditional definition of marriage by extending that status to other relationships.<sup>131</sup> Representative Davies then argued that the appropriate question was why same-sex couples could not have all of the benefits of married couples. He answered the question by arguing that there was no reason for disparate treatment.<sup>132</sup>

In the same vein, Representative Eric Croft characterized the amendment as “odd” and charged that it denied rights to Alaska citizens. He thought the amendment was analogous to anti-miscegenation laws and worried that someday the State would be embarrassed by the provision.<sup>133</sup> Representative Ethan Berkowitz then characterized the amendment as a violation of equal protection,<sup>134</sup> and Representative Irene Nicholia charged that it promoted “hate.”<sup>135</sup> Before the debate closed, however, Representative Ogan responded to these sweeping allegations. Far from being separable from law, he argued, moral judgment is indispensable to all law-

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tively). The resolution passed in its second reading by unanimous consent and was set for its third reading. *See id.* at 3737.

128. S.J. Res. 42, 20th Leg., 2d Legis. Sess. (Alaska 1998).

129. House of Representatives, May 11, 1998, Draft Verbatim Transcript (on file with authors) (statement of Rep. Bunde).

130. *See id.* (statement of Rep. Ogan).

131. *See id.* (statement of Rep. Green).

132. *See id.* (statement of Rep. Davies).

133. *See id.* (statement of Rep. Croft).

134. *See id.* (statement of Rep. Berkowitz).

135. *Id.* (statement of Rep. Nicholia).

making.<sup>136</sup> After the debate, the revised amendment passed the House 28-12, one more vote than needed.<sup>137</sup>

After passage, press reports noted that the amendment's opponents were disappointed. They accused the legislators of making backroom deals to allow the measure to pass and of acting on fear or hatred.<sup>138</sup> Senator Leman and the amendment's supporters attributed the victory to the Legislature's having grasped that marriage is worth protecting, and that the question of same-sex marriage was an issue that should be decided by the people rather than the courts.<sup>139</sup>

## B. Pre-Ballot Litigation

As soon as the amendment passed, Robert Wagstaff, attorney for the *Brause* plaintiffs, announced plans to file suit to prevent the amendment from being voted on by the people.<sup>140</sup>

1. *In Superior Court.* Wagstaff filed suit on July 17, 1998.<sup>141</sup> The lead plaintiff in the challenge was Reverend Howard Bess, pastor of the Church of the Covenant in Wasilla, Alaska. Bess claimed that defending religious liberty was the motivation for the suit. Bess argued that the amendment constituted a codification of

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136. *See id.* (statement of Rep. Ogan).

137. *See* House J. 3785, 20th Leg., 2d Legis. Sess. (Alaska 1998). Representatives voting for the amendment were Austerman, Barnes, Cowdery, Davis, Dyson, Foster, Green, Hanley, Hodgins, Hudson, Ivan, James, Kelly, Kohring, Kott, Martin, Masek, Moses, Mulder, Ogan, Phillips, Porter, Rokeborg, Ryan, Sanders, Therriault, Vezey and Williams. Representatives voting against were Berkowitz, Brice, Bunde, Croft, Davies, Elton, Grussendorf, Joule, Kemplen, Kookesh, Kubina and Nicholia. The following day, it passed on a motion for reconsideration by the same margin and was transmitted to the Senate. *See id.* at 3888-89, 3942. The Senate quickly concurred with the House's version. *See* Senate J. 4157, 20th Leg., 2d Sess. Legis. (Alaska 1998). The concurrence was by the same vote as earlier, 14-6. The resolution was subsequently transmitted to Governor Knowles, although he had no constitutional power to approve or disapprove of it. *See id.* at 4248.

138. *See* Liz Ruskin, *Marriage Measure on Ballot; Voters to Decide if Same-Sex Unions OK*, ANCHORAGE DAILY NEWS, May 12, 1998, at A1.

139. *See id.*

140. *See High Court Declines Same-Sex Case*, ANCHORAGE DAILY NEWS, June 6, 1998, at D1 ("Meanwhile, Wagstaff said he plans to go back to court in a bid to keep the amendment off the ballot. 'There are legal proceedings that are going to be brought to stop that, because we believe it is invalid under the federal constitution,' Wagstaff said.").

141. *See* Complaint for Declaratory Judgment and Permanent Injunction, Bess v. Ulmer, No. 3AN-98-7776 CIV (Alaska Super. Ct. July 17, 1998).

the religious convictions of the Legislature.<sup>142</sup> The other plaintiffs were *Brause* plaintiffs Jay Brause and Gene Dugan.<sup>143</sup> To the press, Wagstaff contended that the amendment violated separation of powers principles (by “tell[ing] judges how they can interpret the constitution”), and hinted that the Legislature was driven by improper religious motivations.<sup>144</sup> Wagstaff also argued that the ballot title and summary did not reflect what the plaintiffs considered to be a “true and impartial” description of the amendment, and asserted standing on that ground. In their complaint, the plaintiffs argued that a “true and impartial” description of the amendment would be entitled “Constitutional Amendment Denying Homosexuals Fundamental Rights”<sup>145</sup> and the summary would read as follows:

This measure will change the Equal Protection, Civil Rights & Privacy Clauses of the Alaska Constitution so as to make them inapplicable to homosexual same sex relationships and marriage. Marriages will be limited to one man and one woman and no provision of the Constitution may be read to require the state to recognize or permit same sex marriages or relationships. The State will have the power to prohibit and penalize any same sex relationships and marriages.<sup>146</sup>

This language was quite different from the title and summary offered by the Lieutenant Governor:

CONSTITUTIONAL AMENDMENT LIMITING MARRIAGE

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. It would also say that no provision of the Alaska Constitution may be interpreted by a court to require the state to recognize or permit marriage between individuals of the same sex.<sup>147</sup>

The *Bess* plaintiffs argued in their complaint that the existing summary was unfair because the amendment would deny existing rights to same-sex couples,<sup>148</sup> that it violated the single subject rule because it dealt with both marriage and the power of the courts,<sup>149</sup>

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142. See Liz Ruskin, *Marriage Vote Challenged; Couples Sue Over Same-Sex Ballot Measure*, ANCHORAGE DAILY NEWS, July 18, 1998, at A1.

143. See *id.*

144. *Id.* (“Let’s not kid ourselves. They’re on a divine mission . . . . If the constitution stops it, they’re out to change the constitution.”).

145. *Id.*

146. Complaint at 3, *Bess* (No. 3AN-98-7776 CI).

147. *Id.*

148. See *id.* at 4-5.

149. See *id.* at 5-6.

and that under *Romer v. Evans*<sup>150</sup> the amendment violated the U.S. Constitution's Equal Protection Clause by denying basic rights to homosexuals.<sup>151</sup> The plaintiffs asked the court to invalidate the summary language and enjoin the amendment from appearing on the November 1998 ballot.<sup>152</sup>

The Alaska Civil Liberties Union also sought to remove the amendment from the ballot.<sup>153</sup> Plaintiff Elizabeth Dodd, President of the board of directors of the ACLU, officially distanced the suit from the issue of same-sex "marriage," arguing that the amendment was an improper revision of the constitution and a discriminatory provision.<sup>154</sup> The ACLU alleged that the amendment violated the "single subject rule," because it addressed both marriages performed in the State and marriages contracted outside the State.<sup>155</sup> The amendment, it argued, is actually a *revision* because it addressed these two subjects and affected the constitutional rights of homosexual persons.<sup>156</sup> While the Constitution can be *amended* by the people of the State, the ACLU argued, it can only be *revised* by constitutional convention.<sup>157</sup> Therefore, the amendment amounted to an improper "revision" of the Alaska Constitution.<sup>158</sup>

Amendment supporters countered that both challenges to the amendment were motivated by a realization that the amendment would pass if the people had the opportunity to vote on it.<sup>159</sup> The Alaska Legislature responded with a suit of its own, also claiming that the language used by the State in its description of the ballot initiative was inaccurate.<sup>160</sup> The language preferred by the Legislature was the Lieutenant Governor's original language:

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150. 517 U.S. 620 (1996); See *supra* notes 84-86 and accompanying text for initial discussion of *Romer*, and *infra* notes 263-295 for a more extensive discussion of whether or not *Romer* is relevant to the Marriage Amendment.

151. See Complaint at 6, *Bess* (No. 3AN-98-7776 CI).

152. See *id.* at 6-7.

153. See Complaint for Declaratory Relief and Permanent Injunction, *Dodd v. Ulmer*, No. 3AN-98-8114 CI (Alaska Super. Ct. July 30, 1998); see also Rosanne Pagano, *ACLU Challenges Referendum on Same-Sex Marriage*, ANCHORAGE DAILY NEWS, July 31, 1998, at B1.

154. The revision argument was made by the ACLU and the discrimination argument was made by Vic Fischer, a former state senator. See Pagano, *supra* note 153.

155. See *id.*

156. See *id.*

157. See *id.*

158. See Complaint at 3-4, *Dodd* (No. 3AN-98-8114 CI).

159. See *id.*

160. See First Amended Complaint at 4, *Legislature v. Ulmer*, No. 3AN-98-7972 CI (Alaska Super. Ct. July 27, 1998).

CONSTITUTIONAL AMENDMENT ON MARRIAGE

This measure would add an amendment to the Alaska Constitution on marriage. The amendment would say that marriage must be between one man and one woman to be valid or recognized in the State. It would also say that no provision of the Alaska Constitution may be read to require the State to recognize or permit same-sex marriages.<sup>161</sup>

The Legislature argued that the existing language was partial and untrue because it stated that the Amendment would “limit” marriage. Since no state or country currently understands marriage to include same-sex couples, excluding same-sex couples cannot be fairly called a “limitation.”<sup>162</sup>

All three parties moved for summary judgment, the cases were consolidated and assigned to Anchorage Superior Court Judge Sen Tan, and a hearing was held on August 30.<sup>163</sup> At that time, Judge Tan ruled orally from the bench that the amendment should stay on the ballot, that the description written by the Lieutenant Governor was adequate, and that the *Romer* claims were not ripe.<sup>164</sup> His final judgment was entered on September 8, 1998.<sup>165</sup>

2. *Before the Alaska Supreme Court.* The *Bess* and *Dodd* plaintiffs then filed an emergency appeal with the Alaska Supreme Court. They repeated their arguments that the amendment related to multiple subjects and constituted an improper “revision” of the Constitution.<sup>166</sup> The *Bess* plaintiffs also pressed a “single amendment” rule, arguing that because three amendments were on the ballot for November 1998, the Legislature was improperly

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161. *Id.* at 3.

