
NOTES

RAVIN REVISITED: DO ALASKANS STILL HAVE A CONSTITUTIONAL RIGHT TO POSSESS MARIJUANA IN THE PRIVACY OF THEIR HOMES?

*This Note takes a fresh look at the Alaska Supreme Court's 1975 decision *Ravin v. State* that declared a state constitutional privacy right to possess marijuana in the home for personal use. It first reviews *Ravin* and discusses its importance for Alaska constitutional law. Next it examines the Voter Initiative of 1990 that attempted to overrule *Ravin* and finds that the Initiative is unconstitutional unless the factual premises upon which *Ravin* were based are no longer valid. The Note then re-examines those factual premises and argues that they are in fact still valid and that therefore, *Ravin* should still be respected as good law. It concludes by discussing various ways in which Alaska can remedy the current tension between *Ravin* and the Voter Initiative.*

I. INTRODUCTION

Ravin v. State is one of the most well-known and controversial decisions ever rendered by the Alaska Supreme Court. In that 1975 opinion, the court held that the Alaska Constitution protects a privacy right to possess marijuana in the home for personal use. In 1982, the Alaska legislature codified *Ravin* by legalizing possession of up to four ounces of marijuana in a private place. However, in 1990, Alaska voters adopted a Voter Initiative that required the legislature to re-adopt the pre-*Ravin* flat prohibition on possession of marijuana, even in a private place.

Eight years after the passage of the Voter Initiative, it is still unclear whether private marijuana possession is legal under Alaska law. This Note revisits *Ravin* in an attempt to shed some

light on the issue. Part II describes *Ravin* and compares it to the decisions of courts in other jurisdictions that have faced a similar issue. Part III documents the prominence of *Ravin*, both in Alaska's constitutional jurisprudence and in state constitutional law more generally. Part IV examines the Voter Initiative of 1990, and concludes that it should not successfully recriminalize marijuana unless *Ravin* is found to have been based on invalid scientific premises. Part V looks at the constitutional principles that the Alaska Supreme Court established in *Ravin* for determining whether an invasion of privacy by the state is justified, while Part VI reviews the current scientific evidence on marijuana. Ultimately, the Note argues that the factual bases upon which *Ravin* was decided are still valid. Part VII ponders the various legal methods by which the current situation can be resolved. Finally, the Note concludes by arguing that, despite the Voter Initiative of 1990, *Ravin* should be respected as good law today.

II. *RAVIN V. STATE*

A. A Landmark Decision

In *Ravin v. State*, the Alaska Supreme Court was asked to decide the constitutionality of an Alaska statute proscribing the possession and use of marijuana.¹ Irwin Ravin was arrested and charged with possession of marijuana. Ravin filed a motion to dismiss, arguing that his right to privacy, as protected by both the U.S. and Alaska Constitutions, includes the right to possess marijuana for personal use.² The motion was denied by both the district and superior courts, and Ravin appealed to the Alaska Supreme Court.³

The Alaska Supreme Court first reviewed the principal United States Supreme Court opinions dealing with the right to privacy and concluded that they do not recognize any privacy right to possess marijuana, because "the federal right to privacy only arises in connection with other fundamental rights."⁴ The court did not stop there however – it conducted a separate inquiry into the

1. See *Ravin v. State*, 537 P.2d 494, 496 (Alaska 1975).

2. See *id.*

3. See *id.*

4. *Id.* at 498-500 (analyzing *Griswold v. Connecticut*, 381 U.S. 479 (1965) (statute barring dispensation of birth control information struck down on privacy grounds); *Stanley v. Georgia*, 394 U.S. 557 (1969) (state conviction for possession of obscene material overturned as violating first and fourteenth amendments); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (restricting protection of *Stanley* holding to the home)).

extent to which the Alaska Constitution protects privacy.⁵ In a previous decision, *Breese v. Smith*,⁶ the court had declined to decide whether a school-imposed hair-length regulation violated the federal constitution,⁷ but nevertheless held that the regulation was prohibited by the Alaska Constitution.⁸ The *Breese* court reasoned that “the right ‘to be let alone’ – including the right to determine one’s own hairstyle in accordance with individual preferences and without interference of governmental officials and agents – is a fundamental right under the constitution of Alaska.”⁹ Soon after *Breese*, Alaska amended its constitution to establish that “[t]he right of the people to privacy is recognized and shall not be infringed.”¹⁰ Based on *Breese* and the new state constitutional provision, the court in *Ravin* recognized that the Alaska Constitution, unlike the federal constitution, protects privacy, or the “right to be let alone,” as an independently existing right.¹¹

