

ALASKA, THE LAST STATEHOOD CONSTITUTION, AND SUBNATIONAL RIGHTS AND GOVERNANCE*

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By being among the last states to write a constitution, we now have the advantages of correcting the mistakes of others, simplicity, and the delegation of responsibility, which can be clearly seen by our citizens. Rather than expressing details, as did the constitutions of many states, ours set broad goals for the new state of Alaska. Details would come later during the legislative process.

-Former Alaska Governor Tony Knowles¹

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1. Tony Knowles, *Foreword* to GERALD A. McBEATH, *THE ALASKA STATE CONSTITUTION: A REFERENCE GUIDE* xix, xx (1997).

[I]n state constitution-making we must be content with something less than the Platonic ideal; we must aim rather for a constitutional document that is designed to enable the state to carry on its work of government today and in the foreseeable future with efficiency and economy and with adequate powers to undertake its tasks . . . Viewed in that light, we are likely to discover that a flexible and adaptable instrument that helps us in the solution of today's problems is likely to be effective, with only minor modifications, in managing tomorrow's tasks as well. It is precisely the broad and flexible charters of the late nineteenth century that were too closely concerned with the solutions of many narrowly specific and immediate problems that have become obsolete and that interfere with contemporary solutions because of their mass of detail and resulting rigidity.

FRANK P. GRAD & ROBERT F. WILLIAMS, *2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS* 7-8 (2006); *see also id.* at 14-30.

One of the dismaying realities of American legal education, particularly at its most elite level, is the abject ignorance displayed about the importance of state constitutions and even of state judiciaries, even though most of the common law cases that students read arise in state courts. Still, too many students may well graduate from three years of legal study with the perception that the only Constitution operating within the United States is the national document and that the only courts one need really focus on are federal courts, particularly, of course, the United States Supreme Court.

-Professor Sanford Levinson²

I. INTRODUCTION

The editors of the *Alaska Law Review* are to be commended for taking the state constitution seriously.³ This is, of course, nothing new because the *Alaska Law Review* has, since its inception, included important scholarship on the Alaska Constitution.

Alaska's 1955-56 Constitutional Convention was the penultimate step in a decades-long campaign for Alaskan statehood.⁴ When Alaska finally gained its statehood, its state constitution took its place with the other forty-nine American subnational constitutions. While preparing the Alaska Constitution, delegates to Alaska's 1955-56 Constitutional Convention might well have echoed the words Delegate John Dickinson uttered at the beginning of the 1787 Federal Constitutional Convention: "Experience must be our only guide."⁵ This theme of building on the experiences of other states ran throughout the production of the Alaska Constitution.

This Article will focus on the general characteristics of American state, or subnational, constitutions,⁶ locating the Alaska Constitution within that state constitutional tradition rather than our federal

2. Sanford V. Levinson, *Foreword* to MICHAEL L. BUENGER & PAUL J. DE MUNIZ, *AMERICAN JUDICIAL POWER: THE STATE COURT PERSPECTIVE* ix (2015).

3. See e.g., Robert C. Welsh & Ronald K. L. Collins, *Taking State Constitutions Seriously*, CENTER MAG., Sept.-Oct. 1981, at 6.

4. Michael Schwaiger, *Understanding the Unoriginal: Indeterminant Originalism and Independent Interpretation of the Alaska Constitution*, 22 ALASKA L. REV. 293, 303 n.45 (2005).

5. Robert F. Williams, "Experience Must Be Our Only Guide": *The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403, 421 (1988).

6. American state constitutions, of course, are internal constitutions that operate within the dominant Federal Constitution. ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 17 (2009).

constitutional tradition. This focus will include a brief discussion of “New Judicial Federalism,” where state courts interpret their state constitutions to provide broader protective rights than those recognized by the United States Supreme Court under the Federal Constitution. I will then discuss specific characteristics of the Alaska Constitution and judicial interpretations of it, within the national context.

II. THE ALASKA CONSTITUTION AS A SUBNATIONAL CONSTITUTION

An article by my long-time Rutgers Political Science colleague, Alan Tarr, perceptively locates the current Alaska Constitution within its comparative “time and place.”⁷ Each of the constitutions of the non-original states is part of an epic story of that state’s transition from colonial or territorial status to statehood. Consequently, as pointed out by former-Governor Knowles above, Alaskans had the benefit of these epic stories of virtually all of the other states. Alaskans could look to these states’ experiences both with their initial constitutions and after their admissions to the Union as they continued to tinker with provisions on government structure, rights guarantees, and the entrenchment of policy matters in their state constitutions.⁸ One recent analyst of Wisconsin’s statehood constitution-making process stated:

Western state formation, even in its concrete form of constitutional conventions and founding texts, required a touch of fiction For the writing of a constitution necessitated that Wisconsin citizens imagine their state in its future life. In other words, they had to engage in a kind of (political) science fiction.⁹

The experiences of other states make this exercise in imagination easier, but not necessarily simple, for later-formed states like Alaska.