162. *Id.* at 4-5.

163. See Motion for Summary Judgment and Supporting Memorandum at 13-14, *Bess v. Ulmer*, No. 3AN-98-7776 CI (Alaska Super. Ct. July 27, 1998); Opposition to Defendant’s Motion for Summary Judgment and Plaintiff’s Cross-Motion for Summary Judgment and Supporting Memorandum at 12, *Dodd v. Ulmer*, No. 3AN-98-8114 CI (Alaska Super. Ct. Aug. 24, 1998); Memorandum in Support of the Alaska Legislature’s Cross-Motion for Summary Judgment, Opposition to the *Bess* Plaintiff’s Motion for Summary Judgment, and Partial Opposition to Ulmer’s Motion for Summary Judgment at 14, *Legislature v. Ulmer*, No. 3AN-98-7972 CI (Alaska Super. Ct. Aug. 24, 1998).

164. See Transcript of Oral Proceedings at 69-75, *Bess v. Ulmer*, Nos. 3AN-98-7776 CI, 3AN-98-7972 CI, and 3AN-98-8114 CI (Alaska Super. Ct. Aug. 31, 1998); see also Liz Ruskin, *Judge: One-Sex Marriage Issue Can Go to Voters; Amendment Foes Plan High Court Appeal*, ANCHORAGE DAILY NEWS, Sept. 1, 1998, at B1.

165. See Final Judgment, *Bess* (No. 3AN-98-7972 CI).

166. See Supplemental Brief of the Alaska Legislature at 1, *Bess v. Ulmer*, Nos. S-8811, S-8812, 1999 WL 619092 (Alaska Sept. 15, 1998).

acting like a constitutional convention.<sup>167</sup> The Legislature responded that the amendment was about marriage, not discrimination, and that it would keep Alaska's marriage law consistent with every other jurisdiction in the world.<sup>168</sup>

Oral argument was held on September 18, 1998.<sup>169</sup> On September 22, the Alaska Supreme Court allowed the Marriage Amendment to go forward, but deleted the second sentence.<sup>170</sup> It ignored *Romer*.<sup>171</sup> In its opinion, the Court noted that the first sentence of the amendment was simple and denied that it violated the one subject rule.<sup>172</sup> It also rejected the single amendment rule sought by the *Bess* plaintiffs.<sup>173</sup> The Court ruled, however, that the second sentence was superfluous, or could provide a basis for interfering with constitutional rights, and struck it down.<sup>174</sup>

The amendment was on its way to the ballot in the following form: "To be valid or recognized in this State, a marriage may exist only between one man and one woman."<sup>175</sup>

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167. *See id.* at 1-4.

168. *See id.* at 5, 12.

169. *See* Liz Ruskin, *Same Sex Marriage Measure Argued*, ANCHORAGE DAILY NEWS, Sept. 19, 1998, at D1.

170. *See* Preliminary Opinion and Order, *Bess v. Ulmer*, Nos. S-8811, S-8812, S-8821 (Alaska Sept. 22, 1998), *aff'd*, *Bess v. Ulmer*, 1999 WL 619092, at \*13 (Alaska Aug. 17, 1999). The Preliminary Opinion and Order was edited and included as an appendix to the Final Opinion and Order. *See id.* at \*11-15 & n.3.

171. *See id.* at \*13; Liz Ruskin, *Marriage Remains on Ballot; But Court Strikes Down Inmates' Rights Measure*, ANCHORAGE DAILY NEWS, Sept. 23, 1998, at A1. The Final Opinion does not mention *Romer* either.

172. *See* Preliminary Opinion, 1999 WL 619092, at \*13. In contrast to the Preliminary Order and Opinion, the 1999 Final Opinion and Order relegates all discussion of the deleted second sentence to a footnote. *See id.* at \*17 n.57.

173. *See id.* at \*14.

174. *See id.* at \*13.

175. S.J. Res. 42, 20th Leg., 2d Legis. Sess. (Alaska 1998), as modified by Preliminary Opinion and Order, 1999 WL 619092, at \*14. The Alaska Family Coalition, the major citizens' organization supporting the amendment, was critical of the Court's decision (and self-proclaimed authority) to delete the second sentence, but nonetheless declared victory: "The court's decision protects the right of Alaskans to determine the future of our society. Now we can get on to the important business of conducting a public debate on this issue that is spirited, but also civil." *Supreme Court Rules on Legal Challenges to Ballot Measure 2, Shortened Version of Marriage Amendment Cleared for Nov. 3 Ballot*, Press Release of the Alaska Family Coalition (Sept. 22, 1998).

### C. Popular Debate and Ratification

Early in the debate, opponents of the Marriage Amendment claimed that the campaign would be ugly.<sup>176</sup> As it turned out, the campaign was spirited but not overly contentious.<sup>177</sup>

1. *The Players.* The major group supporting the amendment was the Alaska Family Coalition (the “AFC”).<sup>178</sup> Formed in June 1998, the AFC steering committee included civic leaders, businessmen, attorneys, a former Mayor of Anchorage, and a former Governor’s Chief-of-Staff.<sup>179</sup> The major group opposing the amendment was Alaskans for Civil Rights/No On Two Campaign (the “ACR”).<sup>180</sup> The ACR claimed the official support of the Alaska Democratic Party, the League of Women Voters, the Alaska Civil Liberties Union, People for the American Way, and Parents and Friends of Lesbians and Gays.<sup>181</sup>

2. *The Arguments.* The AFC argued that the amendment was necessary to counter the radical redefinition of marriage in *Brause*.<sup>182</sup> The ACR campaign argued that marriage was not the issue, and that the amendment would not have any effect on existing law (assuming defeat of the *Brause* plaintiffs on appeal).<sup>183</sup> It framed the amendment as an attack on the right to privacy and warned that its proponents might go after other groups later.<sup>184</sup>

In addition to these groups, the Catholic Bishops of Alaska issued a statement favoring the definition of marriage as a relation-

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176. See Steve Rinehart, *Gay Marriage Haunts Campaign; Lindauer Hits Knowles, Then Hedges on Same Sex Issue*, ANCHORAGE DAILY NEWS, Sept. 13, 1998, at A1.

177. See Liz Ruskin, *Marriage Amendment Debate Remains Quiet*, ANCHORAGE DAILY NEWS, Sept. 13, 1998, at A12.

178. See *id.*

179. See *id.*

180. See *Ballot Measure #2: What Are the Facts?*, Press Release (visited Feb. 5, 1999) <<http://www.no-on-two.org>>.

181. See *id.*

182. See *Alaska Family Coalition Calls on ACLU to Drop Lawsuit*, Press Release of the Alaska Family Coalition (Aug. 31, 1998).

183. See *Ballot Measure 2* (visited Sept. 18, 1999) <[http://members.tripod.com/~no\\_on\\_2/ss1016.html](http://members.tripod.com/~no_on_2/ss1016.html)>.

184. See *id.* Interestingly, in order to support the argument that the amendment would merely maintain the status quo, the ACR had to assume that *Brause* did *not* change the marriage law. Yet if the amendment disturbs privacy, which might embolden the Legislature to change privacy protections, opponents would have to rely upon the idea, first presented in *Brause*, that the right to privacy potentially *mandates* recognition of same-sex marriage.

ship between one man and one woman.<sup>185</sup> In their statement, addressed both to Catholics and to “anyone who wished to listen,” the Bishops expressed their conviction that “Proposition 2 is about marriage. In both our civic community and in our Catholic community we voters will be asked to declare ourselves on our understanding of marriage. No one should miss that vote. No one should vote without thinking through clearly what marriage is at its core.”<sup>186</sup> The Bishops argued that the Marriage Amendment codifies the traditional view of marriage and expresses the unique importance of marriage to society.<sup>187</sup>

Polls taken during the Legislature’s debate on the Marriage Amendment in April yielded mixed results.<sup>188</sup> One poll claimed that two-thirds of Alaskans supported a constitutional ban on same-sex marriage, while another claimed only half of Alaskans favored a ban.<sup>189</sup> As the fall progressed, both sides avoided the issue of homosexuality. Opponents focused on privacy and civil rights. Supporters focused on self-government and reaffirming the meaning of marriage.<sup>190</sup>

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185. *See My Turn: Marriage is Between One Man, One Woman* (visited Sept. 18, 1999) <<http://www.no-on-two.org/je0909a.html>>.

186. *Id.* There are 40,000 Catholics in Alaska. *See* Maureen Clark, *Bishops Back Single-Sex Marriage Ban; State’s Roman Catholic Leaders Air Views in Letter to Parishioners*, ANCHORAGE DAILY NEWS, Sept. 8, 1998, at B1.

187. *See My Turn*, *supra* note 185.

188. *See* Liz Ruskin, *Polls Split on Gay Marriage Amendment; Question Gets Opposite Results*, ANCHORAGE DAILY NEWS, Apr. 16, 1998, at B1.

