ARTICLE

BESS V. ULMER—THE SUPREME COURT STUMBLES AND THE SUBSISTENCE AMENDMENT FALLS

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This Article critiques Bess v. Ulmer, *the Alaska Supreme Court decision regarding the distinction between constitutional amendments and revisions. The Article begins by reviewing the holding and reasoning of* Bess *and argues that the rule articluated by the*

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court is unfounded. The Article also comments on the court's order severing a portion of a legislatively proposed amendment and argues that this action exceeded the court's authority and infringed upon the separation of powers doctrine. The Article concludes by examining the Bess *decision as applied to possible subsistence amendments and by proposing alternatives to the* Bess *standard for distinguishing between amendments and revisions.*

I. INTRODUCTION

The 1999 Alaska Supreme Court decision *Bess v. Ulmer*[1] articulated, for the first time in Alaska, the difference between a constitutional revision and a constitutional amendment. Like most state constitutions in the United States, Alaska's provides two methods of change—one for amendments and one for revisions. The *Bess* case was a unique opportunity for the court to create a workable and predictable standard establishing the scope of Alaskans' power to amend their constitution through the legislative process and subsequent popular ratification. After an extensive review of Alaska's constitutional history, out-of-state constitutional jurisprudence, and scholarly discussion, the court adopted a so-called "hybrid" test that set out quantitative and qualitative limits for a constitutional amendment.[2] In doing so, the court cast a shadow of confusion and uncertainty over the constitutional horizon—bewildering Alaskans and mystifying the legislature. By establishing narrow parameters for permissible change by constitutional amendment, the court has effectively precluded the legislature from placing most, if not all, of the recently proposed subsistence amendments on the ballot.

II. THE *BESS V. ULMER* DECISION

The *Bess* dispute came before the court as a result of the opposition of several citizens' groups to the placement on the ballot of three controversial propositions to amend the Alaska Constitution.[3] Legislative Resolve No. 59 would have limited the rights of Alaska prisoners to those guaranteed by the U.S. Constitution.[4]

1. 985 P.2d 979 (Alaska 1999).
2. *See generally id.*
3. *Id.* at 981.
4. Leg. Res. 59, 20th Leg., 2d Sess. (Alaska 1998). The proposal read:

> Rights of Prisoners. Notwithstanding any other provisions of this constitution, the rights and protections, and the extent of those rights and protections, afforded by this constitution to prisoners convicted of crimes shall be limited to those rights and protections, and the extent of those rights and protections, afforded under the Constitution of the United States to prisoners convicted of crimes.

Legislative Resolve No. 71 limited the constitutional definition of marriage to one man and one woman.[5] Finally, Legislative Resolve No. 74 removed from the executive the power to redistrict, and gave that power instead to an independent body.[6] The citizens' groups challenged the measures, arguing that "the propositions were revisions not amendments; revisions can only be accomplished through a constitutional convention."[7]

There are two paths to constitutional change in Alaska: amendment and revision.[8] An amendatory change may be proposed by a two-thirds vote of each house of the legislature.[9] The Lieutenant Governor is then charged with preparing a summary of the amendments and placing them on the ballot in the next general election.[10] If approved by the majority of the electorate, the amendment is adopted.[11] An amendment may also be enacted through a constitutional convention.[12] A revision, by contrast, may be enacted only by constitutional convention. This limitation is inferred from the language of article XIII. Section 1 authorizes the legislature to propose amendments, while section 4 provides that a constitutional convention has "plenary power to amend or revise the constitution, subject only to ratification by the people."[13] The citizens' groups in *Bess* argued that article XIII's use of "amend" to describe the legislature's power, and "amend or revise" to describe a convention's power reflected a substantive distinction and meant that the legislature cannot propose revisions.[14]

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5. Leg. Res. 71, 20th Leg., 2d Sess. (Alaska 1998). The proposal read:

> 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.

6. Leg. Res. 74, 20th Leg., 2d Sess. (Alaska 1998).

7. *Bess*, 985 P.2d at 981.

8. ALASKA CONST. art. XIII, §§ 1-4.

9. *Id*. § 1.

10. *Id*. At the time of the *Bess* litigation, Fran Ulmer was the Lieutenant Governor. Accordingly, her name appears in the caption of the case, as the case was styled as an injunction barring her from placing the contested proposals on the ballot.

11. *Id.*

12. *Id*. § 4 ("Constitutional conventions shall have plenary power to amend or revise the constitution, subject only to ratification by the people. No call for a constitutional convention shall limit these powers of the convention.").

13. *Id.* §§ 1, 4.

14. *Bess*, 985 P.2d at 981.

The superior court granted summary judgment in favor of the state.[15] The citizens' groups appealed, and because the election was rapidly approaching, the supreme court reviewed the decision on an expedited basis.[16] The court issued a preliminary order, which struck Legislative Resolve No. 59 (the prisoners' rights measure) as a revision, edited Legislative Resolve No. 71 (the marriage measure) and permitted the changed proposal, and permitted Legislative Resolve No. 74 (the redistricting measure).[17] The supreme court later issued a more comprehensive final opinion, drafted by Justice Matthews, in which it explained the reasoning behind its preliminary opinion.[18]

As a result of the expedited appeal process, the *Bess* court made its decision with inadequate briefing. The superior court's ruling did not address whether the prisoners' rights amendment, standing alone, was a revision, and the notice of appeal did not raise the issue.[19] The plaintiffs' notice of appeal, filed with the superior court on September 4, 1998, alleged that the superior court erred in finding the proposed marriage amendment constitutional, and also erred in finding that the cumulative effect of all three proposed amendments did not amount to a revision.[20] The supreme court's expedited appeal order directed that the appeal would be based primarily upon the briefing filed with the superior court, but permitted supplemental briefing as well.[21] Only the plaintiffs' reply brief to the superior court discussed whether the prisoners' rights amendment, standing alone, was a revision.[22] The State did not brief this issue in its supplemental brief because the notice of appeal did not raise the issue.[23] Plaintiffs did brief the issue,[24] however, and the court ruled the prisoners' rights amendment to be a

15. *Id.* at 982.

16. *Id.* at 993.

17. *Id.* at 994-96.

18. *Id.* at 981.

19. Motion for Expedited Consideration of Appeal, Bess v. Ulmer, 985 P.2d 979 (Alaska 1999) (Nos. S-08811/8812) (on file with authors).

20. Notice of Appeal, *Bess* (Nos. S-08811/8812); Statement of Points on Appeal, *Bess* (Nos. S-08811/8812) (on file with authors).

21. Order, *Bess* (Nos. S-08811/8812) (on file with authors).

22. Combined Reply to Motions Filed by State of Alaska and Legislative Council Re: Motion for Summary Judgment, *Bess* (Superior Court of Alaska 1988) (No. 3AN 98-7972CIV) (on file with authors).

23. Supplemental Brief of the Alaska Legislature, *Bess* (Nos. S-08811/8812) (on file with authors).

24. Supplemental Memorandum, *Bess* (Nos. S-08811/8812) (on file with authors).

revision.[25] Since both supplemental briefs were due on September 15th, 1998,[26] the State did not have an opportunity to reply to the plaintiffs' discussion of this issue in its supplemental brief. Accordingly, the *Bess* court ruled on the constitutionality of the prisoners' rights amendment (and, in the process, applied the new test and set an example for other courts to follow) without the benefit of adequate briefing on the subject.[27]

The supreme court held that the Alaska Constitution did substantively distinguish between amendment and revision.[28] In reaching this holding, the court relied primarily upon the Proceedings of the Alaska Constitutional Convention, explaining that the Framers "explicitly contemplated the importance of the differentiation between amendments and revisions and between their respective fields of application."[29] One delegate noted the significant difference between "simple" amendments to articles or sections of the constitution and revisions "which [imply] rewriting the constitution."[30] The court in *Bess* thus attributed substantive meaning to the inclusion of both words "amend" and "revise" in section 4 of the constitution:

> The Framers' decision to narrow the alternatives for adopting revisions by making constitutional conventions the sole permissible procedure demonstrates not only their awareness of the distinction between revisions and amendments, but also their desire to give the distinction substance, thereby ensuring that it would be observed by future generations of Alaskans.[31]

The court developed three policy rationales supporting a vigorous distinction between amendments and revisions. First, the court explained that limiting the amount of constitutional change

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25. Bess v. Ulmer, 985 P.2d 979, 987-88 (Alaska 1999).

26. Order, *Bess* (Nos. S-08811/8812) (on file with authors).

27. Note that this was contrary to the court's usual practice of not ruling on an issue that has not been adequately briefed by the parties. *See, e.g.,* A.H. v. W.P., 896 P.2d 240, 243 (Alaska 1995) (holding that where "a point is given only cursory statement in the argument portion of a brief, the point will not be considered on appeal") (citation omitted). Moreover, it was an unwise practice and inconsistent with that of most other courts. Other courts tend to believe that an issue is fully explored only when adversarial parties have fully presented their opposing viewpoints, and that such briefing greatly enhances a court's ability to reach a correct judgment. *See, e.g.,* Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 558 (1994).

28. *Bess*, 985 P.2d at 982.

29. *Id*.

30. 2 Proceedings of the Alaska Constitutional Convention 1247 (Jan. 5, 1956).

31. *Bess*, 985 P.2d at 983.

protected the stability of Alaska's constitutional regime.[32] Second, the court hoped that constitutional conventions would somehow be better equipped than legislatures to consider constitutional changes.[33] Finally, the court expressed concern about logrolling and bundling, reasoning that multifarious amendments might "aggregate[] for the measure the favorable votes from electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accepting the remainder."[34]

The court concluded that the Framers intended a substantive distinction, but that they did not supply a particularly clear definition of the concepts of "amendment" and "revision."[35] Accordingly, the court looked to scholarly works on the subject, primarily a treatise by Judge John A. Jameson.[36] In particular, the court adopted Jameson's language defining amendments as changes that are "few, simple, independent, and of comparatively small importance."[37] The court also adopted Jameson's declaration that a constitutional convention is required for "a general revision of [the] Constitution, or even for single propositions involving radical changes as to the policy of which the popular mind has not been informed by prior discussions."[38]

The court supplemented its scholarly research with reference to the jurisprudence of other states. In particular, the court relied heavily on California cases applying the distinction between amendment and revision,[39] noting that California had collected over one hundred years of jurisprudence on the question.[40] Accordingly, the court adopted California's qualitative/quantitative analysis[41] developed in four main cases: *Amador Valley Joint Union High School District v. State Board of Equalization*,[42] *Brosnahan v.*

32. *Id.* ("One purpose of requiring a constitutional convention for revisions of the constitution is to promote stability.").

33. *Id.*

34. *Id.* at 985 (quoting McFadden v. Jordan, 196 P.2d 787, 797 (Cal. 1948)).

35. *Id.* at 982.

36. *Id.* at 983-84, 987. The court alluded to other scholars' works and cited from WALTER F. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 261-62 (1910), but Chief Justice Matthews relied primarily on JOHN A. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY, POWERS, AND MODES OF PROCEEDING §§ 540, 574(c) (4th ed. 1887).

37. *Bess,* 985 P.2d at 983, 987 (quoting JAMESON, *supra* note 36, § 540).