About half of the states in the United States were admitted to the Union pursuant to a congressional “enabling act.” These enactments directed territories seeking statehood in a number of specific ways with respect to processes for drafting their proposed constitutions, and often required the inclusion of specific constitutional provisions. Alaska was

7. G. Alan Tarr, *Of Time, Place and the Alaska Constitution*, 35 ALASKA L. REV. 155 (2018).

8. See generally James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819 (1991) (tracking the development, decline, and rebirth of influence of state constitutions).

9. BETHEL SALER, *THE SETTLERS’ EMPIRE: COLONIALISM AND STATE FORMATION IN AMERICA’S OLD NORTHWEST* 249 (2015) (footnotes omitted); see also *id.* at 2 (“United States is a ‘settler nation’ . . . These settler societies possess an ambivalent double history as both colonized and colonizers.”).

not admitted pursuant to an enabling act, so it proceeded toward statehood without such advance direction.¹⁰ Alaska was free from congressional requirements that could have had lasting effects on Alaska after joining the Union.¹¹ Despite this apparent independence, the Alaska Constitutional Convention seems to have limited itself by focusing on presenting a statehood constitution to Congress that would most easily lead to acceptance into the Union.¹² This focus often came at the expense of innovation in the constitution.

Alaska's decision not to innovate in its constitution was understandable in the context of its quest for statehood and desire to avoid congressional delay. However, it also illustrates a broader point about American state constitutions and, indeed, subnational constitutions worldwide. Our Federal Constitution leaves an expansive "subnational constitutional space," allowing states to innovate in the design of their state constitutions.¹³ There are common variations in our state constitutions such as elected or appointed judiciaries, plural or single executives, differing rights guarantees, etc., but there are very few true innovations in state constitutions. Only one state has a unicameral legislature;¹⁴ none have a parliamentary system.¹⁵ The subnational constitutional space in other nations' federal constitutions is less expansive, but it is still underutilized, as in America.¹⁶ Alaska's experience of choosing to forego innovation in favor of easier acceptance into the Union, provides one understandable reason for this phenomenon.

10. Tarr, *supra* note 7, at 163.

11. See, e.g., *Fain Land & Cattle Co. v. Hassell*, 790 P.2d 242, 597-98 (Ariz. 1990) (restricting Arizona's disposal of state trust lands to methods enumerated in the Enabling Act and included in the Arizona Constitution). For a detailed analysis of the kinds of provisions required from states seeking admission to the Union, contained in the enabling acts, see Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on the States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 120 (2004) (explaining congressional history of imposing additional burdens on admission to the Union).

12. Schwaiger, *supra* note 4, at 303-04.

13. Robert F. Williams & G. Alan Tarr, *Subnational Constitutional Space: A View From the States, Provinces, Regions, Länder, and Cantons*, in FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS 3, 4-5 (G. Alan Tarr, Robert F. Williams & Joseph Marko eds., 2004); Robert F. Williams, *Teaching and Researching Comparative Subnational Constitutional Law*, 115 PENN ST. L. REV. 1109, 1112 (2011).

14. NEB. CONST. art III, § 1. See *infra* note 51 and accompanying text (analyzing practical development and usage of Nebraska Constitution).

15. Jonathan Zasloft, *Why No Parliaments in the United States?*, 35 U. PA. J. INT'L L. 269, 270 (2013).

16. Williams & Tarr, *supra* note 13, at 14-15; Williams, *supra* note 13, at 1114-15.

American state constitutions differ in many important respects from the more familiar Federal Constitution. Unlike the federal constitutional process, state constitutions and their amendments emanate directly from the people of the state through votes on new constitutions, revisions, and amendments.¹⁷ This provides a constitutional interpretation technique that is not available in federal constitutional doctrine, where state constitutional provisions can be seen as the “voice of the people.” This means that voters’ pamphlets and guides, and even newspaper analyses can be relevant when interpreting the meaning of the state constitution.¹⁸ In the words of the New Jersey Supreme Court:

It is a familiar rule of construction that where phraseology is precise and unambiguous there is no room for judicial interpretation or for resort to extrinsic materials. The language speaks for itself, and where found in our State Constitution the language is the voice of the people. As this Court said some twenty years ago,

[T]he Constitution derives its force, not from the Convention which framed it, but from the people who ratified it: and the intent to be arrived at is that of the people.