189. *See id.*

190. *See id.*

3. *The Controversies.* The Amendment collided with the gubernatorial campaign when Republican contender John Lindauer accused Democratic Governor Tony Knowles of supporting same-sex marriage. The Governor denied the charge.<sup>191</sup> In a debate between the candidates for Lieutenant Governor, incumbent Democrat Fran Ulmer stated that she and the Governor felt the amendment was unnecessary. Her opponent, State Senator Jerry Ward, described their position on the amendment as an example of the administration's distance from the average voter.<sup>192</sup> Ward noted that both he and the Republican candidate for Governor supported the amendment.<sup>193</sup>

The issue of outside influence also arose. American Renewal, headed by Gary Bauer, provided a financial contribution to the campaign for the amendment early on.<sup>194</sup> The opponents of the amendment were even more concerned when in October, The Church of Jesus Christ of Latter-day Saints gave \$500,000 to the AFC.<sup>195</sup>

The ACR campaign, however, also raised funds effectively, even receiving a donation from Judge Michalski's wife.<sup>196</sup> It also received high-profile endorsements from the League of Women Voters of Alaska and other prominent officials and groups.<sup>197</sup>

The *Anchorage Daily News* endorsed the Marriage Amendment.<sup>198</sup> Observing that "a process in which a single judge provokes the Legislature to hurriedly amend the constitution is a poor one," the paper argued that "society has a right to define marriage and defend the tradition of marriage."<sup>199</sup> The editorial criticized the *Brause* decision as "narrow, provincial" and "without context."<sup>200</sup> It noted that "marriage is a unique institution for historical, cul-

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191. See Rinehart, *supra* note 176.

192. See *Lt. Governor Candidates Spar on Marriages*, *PFD*, ANCHORAGE DAILY NEWS, Oct. 9, 1998, at D7.

193. See *id.*

194. See Liz Ruskin, *Ballot Funding Outlined; Proposition 2 Foes Lead the Fund-Raising*, ANCHORAGE DAILY NEWS, Oct. 7, 1998, at B1.

195. See Liz Ruskin, *Same-Sex Marriage Foes Given \$500,000; Mormon Gift Infuriates Opponents*, ANCHORAGE DAILY NEWS, Oct. 3, 1998, at A1. The Coalition noted that there are 24,000 members of the Church in Alaska, so the charge of outside influence was not very strong. See *id.*

196. See Ruskin, *supra* note 194.

197. See League of Women Voters of Alaska, *Ballot Measure No. 2 Attacks, Weakens Constitution; Compass*, ANCHORAGE DAILY NEWS, Oct. 18, 1998, at H4.

198. *Opinion—Ballot Measure 2; A Yes Vote—But a Complex Choice*, ANCHORAGE DAILY NEWS, Oct. 25, 1998, at F2.

199. *Id.*

200. *Id.*

tural and biological reasons” which “should not be altered by a sudden flash of legal light in an Alaska courtroom.”<sup>201</sup>

4. *The Results.* The amendment passed overwhelmingly on November 3, 1998 by a vote of sixty-eight to thirty-two percent. Alaskans reaffirmed their definition of marriage.<sup>202</sup>

#### D. Post-Passage Developments

Immediately after the passage of the amendment, the Alaska Legislature moved for the *Brause* case to be dismissed as moot.<sup>203</sup> The Legislature argued that the Marriage Amendment foreclosed the *Brause* plaintiffs’ claim for a marriage license by specifying that only opposite-sex marriages are valid or recognized in the State.<sup>204</sup> The Legislature cited the Alaska Supreme Court’s statement in the consolidated *Ulmer* cases that a specific constitutional amendment (like the Marriage Amendment) controls other constitutional amendments that are more general.<sup>205</sup> Thus, the Marriage Amendment essentially trumps any of Brause’s constitutional claims.<sup>206</sup> The Legislature also addressed substantive criticisms of the amendment by arguing that the State can constitutionally distinguish between unmarried persons and married persons for purposes of extending certain public benefits, and that there is no fundamental right of unmarried couples to receive marital benefits.<sup>207</sup> This is because marital status is not a suspect classification and legitimate state purposes are advanced by favoring marriage over non-marital relationships.<sup>208</sup>

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201. *Id.* At the same time, however, it also strongly endorsed the extension of domestic partnership benefits to same-sex couples. *See id.*

202. *See* Defendants’ Second Motion for Summary Judgment, Exhibit A (copy of Lieutenant Governor’s Certificate of Election), *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88753 (Alaska Super. Ct. Feb. 27, 1998); *see also* Liz Ruskin, *Limit on Marriage Passes in Landslide*, ANCHORAGE DAILY NEWS, Nov. 4, 1998, at A1.

203. *See* Memorandum in Support of the Motion to Dismiss Brause’s and Dugan’s Claims as Moot Based Upon the Ratification of the Defense of Marriage Amendment, *Brause* (No. 3AN-95-6562) [hereinafter Ratification Memorandum].

204. *See id.* at 3.

205. *See id.* The Court repeated this observation in its Final Opinion and Order, *Brause v. Bureau of Vital Statistics*, 1999 WL 619092, at \*17 n.57 (“[A] specific amendment controls other more general provisions with which it might conflict.”).

206. *See* Ratification Memorandum, *supra* note 203, at 4.

207. *See id.* at 6.

208. *See id.* at 8-9.

The *Brause* plaintiffs challenged the Legislature's standing to speak to the matter.<sup>209</sup> They also charged that the Legislature's unwillingness to offer marriage licenses or marital benefits to same-sex couples was evidence that the Legislature was seeking to disfavor the couples.<sup>210</sup> The plaintiffs next advanced the theory that while the Marriage Amendment disallowed the issuance of marriage licenses to same-sex couples, it did not preclude a constitutional right for same-sex couples to have all of the *benefits* attached to legal marriage.<sup>211</sup> Alternatively, the plaintiffs argued, the court should overturn the amendment based on *Romer v. Evans*.<sup>212</sup>

The Legislature replied that same-sex couples could petition the legislature for the extension of domestic partner benefits, but denied that such benefits were *constitutionally* mandated.<sup>213</sup> It claimed that the amendment does not discriminate on the basis of "sexual orientation" because it treats all unmarried persons the same.<sup>214</sup> It further argued that the amendment would survive constitutional scrutiny because it was supported by "legitimate reasons."<sup>215</sup> It then distinguished the Marriage Amendment from the amendment at issue in *Romer*: Whereas the problem with the Colorado amendment was its overbreadth (it could be read to deny homosexuals any protections of the law), the Marriage Amendment was amply justified by its preservation of marriage and its prevention of conflicts with federal and state laws.<sup>216</sup>

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209. See Opposition to Motion for Summary Judgment and Dismissing Brause and Dugan's Claims Based Upon the Ratification of the Defense of Marriage Amendment at 1, *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88745 (Alaska Super. Ct. Nov. 15, 1998).

210. See *id.* at 5.

211. See *id.* at 7.

212. See *id.*; see also *Romer v. Evans*, 517 U.S. 629 (1996).

213. See Alaska Legislature's Reply in Support of Motion for Summary Judgment and Dismissing Brause's and Dugan's Claims Based Upon the Ratification of the Defense of Marriage Amendment at 7, *Brause* (No. 3AN-95-6562 CI) [hereinafter Legislature's Reply].

214. See *id.* at 8. The Supreme Court's Preliminary Opinion and Order noted that the civil rights clause of the Alaska Constitution, article I, § 3, "is not affected [by the revised text of the Marriage Amendment], for it does not specify sexual preference as a suspect classification." *Bess v. Ulmer*, Nos. S-8811, S-8812, S-8821, 1999 WL 619092, at \*13 (Alaska Aug. 17, 1999).

215. See Legislature's Reply at 12, *supra* note 213.

216. See *id.* at 19. At this point, the Alaska Attorney General weighed in with the surprisingly brief argument that the Amendment speaks for itself and that the *Brause* case should be dismissed. See Defendants' Second Motion for Summary Judgment at 2, *Brause* (No. 3AN-95-6562 CI).

The Legislature then moved to have *Brause* consolidated with *Bess*, arguing that the two cases involved the same parties (Brause, Dugan and the Legislature) and the same issue (the constitutionality of the Marriage Amendment).<sup>217</sup> In the alternative, the Legislature requested a grant of intervenor status. The request was based on it being a party to the federal equal protection claims originally brought in *Bess*, which charged the Legislature with unconstitutional “animus” – claims that were now being repeated post-election by the *Brause* plaintiffs.<sup>218</sup> Plaintiffs curtly disagreed, and accused the Legislature of trying to intervene just to remove Judge Michalski from the case.<sup>219</sup> Judge Michalski denied the motions. Finally, on September 22, 1999, Judge Michalski dismissed the *Brause* case.<sup>220</sup>

#### IV. THE CONSTITUTIONALITY OF THE MARRIAGE AMENDMENT

With the passage of the Alaska Marriage Amendment on November 3, 1998, the focus has shifted to constitutional questions. The *Brause* and *Bess* plaintiffs have lodged privacy and equal protection challenges under both the Alaska and United States Constitutions. In this section we explain why we believe that none of these challenges are likely to be successful.<sup>221</sup>

##### A. The Alaska Constitution

The *Brause* plaintiffs argue that although the amendment is now part of the Alaska Constitution, it still constitutes “sex discrimination.” To address the tension between the amendment and other clauses, they argue that the court should construe the amendment to cover only marital status. To effectuate the intent

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217. See Memorandum in Support of the Alaska Legislature’s Motion to Consolidate this Action with *Bess* (No. 3AN-98-7776 CIV), *Brause* (No. 3AN-95-6562 CI).

218. See *id.* at 5.

219. See Response to Alaska Legislature’s Renewed Motion to Intervene at 2, *Brause* (No. 3AN-95-6562 CI).

220. See Superior Court Rules on Same-Sex Marriage Lawsuit, Press Release of Senator Loren Leman (Sept. 22, 1999) (on file with authors). On Oct. 28, 1999, in the wake of the dismissal of *Brause*, the ACLU filed a new suit against the State of Alaska and Municipality of Anchorage, claiming that under the Alaska Constitution the government may not offer marriage-based benefits without offering equal benefits to “domestic partners.” See *ACLU Lawsuit Seeks Equal Benefits for Alaska’s Gay and Lesbian Employees*, Press Release of the Alaska Civil Liberties Union (Oct. 27, 1999) (on file with authors).