38. *Id.* at 983 (quoting JAMESON, *supra* note 36, § 547(c)).

39. *Id.* at 984-87.

40. *Id.* at 984.

41. *Id.* at 987.

42. 583 P.2d 1281 (Cal. 1978).

Brown,[43] *Raven v. Deukmejian*,[44] and *Legislature of the State of California v. Eu*.[45] The California test finds that a proposal is a quantitative revision if it proposes to add numerous sections to the constitution or to delete existing language such that it alters the "substantial entirety" of the document.[46] A proposal is a qualitative revision, on the other hand, if it substantially alters the basic governmental plan.[47]

Drawing from Judge Jameson's writings and the California cases, the court in *Bess* outlined the distinction between an amendment and a revision. Basically, the court's rule is that "changes which are few, simple, independent, and of comparatively small importance" can be considered an amendment, whereas sweeping changes are a revision for which a constitutional convention is required.[48] The court did not, however, simply adopt California's tests *in toto*. Rather, the court crafted a "hybrid" test that appears to involve a sliding scale relating the qualitative and quantitative elements to one another.[49] This so-called "hybrid" test requires consideration of both the qualitative and quantitative impact of a proposed constitutional change in determining whether it is an amendment or a revision.[50] A partial showing on one test can, evidently, reduce the showing required on the other test.[51]

Having articulated a framework for distinguishing between amendments and revisions, the *Bess* court went on to apply its test to the three proposals in question. The court held that Legislative Resolve No. 59 (the prisoners' rights measure) was a revision and thus could not be proposed by the legislature.[52] Although this measure was very similar to the California measure discussed in *Raven v. Deukmejian*, the Alaska court distinguished its own analysis by finding that the measure was *both* a qualitative and a quantitative revision.[53] The court noted that even though the measure on its face proposed to add only one sentence to the constitutional

43. 651 P.2d 274 (Cal. 1982).
44. 801 P.2d 1077 (Cal. 1990).
45. 816 P.2d 1309 (Cal. 1991).
46. *Bess*, 985 P.2d at 986-87.
47. *Id*.
48. *Id.* at 983, 987 (quoting JAMESON, *supra* note 36, § 540).
49. *Id.* at 987; *see also id.* at 989-90 (Compton, J., dissenting in part).
50. *Id.* at 987-88; *see also id.* at 989-90 (Compton, J., dissenting in part).
51. *See id.* at 988.
52. *Id.* at 987-88.
53. *Id*.

text, it had the potential to affect eleven separate sections of the constitution.[54]

The court edited Legislative Resolve No. 71 (the marriage measure) by deleting the second sentence of the proposal and then found that, as edited, it was "sufficiently limited in both quantity and effect of change."[55] Finally, the court held that Legislative Resolve No. 74 (the redistricting measure) was an amendment and appropriate for proposal by the legislature.[56] The court held this despite the fact that No. 74 changed the structure of Alaskan government by transferring apportionment power from the Executive branch to a redistricting board.[57]

Justice Compton dissented, disagreeing not so much with the court's result as with its reasoning.[58] He noted that the court was unclear about what test it was adopting.[59] Although the majority repeatedly made reference to the "hybrid" test, they did not define it or clearly differentiate it from the California test.[60] Justice Compton noted that the California analysis involved two separate tests, while the *Bess* court's analysis of Legislative Resolve No. 74 seemed to advocate what sounded "suspiciously like a sliding comparative scale test," involving the dual quantitative/qualitative aspects working in tandem.[61] Justice Compton's dissent, while touching on some of the major problems of the *Bess* test, did not recognize the substantial distinctions between the California cases cited and the facts before the court.

The legislature's response to the *Bess* decision was unambiguously negative. The Senate Judiciary Committee adopted and sent a letter to the Alaska Supreme Court expressing great concern about several aspects of *Bess*: the rewriting of the proposed marriage amendment; the lack of adequate briefing on the independent

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54. *Id*.

55. *Id*. at 988.

56. *Id.* at 988-89.

57. *Id.* at 995 (Preliminary Opinion and Order).

58. *Id*. at 989-92 (Compton, J., dissenting in part). Justice Compton would have found Legislative Resolve No. 74 (the reapportionment measure) a constitutional revision because it redistributed foundational powers formerly held by the chief executive alone to various other branches of government. *Id.* at 992 (Compton, J., dissenting in part). He cited *Wade v. Nolan*, 414 P.2d 689, 694-95 (Alaska 1966), in support of the uniqueness of Alaska's apportionment scheme and its central role in the Framers' vision of the basic structure of government. *Bess*, 985 P.2d at 991 (Compton, J., dissenting in part).

59. *Bess*, 985 P.2d at 989 (Compton, J., dissenting in part).

60. *Id*. at 989-90 (Compton, J., dissenting in part).

61. *Id*. at 989-92 (Compton, J., dissenting in part).

constitutionality of the proposed prisoners' rights amendment and the proposed redistricting amendment; and the ambiguity of the *Bess* rule.[62] The legislature even attempted to resolve the problems created by *Bess* by proposing an amendment adopting a single subject rule for distinguishing between amendments and revisions to the constitution.[63] It is, of course, an open question whether such a proposal would pass the *Bess* test. Likewise, it is far from clear that *Bess* would permit an amendment giving the legislature the power to propose revisions. The remainder of this Article will explain some of the most salient criticisms of the *Bess* opinion.

III. THE *BESS* COURT LACKED THE AUTHORITY TO REWRITE A PROPOSED CONSTITUTIONAL AMENDMENT

The *Bess* court changed the text of the proposed marriage amendment before passing it on to the voters for ratification. Before *Bess*, the marriage measure contained two sentences: "To be valid or recognized in this State, a marriage may exist only between one man and one woman. No provision of this constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex."[64] The *Bess* court found that the first sentence was clearly only an amendment, but was concerned that the second sentence either had a very broad sweep changing many constitutional provisions, or simply repeated the first sentence and thus was surplusage.[65] Since the court believed that surplus language should never be added to the constitution, it ordered the deletion of the second sentence before placing Legislative Resolve No. 71 on the ballot.[66]

Regardless of whether the remainder of the *Bess* court's legal reasoning is persuasive or not, it is beyond question that the court exceeded its authority when it rewrote the proposed marriage amendment and passed the new, judicially proposed amendment on to the voters. The Alaska Constitution specifically authorizes only two entities to propose constitutional amendments—the legislature and a constitutional convention.[67] Neither of those entities

62. Letter from the Senate Judiciary Committee to Alaska Supreme Court Justices (Apr. 20, 2000) (on file with authors).

63. Leg. Res. 47, 21st Leg., 2d Sess. (Alaska 2000). This was Ballot Measure No. 2 in the 2000 General Elections. It received 46% of the vote and, therefore, did not pass.

64. Leg. Res. 71, 20th Leg., 2d Sess. (Alaska 1998).

65. *Bess*, 985 P.2d at 988 n.57; *see also id*. at 995-96 (Preliminary Opinion and Order).

66. *Id*.

67. ALASKA CONST. art. XIII, §§ 1, 4.

proposed the marriage amendment on which the Alaska electorate eventually voted. That amendment was proposed by the Supreme Court of the State of Alaska, a body not authorized to do so by the constitution. Section A of this Part will argue that by assuming the power to change proposed amendments (and thereby to propose new ones), the court departed from the procedure spelled out in the Alaska constitution, while Section B will argue that the court also wrought an erosion of the separation of powers. Section C will argue that the court's purported justification for this action was insufficient.

A. Judicial Alteration of a Proposed Constitutional Amendment Plainly Violates the Alaska Constitution

As the court declared in *Bess*, the procedures for amending or revising the state constitution must be *strictly* adhered to.[68] Those provisions are quite clear. Article XIII, section 1 of the Alaska Constitution provides that amendments "may be proposed by a two-thirds vote of each house of the legislature."[69] Amendments can then be adopted by a majority vote of the electorate.[70] Article XIII, section 4 of the Alaska Constitution provides that "[c]onstitutional conventions shall have the plenary power to amend or revise the constitution."[71] Neither section 2 nor section 3 provides any authority for the judiciary to propose amendments or to change amendments proposed by the legislature. The Alaska Supreme Court has recognized this principle in the context of statutory lawmaking, holding that "[t]he state Constitution invests the power to enact laws in the legislature and the people, but not the courts. Alaska courts are obligated to avoid interfering with the lawmaking process any more than is necessary."[72]

When the court changes the wording of a proposed amendment, it changes the meaning of the amendment. By doing so, the court assumes the role of essentially proposing a new amendment, thereby usurping the legislature's exclusive constitutional power. The procedure articulated by the constitution is clear and precise: the legislature proposes a change, and the people vote yea or nay. The *Bess* court added a judicial revision step not contemplated by

68. *Id*. at 982; *see also* State v. Lewis, 559 P.2d 630, 639 (Alaska 1977).

69. ALASKA CONST. art. XIII, § 1.

70. *Id*.

71. *Id*. § 4.

72. McAlpine v. Univ. of Alaska, 762 P.2d 81, 94 (Alaska 1988) (citations omitted).

the constitution. That is inconsistent with strict adherence to the constitutional procedure.

Ironically, California courts (the same courts upon which the *Bess* court relied so heavily) invalidate entire initiatives, rather than invalidating portions of initiatives,[73] reasoning that "the whole theory of initiative legislation [is] based upon the security that the legislation proposed and petitioned for by the people shall be voted upon at the polls by them without interference, revision, or mutilation by any official or set of officials[.]"[74] Not only was the *Bess* court's action a violation of the plain text of the Alaska constitution, it also compromised, as Section B will argue, the separation of powers principles underlying that text.

B. Judicial Alteration of a Proposed Constitutional Amendment Erodes the Separation of Powers

Like the U.S. Constitution, the Alaska Constitution is built upon a separation of powers. "Under the structure envisaged by Alaska's fundamental charter, the legislative power of the state is vested in the legislature, the executive power in the governor, and the judicial power in a supreme court, a superior court and such additional courts as established by the legislature."[75] The Framers of the Alaska Constitution recognized the traditional framework of the federal government's doctrine of separation of powers and incorporated it into the Alaska Constitution.[76] Implementing and abiding by "the separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision."[77]

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73. *See* Bennett v. Drullard, 149 P.2d 368, 370 (Cal. Dist. Ct. App. 1915).

74. *Id*.

75. Bradner v. Hammond, 553 P.2d 1, 6 (Alaska 1976) (citing ALASKA CONST. art. II, § 1; art. III, § 1; art. IV, § 1) (footnotes omitted).

76. The Alaska Supreme Court has said that

> "[t]he governmental authority of the State of Alaska was distributed among the three branches, the executive, the legislative and the judicial." Analyzing this tripartite form of government provided for Alaska, this court concluded that ". . . it can fairly be implied that this state does recognize the separation of powers doctrine." Our recent opinion in *Continental Insurance Cos. v. Bayless & Roberts, Inc.,* acknowledges that the underlying rationale of the doctrine of separation of powers is the avoidance of tyrannical aggrandizement of power by a single branch of government through the mechanism of diffusion of governmental powers.

Id. at 5 (citations and footnotes omitted).