The Constitution was written “to be understood by the voters: its words and phrases were used in their normal and ordinary as distinguished from technical meaning”; and “where the intention is clear there is no room for construction and no excuse for interpolation or addition.”¹⁹

State constitutions have evolved over the years to include policy matters and “positive rights” that can (and possibly should) be seen as more appropriate for statutory law.²⁰ Christopher Hammons formulated the distinction between “framework-oriented” and “policy-oriented”

17. WILLIAMS, *supra* note 6, at 20. The exception is the state of Delaware, in which the state constitution may be amended by the legislature.

Article XVI describes two different procedures for changing the Delaware Constitution. These procedures include an amendment process by the General Assembly and a revision process by a constitutional convention. Neither procedure permits the people to vote directly on proposed changes to the Delaware Constitution. Neither procedure requires the governor’s approval.

RANDY J. HOLLAND, *THE DELAWARE STATE CONSTITUTION: A REFERENCE GUIDE* 228 (2002).

18. WILLIAMS, *supra* note 6, at 25-27, 315.

19. *Vreeland v. Byrne*, 370 A.2d 825, 830 (N.J. 1977) (*quoting* *Gangemi v. Berry*, 134 A.2d 1, 16 (N.J. 1957)).

20. WILLIAMS, *supra* note 6, at 22-23.

provisions in state constitutions, concluding that the national average was about forty percent policy-oriented.²¹

Furthermore, while the Federal Constitution enumerates powers for the federal government, the state constitutions operate within the plenary powers reserved to the states, where enumerations of power are unnecessary. As such, instead of delineating additional powers, state constitutions operate primarily as documents of limitation.²² Additionally, state constitutions are much easier to amend than the Federal Constitution. Therefore, state constitutions have grown in length over the years, through additional constitutional conventions or the amendment process.²³

Assessments of American constitutionalism rarely look to state constitutions, instead focusing exclusively on the Federal Constitution and its interpretation by the Supreme Court. Focusing on the Federal Constitution leads to the conclusion that America is “exceptional” when compared with other nations because of the static nature and absence of positive rights in the Federal Constitution. However, careful analysis has recently clarified the possible error of this point of view:

Our analysis reveals three important features of state constitutions that should prompt reconsideration of US constitutional exceptionalism. First, like most of the world’s constitutions, state constitutions are rather long and elaborate, and they include detailed policy choices. The exceptional American taste for constitutional brevity, it turns out, is confined to the federal document alone. Second, like most of the world’s

21. Christopher W. Hammons, *State Constitutional Reform: Is it Necessary?*, 64 ALB. L. REV. 1327, 1333 (2001). Walter Dodd emphasized an important reason for “legislation” in state constitutions:

Similar reasons in some cases account for the placing of legislation in the constitution itself. For example, when the highest state court has declared unconstitutional a statute limiting labor on public works to eight hours a day, the people may put into the constitution an authorization for such legislation, but they may with equal brevity put the legislative action into the constitution itself.

Walter F. Dodd, *The Function of a State Constitution*, 30 POL. SCI. Q. 201, 213 (1915); see also JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 231-38, 240-46 (1950) (tracking comparative influence of constitution makers, executives, and legislators).

22. WILLIAMS, *supra* note 6, at 27. Therefore, many of the difficult questions of judicial interpretation of state constitutions involve implied limitations on power. Walter F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L.J. 137, 160 (1919).

23. See generally JOHN J. DINAN, *STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES* (2018) (asserting the relative ease of state amendment processes makes amendments a realistic and regular vehicle for seeking change).

constitutions, state constitutions are frequently amended, overhauled, and replaced. Thus, the textual stability of the over-two-century-old federal Constitution is exceptional compared not only with other national constitutions but also with the constitutions of the American states, which are characterized, in part, by a commitment to progress and change. Third, like most of the world's constitutions, state constitutions contain positive rights, such as a right to free education, labor rights, social welfare rights, and environmental rights. While the federal Constitution arguably omits explicit declarations of these rights, they are not foreign to the American *constitutional tradition*. On all these dimensions, it is at the federal level only that Americans' constitutional practices appear exceptional. When we include the writing and revision of state constitutions in our assessment, it becomes clear that American constitutionalism is not nearly as distinctive as most comparative studies and political commentators have suggested.²⁴