221. A similar version of this analysis appears in Coolidge, *supra* note 3, adjusted to address specifics of the Hawaii text.

of the equal protection clause, the court should therefore confer upon plaintiffs all marital benefits and rights.<sup>222</sup> Similar arguments have been made in *Baehr v. Anderson*, the Hawaii same-sex marriage case.<sup>223</sup>

However, if the amendment clearly intends to overturn Judge Michalski's decision, then the logic of that decision - his privacy and equal protection holdings - cannot survive. Alaska's equal protection clause should be read as it was prior to *Brause*, in which case no "tension" need exist between that section and the amendment that has recently joined it. Moreover, the term marriage in the amendment should be understood to encompass both the status and benefits of marriage. No artificial separation of them is justifiable. Similar arguments have been made by the parties and amici in the Hawaii case.<sup>224</sup>

We do not expect that the courts will interpret the Marriage Amendment narrowly, and equal protection broadly, to thereby mandate marital rights and benefits to unmarried couples. However, the Alaska Supreme Court has not yet addressed whether "sexual orientation" should be treated as a suspect classification. Although neither *Brause* nor *Bess* initially addressed the issue, plaintiffs may argue that the Marriage Amendment discriminates on the basis of "sexual orientation" and merits heightened scrutiny.

Only recently, the Oregon Court of Appeals has held that "sexual orientation" constitutes a suspect classification under the Oregon Constitution. On this basis, it has ordered that spousal

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222. See *supra* Part II.B.

223. See Plaintiffs-Appellees' Supplemental Brief at 17, *Baehr v. Anderson*, No. 91-1394-05 (Haw. Jan. 22, 1999) (arguing that because Hawaii's Marriage Amendment did not overturn the Hawaii Supreme Court's earlier holding in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) that the marriage statute constituted sex discrimination, Hawaii's equal protection clause entitles plaintiffs to marital rights and benefits). In addition, as amicus in *Baehr*, the ACLU of Hawaii urges the Court to apply a "preservation principle" that would resolve any "conflict" between the amendment and the existing Hawaii equal protection clause by requiring marital *benefits* to be granted to same-sex couples. See Brief of Amicus Curiae of the American Civil Liberties Union of Hawaii Foundation, *Baehr v. Miike*, No. 91-1394-05 (Haw. Dec. 22, 1998).

224. See Supplemental Brief of Amicus Curiae Hawaii Catholic Conference, *Baehr v. Anderson*, No. 91-1394-05 (Haw. Dec. 23, 1998) (arguing that the Hawaii Amendment overruled *Baehr v. Lewin* and treats marital benefits and status as inseparable), and Defendant-Appellant's Supplemental Reply Brief, *Baehr v. Anderson*, No. 91-1394-05 (Feb. 1, 1999) (arguing that the marriage law does not discriminate on the basis of sex, and that the term marriage should be understood to encompass both status and benefits).

benefits be provided to all similarly situated “domestic partners.”<sup>225</sup> Based on such logic, one could argue that even if marital status remains a reasonable classification, the constitutional imperative of overcoming “sexual orientation” discrimination requires the equal distribution of all marital benefits and rights.

However, the likelihood of the Alaska Supreme Court making a similar holding is remote. The Oregon decision is only intermediate, and was not appealed to the Oregon Supreme Court.<sup>226</sup> No other court has followed its lead. Attempts to establish “sexual orientation” as a suspect classification at the federal level also continue to fail.<sup>227</sup> Finally, Alaska has a Marriage Amendment, whereas Oregon does not. It would be odd, to say the least, for the Supreme Court to hold that one section of the Constitution is subject to strict scrutiny based on another section.<sup>228</sup>

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225. See *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435, 448 (Or. Ct. App. 1998). The Court of Appeals examined the Oregon Health Sciences University’s policy of using the category of “spouse” for granting insurance benefits, and required the University to include same-sex domestic partners within this category. See *id.* at 447-48. (The court added in a footnote that it was not addressing the question of Oregon’s marriage statute. See *id.* at 443, n.3.) Since the term “domestic partner” was not defined in Oregon law, the Court supplied its own definition: “homosexual persons not related by blood closer than first cousins who are not legally married, who have continuously lived together in an exclusive and loving relationship that they intend to maintain for the rest of their lives, who have joint financial accounts and joint financial responsibilities, who would be married to each other if Oregon law permitted it, who have no other domestic partners, and who are 18 years of age or older.” *Id.* at 439.

226. A petition for a writ of mandamus, filed by an Oregon legislator, which would have compelled the State to appeal, was denied by the Oregon Supreme Court in March 1999. *State ex. rel. Sunseri v. Court of Appeals*, No. S46055 (Or. Mar. 15, 1999).

227. See *infra* note 265 (noting Circuit Courts of Appeal that have rejected such claims).

228. The Alaska Supreme Court’s initial decision in *Bess* noted that the civil rights clause of the Alaska Constitution, art. I, § 3, “is not affected [by the revised text of the Marriage Amendment], for it does not specify sexual preference as a suspect classification.” *Bess v. Ulmer*, Nos. S-8811, S-8812, S-8821, 1999 WL 619092 (Alaska Aug. 17, 1999). This suggests that in the absence of added textual authority, the Court is unlikely to hold that “sexual preference” (as it puts it) is a suspect classification.

## B. The United States Constitution

The plaintiffs have also asserted violations of federal constitutional rights. These claims were advanced unsuccessfully before the election, and have since been renewed.<sup>229</sup>

1. *Due Process*. A substantive due process claim arises when an individual has a “fundamental right” that has been violated by state or federal law. A court must first decide whether the claimed right exists. If not, the law will be presumed rational and upheld. If the right exists, the court must decide if it has been violated. If it has, the court will apply strict scrutiny, and uphold the offending law only if it is narrowly tailored to advance a compelling state interest.<sup>230</sup>

Defining a “fundamental right” and then deciding whether it has been violated are the most crucial and yet controversial steps in this analysis. The Supreme Court has affirmed the right to an abortion,<sup>231</sup> and the right to marry a member of the opposite sex.<sup>232</sup> Yet it has rejected a right to same-sex sexual relationships<sup>233</sup> and, most recently, a right to assisted suicide.<sup>234</sup>

The *Brause* plaintiffs allege that the Marriage Amendment deprives them of fundamental rights. The rights of which the plaintiffs claim they were deprived include the right to intimate association, privacy, and the right to marry. The claimed right to intimate association, however, does not exist.<sup>235</sup> The right to privacy claim is more familiar. Yet, in the facts of the present case, it entangles the plaintiffs in the same kinds of difficulties encountered by Judge Michalski in trying to explain his decision in *Brause*.<sup>236</sup> A claim that one’s right to privacy has been violated is usually a claim of governmental interference with one’s private behavior. Yet, as we

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229. See *supra* note 106 and accompanying text.

230. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 708, 720-21 (1997) (reaffirming importance of history, tradition, and specificity in identification of fundamental rights, to avoid policy-making by the judiciary).

231. See *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion).

232. See *Turner v. Safley*, 482 U.S. 78 (1987).

233. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

234. See *Washington*, 521 U.S. at 702.

235. The most significant recent attempt to establish “intimate association” as a fundamental right failed. See *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995) (plaintiff has constitutional right to intimate association; remanded for trial under strict scrutiny standard), *vacated*, 78 F.3d 499 (11th Cir. 1996), *rev’d*, *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (*en banc*), *cert. denied*, 118 S.Ct. 693 (1998).

236. For a discussion of *Brause*, see *supra* Part II.B.

have seen, marriage is not a “private behavior.” It is a public status to which rights and benefits attach.

The right to marry claim seems most appropriate. The Marriage Amendment forbids plaintiffs from marrying. Plaintiffs must convince the court that they can marry, and that same-sex marriage will merely extend, rather than redefine, Western traditions of marriage.<sup>237</sup>

The possibility that the United States Supreme Court will agree with the plaintiffs is very remote. First, although the Court has not yet addressed this issue, other courts have, and except for

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237. The Supreme Court has become more cautious in recent years about recognizing rights “by extension.” Consider these remarks by Justice Rehnquist from his majority opinion in *Washington v. Glucksberg*, 521 U.S. 702 (1997), *rev’g Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996 (en banc)):

[T]he Court’s opinion in *Casey* described, in general ways and in light of our prior cases, those personal activities and decisions that this court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment . . . . That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* did not suggest otherwise.

*Id.* at 727-28 (footnotes and citations omitted). *Glucksberg* thus expressly limits the scope of the so-called “mystery passage” in *Casey*, which was the initial occasion for the “right-to-die” cases: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion). District Judge Barbara Rothstein relied explicitly on the “mystery passage” to justify her initial ruling in *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459-65 (W.D. Wash. 1994), which was affirmed by Judge Reinhardt in the en banc opinion of the Ninth Circuit, 79 F.3d 790, 813-14 (9th Cir. 1996). The Supreme Court, however, obviously came to a much different conclusion. *Glucksberg* suggests that it will be difficult to establish new fundamental rights. For readings sympathetic to this conclusion, see Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 666, and Lynne Marie Kohm, *Liberty and Marriage — Baehr and Beyond: Due Process in 1998*, 12 BYU J. PUB. L. 253, 262-272 (1998). For dissenting perspectives on *Glucksberg*, see, e.g., John P. Safranek, M.D. & Stephen J. Safranek, *Can the Right to Autonomy be Resuscitated After Glucksberg?*, 69 U. COLO. L. REV. 731 (1998); Kathryn L. Tucker, Symposium, *The Death with Dignity Movement: Protecting Rights and Expanding Options after Glucksberg and Quill*, 82 MINN. L. REV. 923 (1998).