77. *Id*. at 7 (citing Leege v. Martin, 379 P.2d 447, 450 (Alaska 1963); State v. Campbell, 536 P.2d 105, 110-11 (Alaska 1975)).

Yet blend the *Bess* court did. The constitution allocates to the legislature the power to draft amendments, the people the power to approve or reject them, and the court the power to interpret and apply them. The *Bess* court undertook a remarkable power grab when it arrogated to itself not just the power to interpret constitutional amendments, but also the power to manipulate the language of the amendments it will later interpret.

In *McAlpine v. University of Alaska*,[78] the court expressly acknowledged that severing preelection ballot provisions raises a very real separation of powers issue.[79] *McAlpine* involved a state university's challenge to the lieutenant governor's certification of an initiative that would establish a separate community college system within state government and require the university to transfer property to the new system.[80] Recognizing that the severance issue "involves separation of powers considerations" because the "constitution invests the power to enact laws in the legislature and the people, but not in the courts,"[81] the court held that

> the duty of a court in conducting a preelection review of an initiative is similar to the court's duty when reviewing an enacted law. In particular, when the requisite number of voters have already subscribed to an initiative, a reviewing court should sever an impermissible portion of the proposed bill when the following conditions are met: (1) standing alone, the remainder of the proposed bill can be given legal effect; (2) deleting the impermissible portion would not substantially change the spirit of the measure; and (3) it is evident from the content of the measure and the circumstances surrounding its proposal that the sponsors and subscribers would prefer the measure to stand as altered, rather than to be invalidated in its entirety.[82]

Notably, the court derives its authority to sever from a statute. Generally, courts can sever statutes that expressly contain a severability clause. Alaska courts have also determined that, because of Alaska's general savings clause, they can sever statutes enacted by the legislature without such clauses.[83] The general savings clause states that

> [a]ny law heretofore or hereafter enacted by the Alaska legislature which lacks a severability clause shall be construed as though it contained the clause in the following language: "If any provision of this Act, or the application thereof to any person or

78. 762 P.2d 81 (Alaska 1988).
79. *Id*. at 94.
80. *Id*. at 82.
81. *Id*. at 94.
82. *Id*. at 94-95 (citations omitted).
83. Lynden Transport v. State, 532 P.2d 700, 713-15 (Alaska 1975).

> circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby."[84]

The general savings clause allowed the court to determine that an otherwise constitutionally permissible portion of a statute can be severed only if the statute standing alone can be given legal effect and that the legislature intended the provision to stand if other provisions were struck by a court.[85] The *McAlpine* court agreed that the severance power is a creature of statute, stating:

> [w]e have alluded to but not examined the contours of the doctrine of severability as mandated by separation of powers under the state Constitution. This court's decisions in recent severability cases were controlled by AS 01.10.030, the general savings statute for legislatively-enacted laws, rather than directly by concerns of separation of powers.[86]

Since the constitution is Alaska's highest law, to be strictly adhered to, no severability statute can grant the court powers that the constitution has withheld. Accordingly, while the court may have the power to edit legislation proposed by popular initiative before it is voted on, it does not have the power to so edit proposed constitutional amendments.

McAlpine and related cases dealt with popularly proposed statutory law.[87] A proposal to amend the Alaska Constitution begins as a resolve in the legislature, and presents an even stronger case for judicial restraint. Given the greater significance of a constitutional amendment, the separation of powers concerns should be of considerably greater force.

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84. ALASKA STAT. § 01-10-030 (Michie 2000).

85. *Lynden Transport*, 532 P.2d at 713-15.

86. *McAlpine*, 762 P.2d at 94 n.24 (citations omitted). Indeed, "[t]he separation of powers doctrine prohibits us [the court] from enacting legislation or redrafting patently defective statutes." Bonjour v. Bonjour, 592 P.2d 1233, 1238 (Alaska 1979) (citing State v. Campbell, 536 P.2d 105, 111 (Alaska 1975), *overruled by* Kimoktoak v. State, 584 P.2d 25 (Alaska 1978)); Gottschalk v. State, 575 P.2d 289, 296 (Alaska 1978)). Similarly, in *Campbell*, the court stated:

> [t]his court is admittedly under a duty to reconcile, whenever possible, challenged legislation with the constitution by rendering a construction that would harmonize the statutory language with specific constitutional provisions. However, in fulfilling that duty, the extent to which the express language of the provision can be altered and departed from and the extent to which the infirmities can be rectified by the use of implied terms is limited by the constitutionally decreed separation of powers which prohibits this court from enacting legislation or redrafting defective statutes.

536 P.2d at 110-11 (footnotes omitted).

87. *See McAlpine*, 762 P.2d at 82.

In decisions before *Bess,* the court had conceded its lack of power to rewrite legislation. In *State v. Campbell*,[88] the court was faced with a challenge to the constitutionality of a statute.[89] Noting that the role of the court was to reconcile, whenever possible, the statute with the constitution by rendering a construction that harmonizes statutory language with constitutional provisions, it nonetheless recognized that its power to interpret the statute was limited by the separation of powers doctrine.[90] Since the doctrine limits the ability of the court to imply terms in a statute, it certainly prohibits the court from engaging in the wholesale rewriting of a legislatively proposed constitutional amendment.

The court's role in reviewing constitutional amendments and the process by which they were adopted is a significant check on the people of Alaska and their legislature's ability to propose amendments to the constitution. The separation of the power to propose amendments from the power to review and apply them creates a system of checks and balances on the process of amending the constitution. When the judiciary rewrites proposed amendments, it impermissibly alters this system of checks and balances because the branch of government drafting proposed amendments becomes the branch that will also review the proposals for constitutionality and apply the amendments to specific cases.

This is, to the best of the authors' awareness, the only case in which an American court has ever altered the text of a legislatively proposed constitutional amendment and then placed it on the ballot. To take such a radical new step, and arrogate to itself such authority, the court would need a compelling justification. The justification actually offered in *Bess*, however, was far from sufficient.

C. The *Bess* Court's Justification Was Insufficient

The only justification for this action given by the court was the allegation that counsel representing the legislature stipulated to the modification of the amendment. The court claimed that "[a]t oral argument the appellees acknowledged that this court has the power to order the deletion of the second sentence."[91] This justification is insufficient for two reasons.

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88. 536 P.2d 105 (Alaska 1975), *overruled by* Kimoktoak v. State, 584 P.2d 25 (Alaska 1978).

89. *Id*. at 106.

90. *Id.* at 110-11; *see also* Veco Int'l, Inc. v. Alaska Pub. Offices Comm'n, 753 P.2d 703, 713 (Alaska 1988); *Kimoktoak*, 584 P.2d at 31 n.6.

91. Bess v. Ulmer, 985 P.2d 979, 995 (Alaska 1999).

First, no attorney or party can waive the specific language of the constitution or the doctrine of separation of powers. Other jurisdictions recognize and vigorously enforce this principle. For example, it is well settled law in the federal courts that no stipulation—either by an attorney or by one of the parties themselves—can create federal subject matter jurisdiction (*i.e.*, vest the court with the power to hear a case) where Congress has not conferred it.[92] A similar principle applies here. No stipulation—either by an attorney or by one of the parties—can vest the court with the power to change an amendment before placing it in front of the Alaska electorate. Only the constitution itself can do that.

Second, even if the legislature somehow could authorize the court to change a proposed amendment, the purported concession was allegedly extracted from the legislature's counsel at oral argument,[93] and, therefore, counsel had no opportunity to consult the legislature, his client. Accordingly, the purported concession could not be construed as a legislative authorization to depart from the constitutionally mandated procedure.

The court should not have violated the separation of powers doctrine based on an attorney's stipulation. It is beyond debate that the specific language of a proposed amendment can be approved only by a two-thirds vote of both houses of the legislature. The so-called Marriage Amendment that ultimately passed was not proposed by the legislature in the manner required by the constitution, but rather was proposed by the court. The constitution does not allow attorneys or the court to modify proposed constitutional amendments.

* * *

The portion of *Bess v. Ulmer* holding that the court may change the text of a legislatively proposed constitutional amendment before passing it on to the voters is, beyond question, indefensible. As to this issue, *Bess* clearly violates the plain text of the Alaska Constitution. Moreover, the *Bess* doctrine aggregates too much power in the hands of the judiciary, substantially eroding the separation of powers in Alaska. Regardless of the merits or demerits of the remainder of the *Bess* decision, as discussed in the remainder of this Article, the court should take the earliest opportunity to disavow this portion of *Bess*.

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92. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 398 (1975); Mitchell v. Maurer, 293 U.S. 237, 244 (1934); Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U.S. 379, 382 (1884).

93. *Bess*, 985 P.2d at 995 ("At oral argument the appellees acknowledged that this court has the power to order the deletion of the second sentence . . . .").

IV. THE ERRORS OF THE *BESS* TEST

The *Bess* court went too far in attempting to give teeth to the distinction between amendment and revision. While the constitution clearly uses both terms, and the minutes of the constitutional convention reveal that the Framers plainly intended the two terms to mean different things, there is no warrant for the aggressive move in *Bess* to broaden the "revision" category and narrow the "amendment" category. By doing so, the *Bess* court froze the Alaska Constitution in its current form. Under *Bess*, the vast majority of changes that could allow the Alaska Constitution to live and grow with the needs of the Alaska people can be made only by constitutional convention.

The *Bess* court undertook this freezing of the Alaska Constitution based on extremely suspect legal grounds. Section A of this Part will argue that the *Bess* court's reliance on California cases was unwarranted. Section B will argue that, not only was the precedential support for *Bess* dubious at best, but also the policy rationales articulated in the *Bess* decision do not support the test ultimately adopted. Finally, Section C will argue that the *Bess* test is subjective and confusing, providing inadequate guidance to the legislature and future courts.

A. *Bess*'s Reliance on the California Cases Was Inappropriate

The *Bess* court lifted its two-part test from a series of California cases.[94] California, however, allows its legislature to propose both amendments and revisions—only the citizens' initiative process in California is limited to amendments.[95] The California cases thus distinguish between amendment and revision in an attempt to set rules for the otherwise freewheeling initiative process, not in an attempt to curtail the constitutionally delegated powers of a democratically elected legislature. Accordingly, the California courts had considerable latitude, since limiting the initiative process did not limit Californians to the choices of virtually no constitutional change or an unpredictable and even dangerous constitutional convention. The middle ground of legislative revision has always remained open in California. The *Bess* court, however, transplanted those tests to Alaska, without proper appreciation for their context. The Alaska legislature, therefore, is now hobbled by a test designed to constrain the unreflective and often rash initiative process, while the people of Alaska have no method short of a constitu-

94. *See* cases cited *supra* notes 42-45.

95. CAL. CONST. art. XVIII, §§ 1, 3.

tional convention to accomplish meaningful changes to their constitution.

The California Constitution currently allows constitutional change by four methods: (1) amendment proposed by a two-thirds vote of each house of the legislature; (2) revision proposed by a two-thirds vote of each house of the legislature; (3) revision proposed by constitutional convention; and (4) amendment proposed by citizen initiative.[96] In all four cases, the proposed changes must be ratified by a majority vote of the people of California.[97] It is the interpretation of the fourth method of constitutional change—the citizens' initiative—from which emerged the qualitative/quantitative test partially adopted by the *Bess* court.