Despite recognizing the specific guarantee of privacy provided by the Alaska Constitution, the court held that this guarantee does not include an absolute fundamental privacy right to possess marijuana.¹² It distinguished *Breese* by clarifying that “[f]ew would believe they have been deprived of something of critical importance if deprived of marijuana, though they would if stripped of control over their personal appearance.”¹³

Although the *Ravin* court refused to recognize a general right of privacy to possess marijuana, it did single out possession in the home as deserving special consideration.¹⁴ The court reasoned that “[i]f there is any area of human activity to which a right to privacy pertains more than any other, it is the home.”¹⁵ In support of this view, the court cited portions of the federal Bill of Rights,¹⁶ various Alaska statutes,¹⁷ and the distinct “character of life” in Alaska.¹⁸

5. *Id.* at 500.

6. 501 P.2d 159 (Alaska 1972).

7. *See id.* at 166.

8. *See id.* at 174.

9. *Id.* at 171.

10. ALASKA CONST. art. I, § 22.

11. *See Ravin*, 537 P.2d at 501.

12. *See id.* at 502.

13. *Id.*

14. *See id.* at 502-03.

15. *Id.* at 503.

16. *See Ravin*, 537 P.2d at 503 (discussing U.S. CONST. amends. I, III, IV, and V).

17. *See id.* at n.42 (citing ALASKA STAT. §§ 09.35.090 (homestead exemption to execution sales) (repealed in 1982 and replaced with ALASKA STAT. § 09.38.010 (Michie 1996)), 11.15.100 (justifiable homicide defense for protection of the

Just a year earlier, in *Gray v. State*,¹⁹ the court already had held that the Alaska Constitution protects from legislative intrusion “the ingestion of food, beverages or other substances” in the home.²⁰ Therefore, it was a fairly modest step in *Ravin* for the court to conclude that

the citizens of the State of Alaska have a basic right to privacy in their homes under Alaska’s constitution. This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home unless the state can meet its substantial burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest.²¹

More specifically, the court stated that the state had the “greater burden of showing a close and substantial relationship between the public welfare and control of ingestion or possession of marijuana in the home for personal use.”²²

To determine whether the state had met its “substantial burden,” the court proceeded to review the evidence presented at trial by both parties pertaining to the effects of marijuana use.²³ It considered evidence put forth by the state: that marijuana use damages the immune system, sexual functioning, and chromosomal structure; produces an extreme panic reaction; leads to a lack of motivation; causes violent criminal behavior; results in experimentation with more dangerous drugs; and leads to long-term psychological problems and addiction.²⁴ However, after conducting a thorough examination of the scientific evidence behind all of the state’s arguments, the court concluded the following:

home) (repealed in 1978 and replaced with ALASKA STAT. § 11.81.335 (Michie 1996)), 11.20.080.100 (distinction between burglary of a dwelling and burglary of other places) (repealed in 1978 and replaced with ALASKA STAT. § 11.46.300 (Michie 1996))).

18. *Id.* at 504.

19. 525 P.2d 524 (Alaska 1974). Gray had been convicted of selling marijuana in a private place and had made the same constitutional argument as *Ravin*. *See id.* at 527. The court held that Gray’s activity was constitutionally protected by the privacy amendment. *See id.* However, since there had been no evidentiary hearing regarding the effects of marijuana use, it remanded the case for determination of whether the statute under which Gray was convicted was “necessary to further a compelling state interest.” *Id.* at 528. The court observed that it recently had granted review in *Ravin* and that its decision in that case could control the final determination of Gray’s claim. *See id.* at 528 n.16.

20. *Id.* at 528.

21. *Ravin*, 537 P.2d at 504.

22. *Id.*

23. *See id.* at 504-05.

24. *See id.* at 506-08.