*Brause*, now overruled, none have accepted same-sex couple's fundamental right to marry.<sup>238</sup>

Second, despite arguments made by plaintiffs and their allies, there exists no line of Supreme Court cases concerning the right to marry that, if only logically extended, lead inexorably to same-sex marriage.<sup>239</sup>

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238. *Baehr v. Lewin*, 852 P.2d 44, 55-57 (Haw. 1993) (unanimity on this issue, despite differences on equal protection); *Dean v. District of Columbia*, 653 A.2d 307, 331 (1995) (same); *Baker v. State*, No. S1009-97, (Vt. Super. Ct. Dec. 17, 1997), *appeal pending*, No. 98-32 (Vt 1999).

239. *See Turner v. Safley*, 482 U.S. 78 (1987) (striking down a Missouri regulation forbidding certain prisoners from marrying); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking down a Wisconsin law forbidding remarriage unless child support payments are current, on fundamental rights/equal protection grounds); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down Virginia's anti-miscegenation laws partly on due process grounds). For a thorough review of these and other Supreme Court decisions, *see* Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790-1990*, 41 HOWARD L.J. 289, 302-34 (1998). In Wardle's view,

the Supreme Court has consistently recognized a constitutionally protected right to marry and has consistently indicated that the legislature has the primary role in defining and regulating marriage. The Court, however, has also recently expressed (but rarely exercised) its authority to strike down exorbitant laws that infringe extremely the traditional right to marry.

*Id.* at 336; *see also* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims For Same-Sex Marriage*, 1996 BYU L. REV. 1 (arguing that the Court defines marriage as a male-female community). For alternative views, *see, e.g.,* WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 123-152 (1996); MARK STRASSER, *LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION* 49-74 (1997). Strasser argues that same-sex marriage should not be characterized as a new right, but as an extension of an already-guaranteed right. He argues for a broad reading of due process based on *Casey*. *See id.* at 51-52, 64, 67-70. Strasser's reading of *Casey*, however, antedates the narrower reading of due process offered in the U.S. Supreme Court's analysis in *Glucksberg*.

Eskridge argues that *Zablocki* and *Turner*, properly understood, mandate the legalization of same-sex marriage. Claiming that marriage is "a prepolitical form of interpersonal liberty," Eskridge attempts to use *Zablocki* to claim that there are only two legitimate elements of a due process test: (1) "Is there a 'direct legal obstacle in the path of persons desiring to get married?'" and (2) "[i]f so, is that restriction 'supported by sufficiently important state interests and . . . closely tailored to effectuate only those interests?'" ESKRIDGE, *supra*, at 131-32. In his opinion, "[t]he real problem with the Hawaii decision [which rejected the idea of a fundamental right to same-sex marriage] is its addition of an unauthorized third step: Is the couple one that has traditionally been allowed to marry?" *Id.* According to Eskridge's version of due process analysis, tradition is irrelevant: "[T]he plaintiffs need not show their historical pedigree; all they have to show is their exclusion from a state-created fundamental right." *Id.* at 133. Evidently

Third, ironically, the conflict over same-sex marriage may have strengthened the historic and existing public consensus that marriage, properly understood, *requires* a man and a woman. Given this public reaffirmation, and faced with the alternative of (explicitly or implicitly) striking down marriage statutes in all fifty states, the Court is unlikely to strike down the Marriage Amendment.<sup>240</sup> The Court would more likely *uphold* the Marriage Amendment as a legitimate exercise of self-government and might even reaffirm the existing definition of marriage itself.

2. *Equal Protection.* An equal protection attack on the Marriage Amendment would assert that a state or federal law 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 a 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.<sup>241</sup> 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.<sup>242</sup>

Equal protection attacks on the Alaska Marriage Amendment 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,

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Eskridge believes the Court should have this power because “[m]arriage is an important social and legal construction, and it is what we make it to be.” *Id.* at 160.

240. There is nothing in text, tradition, history or experience to suggest that marriage can be reasonably extended to same-sex couples unless its meaning is radically altered. The only way to accomplish this extension is to first *redefine* marriage as merely a form of “relational privacy” or “prepolitical liberty,” as Professor Eskridge has attempted, and then persuade the Court to enact it. *See* ESKRIDGE, *supra* note 239, at 131-34. If Professor McConnell is right that the Court has adopted “a constitutional jurisprudence of unenumerated rights under the Due Process Clause based not on the normative judgments of courts, but on constitutional text supplemented by the tradition and experience of the nation,” such an outcome is highly unlikely. Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 666.

241. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

242. *See id.* at 632.

which fails even the rational basis test. Here we examine both claims, concluding that each should be rejected.

a. *Is the Amendment “Sex-Discrimination”?* Laws that classify “based on sex” are treated by the Supreme Court as “quasi-suspect” classifications requiring “intermediate” or “skeptical” scrutiny.<sup>243</sup> *United States v. Virginia* provides a two-part test for conducting this scrutiny.<sup>244</sup> First, a statute must be identified as “sex-based.”<sup>245</sup> Second, “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive’ justification for that action.”<sup>246</sup> 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.<sup>247</sup>

The Justice adds, “[t]he heightened review standard our precedent establishes does not make sex a proscribed classification.”<sup>248</sup> 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.’”<sup>249</sup> 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.”<sup>250</sup>

It is clear from Justice Ginsburg’s logic that a statute that disadvantages one sex over the other is a sex-based classification that

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243. See *United States v. Virginia*, 518 U.S. 515, 531 (1996).

244. See *id.* at 530-31.

245. *Id.*

246. *Id.* The Court declined to adopt a strict scrutiny test, although it could be argued that it toughened the intermediate scrutiny standard. See Anita Blair, *How We Got the ERA*, THE WOMEN’S QUARTERLY 6-10 (Spring 1997).

247. *Virginia*, 518 U.S. at 533 (internal citations and italics omitted).

248. *Id.*

249. *Id.* (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

250. *Id.*

merits “skeptical scrutiny.”<sup>251</sup> It is not clear that Justice Ginsburg would see the Marriage Amendment as such a law.<sup>252</sup>

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.<sup>253</sup> 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.<sup>254</sup> One other high court (the District of Columbia)<sup>255</sup> and one appellate court (Washington)<sup>256</sup> 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.

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251. Professor Cass Sunstein characterizes Ginsburg’s argument in this way: “The problem with the Virginia system was not that the state noticed a difference between men and women, but that it turned that difference into a disadvantage.” Cass Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 74 (1996). Sunstein adds that:

The Court emphasized that there are indeed biological and social differences between men and women, and that these differences are to be “celebrat[ed],” not turned into a source of inequality. The opinion suggests that the problem of gender inequality is a problem of second-class citizenship, in which the state uses women’s differences from men as a justification for prescribing gender roles in a way that deprives women of equal opportunity. Significantly, this conception of gender equality avoids a claim that women are not biologically or socially different from men. It also avoids a claim that those differences justify unequal treatment.

*Id.* at 76-77.

252. If it does so, the Court may find itself in uncharted waters where it would rather “leave things undecided.” See Sunstein, *supra* note 251, at 72-78 (commending the “minimalism” of *Virginia*.).

253. See *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993) (requiring strict scrutiny under the Hawaii Constitution); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743, at \*5 (Alaska Super. Ct. 1997) (requiring intermediate scrutiny under the Alaska Constitution).

254. By our reading, the Hawaii Marriage Amendment overturns *Baehr*, and the Alaska Marriage Amendment overturns *Brause*. On Hawaii, see Coolidge, *supra* note 3.

255. See *Dean v. District of Columbia*, 653 A.2d 307, 310-31 (D.C. App. 1995). In his dissent in *Dean*, Judge Ferren, who was sympathetic to the plaintiffs’ claims, based his argument on sexual orientation, rather than gender. See *id.*

256. See *Singer v. Hara*, 522 P.2d 1187, 1190-91 (Wash. Ct. App. 1974).

Is it likely that the Supreme Court will follow the Hawaii Supreme Court and hold that the Marriage Amendment is a form of sex discrimination? We think not. The amendment does not classify based on “physical differences” or “inherent differences” between men and women.<sup>257</sup> Instead, the Marriage Amendment is based upon what Justice Ginsberg calls “a community composed of both [sexes].”<sup>258</sup> The Justice rightly states that “the two sexes are not fungible.”<sup>259</sup> 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.<sup>260</sup>

As a matter of prudence, the Court should hesitate before casting a cloud upon marriage law in all fifty states, if not overturning them outright. Such a decision would pre-empt the political process, similar to the effect of *Roe v. Wade*,<sup>261</sup> in an area that has always been considered primarily a matter of decision-making for the States.<sup>262</sup> Moreover, the Court should anticipate that if it strikes down the Marriage 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.

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257. For example, because only women can become pregnant, a law that classified based on pregnancy would be a genuine “sex-based classification,” presumably subject to intermediate scrutiny. However, such a law would not be based on prejudicial notions, and might thereby survive Justice Ginsburg’s test. For an analogous discussion in a statutory context, see *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 290 (1987) (explaining that the Pregnancy Discrimination Act is consistent with Title VII of the Civil Rights Act because it is carefully drawn to avoid “archaic or stereotypical notions about pregnancy and the abilities of pregnant workers”).

258. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

259. *Id.*

260. Professor Wardle argues that existing marriage statutes, which require one person of each sex for a legal marriage, convey a critical message about the equal contribution of both sexes to an important social institution. Legalizing same-sex marriage, on the other hand, would send a message that a woman is not necessary and equally indispensable to the socially valued institution of marriage, thereby weakening rather than strengthening equality for the vast majority of women. See Wardle, *supra* note 95, at 87.

261. 410 U.S. 113 (1973).

262. For doubts about the wisdom of proceeding in this direction, see Sunstein, *supra* note 251, at 96-99 (recommending that the Court allow the marriage issue to be resolved legislatively rather than intervening and pre-empting the democratic process); see also Richard Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1585-86 (1997).

b. *Romer v. Evans and the Marriage Amendment*. Apart from whether or not the Marriage Amendment is a “sex-based classification,” does it fail even rational basis review because it “targets” gays and lesbians based on “animus”?