This reinterpretation of American constitutionalism has continued by evaluating the question of "entrenchment" in constitutions.²⁵

A dominant theme of the constitutional theory literature is that successful constitutions must not only constrain those in power, but must do so over long time horizons, establishing constraints durable enough to bind across generations By entrenching commitments, constitutions serve as a mechanism for overcoming the inconsistency of preferences over time.²⁶

Scholars insist that entrenchment is necessary because it removes matters from the political agenda and allows political parties to form new democracies with established rules. Entrenched constitutions are "spare frameworks," rigid, and characterized by "generality and abstraction."²⁷ Again, this may be too narrow a view of the American state constitutions and other nations' constitutions:

The model of an entrenched and spare document, which changes meaning primarily through judicial interpretation, successfully describes the U.S. Constitution. However, it does a

24. Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1644–45 (2014); see generally EMILY J. ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* (2013).

25. Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward An Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657, 657 (2016).

26. *Id.*

27. *Id.* at 658.

poor job of depicting most other national democratic constitutions, or even U.S. state constitutions. As we will demonstrate, specific and unentrenched constitutions developed over the course of the nineteenth and twentieth centuries, and are now the dominant form of constitutionalism across the globe, and within the U.S. states. We argue that these polities' flexible and detailed constitutional texts embody an alternative model of constitutionalism. Rather than entrenching constraints through spare and stable texts, these constitutions provide officeholders—judges, legislatures and executives—with specific and frequently modified instructions. Although these flexible constitutions do not entrench commitments over long time horizons, we argue that they are nonetheless attempts to constrain the exercise of political power by leaving empowered actors with fewer choices about which policies to pursue.²⁸

Thus, we are seeing the beginning of a theoretical reassessment of the differences between our federal and state constitutions.²⁹ These reassessments clearly demonstrate that our state constitutions are not simply little versions of our Federal Constitution. This distinction is crucial to understanding the Alaska Constitution.

III. ALASKA AND THE NEW JUDICIAL FEDERALISM

*Ravin v. State*³⁰ is probably the most well-recognized decision of the Alaska Supreme Court. In *Ravin*, the Court held that Alaska's textual privacy guarantee³¹ protected an individual's right to possess marijuana in the home.³² As seen in *Ravin*, the Alaska Supreme Court was a very early proponent of the New Judicial Federalism, whereby state courts

28. *Id.*

29. See G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 842 (1991) (providing an early call for this theoretical reassessment).

30. 537 P.2d 494, 503 (Alaska 1975). Commentary on this decision has occupied many pages in this Law Review. See, e.g., John F. Grossbauer, Note, *Alaska's Right to Privacy Ten Years After Ravin v. State: Developing a Jurisprudence of Privacy*, 2 ALASKA L. REV. 159, 160-69 (1985); Jason Brandeis, *The Continuing Vitality of Ravin v. State: Alaskans Still Have a Constitutional Right to Possess Marijuana in the Privacy of Their Homes*, 29 ALASKA L. REV. 175, 175-236 (2012); Jason Brandeis, *Ravin Revisited: Alaska's Historic Common Law Marijuana Rule at the Dawn of Legalization*, 32 ALASKA L. REV. 309, 309-47 (2015).

31. ALASKA CONST. art. I, § 22 ("The Right of the People to Privacy is Recognized and Shall not be Infringed. The Legislature shall implement this section."). See also Ken Gormley & Rhonda G. Hartman, *Privacy and the States*, 65 TEMPLE L. REV. 1279, 1280 (1992) (tracking the development of the right to privacy).

32. *Ravin*, *supra* note 30, at 513.

interpret their own state constitutions to provide more protective rights than those recognized by United States Supreme Court interpretations of the Federal Constitution.³³ In 1970, for example, long before Justice William J. Brennan, Jr.'s famous 1977 article encouraging state courts to go beyond federal constitutional protections,³⁴ the court in *Baker v. City of Fairbanks*³⁵ issued the following ringing endorsement of independent state constitutional law:

[W]e recognize that this result has not been reached in certain other jurisdictions or by the United States Supreme Court. The mere fact, however, that the United States Supreme Court has not extended the right to jury trial to all types of offenses does not preclude us from acting in this field. While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a *duty*, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles imbedded in our constitutional law.³⁶

California Supreme Court Justice Goodwin Liu has recently reviewed the New Judicial Federalism and Justice Brennan's impact, concluding that the "redundancy" in the federal and state rights guarantees is an

33. WILLIAMS, *supra* note 6, at 7, 113-19.

34. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). Justice Brennan's article, although published only in 1977, is among the "most frequently cited law review articles of modern times." Ann Lousin, *Justice Brennan: A Tribute to a Federal Judge Who Believes in State's Rights*, 20 J. MARSHALL L. REV. 1, 2 n.3 (1986). Justice Stewart G. Pollock of the New Jersey Supreme Court referred to Justice Brennan's article as the "Magna Carta of state constitutional law." Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983). Justice Brennan updated his views in *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

35. 471 P.2d 386 (Alaska 1970).