It appears that the effects of marijuana on the individual are not serious enough to justify widespread concern, at least as compared with the far more dangerous effects of alcohol, barbiturates and amphetamines. Moreover, the current patterns of use in the United States are not such as would warrant concern that in the future consumption patterns are likely to change.²⁵

The court emphasized that it did not endorse the choice to possess or consume marijuana.²⁶ Nevertheless, it ultimately found that “no adequate justification for the state’s intrusion into the citizen’s right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown.”²⁷

In reaching this conclusion, the court acknowledged that marijuana use in certain contexts does pose a threat to the general welfare.²⁸ For instance, the court made clear that the state was still justified in prohibiting juvenile marijuana use, driving while intoxicated due to marijuana, and private marijuana possession of amounts indicative of an intent to sell.²⁹ Ultimately, however, it found that these harms “standing alone” do not create “a close and substantial relationship between the public welfare and control of ingestion of marijuana or possession of it in the home for personal use.”³⁰ In 1982, the Alaska legislature codified *Ravin* in the state’s criminal code by legalizing possession in a private place of up to four ounces of marijuana.³¹

B. Consideration by Other Courts of the Right to Possess Marijuana

With the *Ravin* decision, Alaska became the first state to announce any constitutionally protected privacy interest in marijuana possession.³² Federal and state courts have universally rejected claims that the federal constitution’s due process clause protects

25. *Id.* at 509-10.

26. *See id.* at 511-12.

27. *Id.* at 511.

28. *See id.*

29. *See id.* In a subsequent decision, the court declared that it would provide no protection for personal marijuana use in public. *See Belgarde v. State*, 543 P.2d 206, 207-08 (Alaska 1975).

30. *Ravin*, 537 P.2d at 511.

31. *See* 1982 Alaska Sess. Laws § 2 ch. 45.

32. *But see* *State v. Kantner*, 493 P.2d 306, 313 (Haw. 1972) (Levinson, J., dissenting) (stating that a marijuana possession conviction should be reversed because of a right to privacy); *People v. Sinclair*, 194 N.W.2d 878, 896 (Mich. 1972) (Kavanagh, J., concurring) (stating that a marijuana possession conviction should be reversed because of a right to privacy).

any right to possess or consume marijuana.³³ For instance, *NORML v. Guste*, a class action lawsuit, alleged that federal statutes prohibiting possession of marijuana “encroach on constitutionally protected zones of privacy.”³⁴ The United States District Court for the Eastern District of Louisiana noted that the asserted right was distinct from every other Supreme Court decision to enunciate a zone of privacy:

[Those cases] involved concepts of basic and fundamental rights such as the right to marry, to bear children, to think and read what one wishes, to worship God according to the dictate of his conscience, to acquire useful knowledge. . . . Plaintiff’s claim in the present case rests on bare allegations of a general right to privacy to do what one wishes in his own home and with his own body.³⁵

The court found implausible the contention that such a broad right should be construed from the line of Supreme Court decisions implicating due process concerns.³⁶ Accordingly, it held that “[t]he right of [the] plaintiff to possess marijuana in his own home can under no factual or legal interpretation be classified as fundamental or implicit in the concept of ordered liberty.”³⁷

Aside from the federal claim made in *Guste*, courts in states other than Alaska have considered whether their state constitutions protect marijuana possession, but none has come to the same conclusion as *Ravin*.³⁸ Most of these courts distinguished *Ravin*

33. See, e.g., *NORML v. Guste*, 380 F. Supp. 404, 407 (E.D. La. 1974); *State v. Murphy*, 570 P.2d 1070, 1073 (Ariz. 1977); *Kreisher v. State*, 319 A.2d 31, 32 (Del. Super. Ct. 1974); *Laird v. State*, 342 So.2d 962, 963 (Fla. 1977); *Borras v. State*, 229 So.2d 244, 246 (Fla. 1969); *Blincoe v. State*, 204 S.E.2d 597, 599 (Ga. 1974); *State v. Renfro*, 542 P.2d 366, 368-69 (Haw. 1975); *State v. Baker*, 535 P.2d 1394, 1399 (Haw. 1975); *State v. Kincaid*, 566 P.2d 763, 765 (Idaho 1977); *State v. O’Bryan*, 531 P.2d 1193, 1198 (Idaho 1975); *NORML v. Scott*, 383 N.E.2d 1330, 1332-33 (Ill. App. Ct. 1978); *State v. Chrisman*, 364 So.2d 906, 907 (La. 1978); *Marcoux v. Attorney Gen.*, 375 N.E.2d 688, 691 (Mass. 1978); *Commonwealth v. Leis*, 243 N.E.2d 898, 903-04 (Mass. 1969); *People v. Alexander*, 223 N.W.2d 750, 752 (Mich. App. 1974); *State v. Kells*, 259 N.W.2d 19, 24 (Neb. 1977); *State v. Nugent*, 312 A.2d 158, 162 (N.J. Super. Ct. App. Div. 1973); *Miller v. State*, 458 S.W.2d 680, 684 (Tex. Crim. App. 1970); *State v. Anderson*, 558 P.2d 307, 309 (Wash. Ct. App. 1976); *State ex rel. Scott v. Conaty*, 187 S.E.2d 119, 123 (W.Va. 1972).