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*,<sup>263</sup> the Court struck down a Colorado constitutional amendment (“Amendment 2”) which classified on the basis of “homosexual, lesbian or bisexual orientation.”<sup>264</sup> The question, therefore, is squarely posed: is *Romer* a potential basis for overturning the Marriage Amendment? The *Brause* and *Bess* plaintiffs claim that it is.<sup>265</sup>

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263. 517 U.S. 620 (1996).

264. *Romer* invalidated “Amendment 2,” which was put on the ballot by initiative. It reads, in pertinent part:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

*Id.* at 624.

265. See First Amended Complaint for Declaratory Judgment and Permanent Injunction at 7, *Bess v. Ulmer*, No. 3AN-98-7776 CI (Alaska Super. Ct. July 17, 1998). The challengers may also argue that sexual orientation should merit heightened scrutiny analogous to gender or race. This is the approach of the Oregon *Tanner* case, *supra* note 225. But see *Baehr*, 852 P.2d at 52 n.11 (The *Baehr* plurality did not hold that the marriage statute discriminates based on “sexual orientation.”). Although two federal district courts did reach this conclusion, both verdicts were subsequently reversed. See *Able v. United States*, 968 F. Supp. 850, 861-64 (E.D.N.Y. 1997), *rev'd on other grounds*, 155 F.3d 628 (2d Cir. 1998); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 436 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995). Meanwhile, nine other Circuit decisions have rejected the claim, and none have accepted it. See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998); *Thomasson v. Perry*, 80 F.3d 915, 927-928 (4th Cir.), *cert. denied*, 117 S. Ct. 358 (1996); *Richenberg v. Perry*, 97 F.3d 256, 268 n.5 (8th Cir. 1996), *cert. denied*, 66 U.S.L.W. 3254 (1997); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571-72 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), *cert. denied*,

The Court struck down Amendment 2 because, by its reading, Amendment 2 was “at once too narrow and too broad.”<sup>266</sup> It was too narrow because it characterized a class of people by a single trait.<sup>267</sup> It was too broad because, on the basis of that single trait, it “then denie[d] them protection across the board.”<sup>268</sup> 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).<sup>269</sup> Rather, Amendment 2 was “inexplicable by anything but animus toward the class that it affects.”<sup>270</sup> The majority opinion considered Amendment 2 not only irrational, but evil.<sup>271</sup>

*Romer* is the subject of wide and contradictory commentary.<sup>272</sup> We observe three views of how it might apply to the issue of the constitutionality of the Marriage Amendment. The first view argues that *Romer* is an insufficient basis for overturning the Marriage Amendment. The second argues that *Romer* can and should be used to overturn the Marriage Amendment. The third argues that *Romer* could be used to overturn the Amendment, but counsels against doing so.

The first view, represented by Professor Richard Duncan of Nebraska, is that *Romer* has nothing to do with marriage laws

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478 U.S. 1035 (1986); National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1273 (10th Cir. 1984), *aff’d*, 470 U.S. 903 (1985).

266. *Romer*, 517 U.S. at 633.

267. *See id.* As the Court sees it, the Amendment “imposes a special disability upon those persons alone.” *Id.* at 631.

268. *Id.* The Court interpreted Amendment 2 not merely as repealing ordinances passed by municipalities prohibiting discrimination on the basis of sexual orientation, but also as prohibiting “all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians.” *Id.* at 624. For this reason, the Court dismissed the claim that the statutes repealed by Amendment 2 concerned “special rights.” In the Court’s words, “[w]e find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.” *Id.* at 631.

269. *See id.* at 635.

270. *Id.* at 632.

271. This is the characterization of the majority’s opinion by the dissent. *See id.* at 636 (Scalia, J., dissenting).

272. The literature is voluminous. Besides the work of Duncan, Sunstein, and Koppelman, which we discuss in this section, one can consult the full list of articles in Samuel A. Marcossou, *Romer and The Limits of Legitimacy: Stripping Opponents of Gay and Lesbian Rights of Their “First Line of Defense” in the Same-sex Marriage Fight*, 24 J. CONTEMP. L. 217, 219 n.10 (1998).

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.<sup>273</sup>

According to Duncan, marriage statutes define marriage, rather than disadvantage homosexuals.<sup>274</sup> 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) en-

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273. Duncan argues that *Romer* has a "narrow and shallow bite": "It is narrow in the sense that the Court decided only the case before it and avoided creating broad rules that courts might apply in other cases. The decision is shallow in the sense that the Court's reasoning was almost subrational - there is more reflex than reason in Justice Kennedy's opinion in *Romer*." Richard F. Duncan, *The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL RTS. J. 147, 148 (1997) [hereinafter Duncan, *The Narrow and Shallow Bite*]; see also Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, The Culture War, and Romer v. Evans*, 72 NOTRE DAME L. REV. 345, 346-55 (1996) (arguing that the Court in *Romer* applied ordinary equal protection analysis and created no new standards generally applicable to gay rights cases). In Duncan's opinion, the case would have come out the same way had the Colorado Amendment been targeted at any "narrowly defined" group. See Duncan, *The Narrow and Shallow Bite*, *supra*, at 149 (citing Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 94 (1997)). The Court, Duncan believes, seemed more concerned about suspect *laws* than suspect *classifications*. See *id.* Furthermore, according to Duncan, "[i]t was the extreme overbreadth of Amendment 2 — not the identity of the class of persons covered by the Amendment that concerned . . . the majority." *Id.* at 150. He considers the fact that *Romer* left *Bowers v. Hardwick* standing, and did not hold that "sexual orientation" is a suspect classification, to confirm this interpretation. See *id.* at 150-52 (referring to *Bowers v. Hardwick*, 478 U.S. 186 (1986)). Duncan notes that the respondents in *Romer* did not ask the Supreme Court to overrule *Hardwick*. See *id.* at 154. From this he concludes that *Romer* "did not hold that moral disapproval of homosexual conduct is invidious or irrational." *Id.* at 150. One may infer the presence of animus when a law (1) narrowly targets a specific group, (2) imputes a broad and undifferentiated disability to this group, and (3) the State offers no rational purpose. One need not search the public record for general "evidence" of animus. One need only look at the law and the reasons offered for it, and infer "animus" if these first two criteria are not met.

274. [T]hose who wish to use *Romer* and the rational basis test to overturn conventional marriage laws are tilting at windmills. Laws defining marriage as a relationship between one man and one woman do not target a class of persons and deny that class the opportunity to protect itself politically against a limitless number of discriminatory harms and exclusions. Marriage laws define and regulate the institution of marriage, but they do not forbid any individual or group from seeking the law's protection against *any kind* of public or private discrimination. Duncan, *The Narrow and Shallow Bite*, *supra* note 273, at 157-58.

couraging dual-gender parenting, (4) educating children, and (5) avoiding slippery slope marital redefinitions.<sup>275</sup> A Marriage Amendment, such as the one in Hawaii, is a valid exercise of democratic self-government. Alaska's amendment is no less valid for including in its text a definition of marriage as the union of a man and a woman.<sup>276</sup>

The second view, represented by Professor Andrew Koppelman of Northwestern, is virtually the opposite of Duncan's view. Koppelman reads *Romer* as a judicial breakthrough whose logic should lead to the overturning of any Marriage Amendment such as Alaska's.<sup>277</sup>

Koppelman agrees with Duncan that the rule in *Romer* has no particular connection to questions of "sexual orientation."<sup>278</sup> But he disagrees that this rule constitutes *Romer*'s full significance. In addition, Koppelman argues, the political context of hostility toward gays must also be considered in analyzing *Romer*.<sup>279</sup> Further-

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275. See *id.* at 147, 158-65. He adds, "If the Court is ever so foolish as to declare the dual-gender definition of marriage unconstitutional, it will need much more than *Romer* to explain this sad conclusion." *Id.* at 165-66.

276. See *id.* at 158; Richard F. Duncan, *They Call Me "Eight Eyes": Hardwick's Respectability, Romer's Narrowness, and Same-Sex Marriage*, 32 CREIGHTON L. REV. 241, 247-48 (1998). Duncan's words about the Hawaii Amendment therefore apply with equal force to Alaska: "[t]he amendment is clearly related to the eminently legitimate goal of protecting the collective right of democratic self-government." *Id.* at 248. But see MARK STRASSER, *THE CHALLENGE OF SAME-SEX MARRIAGE: FEDERALIST PRINCIPLES AND CONSTITUTIONAL PROSPECTS* 54-65 (1999) (arguing that the Alaska Marriage Amendment is based on animus and should be invalidated).

277. See Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89 (1997).

278. If a law targets a narrowly defined group and then imposes upon it disabilities that are so broad and undifferentiated as to bear no discernible relationship to any legitimate governmental interest, then the Court will infer that the law's purpose is simply to harm that group, and so will invalidate the law.

*Id.* at 94. Duncan indicates his agreement with this formulation. See Duncan, *The Narrow and Shallow Bite*, *supra* note 273, at 148.

279. "[T]he issue," Koppelman maintains, "is what the purpose of the law is in the context in which it was enacted. This question 'has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid.' To say it again, context matters." Koppelman, *supra* note 277, at 122 (quoting Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960)); see also *id.* at 93 (arguing that the *Romer* decision implicitly recognizes a widespread animus toward gays that undermines the credibility of any attempt to justify laws that single out homosexuals); *id.* at 123-26 (discussing discrimination against and stereotyping of gays as a pervasive issue in American society, and arguing that an understanding of this

more, *Romer* means that from now on, when the Court is confronted with a law that discriminates based on “sexual orientation,” it will look more carefully for evidence of an impermissible purpose behind such a law.<sup>280</sup> Therefore, though *Romer* does not accord “sexual orientation” heightened scrutiny as such, and does not overrule *Hardwick*, it opens the door for both possibilities in the future.<sup>281</sup>

According to Koppelman, *Romer* offers a three-part test that can be applied to marriage statutes and marriage amendments:<sup>282</sup> (1) Does a marriage law impose disabilities upon a narrowly defined group of people? (2) Are gays, lesbians and bisexuals the targeted group? If the answers to (1) and (2) are both yes, then the Court should cease deference, and ask itself (3) whether the background cultural and legal context discloses evidence of invidious intent.<sup>283</sup>

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background is vital in understanding why Amendment 2 was found unconstitutional).