The citizens' direct power to amend the constitution was born of the 1911 reform movement headed by Governor Hiram Johnson.[98] The monied elites and the Southern Pacific Railroad Company had a vice-like grip on state politics.[99] The progressive Republican reformers viewed direct democracy as the answer to curbing corporate control of the legislative process and returning the power of government to the people.[100] The reformers did not, however, view the citizens' power to effect constitutional change as unlimited. An important distinction was made between the citi-

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96. CAL. CONST. art. XVIII provides:

> § 1. The Legislature by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, may propose an amendment or revision of the Constitution and in the same manner may amend or withdraw its proposal. Each amendment shall be so prepared and submitted that it can be voted on separately.
>
> § 2. The Legislature by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, may submit at a general election the question whether to call a convention to revise the Constitution. If the majority vote yes on that question, within 6 months the Legislature shall provide for the convention. Delegates to a constitutional convention shall be voters elected from districts as nearly equal in population as may be practicable.
>
> § 3. The electors may amend the Constitution by initiative.
>
> § 4. A proposed amendment or revision shall be submitted to the electors and if approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.

97. *Id*. § 4.

98. *See* Gerald F. Uelman, *Handling Hot Potatoes: Judicial Review of California Initiatives After Senate v. Jones*, 41 SANTA CLARA L. REV. 999, 1011 (2001).

99. *See* Julia Anne Guizan, *Is the California Civil Rights Initiative A Wolf in Sheep's Clothing?: Distinguishing Constitutional Amendments from Revision in California's Initiative Process*, 31 LOY. L.A. L. REV. 261, 261 (1997).

100. *See id*.

zens' power to *amend* and a constitutional convention's sole power to *revise* the constitution.[101]

The California Constitution was again amended in 1962 to give the legislature the power to propose revisions.[102] The amendment was founded on the belief that the legislature could provide the same necessarily open, reflective, and careful forum for constitutional change as a constitutional convention.[103] The legislature's new power "expanded the available mechanisms to initiate reform while preserving the need for careful deliberation."[104]

After the legislature acquired revision powers, any limitation or definition of the term "amendment" necessarily concerned the power of the people to effect constitutional change by initiative—not the power of a representative democracy to enact well-drafted, carefully debated constitutional reforms. The bulk of the jurisprudence developing the quantitative/qualitative test was decided after 1962. All post-1962 California cases cited by the *Bess* court dealt with challenges to citizens' initiatives.

The California court first differentiated between amendment and revision in *Livermore v. Waite*,[105] an 1894 case challenging a legislative proposal to amend the constitution to change the state capital from Sacramento to San Jose.[106] In finding the impugned measure a revision, the court broadly described an amendment as implying "such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed."[107] Any change beyond that was a revision.

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101. *See* CAL. CONST. art. XVIII, §§ 2-3. Further evidence of the deliberate and important distinction between amendment and revision can be derived from the fact that Hiram Johnson was assistant counsel in *Livermore v. Waite*, 36 P. 424 (Cal. 1894). He argued that the legislatively proposed measure to change the capital was in fact a revision of the constitution and beyond the normal amendatory powers of the legislature. The court agreed with him and struck the measure. *See* Uelman, *supra* note 98, at 1011-12.

102. The constitutional amendment to allow the legislature to propose constitutional revisions was put forth by the 1962 Constitutional Revision Commission charged with paring down the constitution's unmanageable length and complexity. *See* Uelman, *supra* note 98, at 1012-13.

103. *Id*. at 1013.

104. *Id*. at 1018.

105. 36 P. 424 (Cal. 1894).

106. *Id*. at 424-25. At the time, the California Constitution only permitted revision by constitutional convention. The legislature had the power to *amend* the constitution but not to *revise* it. Citizens' initiatives had not yet been introduced into the California constitutional scheme.

107. *Id.* at 426.

Half a century later, the court extended the same definition of amendment to limit the scope of constitutional change allowed by citizens' initiatives. In *McFadden v. Jordan*,[108] a 1948 case, the court held that an initiative measure proposing to add a new article consisting of 12 sections and over 21,000 words to the constitution was a revision.[109] At the time, the constitution was made up of 25 articles divided into 347 sections (and only 55,000 words).[110] The measure in question dealt with subjects ranging from oleomargarine to surface mining and was offered as a single amendment.[111] In applying the *Livermore* standards to citizens' initiatives, the court noted that the amendment/revision distinction was "scrupulously preserved" in article XVIII, section 3 (Amendment by Initiative) in that it expressly excluded revision by initiative.[112] Far from being a change "within the lines of the original instrument" allowed by the amendment procedure, the impugned measure substantially altered the purpose of the constitution and attained objectives "clearly beyond the lines of the [c]onstitution as [then] cast."[113] The sheer size and multifarious subject matter of the measure were determinative aspects of the court's decision, as well as the measure's attempt to effect a blanket repeal of any conflicting sections of the constitution.[114] The court was satisfied that the measure was indeed a revision, pointing to the fact that it would have *directly* repealed or substantially amended at least fifteen of the twenty-five articles of the constitution. While the *McFadden* decision did not formulate the bifurcated quantitative/qualitative test, it laid the groundwork for the court's later adoption of the quantitative aspect of the eventual two-part test.

In 1978, in *Amador Valley Joint Union High School District v. State Board of Education*,[115] the court first expressly engaged the quantitative/qualitative language in analyzing a citizens' initiative that proposed to change the property taxation scheme in the State

108. 196 P.2d 787 (Cal. 1948).

109. *Id*. at 799.

110. *Id*. at 790.

111. *Id*. at 790-93, 796-97.

112. The *McFadden* court adopted the principle that every legislative enactment is presumed to have been passed in light of the jurisprudence of the day. *Id*. at 789-90.

113. *Id*. at 799.

114. *Id*. at 788-89, 794. Section XII(7) of the measure in question read "If any section, subsection, sentence, clause or phrase of the constitution is in conflict with any of the provisions of this article, such section, subsection, sentence, clause or phrase is to the extent of such conflict hereby repealed." *Id*. at 797.

115. 583 P.2d 1281 (Cal. 1978).

of California.[116] In establishing a more defined conceptual threshold for the amendment/revision distinction, the court determined that a measure "so extensive . . . as to change directly the 'substantial entirety' of the [California] Constitution by deletion or alteration of numerous existing provisions" is a quantitative revision.[117] A qualitative revision, by contrast, could be accomplished by a relatively simple enactment if it achieved "far-reaching changes in the nature of [California's] basic governmental plan."[118] The court upheld the initiative measure as suitable for the amendment procedure because it was less sweeping than the *McFadden* measure and operated functionally within the narrow range of taxation.[119] While petitioners suggested that the measure had far-reaching effects in that it potentially modified eight articles and thirty-seven sections of the constitution, the court held that most of the direct changes were confined to article XIII, which already contained thirty-three separate sections dealing with taxation.[120] It was unsurprising—and most certainly intended—that the taxation provisions of article XIII would be directly affected by the initiative measure. Unfortunately, the *Amador* court dealt unsatisfactorily with the issue of indirect modification of other articles, saying only that the potential modifications suggested by the petitioners were founded on an erroneous interpretation of the new article.[121]

The *Amador* court introduced qualitative assessment of a proposed measure's impact in response to the petitioners' suggestion that the new article affected the loss of "home rule" and effectively jeopardized the republican form of government.[122] In dismissing

116. *Id*. at 1283, 1286.

117. *Id*. at 1286.

118. *Id*.

119. *Id*. It should be noted that the California Constitution imposes a single-subject requirement for citizens' initiatives. *See* CAL. CONST. art. II, § 8(d) ("An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."). California courts have interpreted the single-subject requirement expansively, demanding only that provisions of initiatives be "reasonably germane" to the single overriding purpose or object of the measure. Evans v. Superior Court, 8 P.2d 467, 469 (Cal. 1932).

120. *Amador Valley*, 583 P.2d at 1286.

121. *Id*.

122. *See id.* at 1287-89. The petitioners argued that the amendment to article XIII endangered local government's right to control and finance local affairs without undue interference from the legislature by imposing constitutional limits on property taxation rates and assessments. The contention that the measure altered the republican form of government was founded on section 4 of the amendment, which required any "special taxes" to be approved by a super-majority of

the "home rule" challenge as unfounded, the court placed particular emphasis on the fact that the measure neither destroyed nor annulled any taxation powers.[123] The local agencies retained the same statutory and constitutional powers as before—they were merely subject to new limits.[124] The court refused to acknowledge or consider that the local agencies' autonomy and control over finances may be indirectly compromised through reduction in property tax revenues and new procedural limits on the ability to enact special taxes.[125]

The court dismissed the claim that the measure would amount to a loss of the republican form of government.[126] The measure did nothing to derogate from local or state governments' function as elected representative bodies.[127] It merely placed limits on those governments' abilities to increase taxes without voter approval. The fact that voting requirements in financial matters were not unprecedented in California's legislative history was a significant element in the analysis.[128]

Amador's qualitative/quantitative reasoning was echoed by later courts, most notably in *Brosnahan v. Brown*,[129] *Raven v. Deukmejian*,[130] and *Legislature of the State of California v. Eu*[131]. The *Brosnahan* court, however, added an additional refinement. Importing language from *Amador*, the court resolved that any fatal violation of the quantitative/qualitative test must "necessarily and inevitably" appear from the face of the challenged measure.[132] The court found that the proposed "Victim's Bill of Rights" measure did not violate the quantitative limits on the amendment procedure because *on its face* it repealed only one section and added another—indicating that the court's test contemplates only assess-

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the qualified electors in the region. The petitioners suggested that this referendum requirement amounted to a shift from representative to direct democracy.

123. *Id*. at 1287.

124. *Id*. at 1288.

125. *See id*. at 1287-88.

126. *Id*. at 1288.

127. *Id*.

128. *Id*. at 1289. The court noted that prior to the enactment of article XIII § A, the California Constitution required ratification by a super-majority of qualified electors to incur a deficit in any fiscal year.

129. 651 P.2d 274, 288 (Cal. 1982).

130. 801 P.2d 1077, 1085-86 (Cal. 1990).

131. 816 P.2d 1309, 1316-17 (Cal. 1991).