34. *Guste*, 380 F. Supp. at 405.

35. *Id.* at 407.

36. See *id.* at 406-07.

37. *Id.* at 407.

38. See, e.g., *Murphy*, 570 P.2d at 1073; *Laird*, 342 So. 2d at 965; *Renfro*, 542 P.2d at 368-69; *Baker*, 535 P.2d at 1399-1400; *Kincaid*, 566 P.2d at 765; *Scott*, 383 N.E.2d at 1333-34; *Anderson*, 558 P.2d at 309-10.

because their state's constitution, unlike Alaska's, did not contain any specifically enumerated right to privacy.³⁹ States that do have privacy provisions in their constitution have looked at the reasoning of the *Ravin* court but determined that it did not apply in their jurisdiction.⁴⁰

In *State v. Baker*, a decision announced just fifteen days before *Ravin*, the Hawaii Supreme Court declined to interpret the privacy provision of the Hawaii Constitution so as to protect marijuana possession as a fundamental right.⁴¹ The *Baker* court correctly predicted that the Alaska Supreme Court's opinion in *Gray* would lead to its ultimate holding in *Ravin*.⁴² However, the court went on to say that

if we so viewed the Hawaii Constitution it would take away from our food and drug laws the presumption of constitutionality and require the showing of a compelling state interest before any of them could be enforced. We find nothing in our constitution or its history that leads to that conclusion.⁴³

While declining to specifically discuss the differences between its constitution and Alaska's, the court was confident in its conclusion that the privacy provisions in the two documents should be interpreted differently.⁴⁴

In *State v. Murphy*, the Arizona Supreme Court was asked to interpret the privacy provision of the Arizona Constitution within a similar context.⁴⁵ While noting the holding in *Ravin*,⁴⁶ the Arizona court held that its constitutional privacy provision

goes only to the power of the police to enter a home in search of evidence of [a] crime. The right to possess marijuana in a person's own home is not a basic constitutional right and is not, we

39. See, e.g., *Kincaid*, 566 P.2d at 765; *Laird*, 342 So.2d at 965; *Anderson*, 558 P.2d at 309.

40. See, e.g., *Murphy*, 570 P.2d at 1072; *Baker*, 535 P.2d at 1399-1400.

41. See *Baker*, 535 P.2d at 1399-1400. The privacy clause of the Hawaii Constitution reads: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated." HAW. CONST. art. I, § 7.

42. *Baker*, 535 P.2d at 1400.

43. *Id.*

44. See *id.* The Alaska privacy provision is a more general recognition of "the right of the people to privacy," while the Hawaii provision is similar in language to the first half of the Fourth Amendment except that it adds a right against "invasions of privacy." Compare ALASKA CONST. art. I, § 22 with HAW. CONST. art. I, § 7.

45. See *Murphy*, 570 P.2d at 1072. The Arizona Constitution states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." ARIZ. CONST. art. 2, § 8.