280. *See id.* at 89-90. According to Koppelman, when the Court looks for an impermissible purpose, it is likely to find it: “Laws that discriminate against gays will always be constitutionally doubtful, however, because they will always arouse suspicion that they rest on a bare desire to harm a politically unpopular group. Thus teaches *Romer v. Evans*.” *Id.* (citation omitted).

281. *See id.* at 137-38. Indeed, Koppelman quotes from *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) (indicating that proof of a discriminatory purpose as a motivating factor in legislation eliminates the justification for judicial deference) and then explicitly reasons why sexual orientation should be a suspect classification: “A classification should be suspect, then, if many citizens think that the classification in question distinguishes persons who are entitled to a full measure of concern and respect from persons who are inherently degraded and inferior. Sexual orientation is a classification of this sort.” *Id.* at 134.

282. *See supra* notes 278-281 and accompanying text.

283. Question (3) is the most crucial, yet it turns out to be rather slippery. “The fact that a group, narrowly defined, is saddled with a broad range of disabilities,” Koppelman acknowledges, “does not, without more, warrant an inference of impermissible motive.” Koppelman, *supra* note 273, at 122. What, then, warrants such an inference? Koppelman offers these “indicia” from the example of Amendment 2:

(a) *The Text*. The “targeting” was relatively straightforward, because the text itself referred not to “sexual orientation” generally, but to “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.” *Id.* at 93 & n.19. For this reason the arguments provided by the State to justify the law are, in the final analysis, irrelevant. The Court “strikes down some laws, even those that can be given innocent explanations, when objective indicia of invidious intent dispose the Court toward suspicion.” *Id.* at 121. Indeed, the *least possible trace* of an “impermissible motive” unmask the innocence and provides an objective indicator.

In Koppelman's opinion, there is no legitimate basis for the legal distinction between male-female and same-sex couples. The limitation of marriage to opposite-sex couples is a reflection of patriarchy and homophobia.<sup>284</sup> Koppelman's answer to the first question, therefore, is succinct: By limiting marriage to male-female

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Thus the explicit reasons offered by the State "cannot resolve the constitutional debate over that issue." *Id.* at 146 n.164.

(b) *The Context.* In the absence of concrete evidence, Koppelman must find an "inadmissible purpose" by a series of inferences: (1) marriage laws deny benefits to all except male-female couples; therefore (2) this denial is especially targeted at gays, lesbians and bisexuals; therefore (3) the "objective indicia" of this "impermissible purpose" is some combination of text, cultural background and legislative history. Koppelman also argues that "[v]iewing Amendment 2 as sex discrimination would have been a simpler and more automatic path to heightened scrutiny." *Id.* at 130. He believes that this view — equating sexual orientation discrimination with sex discrimination — is plausible because "[a]ny action that singles out homosexuals facially classifies on the basis of sex." *Id.* at 129. Koppelman assumes that it is a matter of common knowledge that heterosexism and sexism are linked. *See id.* He expands on this point in another article: "[T]he effect that the taboo against homosexuality has in modern American society is, in large part, the maintenance of illegitimate hierarchy; the taboo accomplishes this by reinforcing the identity of the superior caste in the hierarchy, and this effect is at least in large part the reason why the taboo persists." Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 255 (1994) (citation omitted) [hereinafter Koppelman, *Sex Discrimination*].

Koppelman argues that evidence of invidious intent toward gays, lesbians and bisexuals is so plain from the common knowledge of our culture that if the Supreme Court understands what is really happening, it will clearly see that Amendment 2 was based on an impermissible purpose. *See* Koppelman, *supra* note 277, at 123. However, when it comes to the actual context of Amendment 2, he concedes that "[t]he evidence of actual discriminatory animus is sparse. The offending, overbroad language of the Amendment did not even appear on the ballot, which contained only a summary of the law. Survey data does not turn up convincing evidence of impermissible animus in the Colorado electorate." *Id.* at 135. Despite this admission, Koppelman argues that Amendment 2 is like the anti-miscegenation law overruled in *Loving v. Virginia*, 388 U.S. 1 (1967):

In both *Loving* and *Romer*, the kind of classification that was used triggered a presumption of unconstitutionality, which the state was unable to overcome. In both cases, the triggering of that presumption was appropriate because the classifications in question were ones that were widely understood to separate those citizens who were fully human from the *untersmenschen*. The use of such classifications sufficed to raise a serious doubt about the legitimacy of the laws' motivations. Once such a doubt has been raised, legislation can no longer be presumed to be constitutional.

*Id.* at 133.

284. *See generally* Koppelman, *Sex Discrimination*, *supra* note 283, at 238.

couples, marriage laws facially target a “narrowly defined class.” Second, lesbians, gays and bisexuals *are* that targeted class. Third, if one looks at the cultural background of hatred, stereotyping, sexism and religious belief against gays and lesbians, polls that show widespread popular opposition to legalizing same-sex “marriage,” and alleged examples of “animus” that have surfaced during the 1998 campaign, one has a clear basis for inferring “invidious intent” behind marriage laws. Says Koppelman, “I have been arguing for years that the Constitution requires recognition of same-sex marriage.”<sup>285</sup>

The third view, represented by Professor Cass Sunstein of Chicago, is that there is a relationship between *Romer* and the Marriage Amendment, but it is one fraught with danger. Sunstein offers his proposed interpretation:<sup>286</sup>

The underlying judgment in *Romer* must be that, at least for purposes of the Equal Protection Clause, it is no longer legitimate to discriminate against homosexuals as a class simply because the state wants to discourage homosexuality or homosexual behavior. The state must justify discrimination on some other, public-regarding ground.<sup>287</sup>

In Sunstein’s view, *Romer* “embodies a ban on laws motivated by a desire to create second-class citizenship, a point that connects the outcome with *United States v. Virginia* as well. This was the forbidden motivation that the Court described as ‘animus.’”<sup>288</sup> *Romer* sends a message to counter that animus: gays, lesbians and bisexuals are citizens like everybody else.<sup>289</sup>

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285. Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEXAS L. REV. 921, 932 & n.30 (1998) [hereinafter Koppelman, *Same-Sex Marriage*] (citing previous articles) (citation omitted). He also believes the Defense of Marriage Act is unconstitutional. See Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1(1997). Professor Mark Strasser has similar sentiments: “That Congress would even consider passing such an act and that the president would even consider signing such a bill into law are testaments to the willingness of many to codify the stigmatization of a disfavored group in exchange for votes.” STRASSER, *supra* note 239, at 127. “It is difficult,” he adds, “to imagine what explanation could be offered for DOMA other than that of animus.” *Id.* at 139.

286. See Sunstein, *supra* note 251, at 64. On the surface, it is “narrow and shallow,” yet it “may turn out to be broader and deeper,” because “ultimately analogical reasoning and principles of stare decisis will determine its scope.” *Id.* In short, “*Romer* imposes unusually few constraints on its own interpretation.” *Id.*

287. *Id.* at 62.

288. *Id.* at 63 (internal citation omitted).

289. “At least in the short run,” Sunstein argues,

[T]he importance of *Romer v. Evans* may lie more in its expressive function than in its concrete effects on law and policy. It says something

Although Sunstein sees a link between “animus” and “sexual orientation” in his reading of *Romer*, he has not endorsed the judicial invalidation of marriage statutes.<sup>290</sup> Regarding the issue of same-sex “marriage,” he argues that “the Court should eschew broad rules and proceed in a way that complements and does not displace democratic processes.”<sup>291</sup> Sunstein is silent, however, on the question of whether he agrees with the substantive arguments for using *Romer* to overrule marriage statutes. Instead, he appeals to “minimalism,” prudence, incrementalism, democratic deliberation and attention to possible adverse consequences of judicial activism.<sup>292</sup>

Because Sunstein is as concerned about the process by which same-sex marriage may be legalized, as he is about the substance of the issue, we think that his type of analysis would uphold the Marriage Amendment. Unlike Amendment 2, the Marriage Amendment went through the normal legislative process.<sup>293</sup> It is not an attack on homosexuals. Instead, it only resolves the question of how marriage is defined under Alaska law.<sup>294</sup> Judge Michalski declared that the marriage statute required strict scrutiny. The people of Alaska decided otherwise. Alaskans are the authors of their Constitution, and ultimately it is their issue to resolve. Professor Sunstein would likely consider it reckless for either the Alaska or the United States Supreme Court to overturn the Marriage Amendment on the ground that it is based on “animus.”

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large about the place of homosexuals in society. Whatever the doctrinal complexities, it claims, and is understood to claim, that they are citizens like everyone else.

*Id.* at 71 (internal citation omitted).

290. *Id.* at 98-99.

291. *Id.* at 100. See also Posner, *supra* note 262, at 1585-86, for similar arguments in favor of judicial restraint.

292.

Even if judges find the challenge to the ban on same-sex marriages plausible in substance, there is much reason for caution on their part. Immediate judicial invalidation [sic] of same-sex marriages could well jeopardize important interests. It could galvanize opposition and (predictably) lead to a strong movement for a constitutional amendment overturning the Court's decision. It could weaken the antidiscrimination movement itself as that movement is operating in democratic arenas. It could provoke increased hostility and even violence against homosexuals. It would certainly jeopardize the authority of the judiciary.

Sunstein, *supra* note 251, at 97 (citations omitted).