132. *Brosnahan,* 651 P.2d at 289.

ment of textual changes to the constitution.[133] The challenged measure did not amount to a change "so extensive . . . as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions."[134] Qualitatively, the court also found that the measure fell short of constituting "such far-reaching changes in the nature of our basic governmental plan as to amount to a revision."[135] Petitioners suggested that the measure's provisions in regard to plea bargaining and the right to safe schools prevented the court from carrying out its constitutional mandate to decide cases and would result in serious abridgement of the people's constitutional right to public education.[136] In dismissing the challenges, the court refocused the quantitative/qualitative analysis on the direct and obvious impact of a challenged measure, rather than on speculation about the potential modifying effect of the provision on future judicial interpretation of other sections of the constitution. The court said:

> As we have already indicated, however, petitioners' forecast of judicial and educational chaos is exaggerated and wholly conjectural, based primarily upon essentially unpredictable fiscal or budgetary constraints. In *Amador*, we discounted similar dire predictions that the adoption of article XIII A . . . would result in a loss of "home rule" and the conversion of our governmental framework from "republican" to "democratic" in form. We observed that "nothing on the face of the article" compels such results, nor confirms that the article "necessarily and inevitably" will produce those feared results.[137]

The significance of *Amador*'s "on its face" rule is noteworthy. Even the California courts will strike a proposal as revisory only if the revisory character of the proposal is apparent on its face.[138] That is California's rule for handling the volatile citizen initiative process. Not only did the *Bess* court incorporate California's rule and apply it to legislatively proposed amendments, *Bess* actually made the rule even stricter for the legislature by inquiring beyond the face of the amendment. Thus, even the most extreme and radical citizens' groups in California have *more* power to propose

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133. *Id*. at 288. The measure repealed article I, section 12 (right to bail), and added article I, section 28 (dealing with victim's rights to restitution, safe schools, truth-in-evidence, bail, and use of prior convictions).

134. *Id*. (quoting Amador Valley Joint Union High Sch. Dist. v. State Board of Education, 583 P.2d 1281, 1286 (Cal. 1978)).

135. *Id*. at 288-89 (emphasis omitted).

136. *Id*.

137. *Id*. (citations omitted).

138. *See, e.g.*, *Amador Valley*, 583 P.2d at 1297.

changes to their constitution than the democratically elected legislature of Alaska has to propose changes to the Alaska constitution.

Since *Brosnahan*, California's qualitative/quantitative effects test has remained essentially unchanged. In keeping with the court's oft-stated mandate to jealously guard the sovereign people's initiative power, the constitutionally entrenched initiative right has been liberally construed, with most doubts resolved in favor of its exercise. That is not to say that the court's application of the test is so liberal as to emasculate any substantive distinction between amendment and revision. The qualitative effects test has been used as a sword to strike initiatives reaching beyond the scope of allowable amendments. In *Raven v. Deukmejian*,[139] the court found that a proposed measure limiting criminal defense rights to those guaranteed under the U.S. Constitution was a qualitative revision because it vested all judicial interpretive power in relation to criminal defense rights in the U.S. Supreme Court.[140] The measure derogated substantially from essential powers assigned by the California Constitution to a branch of government (the judiciary). In other words, it fundamentally altered the basic governmental plan to such an extent as to amount to a revision.

The quantitative/qualitative effects test, however, does not operate alone as the gate-keeper to the amendment/revision process in California. As mentioned above, the California Constitution demands that initiative measures (either statutory or constitutional) embrace but one subject.[141] If a measure violates the single-subject rule, it cannot be placed on the ballot for ratification by the voters. The single-subject rule has been broadly construed to mean that the provisions of the measure must be reasonably germane to the overarching purpose of the initiative.[142] Like the quantitative/qualitative effects test, the court has instructed that doubts be resolved in favor of the initiative.[143] However, the California Supreme Court's recent decision in *Senate v. Jones*[144] is evidence of a shift regarding judicial deference to initiatives. While single-subject jurisprudence previously required a clear showing of invalidity to subject the initiative measure to pre-election review, the *Jones* court lowered the threshold to a more restrictive "strong

139. 801 P.2d 1077 (Cal. 1990).

140. *Id*. at 1087.

141. CAL. CONST. art. II, § 8(d) ("An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.").

142. Evans v. Superior Court, 8 P.2d 467, 469 (Cal. 1932).

143. *See* DeVita v. County of Napa, 889 P.2d 1019, 1038 (Cal. 1995).

144. 988 P.2d 1089 (Cal. 1999).

likelihood" of invalidity.[145] The *Jones* case also represents the court's willingness to look beyond the language of the measure for evidence of logrolling and consider the potential for voter confusion or deception.[146]

While the *Jones* case deals only with the single-subject test, a more restrictive interpretation of the qualitative/quantitative effects test is sure to follow. Initiatives now dominate the political horizon in a state where voter turnout diminishes as the length and complexity of the ballot increases.[147] Public policy debates occur in the threatening shadow of a referendum initiated by a cowboy taxpayer deciding to "settle" the issue once and for all. As one author wrote:

> Each time Californians go to the polls, they expect to encounter a dozen ballot propositions, to determine questions as basic as who should go to jail, who should be executed, who should pay taxes and how much they should pay, and who can marry whom. Initiative contests become the political battleground where trial lawyers shoot it out with insurance companies, prosecutors face off against criminal defense lawyers, the religious right confronts the gay rights movement, and environmentalists take on polluters.[148]

Voter, lawmaker, and judicial frustration with the initiative industry will undoubtedly result in changes in the way courts approach the distinction between amendment and revision. The evolution of the quantitative/qualitative effects test is far from over. Survival of the initiative system in California may depend on a more conservative application of one of the last judicial tools for protecting the efficiency and effectiveness of both the legislative and voting processes.

A potential shift to a more conservative interpretation of initiative rights in California is all the more reason to distinguish the California test from the Alaska test. As future courts look for guidance in the application of Alaska's "hybrid" test, they may be convinced to adopt increasingly restrictive approaches. The people of Alaska could be left with virtually no power to enact important changes to their constitution short of an uncontrollable constitutional convention.

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145. *Id*. at 1096.
146. *See* Uelman, *supra* note 98, at 1008.
147. *Id.* at 1024.
148. *Id*. at 1000.

In sum, the *Bess* court extracted from the California cases a rule designed to check the excesses associated with California's system of government by initiative. Transplanting those rules into the context of legislatively proposed constitutional amendments was inappropriate because the checks and procedures built into the legislative process are already a significant insulator against rash and hasty decisionmaking. The California cases gave no consideration to this distinction because the California legislature is given the constitutional power to propose both amendments and revisions.

Moreover, because the California legislature is empowered to propose revisions, the California courts can confine the scope of acceptable amendments without paralyzing the California Constitution. Regardless of the evolution of the amendment/revision distinction in the California courts, the voters of California will be able to effect change in their constitution without convening a constitutional convention. In Alaska, by contrast, if the definition of "amendment" is restricted, Alaska voters will eventually be forced into a Hobson's choice—either live with an out-of-date constitution that does not and cannot address important issues of the day, or convene a constitutional convention and take the risk of completely unsettling more than a half-century of constitutional tradition.

The court should not proclaim the meaningful, substantive distinction between types and methods of constitutional change in one breath, and then, in the next, arbitrarily ignore other important distinctions between types and methods of constitutional change when crafting rules and doctrine. In adopting the California test without acknowledging the vital differences between the constitutions of California and Alaska, the *Bess* court imposed a standard founded in a history very distinct from Alaska's.[149]

B. The Policy Rationales Articulated in *Bess* Do Not Justify the Restrictive *Bess* Test

Not only is the precedential support for *Bess* inconsistent with the Alaska constitutional structure, the policy concerns expressed by the court do not warrant the restrictive test ultimately adopted. The *Bess* court justified its approach by citing (1) a need for constitutional stability, (2) the theory that a constitutional convention

149. Not only did the *Bess* court fail to acknowledge the crucial differences between the constitutions of California and Alaska, the majority opinion actually asserts that the two documents allow for similar methods of change. Bess v. Ulmer, 985 P.2d 979, 987 (Alaska 1999).

would be better suited than a legislature to make large changes to the constitution, and (3) a fear of bundling and logrolling. None of these concerns warrants the outcome in *Bess*.

The first justification offered by the *Bess* court was stability.[150] As the court explained, "[s]ome political thinkers have interpreted the written constitution in the American political system as a stabilizing document which operates to retard change or requires a more deliberate selection of what changes society deems desirable."[151] Essentially, the court observed that making the document harder to change in a meaningful fashion helps provide a buffer against hasty and unwise changes driven by popular emotion rather than careful reflection. While this concern may make sense in the initiative context, where proposals are debated—if at all—in the soundbite mass media, it is much less weighty in the context of legislatively proposed changes. The legislative process itself is a brake on hasty and ill-considered proposals, requiring debate, deliberation, and compromise.[152] Moreover, giving excessive weight to this concern leads to a stagnant constitutional regime. By far the most stable constitutional regime would be one that simply never changed at all, yet such a regime would not keep up with the changing needs of Alaska's people. The question, therefore, is how best to balance the need to prevent too much ill-considered change with the need to permit sufficient adjustments to allow the Alaska Constitution to breathe and grow. The Framers certainly recognized the need to balance stability with flexibility, since they provided for multiple avenues of constitutional change.

The *Bess* standard fails to strike that balance. It fails to consider that forcing too much needed constitutional change into the constitutional convention process either paralyzes the constitution or compels a risky and unpredictable constitutional convention. Under *Bess*, if the citizens of Alaska desire a particular constitutional change (such as the various proposed subsistence amendments[153]) they may have no alternative but to call a constitutional convention. Once a convention is called, however, it has "plenary power" to revise the constitution.[154] Accordingly, once called, a constitutional convention cannot be controlled and risks introducing far more instability into Alaska's constitutional system. The

150. *Id*. at 983 ("One purpose of requiring a constitutional convention for revisions of the constitution is to promote stability.").

151. *Id*.

152. Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1051 (2001).

153. *See infra* Part V.

154. ALASKA CONST. art. XIII, § 4.

choice between stasis and a constitutional convention is one Alaskans should not be forced to make.

The second justification offered by the *Bess* court was the theory that constitutional conventions are somehow better equipped than legislatures to consider changes to the state's organic law.[155] The court reasoned that legislatures might not have the time to properly consider all the ramifications of a constitutional revision,[156] and, more importantly, that legislatures will be "a mirror of political passions and interests, and, with the best intentions, cannot be expected to be free from bias."[157] The court endorsed Judge Jameson's hope that "when a Convention is called, it is sometimes possible to secure the return of" unbiased delegates.[158]

This assumption, of course, does not square with contemporary political reality. Constitutional convention delegates are highly unlikely to be chosen through some Platonic test that measures the ability to comprehend and revise constitutions. Rather, delegates will likely be proposed by local and statewide political organizations and selected by votes that follow party lines or other political, ethnic, or ideological factions. As a result, convention delegates will likely reflect the preferences and biases of the prevailing parties (and therefore of the legislature). Creating a hermetically sealed convention would be practically impossible.

Moreover, the more one moves away from a convention that reflects prevailing political divisions, the more one risks diminishing the capacity of the delegates. At the opposite extreme, for example, randomly picking delegates out of the phone book has a high chance of selecting a group of delegates remarkably ill-suited to reading the existing constitution and drafting revisions.

The third, and by far the strongest, justification offered in *Bess* was a concern about a bundling effect.[159] The court cited a California case which expressed concern that multifarious amendments might "aggregate[] for the measure the favorable votes from electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accepting the remainder."[160] Essentially, the *Bess* court feared that allowing the legislature to propose complex, multifarious amendments would create a situation in which voters might ac-

155. *Bess*, 985 P.2d at 983.

156. *Id*. ("Legislatures will usually have their time taken up with other matters and be unable to devote sufficient time to [the] subject.").

157. *Id.* at 984 (citing JAMESON, *supra* note 36, § 539).

158. *Id*.

159. *Id*. at 985.