36. *Id.* at 401-02 (emphasis added). See Thomas V. Van Flein, *The Baker Doctrine and the New Federalism: Developing Independent Constitutional Principles Under the Alaska Constitution*, 21 ALASKA L. REV. 227, 242 (2004) ("Each individual state, including Alaska, should reevaluate its respective state constitution and promote the development of state law independently of federal doctrine."); see generally Schwaiger, *supra* note 4.

extremely positive attribute of American constitutionalism.³⁷ This is clearly recognized by courts in Alaska. Justice Liu said: “The redundancies built into our structure of government largely serve to channel and manage conflict rather than to facilitate permanent resolution.”³⁸ He continued:

State constitutionalism is properly understood as a mechanism by which ongoing disagreement over fundamental principles is acknowledged and channeled in our democracy. Far from endangering the legitimacy of constitutional law, interpretive pluralism is a source of its resilience and deep resonance with our diverse citizenry. When a state court departs from Supreme Court precedent to secure greater protection for individual rights under a parallel provision of its state constitution, the state court “registers a forceful and often very public dissent.” Whether or not it influences other states or eventually induces the Supreme Court to reconsider its precedent, the state decision carries forward a dialogue over the meaning of our basic liberties. In short, state constitutionalism is one way in which our structure of government provides an outlet for constitutional conflict.³⁹

States such as Alaska have now progressed quite far into the New Judicial Federalism. One may ask whether this movement has resulted in enhanced rights protection for Americans. One point of view holds:

By diffusing governmental power, federalism permits the constituent units of a federal system to determine to a significant extent the ends that they will pursue and the means by which they will accomplish those ends. Implicit in federal arrangements is the expectation that the retention of these choices by the constituent governments will produce diversity; that given the opportunity, these governments will order their affairs in diverse ways. Thus, federalism can claim to serve the ends of both pluralism and self-government. In doing so, however, federalism necessarily sacrifices complete uniformity of treatment for those ruled by the various constituent governments. Put simply, in a federal system many of the laws one must obey, the benefits one receives, and the rights one

37. Goodwin Liu, *Brennan Lecture, State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1313 (2017).

38. *Id.* at 1335.

39. *Id.* at 1336.

enjoys depend on the political jurisdiction in which one resides.⁴⁰

Other scholars have put it a bit differently:

Any system that enhances some norms must, perforce, diminish others. It is clear that the norm of efficiency is not fostered by the dispersal of judicial power. It is certainly cheaper and easier to understand and deal with a court system with one set of rules, decisions, and rights than it is to deal with fifty-one. To the extent that judicial federalism allows or even encourages differential treatment of issues and people, the norm of uniformity is also clearly a victim. But we must be careful to point out that uniformity neither guarantees nor prevents equitable treatment. To confuse uniformity with justice in all cases would be a grave error.⁴¹

Here, the positive aspects of “redundancy,” discussed earlier, must be kept in mind. The Alaska Constitution provides numerous provisions that should be viewed in this light.⁴²

IV. THE ALASKA CONSTITUTION IN THE NATIONAL CONTEXT

American state constitutions, by contrast to our Federal Constitution, lend themselves to comparative analysis. In many respects, Alaska’s Constitution compares favorably.