293. See *supra* Part III.

294. See *id.*

What are we to make of these three readings of *Romer*, and their implications for the question of the constitutionality of the Alaska Marriage Amendment? From a practical standpoint, Professor Louis Michael Seidman of Georgetown has probably said it best: “For now, the only thing that is certain is that the opinion is open to a broad construction if future courts are disposed to so construe it. Whether they will be so disposed depends upon future political and social developments that we cannot reliably predict.”<sup>295</sup>

What we can look at, however, are the particular “political and social developments” that have already transpired in Alaska, in order to see how persuasive these readings might be. When we look at the origins and passage of the Marriage Amendment, we see these crucial facts:

The Amendment arose in immediate response to an unprecedented court decision.<sup>296</sup>

The Amendment was the subject of public testimony from all perspectives.<sup>297</sup>

The Amendment text is a positive statement about marriage, not a negative attack.<sup>298</sup>

The Amendment sponsors and supporters did not engage in attacks on homosexuals.<sup>299</sup>

Major media editorialized in favor of putting the Marriage Amendment to a vote.<sup>300</sup>

Religious groups and religiously committed citizens argued both sides of the issue.<sup>301</sup>

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295. Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 98. Under Koppelman's approach to *Romer*, courts would hold that *any* policy, regulation, statute or constitutional provision that defines marriage as the union of a man and a woman violates the “meaning” of the Equal Protection Clause of the Fourteenth Amendment. It is hard to imagine the Supreme Court holding this, and Koppelman admits it:

[C]ourts are likely to continue to hold that homosexual sexual conduct is not protected by the constitutional right to privacy, and that laws discriminating against lesbians and gay men are not presumptively unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. . . . [I]t would be surprising if the federal courts were to impose same-sex marriage on the entire country, and the strength of the constitutional arguments for doing so does not change that fact.

Koppelman, *Same-Sex Marriage*, *supra* note 285, at 931-32.

296. *See supra* notes 88-92 and accompanying text.

297. *See supra* Part III.C.

298. *See supra* notes 107-108 and accompanying text.

299. *See supra* Part III.

300. *See supra* notes 198-201 and accompanying text.

The primary supporters of the Amendment did not run a “gay-bashing” campaign targeted against lesbians, gays and bisexuals, but instead engaged in a spirited public debate with their opponents about the role of the courts and the meaning of marriage.<sup>302</sup>

This does not sound like the kind of “stereotyping” and “bigotry” that was attacked in *Romer*. Instead, it looks like the majority of Alaskans disagreed with Judge Michalski about marriage.

### C. The Real Question

We believe that the constitutionality of the Alaska Marriage Amendment boils down to a surprisingly simple question: *May the People of a State correct a misinterpretation of their Constitution by their courts?* It is hard to think of any answer but the most obvious one: Yes, they may. How can it be unconstitutional for the people to act as authors of their Constitution?

The only real case that can be made against the constitutionality of the Marriage Amendment is what one might call the “good guys/bad guys” argument.<sup>303</sup> In this reading, there are two sides. The “good guys” are the gay and lesbian community of Alaska, and their allies. The court is the defender of the victims. The “bad guys” are the majority of ordinary citizens of Alaska, who are depicted as either bigots or the tools of bigots. The Legislature is nothing more than a set of “politicians” who are accessories to the crime. In this script, the forces of good seek to defend the Alaska Constitution against the forces of evil who would “limit” (i.e., amend) it.

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301. See *supra* Part III.C.

302. See *id.*

303. For examples of this Manichean strategy, written by those with considerable experience in telling such tales, see Matthew Coles, *The Meaning of Romer v. Evans*, 48 HASTINGS L.J. 1343 (1997); Symposium, *Constructing Family, Constructing Change: Shifting Legal Perspectives on Same-Sex Relationships*, 7 TEMP. POL. & CIV. RTS. L. REV. 245, 329-36 (1998) (comments by William N. Eskridge, Jr. and Sheila Rose Foster); Marcossou, *supra* note 272. In Foster’s words: “The good news is that by looking to previous civil rights movements, in particular, the Civil Rights Movement, and characterizing the issue as one of civil rights, gets the attention of the public. Therefore, I think it is a strategic ploy that works.” Symposium, *supra*, at 332. Or in Eskridge’s words: “Certainly, in the Colorado case, as you know, the race card was played. . . . It seems to me also that when you make these sort of analogies, you are trying to destabilize the status quo.” *Id.* at 333. On this strategy, see David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201 (1998).

Surely this is too simple a tale to be telling about the people of Alaska and the question of marriage.<sup>304</sup> Are there not at least two legitimate points of view on this question?<sup>305</sup> Are the people themselves not engaged in a quintessentially democratic debate about how to handle it?<sup>306</sup> After all is said and done, the rule of law ap-

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304. For similar attention to the complex reality of events in Colorado, without a defense of Amendment 2 as such, see Robert F. Nagel, *Playing Defense*, 6 WM. & MARY BILL RTS. J. 167 (1997).

305. Koppelman admits that these are “contestable” judgments, with which “[r]easonable people may disagree.” Koppelman, *supra* note 277, at 136. He also grants that the state can legitimately promote morality, *see id.* at 139 n.239, and considers his own argument a moral argument about what marriage law *should be*. Carlos A. Ball has also argued that “it is impossible to engage in a fruitful discussion of same-sex marriage without engaging the normative questions; it is impossible to grapple with the complexities of the issue by simply asking for equality and state-neutrality and for protection against discrimination.” Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1942 (1997). A similar critique and proposal has been offered by Chai R. Feldblum in *A Progressive Moral Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 485 (1998). Robert P. George has also offered incisive pieces on democratic disagreement about moral questions, in which he also addresses the issue of same-sex marriage. *See* Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2495-2501 (1997); Robert P. George, *Law, Democracy, and Moral Disagreement*, 110 HARV. L. REV. 1388, 1400-05 (1997) (reviewing CASS R. SUNSTEIN, *LEGAL REASONING & POLITICAL CONFLICT* (1996)).

Having granted that the question of marriage involves normative judgments, and having granted that these judgments are “contestable,” and presumably having granted that law professors, litigators and judges have no special corner on moral judgment, the question is as follows: Why does Koppelman believe that his moral argument should be legally privileged over others? As Richard John Neuhaus has observed, “[p]opularly debating the Constitution is a very American thing to do and should not be left to professional politicians and the elite legal culture of constitutional scholarship . . . . Those who cannot democratically persuade the people to support their policy preferences have a deep stake in the continuation of judicial tyranny.” RICHARD JOHN NEUHAUS, *THE END OF DEMOCRACY?* 260 (1997). Koppelman argues that the Court has a *duty* to decide the issue: “If the Court is not altogether going to abdicate its Fourteenth Amendment role, then it has to make its own best judgment.” Koppelman, *supra* note 277, at 137.

306. “By seizing the reins of Hawaii’s democratic institutions, laws and policies can be written for the benefit of the silent local majority. In the process, non-locals can integrate rather than dominate.” Andrew Hiroshi Aoki, *American Democracy in Hawaii: Finding a Place for Local Culture*, 17 U. HAW. L. REV. 605, 638 (1995) (emphasizing citizen participation according to “local” values of “Family-centeredness,” “gifting,” “consensus resolution,” and “openness,” while overcoming tendencies toward conflict avoidance and excessive self-restraint).

plies to all who live under it, including those who interpret it.<sup>307</sup> In the recent words of Professor Stephen Carter of Yale:

Although judges write as though they are outside the government, I have followed the Reverend Martin Luther King Jr.'s suggestion that courts are no different from any other part of the sovereign. Therefore, they share in the responsibility to uphold the dissenting tradition of the Declaration of Independence, and thus not to be too ready to rebuff the repeated petitions of angry citizens. This implies a judicial duty to give a degree of consideration to the public reception of their work, a perhaps heretical claim in this era of judicial popularity, but a perfectly sensible one if one believes that courts, too, govern.<sup>308</sup>

If it is really true that “[a]ll political power is inherent in the people,”<sup>309</sup> and that “[a]ll government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole”<sup>310</sup> — including the judiciary itself — then surely the people must have the last word. For the people to have that last word is consistent with the Alaska and United States Constitutions.

## V. CONCLUSION

In this article, we have examined the origins, passage, meaning and constitutionality of the Alaska Marriage Amendment. Despite the overwhelming approval of the Amendment, the plaintiffs in

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307. Lutz states:

The Supreme Court may be the conscience of America, but ultimately whether that conscience is correct or not is up to a majority, using the political process in the Constitution, to decide . . . . Let the Court do its job as well as it can, and let the rest of the citizens do theirs, in part by using the political system and not leaving it to the Court to complete the Americans' founding as a people.

Lutz, *supra* note 76, at 170. Maybe then “Americans can speak more clearly to each other as members of a wildly diverse, liberty-loving, self-defining, self-governing *people*.” *Id.*

308. STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED* 142 (1998).

For every time we say . . . that *only* our own vision of constitutional meaning has any reality, a reality that must be universal — we are saying, in effect, that there is wickedness abroad but those of us who are able to reason and influence the national sovereign do not share in it. We are saying that everyone else is the problem but we are the solution. We are saying that the millions of Americans who do not trust the national government are right not to trust it; they are right not to trust it because we *are* the national government, and we do not trust them. That is not an attractive vision of democracy.

*Id.* at 143.

309. ALASKA CONST. art. I, § 2. This precedes the provision on civil rights, which appears in article I, § 3.

310. *Id.*

*Brause* continue their quest to legitimize same-sex marriage through the courts. If they cannot obtain marriage, they insist they still have a constitutional right to every marital benefit.

Will the people's determination to resolve the controversy over the definition of marriage be frustrated by years of litigation attempting to overturn their judgment? Or will the courts submit to the vote? The people of Alaska await the answer to these questions. In the meantime, the voters have added this text into their Constitution:

*Marriage. To be valid or recognized in this State, a marriage may exist only between one man and one woman.*<sup>311</sup>

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311. S.J. Res. 42, 20th Leg., 2d Legis. Sess. (Alaska 1998), as modified by Preliminary Opinion and Order at 5, *Bess v. Ulmer*, Nos. S-8811, S-8812, S-8821, *aff'd*, *Bess v. Ulmer*, 1999 WL 619092, at \*14 (Alaska Aug. 17, 1999).