160. *Id*. (quoting McFadden v. Jordan, 196 P.2d 787, 797 (Cal. 1948)).

cept a package of changes because they wanted one part, without adequately considering the import of other parts of the revision.

This concern does not support the broad lines drawn by *Bess*. It could be addressed by a simple "no multifariousness" rule, and at significantly less cost. If, for example, the court were to require that proposed amendments be of a single subject, then the voters would have an opportunity to vote for or against each individual issue, thereby preventing the aggregation of multiple minorities who each support distinct portions of a proposed amendment from creating a false majority.[161]

C. *Bess*'s Standard is Unclear and Confusing

It is necessary that the law regarding constitutional amendments and revisions be clear. The legislature must know, in advance, the limits of its constitutional powers. Likewise, courts reviewing proposed amendments need to know what the rules are. As the facts in *Bess* demonstrate, there is often not much time for courts to consider these issues and return possible amendments back to the legislature. Moreover, as happened in *Bess*, the time constraints associated with the electoral process may lead to adjudication based on minimal or nonexistent briefing. Accordingly, any standard applied should be as clear and crisp as possible, providing forewarning to all parties concerned. *Bess* falls well short of this standard.

The *Bess* court's deviation from the California test created considerable confusion. While the California test requires the qualitative/quantitative violation to appear on the face of the challenged measure, the *Bess* court indicated that Alaska courts should take a "hybrid" approach and look beyond the obvious and immediate impact of the measure.[162] In its quantitative/qualitative assessment of Legislative Resolve No. 59 (the prisoners' rights measure), the court remarked on the similarities between it and the initiative measure before the *Raven* court.[163] The court partially distinguished the *Raven* analysis, noting:

> The *Raven* court held that the proposal constituted a qualitatively revisory change to the constitution, but not a quantitatively revisory change. We take a hybrid approach. Not only would the proposal, for the reasons stated in *Raven*, "substantially alter the substance and integrity of the [California] Constitution as a document of independent force and effect," but as we held in the Preliminary Opinion and Order, it also would poten-

161. *See infra* Part V.B.

162. *Bess*, 985 P.2d at 988 (referring to the "hybrid test").

163. *Id*. at 987-88.

> tially alter as many as eleven separate sections of [the California] Constitution.[164]

In adopting its "hybrid" approach, the court took a test that had proved to be a reasonably workable standard, limited in subjectivity and appropriate to its purpose in assessing initiative measures, and transformed it into an almost entirely subjective analysis, requiring speculation and guesswork, so striking in ambiguity that it is decipherable only by the courts. The practical effect of this vague "hybrid" approach is to subject Alaskans' constitutional amending powers (as effected by the legislature) to constant review by the courts.

It is somewhat unclear whether the *Bess* court intended further departure from the California test by combining the qualitative/quantitative elements into a single, sliding-scale type analysis.[165] In its assessment of Legislative Resolve No. 74 (the reapportionment provision), the court observed that because the quantitative effects are minimal, "the qualitative force of this narrow change would have to be greater to satisfy our hybrid test."[166] As Justice Compton noted in his dissent, the California analysis "does not test by comparing quantitative and qualitative criteria; each stands on its own merits. A proposed enactment could satisfy neither test, either test, or both tests."[167] Unfortunately, the court did not develop further this sliding scale reference (as well as many other aspects of the "hybrid" test), leaving decidedly important questions entirely unresolved.

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In sum, the legal reasoning in *Bess* left much to be desired. The *Bess* court imported a test from California without changing it to account for the unique structure of the Alaska Constitution. As a result, while Californians can revise their constitution easily

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164. *Id*. (quoting Raven v. Deukmejian, 801 P.2d 1077, 1087 (Cal. 1990)).

165. Justice Compton, in dissent, wrote:

> The court uses the term "hybrid" again with respect to Legislative Resolve No. 74. It concludes that although reassignment of the power to reapportion the legislature is "significant," it does not constitute a revision since it does not deprive the executive branch of a "foundational power." The court reasons: "as the quantitative effect of a proposal is minimal, the qualitative force of this narrow change would have to be greater to satisfy our hybrid test." The court still has not articulated just what its "hybrid test" is, although it sounds suspiciously like a sliding comparative scale test of some sort.

Id. at 989-90 (Compton, J., dissenting in part) (citations omitted).

166. *Id.* at 988.

167. *Id*. at 990 (Compton, J., dissenting in part).

through the legislative process and are not forced into the stasis/constitutional convention choice, Alaskans are trapped by *Bess*. None of the policy rationales articulated in *Bess* justify this radical abridgement of the legislature's constitutional role. Finally, regardless of the precedential or policy wisdom of the *Bess* opinion, the test itself is incomprehensible, and does not allow the legislature to conscientiously discharge its duty to consider the constitutionality of proposed measures.

V. THE *BESS* RULE BARS RECENTLY PROPOSED SUBSISTENCE AMENDMENTS

At the Twenty-first Legislature, Governor Tony Knowles proposed to amend the Alaska Constitution by adding the following section to article VIII:

> Section 19. SUBSISTENCE PRIORITY. The legislature may, consistent with the sustained yield principle, provide a priority to and among rural residents for the taking of fish and wildlife and other renewable natural resources for subsistence.[168]

The purpose of the proposed amendment was to bring the state into compliance with the Alaska National Interest Lands Conservation Act[169] and allegedly allow state management of fish and wildlife throughout the state.[170] There have been many other subsistence amendments discussed along roughly the same lines.

The various proposed subsistence amendments are clearly not amendatory changes, but rather are revisions under *Bess*.[171] They potentially alter or modify thirteen separate sections of the constitution.[172] Through creation of an arbitrary and meritless distinction, the amendments rob non-Natives of rights that the Alaska Supreme Court has repeatedly called "highly important."[173] Fur-

168. H.J.R. 37, proposed, 21st Leg., 1st Sess. (Alaska 1999).

169. Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended at 16 U.S.C. §§ 3101-33 (2000)).

170. H.J.R. 37, proposed, 21st Leg., 1st Sess. (Alaska 1999).

171. This is certainly true of the various subsistence amendments recently proposed. It is possible that some variety of very limited local preference might be proposed in the future that would not fall victim to this critique. We express no opinion as to such an amendment.

172. *See infra* Part V.B. for a discussion of the effect of proposed subsistence amendments.

173. McDowell v. State, 785 P.2d 1, 10 (Alaska 1989); Owsichek v. State Guide Licensing, 763 P.2d 488, 492 n.10 (Alaska 1988); Ostrosky v. State, 667 P.2d 1184, 1196 (Alaska 1983) (Rabinowitz, J., dissenting). In *Ostrosky*, Justice Rabinowitz stated the right to access natural resources is "a highly important right running to each person in the state." 667 P.2d at 1196 (Rabinowitz, J., dissenting). The deci-

ther, they purport to do what the Framers of the constitution expressly prohibited—assign special rights and privileges of access to Alaska's natural resources.

To understand how profoundly any proposed subsistence "amendment" will impact the constitution, and thus how they would violate *Bess*, it is useful to explore the historical foundations on which the constitution was constructed, as well as the constitution's integral role in everyday life in Alaska. Accordingly, Section A of this Part will explore the history underlying the sections of the Alaska Constitution impacted by the proposed subsistence amendment, while Section B will discuss the effect of a subsistence amendment, showing that it violates the *Bess* test.

A. The History of the Alaska Constitution

The Alaska Constitution was drafted by delegates of the Constitutional Convention of 1955-56 with the goal of creating a basic legal framework that would reflect political maturity and readiness for admission to statehood.[174] The delegates had the benefit of almost two hundred years of constitutional interpretation, the advice of nationally renowned constitutional experts, and the lessons and models of the constitutional reform movement of the 1930s.[175] The result of the Fairbanks convention was a document tailored to account for the unique geographic and demographic features of the state at the time. As one scholar wrote:

> The Alaska Constitution is the product of a rugged, frontier community; yet its content fits a modern day, complex, industrial society. It combines the experience of other states with contemporary ideas on constitution making, tradition with innovation, and the classical with the modern. While certain of its provisions are peculiar to the special situations in Alaska, this basic law may well serve as a model for constitutional revision in older states. Perhaps the Alaska Constitution has most nearly approximated the ideal.[176]

While the Alaska model draws heavily from the federal Bill of Rights, it is by no means a carbon copy. The Framers included several provisions not addressed by the U.S. Constitution,[177] in-

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sions in *Owsichek* and *McDowell* also adopted this sentiment. *See Owsichek*, 763 P.2d at 492; *McDowell*, 785 P.2d at 10.

174. *See* Ronald L. Nelson, *Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation*, 12 ALASKA L. REV. 1, 6-7 (1995).

175. *Id*. at 7.

176. P. Allan Dionisopoulos, *Indiana 1851, Alaska, 1956; A Century of Difference in State Constitutions*, 34 IND. L.J. 34, 54 (1958).

177. Nelson, *supra* note 174, at 7-8 n.34.

cluding the right to equal opportunities,[178] the right to receive fair and just treatment in legislative investigations,[179] bail rights,[180] protection from debtors' prison,[181] education,[182] and administration of natural resources.[183] That many of the aforementioned provisions are absent from the U.S. Constitution and other state constitutions only highlights their importance in the Framers' vision of Alaska's basic law.

Article VIII, devoted exclusively to natural resources, is perhaps the hallmark of the Alaska Constitution. Its likeness appears nowhere in any other constitution in the United States. It embodies the significance of fish, minerals, and wildlife in Alaskan society and the expectation that they would continue to be important in the future.[184] Language was carefully chosen with the goals of not restricting future generations and fixing these philosophical concepts so firmly in the law and consciousness of Alaskans that they could not be subverted by stealth, ineptitude, or inattention.[185]

Intricately woven into the text of article VIII are the concepts of broad public access and sustained yield.[186] Sections I, II, III, IV and XV are particularly illustrative of the Framers' intent:

> Section I. STATEMENT OF POLICY. It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.
>
> Section II. GENERAL AUTHORITY. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.
>
> Section III. COMMON USE. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.
>
> Section IV. SUSTAINED YIELD. Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preference among beneficial uses.

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178. ALASKA CONST. art. I, § 1.

179. *Id.* art. I, § 7.

180. *Id.* art. I, § 11.

181. *Id*. art. I, § 17.

182. *Id*. art. VII, §§ 1-3.

183. *Id*. art. VIII.

184. GORDON S. HARRISON, ALASKA LEGIS. RESEARCH AGENCY, ALASKA'S CONSTITUTION: A CITIZEN'S GUIDE 149 (3d ed. 1992).

185. *Id*.

186. *See generally* ALASKA CONST. art. VIII.