46. See *Murphy*, 570 P.2d at 1072.

believe, made so by invocation of the right of privacy provisions of the Arizona Constitution.⁴⁷

In making its decision, the Arizona court did not state whether it believed that the *Ravin* court was flatly wrong, or whether significant differences in the constitutional traditions of the two states required a different result.⁴⁸

III. IMPORTANCE OF *RAVIN* TO CONSTITUTIONAL LAW

A. "New Judicial Federalism"

The *Ravin* decision has been described by at least one commentator as "a leading example of the use a state court can make of its own constitution."⁴⁹ The movement to call for expansive use of state constitutions, or "New Judicial Federalism,"⁵⁰ is often traced to a highly influential law review article written by Justice William J. Brennan, Jr., in 1977.⁵¹ In that article, Justice Brennan recounted the impressive extent to which the Warren-era Supreme Court applied the Bill of Rights guarantees to the states.⁵² He also lamented the fact that since 1969, the Court largely had halted the expansion of constitutional protections and even had withdrawn them to a degree.⁵³ Accordingly, Brennan's thesis was that

state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law – for without it, the full realization of our liberties cannot be guaranteed.⁵⁴

Brennan's point is that state courts, when interpreting language in their state constitutions that is identical to language in the United States Constitution, should not blindly follow the Supreme Court's

47. *Id.* at 1073.

48. *See id.* at 1072 (noting that Arizona's privacy clause is similar to that of many other states, and remarking that "Alaska stands alone").

49. A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 933 (1976).

50. *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 762 n.4 (1992) (discussing background of the expression "New Judicial Federalism").

51. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

52. *See id.* at 493-95.

53. *See id.* at 495-98.

54. *Id.* at 491.

interpretation but should instead conduct an independent analysis and expand the rights protected by the state constitution if appropriate.

B. *Ravin's* Role in Alaska's Constitutional Development

Examples of the type of state expansion on federal constitutional protection that Justice Brennan called for are abundant,⁵⁵ and the Alaska Supreme Court has been recognized as one of the leaders in this trend.⁵⁶ As far back as 1970, the Alaska Supreme Court noted that

[w]hile we must enforce the minimum constitutional standard 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 embedded in our constitutional law.⁵⁷

Ronald L. Nelson has well-documented the "constitutional discourse" that the Alaska Supreme Court subsequently developed to interpret the state constitution.⁵⁸ His extensive analysis led him to

55. See, e.g., *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) (holding that the state constitution's equal protection clause requires equity in state public school funding, despite the United States Supreme Court's holding in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)); *District Attorney for the Suffolk Dist. v. Watson*, 411 N.E.2d 1274 (Mass. 1980) (holding that Massachusetts Constitution's ban against cruel and unusual punishment prohibits the imposition of the death penalty); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997) (holding a statute that prohibited same-gender sexual relations violated the state constitution, despite the United States Supreme Court's holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986), that such a statute would not violate federal constitutional principles).

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

57. *Baker v. City of Fairbanks*, 471 P.2d 386, 401-02 (Alaska 1970) (citations omitted).

58. See Nelson, *supra* note 56, at 11. Nelson's article is an attempt to refute James A. Gardner's argument that

the tension between state and national constitutionalism has been largely resolved in the modern day United States by the collapse of meaningful state identity and the coalescence of a social consensus that fundamental values in this country will be debated and resolved on a na-

opine: “Alaska’s state constitutional decisions – particularly in the areas of equal protection, privacy, freedom of religion and natural resources – have something worth saying and hearing.”⁵⁹

In the Alaska Supreme Court’s evolving interpretation of the privacy amendment to the Alaska constitution, *Ravin* is considered a landmark decision.⁶⁰ It was the first Alaska Supreme Court opinion that required serious consideration of the privacy amendment and the resulting interpretation truly gave the amendment meaning.⁶¹ The principle it establishes – that the privacy amendment can be used to provide more protection than the federal con-

tional level. Thus, regardless of whether such regional differences existed in the past, they no longer exist and we may for the most part disregard them as viable elements of state constitutional discourse.

Gardner, *supra* note 50, at 828. Even if regional values are critical to American’s identities, Gardner further contends that state constitutions are so muddled that they do not actually reflect local values. *See id.* at 818-22. The result is that state courts

by and large have little interest in creating the kind of state constitutional discourse necessary to build an independent body of state constitutional law. . . . In the few cases in which courts hold the state and federal constitutions to be distinct, they often seem to have done so in a way that is so idiosyncratically result-oriented as to provide little basis for further intelligible debate about the nature of the differences between the two documents that account for the court’s departure from federal norms.