Alaska has opted for the minority view that state judges should be appointed, but run for retention.⁴³ As Professor Charles Geyh has recently stated, “Without legitimacy, the judiciary is helpless to thwart defiance of its decisions.”⁴⁴ If a state like Alaska installs an appointive system and the “public ceases to trust judges or those who appoint judges,” then opting for electoral accountability could “preserve or restore legitimacy.”⁴⁵ On the other hand, if the public comes to view an electoral system as

40. ELLIS KATZ & G. ALAN TARR, *FEDERALISM AND RIGHTS* ix-x (1996).

41. MICHAEL E. SOLIMINE & JAMES L. WALKER, *RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM* 141 (1999).

42. See, e.g., ALASKA CONST. art. VII, §§ 1, 4-5.

43. ALASKA CONST. art. IV, §§ 5-6; see also Albert J. Klumpp, *Alaska’s Judicial Retention Elections: A Comparative Analysis*, 34 ALASKA L. REV. 143, 146-47 (2017) (stating that twenty-two U.S. states require at least some judges to be elected for retention); Teri Carns & Susie Dosik, *Alaska’s Merit Selection of Judges: The Council’s Role, Past and Present*, 35 ALASKA L. REV. 177 (2018); Walter Carpeneti & Brett Frazer, *Merit Selection of Judges in Alaska: the Judicial Council, the Independence of the Judiciary, and the Popular Will*, 35 ALASKA L. REV. 205 (2018).

44. Charles Gardner Geyh, *Judicial Selection and the Search for Middle Ground*, 67 DEPAUL L. REV. 333, 367 (2018).

45. *Id.*

“including the perception that justice is for sale in privately financed judicial campaigns,” the pressure will arise for an appointed system.⁴⁶ Alan Tarr has described the controversy in state courts:

Both sides in the contemporary debate over judicial independence and judicial accountability—we shall refer to them as the Bashers and the Defenders—claim to support the rule of law, but they disagree about what threatens it. Defenders see the danger as coming from external pressures on judges by those who seek to influence or intimidate them or induce them to abandon their commitment to the law in favor of what is popular or politically acceptable. But Bashers view the danger as rooted in the absence of checks on judges, which frees them to pursue their political or ideological or professional or class agendas at the expense of fidelity to the law. Impartial decision making, according to Bashers, is best promoted by the prospect of retribution for judicial activism, which keeps in line judges who might otherwise be tempted to read their own preferences into the law.⁴⁷

What about the content of the Alaska Constitution? One analysis has concluded that only twenty-two percent of Alaska’s constitution consists of policy-oriented provisions,⁴⁸ well below the national average of about forty percent.⁴⁹ Of course, what constitutes a policy-oriented provision rather than a framework-oriented provision can be in the eye of the beholder, and neutral, academic observers may not appreciate the important historic and political reasons why state constitutions contain certain detailed provisions.

Notably, despite its focus on a non-innovative state constitution, the Alaska Constitutional Convention did debate the possibility of a unicameral legislature.⁵⁰ The Convention ultimately opted for a bicameral legislature, declining to adopt Nebraska’s unicameral legislature model.⁵¹

46. *Id.* at 367–68.

47. G. ALAN TARR, *WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES* 2 (2012).

48. Christopher W. Hammons, *Was James Madison Wrong? Rethinking the American Preference for Short Framework-Oriented Constitution*, 93 AM. POL. SCI. REV. 837, 837, 847 (1999) (referring to policy-oriented provisions as “particularistic”).

49. Hammons, *supra* note 21; *see also* Hammons, *supra* note 48, at 840 (“[Thirty-nine percent] of the typical state constitution is devoted to matters that most scholars consider extraneous at best.”).

50. Jonathan S. Ross, Note, *A New Answer for an Old Question: Should Alaska Once Again Consider a Unicameral Legislature*, 27 ALASKA L. REV. 257, 264–71 (2010); *see also* GERALD A. MCBEATH, *THE ALASKA STATE CONSTITUTION: A REFERENCE GUIDE* 70 (1997).

51. ROBERT D. MIEWALD & PETER J. LONGO, *THE NEBRASKA STATE CONSTITUTION: A REFERENCE GUIDE* 19, 55–57 (1993).

The Convention also followed many other state constitutions in endowing the governor with the item veto.⁵² Following the model of a number of state constitutions adopted in the Progressive Era,⁵³ the Convention opted to supplement legislative power with the initiative process.⁵⁴

The Convention also included a mandate of a public education, following the lead of the existing states.⁵⁵ The area of public school financing has been among the important areas of state constitutional litigation since the defeat of a federal claim for equal and adequate funding of public schools.⁵⁶ Education is one of the most important reserved powers of the states and is predictably a topic that is covered in state constitutions.