> Section XV. NO EXCLUSIVE RIGHT OF FISHERY. No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.[187]

Through article VIII, the Alaska Constitution embodies historic "public trust" principles of water resource and wildlife management.[188] In speaking of "ancient tradition in property rights," it recognized that title to uncaptured wildlife "is reserved to the people or the state on behalf of the people."[189] The Alaska Supreme Court noted that the Framers relied heavily on *Greer v. Connecticut*,[190] the seminal case on the "public trust" doctrine, in drafting article VIII (particularly section 3's "common use" clause).[191] The *Greer* court noted that the state's power over wildlife "is to be exercised, like all other powers of the government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good."[192]

The expression "for common use" implies that these resources are not to be subject to exclusive grants or special privilege as was so frequently the case in ancient royal tradition.[193] A memorandum of the Constitutional Convention Committee on Resources further emphasizes the Framers' intent to reproduce the principles outlined in *Greer*: "This section is intended to exclude any especially privileged status for any person in the use of natural resources subject to the disposition of the state."[194]

B. The Effect of the Subsistence Amendment

The subsistence amendment as proposed by Governor Knowles in the 1998 special session proposes to assign special ac-

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187. *Id*. art. VIII, §§ 1-4, 15.

188. Stephen M. White, *"Equal Access" To Alaska's Fish And Wildlife*, 11 ALASKA L. REV. 277, 278 (1994).

189. *Id*. at 279 n.8.

190. 161 U.S. 519 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 332 (1979).

191. Owsichek v. State, 763 P.2d 488, 495 (Alaska 1988).

192. *Greer,* 161 U.S. at 529.

193. *Owsichek,* 763 P.2d at 493 (citing Committee on Resources, Terms, Alaska Constitutional Convention Papers, Folder 210).

194. 6 Proceedings of the Alaska Constitutional Convention 84 (Dec. 16, 1955), *quoted in* McDowell v. State, 785 P.2d 1, 6 (Alaska 1989).

cess to natural resources for subsistence purposes to rural residents of Alaska. This is not an issue unfamiliar to Alaska courts. Over the past two decades, the courts have considered numerous challenges to access restrictions. In keeping with the historical and current import of natural resources in Alaska and the Framers' intentions, many decisions closely scrutinized any infringement on article VIII rights.

In determining the qualitative and quantitative impact of the proposed subsistence amendment, it is useful to track judicial interpretation of article VIII. The significance of article VIII (in particular, the common use clause) was first voiced in Justice Rabinowitz's dissent in *State v. Ostrosky*:[195] "Since the right of common use is guaranteed expressly by the constitution, it must be viewed as a highly important interest running to each person within the state."[196] The court was assessing the constitutionality of the Limited Entry Act,[197] which restricted anyone from becoming a primary operator of commercial fishing gear without an entry permit.[198] The permits, unlimited in duration, were restricted in quantity and the original "grantees" had the power to assign, sell, or pass on to heirs their right to the gear fishery resource.[199] Justice Rabinowitz would have held that the statute violated article VIII, section 3 and section 15, as well as article I, section 1.[200] He further indicated that the state carried a high burden of showing the substantiality of its interests when infringing on the right to common use of natural resources under equal protection analysis.[201]

Equal protection analysis is most commonly associated with rights contained in article I. However, Justice Rabinowitz would have held that the rights associated with article VIII were important enough to merit application of the equal protection "sliding scale" test.[202] As mentioned above, the rights infringed were a

195. 667 P.2d 1184 (Alaska 1983).

196. *Id.* at 1196.

197. ALASKA STAT. §§ 16.43.010-.380 (Michie 2000).

198. *Ostrosky*, 667 P.2d at 1188.

199. ALASKA STAT. §§ 16.43.120(b), 16.43.150(h) (Michie 2000).

200. *See Ostrosky*, 667 P.2d at 1195-98 (Rabinowitz, J., dissenting).

201. *Id*. at 1196 & n.3 (Rabinowitz, J., dissenting).

202. *Id.* at 1198 (Rabinowitz, J., dissenting). The "sliding-scale" test is a tool of constitutional analysis unique to Alaska wherein the importance of the right infringed is assessed against the importance of the state interest. The more important the right, the higher the burden shouldered by the state to prove a pressing and substantial interest, as well as use of the least intrusive/impairing means. *Id*. at 1193.

"highly important interest running to each person in the state."[203] Consequently, the state had to show that it had a significant interest that was substantially furthered by infringing the rights in article VIII. Justice Rabinowitz concluded that the provisions of the Limited Entry Act were not the least intrusive means of accomplishing the state's objective.[204] The statute, according to the dissent, was therefore unconstitutional.[205]

The dissent in *Ostrosky* was subsequently adopted by the court in *State v. Owsichek*,[206] an action challenging the constitutionality of exclusive guiding areas.[207] The court in *Owsichek*, however, more thoroughly explored the range of permissible regulations and/or entry restrictions under the "common use clause."[208] While acknowledging that the clause does not preclude the legislature from limiting or restricting access, the court reiterated the state's duty to apply the least intrusive means of accomplishing its objective.[209] In the court's words:

> In *State v. Ostrosky,* we noted that there is a tension between the limited entry clause of the state constitution and the clauses of the constitution which guaranty open fisheries. We suggested that to be constitutional, a limited entry system *should impinge as little as possible* on the open fishery clauses consistent with the constitutional purposes of limited entry, namely, prevention of economic distress to fishermen and resource conservation.[210]

The court continued:

> In light of this historical review we conclude that the common use clause was intended to engraft in our constitution certain trust principles guaranteeing access to the fish, wildlife and water

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203. *Id*. at 1196 (Rabinowitz, J., dissenting).

204. *Id*. at 1195 (Rabinowitz, J., dissenting).

205. *See id.* at 1195-98 (Rabinowitz, J., dissenting).

206. 763 P.2d 488, 492 n.10 (Alaska 1988).

207. *Id*. at 488.

208. *Owsichek*, 763 P.2d at 492. The court stated:

> This court has never considered these questions before. However, in four cases, we have indicated an intent to apply the common use clause in a way that strongly protects public access to natural resources. First, with respect to article VIII generally, we have written, "A careful reading of the constitutional minutes established that the provisions in article VIII were intended to permit the broadest possible access to and use of state waters by the general public." *Wernberg v. State*, 516 P.2d 1191, 1198-99 (Alaska 1973). Given the text of the common use clause, the same policy should apply to wildlife as well.

Owsichek, 763 P.2d at 492 (footnote omitted).

209. *Owsichek*, 763 P.2d at 495.

210. *Id.* at 492 (quoting Johns v. Commercial Fisheries Entry Comm'n, 758 P.2d 1256, 1266 (Alaska 1988)) (emphasis added) (citations omitted).

> resources of the state. The proceedings of the Constitutional Convention, together with the common law tradition on which the delegates built, convince us that a minimum requirement of this duty is a prohibition against any monopolistic grants or special privileges. Accordingly, we are compelled to strike down any statutes or regulations that violate this principle.[211]

Less than one year after the *Owsichek* decision, the court handed down another seminal decision interpreting the provisions of article VIII. In *McDowell v. State*,[212] the court examined the same type of discrimination contemplated by the proposed subsistence amendment. At issue was a 1986 statute imposing a subsistence preference based on rural residency.[213] The court emphatically labeled it unconstitutional, finding the classification methods "crude" and both under- and over-inclusive.[214] The court summarized the principles outlined in previous decisions:[215]

> Most recently in *Owsichek,* we suggested that section 17 of article VIII, the uniform application clause, "may require 'more stringent review' of a statute than does the equal protection clause in cases involving natural resources." . . . We also cited with approval Justice Rabinowitz's dissent in *Ostrosky*, which employs a least restrictive alternative approach in view of the "highly important interest running to each person within the state" by virtue of the common use clause.
>
> In reviewing legislation which burdens the equal access clauses of article VIII, the purpose of the burden must be at least important. The means used to accomplish the purpose must be designed for the least possible infringement on article VIII's open access values.[216]

The court suggested that "a classification scheme employing individual characteristics would be less invasive of the article VIII open access values and much more apt to accomplish the purpose

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211. *Id.* at 496.

212. 785 P.2d 1 (Alaska 1989).

213. *Id*. at 1. Subsistence fishing and hunting are defined as activities that can be undertaken only "by a resident domiciled in a rural area of the state . . . ." ALASKA STAT. § 16.05.940 (Michie 2000). "Subsistence uses" were defined as non-commercial, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of non-edible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption. *Id*.

214. *McDowell,* 785 P.2d at 10-11.

215. *Id*. at 10. The court relied primarily on Justice Rabinowitz' dissent in *Ostrosky* and the majority in *Owsichek*.

216. *Id.* (citations omitted).

of the statute than the urban-rural criterion."[217] The equal access clauses of article VIII, wrote Justice Matthews, are a special type of equal protection guarantee and bar the residential discrimination imposed by the impugned statute.[218]

Justice Moore wrote a concurring opinion in which he subjected the impugned statute to equal protection analysis under article I, section 1. He quickly concluded that the statute's classification scheme for deciding who is entitled to engage in subsistence hunting and fishing was not closely related to the purpose of the Act:

> As the court's opinion describes, large numbers of residents of areas classified as urban under the Act are dependent upon subsistence hunting and fishing. Conversely, some of the state's larger cities where many people are not dependent upon subsistence hunting and fishing, are classified as rural . . . . *The fit between the Act and the state's interest does not even approach that required to withstand close scrutiny. Therefore, the Act violates the equal protection and uniform application clauses of the Alaska Constitution.*[219]

The *McDowell* decision represents the most profound and exhaustive discussion of the meaning of article VIII and its relationship to other sections of the constitution. The very type of discrimination contemplated by Governor Knowles' proposed subsistence amendment is examined and rejected as contrary to the values and goals of Alaska's constitution. The addition of section 19 would change the course of constitutional interpretation of equal protection clauses in both article I and article VIII.

* * *

It is evident from the court's treatment of cases involving access restrictions to natural resources that article VIII is viewed as a fundamentally important subset of equality rights. Unlike other states where similar issues are subsumed under the more general equal protection clauses, Alaska affords independent protection of natural resource access rights. The courts have recognized the significance of the Framers' unique provisions with respect to natural resources and accorded appropriate respect to their intentions in *Ostrosky, Owsichek,* and *McDowell.*

Governor Knowles' proposed subsistence amendment conflicts with the historic principles embodied in Alaska's constitution. Changing the constitution to allow the state to discriminate on the

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217. *Id*. at 11.
218. *Id*.
219. *Id*. at 13 (emphasis added).

grounds of place of residence blatantly disregards the Framers' goals of broad public access, equal protection under the law, and equal, not special, rights or privileges with respect to natural resources. Such a monumental shift in policy cannot legally be achieved through the process of amendment. If the legislature wishes to reverse the philosophical basis of the constitution, it must subject the proposal to the more rigorous, exacting and *independent* scrutiny of a constitutional convention.

Moreover, *Bess*'s reach does not stop at the proposed subsistence amendment. The Alaska Constitution has been amended many times since it was drafted. Without question, some of these amendments are likely "revisions," no matter how the court ultimately ciphers its "hybrid" test.[220] Thus, in addition to confounding any effort to place a subsistence amendment on the ballot, *Bess* retroactively draws into question the legality of many sections of the Alaska Constitution. How will the court respond when a disgruntled citizen sues, claiming he was deprived of rights by the *ultra vires* adoption of a legislatively proposed revision to the constitution?

VI. ALTERNATIVES TO THE *BESS* TEST

It is important that the Alaska Supreme Court establish a test that: (1) does not excessively restrict the legislature's ability to propose necessary constitutional changes; (2) gives substantive meaning to the amendment/revision distinction in the Alaska Constitution; and (3) is tailored to fit the unique structure of the Alaskan constitutional scheme.