Id. at 804. Gardner’s ultimate thesis is that New Judicial Federalists are wrong in both their view that state constitutional decision-making is an important part of protecting liberties and in their belief that courts are actually making informed state constitutional decisions. *See id.*

Nelson’s retort to this argument is that “Alaska’s physical and demographic differences are part of a background that distinguishes it from the other forty-nine states. These differences are of such a magnitude as to render suspect Professor Gardner’s claim that significant local variation in America is implausible.” Nelson, *supra* note 56, at 6. His article then highlights the various areas in which the Alaska Supreme Court has developed an independent and coherent constitutional analysis. *See id.* at 11-32.

59. Nelson, *supra* note 56, at 11.

60. *See, e.g.,* Susan Orlansky & Jeffrey M. Feldman, *Justice Rabinowitz and Personal Freedom: Evolving a Constitutional Framework*, 15 ALASKA L. REV. 1, 12 (1998) (“*Ravin*, like *Breese*, has been cited frequently [by the Alaska Supreme Court] in cases involving issues of privacy and personal freedom. The balancing analysis that Justice Rabinowitz elucidated in *Ravin* is employed in virtually all of those cases.”). *See also* 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 (1985).

61. *See* Grossbauer, *supra* note 60, at 160.

stitution – has become a standard of Alaska’s constitutional interpretation.⁶²

C. *Ravin* as a Model State Constitutional Decision

In addition to its significance to the development of Alaska’s constitutional interpretation of the right to privacy, the *Ravin* decision is, in many ways, a model state constitutional interpretation in that it evades some of the common criticisms of New Judicial Federalism.⁶³ One such criticism is that state constitutional decisions are frequently ambiguous as to whether they are based on state or federal grounds.⁶⁴ *Ravin* clearly states that its holding is based solely on state constitutional grounds.⁶⁵

Another frequent criticism of New Judicial Federalism is that state constitutional decisions seldom refer to local values and illuminate why a unique interpretation of the state constitution is necessary.⁶⁶ But the *Ravin* court was careful to note that the court’s interpretation of the Alaska Constitution

is consonant with the character of life in Alaska. Our territory and now state has traditionally been the home of people who

62. See, e.g., *Valley Hosp. Ass’n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997) (holding that the privacy amendment protects reproductive freedom more broadly than the federal constitution); *State v. Glass*, 583 P.2d 872 (Alaska 1978) (holding that the privacy amendment protects against warrantless recording of conversations although the federal constitution does not).

63. This is perhaps why some scholars critical of New Judicial Federalism have remained reluctant to criticize *Ravin*. See, e.g., Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1514 n.143 (1990); Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1021 (1985).

64. The United States Supreme Court is the most prominent of these critics. The Court has pronounced that if

a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). The result is that state courts that wish to decide a case based on the state constitution but still comment on the federal constitutional claim must be very careful, or they will risk what they thought was a decision of state law being reviewed by the Supreme Court. See, e.g., Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985).

65. See *supra* notes 4-11 and accompanying text.

66. See Gardner, *supra* note 50, at 778-805.

prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.⁶⁷

Striking a similar note, Justice Boochever, in his concurrence to *Ravin*, found that Alaska's historically "strong emphasis on individual liberty"⁶⁸ required a broad interpretation of the privacy amendment.⁶⁹ Thus, *Ravin* was consciously grounded in local values and cannot be easily criticized as arbitrary.⁷⁰ In sum, *Ravin* is one of the foremost New Judicial Federalist decisions.

IV. THE VOTER INITIATIVE OF 1990: ALASKA VOTERS STRIKE BACK

A. The Voter Initiative of 1990

In the years following the *Ravin* decision, Alaska gained a somewhat misleading national reputation for having legalized marijuana use. Public response to this newfound reputation came in the form of a voter initiative designed to re-criminalize marijuana. The Voter Initiative of 1990 (the "Initiative") that re-criminalized marijuana possession and directly challenged *Ravin* passed by approximately a fifty-five percent margin and became effective on March 3, 1991.⁷¹ The initiative stated:

Under Alaska law it is currently legal for adults over 18 years old to possess under four ounces of marijuana in a home or other private place. The penalty for adults over 18 years old for possessing less than one ounce in public is a fine of up to \$100. This

67. *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1974).

68. *Id.* at 514 (Boochever, J., concurring).

69. *See id.* at 514-15 (Boochever, J., concurring).