Among the most misunderstood state constitutional provisions are the varied equality guarantees.⁵⁷ The Alaska Supreme Court has interpreted the Alaska Constitution's Equal Protection Clause⁵⁸ to be "more protective of individual rights than the Federal Equal Protection clause."⁵⁹ In 2016, for example, the Alaska Supreme Court struck down a parental notification requirement for minors' abortions under the Alaska equality clause.⁶⁰

Another major area of litigation under state constitutions has been free speech and assembly protections on private property such as

52. See Nicholas Passarello, Note, *The Item Veto and the Threat of Appropriations Bundling in Alaska*, 30 ALASKA L. REV. 125, 131 (2015) ("Most state governors possess at least some form of item veto."). This additional gubernatorial check on the legislative branch, envied by every President, has been an important tool for governors' involvement with the fiscal affairs of the state. See generally Richard Briffault, *The Item Veto in State Courts*, 66 TEMPLE L. REV. 1171 (1993).

53. See generally John Dinan, *Framing a "People's Government": State Constitution-Making in the Progressive Era*, 30 RUTGERS L.J. 933 (1999).

54. M. Katheryn Bradley & Deborah L. Williams, "Be It Enacted by the People of the State of Alaska . . ." – A Practitioner's Guide to Alaska's Initiative Law, 9 ALASKA L. REV. 279, 279 (1992); see generally Logan T. Mohs, Note, *Alaska's Initiative Process: The Benefits of Advanced Oversight and a Recommendation for Change*, 31 ALASKA L. REV. 295 (2014).

55. Chris Lott, Note, *The Methodological Middle Ground: Finding an Adequacy Standard in Alaska's Education Clause*, 24 ALASKA L. REV. 73 (2007); Kate Wheelock, *The Future of Challenges to the Alaska Public School Funding Scheme after State v. Ketchikan*, 34 ALASKA L. REV. 111, 126 (2017).

56. See generally *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963 (2008).

57. WILLIAMS, *supra* note 6, at 211-16.

58. ALASKA CONST. art. I, § 1 ("all persons are equal and entitled to equal rights").

59. *State v. Anthony*, 810 P.2d 155, 157 (Alaska 1991).

60. *Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122, 1128 (Alaska 2016).

shopping malls.⁶¹ Federal First Amendment free speech doctrine does not, as of now, protect free speech and assembly on such private property.⁶² The question, one of “state action,” has been analyzed in the Alaskan context in the pages of this Law Review.⁶³

Unlike the provisions in most state constitutions dealing with religion,⁶⁴ Alaska’s Article I, Section 4 is very brief and mirrors the federal First Amendment.⁶⁵ Despite its similar structure, however, it does not have to be interpreted the same way the United States Supreme Court interprets the First Amendment.⁶⁶

The automatic referendum is one of Alaska’s choices of how to balance the interests of rigidity and ease of change, a tension present in every constitution. For example, whereas Thomas Jefferson supported easily amendable constitutions with review every generation,⁶⁷ James Madison supported more permanent constitutions.⁶⁸ As I have said, “If state constitutional revision is too difficult, constitutionalism overwhelms democracy; if it is too easy, democracy overwhelms constitutionalism. It is difficult to achieve exactly the right balance, and this point might change over time.”⁶⁹ The automatic referendum on constitutional conventions errs on the side of democracy over constitutionalism, by increasing the ease of constitutional revision.⁷⁰

61. See generally Jennifer A. Klear, *Comparison of the Federal Courts’ and the New Jersey Supreme Court’s Treatments of Free Speech on Private Property: Where Won’t We Have the Freedom to Speak Next?* 33 RUTGERS L.J. 589 (2002).

62. *Id.* at 590-95.

63. See generally Scott J. Nordstrand & Paul D. Seyferth, *Private Rights Versus Public Power: The Role of State Action in Alaska Constitutional Jurisprudence*, 7 ALASKA L. REV. 299 (1990).

64. See generally Robert F. Williams, *State Constitutional Religion Clauses: Lessons from the New Judicial Federalism*, 7 U. ST. THOMAS J.L. & PUB. POL’Y 192 (2013).

65. See Steven Keith Green, *Freedom of Religion in Alaska: Interpreting the Alaska Constitution*, 5 ALASKA L. REV. 237, 239 (1988) (stating “the language of section 4 is taken almost verbatim from the religion clauses of the first amendment to the United States Constitution”).

66. WILLIAMS, *supra* note 6, at 135-39.

67. WILLIAMS, *supra* note 6, at 363. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) in THOMAS JEFFERSON, WRITINGS 1395, 1402 (Library of America ed. 1984). For a complete analysis of Jefferson’s attitudes toward constitutional change, see JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT 59-78 (1992); see also Merrill D. Peterson, *Mr. Jefferson’s “Sovereignty of the Living Generation”*, 52 VA. Q. REV. 437, 437-44 (1976).