Greater scope for change must be allowed under an amendatory process carried out by the legislature. The very nature of the legislative process demands deliberation, consensus-building, and compromise.[221] The super-majority requirement of a two-thirds vote in both houses means that amendment measures cannot ignore segments of society—the needs of all Alaskans must be taken into account to build necessary support for any given proposal. Consensus-building and compromise are not confined to those seated in the two chambers of the legislature. In today's informa-

220. For example, in 1981 the legislature proposed, and the voters ratified, an amendment that established a complex limitation on appropriations in Alaska. It substantially affected many provisions of the Alaska constitution, including articles II, IX, and XV. Other potentially vulnerable amendments include the limited entry amendment, the permanent fund amendment, the resident preferences amendment, and the crime victims' rights amendment.

221. Miller, *supra* note 152, at 1051.

tion age, the legislative process is more accessible than ever. There are virtually no barriers to prevent the public from providing input at the drafting and framing stage. Unlike initiative measures, legislatively proposed amendments can be altered prior to placement on the ballot in response to the public's concerns. In short, the legislative process accomplishes the same goals of open debate, compromise, qualitative majorities, and respect for minority rights as a constitutional convention—merely on a smaller, less expensive, and more convenient scale.

Thus, any test adopted by the Alaska Supreme Court for distinguishing between amendment and revision of the constitution must acknowledge that the legislature plays this role. A convention provides reassuring elements of independence and a particular focus that is exceptionally valuable when contemplating a *substantial* overhaul of the constitution. However, for constitutional changes necessary to the efficient function of the state, and to meet the ever-increasing and diverse needs of Alaskans, the legislature should be less impeded in its law-making powers.

Section A of this Part will propose and describe an alternative hybrid test superior to that adopted in *Bess*. Section B will propose and defend the use of a single-subject test in place of the *Bess* test. Either or both of these alternatives would better suit the needs of Alaskans.

A. An Alternative Hybrid Test

The Alaska Supreme Court should adopt a test similar in structure to the California two-part test, but which incorporates a much broader concept of the term "amendment." It must be clearly distinguished from the California test and be informed by Alaska's history, constitutional structure, and governmental needs. In inquiring whether a proposed measure falls within the scope of an allowable amendment, the court should ask the following:

> (1) Quantitative Inquiry. Does the measure *on its face* substantially alter the fundamental structure of the constitution by deleting, amending, or repealing existing language or adding numerous articles or sections? If the answer is "yes," the measure is a revision. This is an inquiry into the *direct* impact of the measure on the text of the constitution. Unlike the "hybrid" test in *Bess*, this analysis should exclude subjective assessment of potential indirect impacts of the measure on other sections of the constitution. Furthermore, the quantitative effects test would be exceeded only if the measure attempts to substantially change a significant percentage of the existing provisions

> of the constitution (or significantly increases the size of the existing constitution).
>
> (2) Qualitative Inquiry. Does the measure derogate from, reallocate, reassign, or create rights in any of the constituent branches of government such that the fundamental framework of government envisioned by the Framers is substantially altered? Does the measure substantially derogate from fundamental civil rights assigned to the people of Alaska by the Framers of the constitution? If the answer to either question is "yes," the measure is a revision.

Such a test would have several advantages over the *Bess* test. Not only would it be simpler for legislatures and courts to understand, it would also avoid the ripeness problem created in *Bess*,[222] by asking courts only to read the face of the amendment and consider its immediate textual implications.

The *Bess* opinion requires courts to rule on the constitutionality of an amendment proposal by guessing at the amendment's effect. Constitutional amendments, like all laws, gain their meaning by their application to specific facts. Yet the *Bess* decision requires future courts to anticipate, without the benefit of a factual context, the meaning and effect a constitutional amendment will have to determine if the amendment might reach too far and become a revision. Courts generally recognize that it is imprudent to decide issues not actually raised on the specific facts before the court. Law is only meaningful as applied to facts, and the presentation of different facts can significantly change a court's analysis of law. The meaning of a constitutional amendment, for example, is highly dependent on its interpretation by courts. The "case or controversy" clause in Article III of the U.S. Constitution,[223] for example, could be read as permitting federal courts to render advisory opinions. A "case" would be the sort of adversarial proceeding courts are accustomed to dealing with, featuring opposing parties with standing; while a "controversy" would be an inchoate legal issue, the merits of which have been referred to the court. However, as interpreted by the United States Supreme Court, "case or controversy" collapses essentially into "case," and advisory opinions are not permitted.[224]

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222. *See supra* note 27 and accompanying text.

223. U.S. CONST. art. III, § 2.

224. *See, e.g.*, Hayburn's Case, 2 U.S. 408 (1792) (advisory opinions impermissible).

The *Bess* test, however, does not account for this problem. The qualitative test requires courts to decide how big an impact a constitutional provision will have. Yet a court cannot do that without interpreting the amendment. Likewise, the quantitative test requires courts to decide how many other provisions of the constitution an amendment will affect. Yet a court cannot do that, either, without interpreting the amendment. Thus, to apply both tests, a court confronted with a potential amendment must interpret the amendment and define its meaning—with no factual context or basis.

Second, the revised test would capture the significance of structural changes to the division of governmental powers in a way that the *Bess* test does not. The *Bess* test emphasizes form over substance. The *Bess* court quoted with approval a California case that emphasized the number of words in a proposed amendment,[225] while also quoting with approval a scholar who suggests that "a new distribution among the agencies of government of their constitutional powers" is insignificant enough to qualify as an amendment.[226] This reflects a serious mis-emphasis. At best, a word count can suggest that an amendment goes too far; by contrast, the structural division of powers amongst branches of government is palpably one of the most important functions of a constitution.

The *Bess* opinion expressly discounts the significance of structural changes. For example, it quotes Judge Jameson as saying that a proper subject for amendment is "a new distribution among the agencies of government of their constitutional powers."[227] Moreover, the court held that Legislative Resolve No. 74 was an amendment rather than a revision.[228] Number 74, however, removed from the executive the power of reapportionment and vested it in a neutral body, which is a structural reapportionment of power. Accordingly, by both its dicta and holding, *Bess* seems to suggest that structural revisions to the distribution of powers among Alaska's coordinate branches can be accomplished by amendment.

Yet structural changes can hardly be of "comparatively small importance."[229] One of the most important functions of a constitution is to apportion the power delegated by the people to government. The Framers of the federal constitution certainly thought so. Many, in fact, felt a Bill of Rights was wholly redundant. Individ-

225. *Bess,* 985 P.2d at 985 (quoting with approval *McFadden v. Jordan*, 196 P.2d 787, 788 (1948)).

226. *Id*. at 983 (quoting JAMESON, *supra* note 36, § 540, at 562).

227. *Id*.

228. *Id*. at 989 (Compton, J., dissenting in part).

229. *Id*. at 987.

ual liberties were already protected by implication once the powers were separated and assigned between state and federal governments and between the various branches of the federal government.[230]

California courts hold the view that structural changes are revisory in nature. The court in *Amador Valley*, for example, held that a proposal that achieved "far-reaching changes in the nature of our basic governmental plan" would be revisory.[231] Furthermore, the court in *Raven* struck as revisory a proposed measure limiting criminal defense rights to those guaranteed under the federal constitution because it vested all judicial interpretive power in relation to criminal defense rights in the United States Supreme Court.[232] The measure thus derogated substantially the essential powers assigned by the California Constitution to a branch of government (the judiciary).[233] The California test, even as reported in *Bess*, focuses on "far reaching changes in the nature of our basic governmental plan."[234] Unfortunately, while incorporating the text of the California tests, the *Bess* court lost sight of its focus and reasoning.

Instead of emphasizing the importance of structural changes, *Bess* draws the line between amendment and revision, not in a way that is sensitive to protecting the structure created by the Alaska constitution, but rather in a way that focuses on word and section counts. Under *Bess*, a measure can be struck as revisory merely because it has too many words, while another can pass as amendatory, even if it tampers with the distribution of powers among the coordinate branches. Whatever the Framers did intend by the amendment/revision distinction, this certainly was not it.

B. A Single Subject/No Multifariousness Test

We also suggest that the court require that amendment propositions embrace only one subject. This rule would help defend against corruption of the amendment process through logrolling and voter confusion and/or deception. The single-subject test should be very liberally construed, however, in recognition of the

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230. *E.g.,* THE FEDERALIST NO. 84 ("For why declare that things shall not be done which there is no power to do? . . . The constitution is itself, in every rational sense, . . . A BILL OF RIGHTS . . . . Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government?").

231. Amador Valley Joint Union High Sch. Dist. v. State, 583 P.2d 1281, 1286 (Cal. 1978).

232. Raven v. Deukmejian, 801 P.2d 1077, 1087 (Cal. 1990).

233. *Id*.

234. *Bess,* 985 P.2d at 987 (quoting *Amador Valley*, 583 P.2d at 1286).

need to prevent undue restraint of the legislature's amending powers. Echoing the California courts' historical interpretation of the single-subject test, the provisions of a proposed amendment measure need merely be reasonably germane to the overarching purpose of the measure.

The single-subject test would be superior to the *Bess* test for several reasons. Most importantly, it fully satisfies all concerns about logrolling and bundling.[235] It does so, in fact, better than the *Bess* test does. For example, the *Bess* test would not capture an amendment that couples two unrelated, yet quantitatively and qualitatively small measures together. Additionally, the single-subject test focuses attention on content rather than form. Under the *Bess* test, an amendment might fail if it touches a large number of constitutional provisions, regardless of the actual substantive scope of the amendment. This emphasis on provision counts merely invites confusion and complicated litigation, as the subsistence example discussed above[236] demonstrates.

Finally, the single-subject test is vastly simpler and easier to apply than the *Bess* test. As a result, the legislature will understand—*before* litigation, not *after*—whether a proposed constitutional amendment is legitimate. Moreover, courts will be able to adjudicate such cases on a principled basis, rather than making a subjective guess as to the qualitative and quantitative importance of a proposal.

VII. CONCLUSION

The *Bess* decision saddled Alaska with a legal framework that does not fit Alaska's history or constitutional structure. Asked to interpret article XII on an expedited basis, the court leaned too heavily on California's jurisprudence, and did not consider the significant differences between California's methods of constitutional change and Alaska's. Moreover, perhaps due to the haste with which the issue was resolved, the court crafted a test that is unpredictable and unworkable, discounting important factors and overemphasizing trivial ones.

The court should take the earliest opportunity either to replace or at least clarify *Bess*. In general, the court should be guided by an appreciation of the distinct differences between the proposal of an amendment by popular initiative and proposal by a deliberative legislative body. The court should also be sensitive to the fact that Alaskans have only two options for constitutional change; leg-

235. *See supra* Part III.B.
236. *See supra* Part IV.

islatively proposed amendments or a dangerous and uncontrollable constitutional convention. Accordingly, the court should craft a new test or change its current test in a way that gives the legislature more freedom to propose changes to the Alaska Constitution. Until it does so, various changes contemplated by the people of Alaska, most notably recently proposed subsistence amendments, will be blocked—not by the Alaska electorate, but rather by the Alaska Supreme Court.