70. The reliance that the court placed on distinct Alaskan values also helps explain how the *Ravin* court reached a different result than the Hawaii and Arizona Supreme Courts even though all three constitutions specifically enumerate privacy as a right. *See supra* notes 41-48. There is nothing unsettling about the fact that the courts of different states reach contradictory results in the face of similarly worded constitutional provisions as long as the decisions are actually grounded in unique state values that merit a separate outcome.

71. *See Mowing the Grass (Alaska Recriminalizes Possession of Marijuana)*, TIME, Nov. 19, 1990, at 47. In the months preceding the election, the issue became highly politicized and gained a good deal of publicity. The Initiative was preceded by "fifteen years of lobbying by federal government drug warriors." Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571, 601 n.115 (1995). Drug czar Bill Bennett even traveled to Alaska to campaign on its behalf. *See Bennett Urges Alaska Voters to Ban Marijuana*, L.A. TIMES, Oct. 27, 1990, at 21.

initiative would change Alaska's laws by making all such possession of marijuana criminal, with possible penalties of up to 90 days in jail and/or up to a \$1000 fine.⁷²

By explicitly criminalizing possession of marijuana in a private place, the Initiative in no uncertain terms attempted to invalidate the supreme court's decision in *Ravin*. After the Initiative passed, Alaska Statutes section 11.71.060 was duly amended so as again to make four ounces or less of marijuana in a private place illegal.⁷³

The passage of the Initiative created an interesting constitutional issue – whether such an initiative actually had the legal power to “overrule” *Ravin*. Other states have successfully used a voter referendum or legislation to invalidate an undesirable interpretation of a state constitution.⁷⁴ However, the typical route is for the legislature directly to amend the state constitution. In contrast, the Initiative merely altered the general Alaska Criminal Code, not the Alaska Constitution itself. Nevertheless, media and popular reports overlooked the constitutional issue and declared that Alaska voters had “recriminalized the possession of small amounts of marijuana.”⁷⁵ Somewhat surprisingly, even legal experts generally accepted the view that “the people of [Alaska] overturned [the *Ravin*] decision by ballot initiative.”⁷⁶

The civil libertarian group Alaskans for Privacy filed a lawsuit soon after the Initiative was passed, seeking a declaratory judgment that the Initiative was unconstitutional.⁷⁷ The group petitioned for summary judgment, contending that “the scientific and medical data has remained relatively unchanged since 1975.”⁷⁸ The state moved to dismiss the lawsuit, claiming that “current medical and scientific information about [marijuana] shows that the facts have changed since 1975.”⁷⁹ Judge Hunt held that

[t]he disputed evidence submitted to this court raises genuine issues of material fact as to whether the current medical and scien-

72. *Alaskans for Privacy v. State*, No. 3AN-91-1746, slip op. at 11 (D. Alaska Jan. 21, 1992).

73. See ALASKA STAT. § 11.71.060 (Michie 1996).

74. See ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 150-54 (1990).

75. Richard Mauer, *Voters Favor Pot Law: Recriminalization Lead by 10,000*, ANCHORAGE DAILY NEWS, Nov. 7, 1990, at B1.

76. Gardner, *supra* note 50, at 828 n.283; see also M. Kathryn 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, 280 n.3 (1992); Duke, *supra* note 71, at 601 n.115.

77. See *Alaskans for Privacy v. State*, No. 3AN-91-1746, at 1.

78. *Id.* at 13.

79. *Id.* at 12.

tific data supports or contradicts the factual information available to the Supreme Court in 1975. A hearing before the court will be necessary to resolve the factual issues which the parties agree will determine whether prohibiting the possession and use of marijuana by adults in the privacy of their home violates the Alaska [C]onstitution.⁸⁰

Accordingly, she denied both the motion to dismiss and the motion for summary judgment and ordered an evidentiary hearing to determine the scientific evidence regarding marijuana use.⁸¹ The Alaskans for Privacy did not have the funding to conduct such a hearing, however, and the lawsuit was dropped.⁸²

B. *State v. McNeil*

In 1993, the issue resurfaced when a criminal case in Ketchikan directly confronted the Initiative's constitutionality.⁸³ In *State v. McNeil*, a police officer noticed evidence of marijuana possession through the window of the defendant's home.⁸⁴ The officer obtained a warrant, searched the defendant's residence, and discovered .21 grams of marijuana.⁸⁵ Seven months later, McNeil was charged with possession of marijuana.⁸⁶ Because the "[d]efendant [was] an adult, . . . the residence was his home, . . . and the amount and circumstances certainly suggest only personal use," the case required the judge to reconcile *Ravin* with the Initiative.⁸⁷