68. WILLIAMS, *supra* note 6, at 363.

69. *Id.*

70. See Robert J. Martineau, *The Mandatory Referendum on Calling a State Constitutional Convention: Enforcing the People’s Right to Reform Their Government*, 31 OHIO ST. U. L. REV. 421, 423-26 (1970) (explaining that the mandatory referendum regularly submits the question of calling a constitutional convention directly to the people of the state). See generally Gerald Benjamin, *The Mandatory*

Political scientists Gerald Benjamin and Thomas Gais have observed what they call “conventionphobia” in the United States.⁷¹ Even states with an automatic vote on whether to call a convention have not had recent success.⁷² The Alaska Constitutional Convention adopted the automatic referendum, requiring a decision every ten years on whether to call a constitutional convention.⁷³ Such a referendum, however, has never been approved.⁷⁴

The public has continued to vote against conventions even as dissatisfaction with state governments has increased.⁷⁵ The public seems to view a constitutional convention as political business as usual by the “government industry,”⁷⁶ indicating a sentiment that a convention would not produce any beneficial changes.

Constitutional conventions seem to have lost their legitimacy in the public mind. At the time many states’ original constitutions were drafted, the politicians and special interests were afraid of the people acting through constitutional conventions. Now, by contrast, the people are afraid of politicians and special interests acting through constitutional conventions.⁷⁷

These observations may be true in Alaska.

The Alaska Constitution, unlike a number of other state constitutions, does not contain an explicit separation-of-powers clause.⁷⁸ Some state courts place special emphasis on the fact that their constitutions contain a *textual* mandate of separation of powers.⁷⁹ Even without a textual mandate, the Alaska Supreme Court, of course, applies

Constitutional Convention Question Referendum: The New York Experience in National Context, in STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM 145 (G. Alan Tarr & Robert F. Williams eds., 2006) (detailing the role of the automatic referendum in New York). *But see supra* note 28 and accompanying text.

71. *See generally* Gerald Benjamin & Thomas Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL’Y SYMP. 53 (1996).

72. *See id.* at 69–70 (detailing recent failures of automatic referendums).

73. MCBEATH, *supra* note 50, at 214–15.

74. *Id.* at 215.

75. *See* Benjamin & Gais, *supra* note 71 (noting “the pervasive public hostility to government institutions is automatically extended to conventions”).

76. Benjamin & Gais, *supra* note 71, at 71; *see also* Thomas Gais & Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform*, 68 TEMPLE L. REV. 1291, 1304 (1995) (noting “public cynicism about permanent governmental institutions carries over into views regarding constitutional conventions”).

77. WILLIAMS, *supra* note 6, at 388.

78. MCBEATH, *supra* note 50, at 69.

79. *Id.* at 237–38. *See generally* G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329 (2003).

a separation of powers doctrine.⁸⁰ This is despite the fact that the federal constitutional doctrine does not apply to the states.⁸¹

The Alaska Constitution is also unique in its approach to natural resources. As Gerald McBeath has asserted: "Alaska is the only state that has a clear and explicit article in its basic law on natural resources."⁸² This article may be compared favorably with other later state constitutions' environmental and natural resource provisions.⁸³

The Alaska Constitution specifically prohibits a *limited* state constitutional convention.⁸⁴ This can further impede voter approval of a state constitutional convention.⁸⁵ Perhaps the time will come when the Alaska Constitution should be evaluated to determine whether it is still, in Alan Tarr's term, "coherent." This can be a useful exercise.

IV. CONCLUSION

John Bebout, who consulted on the drafting of New Jersey's "model" 1947 Constitution, provided advice to Alaska's constitution makers. In 1991, Bebout said, "Alaska's is, on the whole, the best written constitution in the country . . ."⁸⁶ Alaska's drafters made practical use of the lessons developed over almost two centuries of state constitution making. They were keenly aware of Alaska's potential place within a federal union and, at the same time, its unique challenges. This simultaneous awareness of state and federal contexts is the hallmark of American state constitutionalism.

80. Tarr, *supra* note 79.

81. WILLIAMS, *supra* note 6, at 240.

82. MCBEATH, *supra* note 50, at 15.

83. See generally Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863 (1996).

84. ALASKA CONST. art. XIII, § 4.

85. MCBEATH, *supra* note 50, at 216; see also G. Alan Tarr & Robert F. Williams, *Foreword, Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1085-92 (2005) (discussing the benefits and legality of limited state constitutional conventions).

86. MCBEATH, *supra* note 50, at 20.