After considering the issue, Judge Thompson concluded that the Initiative did not impact the validity of the *Ravin* decision. He stated that

Ravin was founded in the Supreme Court's interpretation of the Alaska Constitution. The legislature – nor for that matter the people through the initiative – cannot "fix" what is disliked in an interpretation of that document by legislation. The only way to "fix" the constitution is by the amendment process or a new convention. The initiative was inadequate to overrule *Ravin* and that case remains the law.⁸⁸

The judge went on to say that *Ravin* would be inapplicable if the factual findings upon which it was premised were no longer accu-

80. *Id.* at 13.

81. *See id.*

82. Interview with William P. Bryson, Attorney for Alaskans for Privacy, Mar. 18, 1998, Anchorage, Alaska.

83. *See State v. McNeil*, No. 1KE-93-947 (D. Alaska Oct. 29, 1993).

84. *See id.* at 1.

85. *See id.*

86. *See id.* at 1-2.

87. *Id.* at 3 (citations omitted).

88. *Id.* at 5.

rate.⁸⁹ However, the prosecution in *McNeil* presented no evidence to suggest that new scientific data regarding the effects of marijuana invalidated the basis for the *Ravin* decision.⁹⁰ Therefore, Judge Thompson felt he had “no basis to overrule or even qualify the *Ravin* decision” and he dismissed the charges against McNeil.⁹¹

As a legal matter, *McNeil* was correct in deeming the Initiative irrelevant. The Alaska Constitution is the fundamental law of Alaska and all other state laws gain their legitimacy from that charter. The Alaska Supreme Court is the ultimate interpreter of the Alaska Constitution,⁹² and, in *Ravin*, it made a specific interpretation as to what the constitutional privacy right encompasses. It is axiomatic that neither a voter initiative, nor any other legislation short of a constitutional amendment, can undo the legal effect of *Ravin*.

C. *City of Boerne v. Flores*: An Analogy to Federal Constitutional Law

An analogous situation at the federal level was recently decided by the Supreme Court in *City of Boerne v. Flores*.⁹³ In that case, the Court was required to determine the constitutionality of the Religious Freedom Restoration Act (“RFRA”).⁹⁴ RFRA was passed by Congress in specific response to the Supreme Court’s decision in *Employment Division v. Smith*,⁹⁵ a decision that sharply redefined the scope of First Amendment protection for religious acts that violate a generally applicable criminal law.⁹⁶ RFRA essentially attempted to reinstate the standard that had been applied by the Court before *Smith*.⁹⁷ In response to RFRA, the Court in *City of Boerne* stated that “[t]he judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the ‘powers of the legislature are defined and limited;

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

90. *See id.* at 6.

91. *Id.*

92. *See Boucher v. Bumhoff*, 495 P.2d 77, 79 (Alaska 1972) (“[T]he task of expounding upon fundamental constitutional law and its application to disputes between various segments of government and society rests with the judicial branch of government.”).

93. 117 S. Ct. 2157 (1997), *on remand*, 119 F.3d 341 (5th Cir. 1997).

94. *See id.* at 2160.

95. 494 U.S. 872 (1990).

96. *See City of Boerne*, 117 S. Ct. at 2160-61.

97. *See id.*

and that those limits may not be mistaken, or forgotten, the constitution is written.”⁹⁸

While recognizing that the Fourteenth Amendment gives Congress the power to enforce constitutional violations by the states, the Court held that RFRA goes beyond mere enforcement and unconstitutionally purports “to determine what constitutes a constitutional violation.”⁹⁹ Just as RFRA illegitimately attempted to interpret the federal constitution, the Initiative illegitimately attempted to interpret the Alaska Constitution. Judge Thompson accurately recognized this illegitimacy and properly held that the Initiative could not be used to convict McNeil. The appropriate way for the citizens of Alaska to directly recriminalize marijuana is not by a voter initiative but by a constitutional amendment.¹⁰⁰

V. CONSTITUTIONAL PRINCIPLES IN APPLYING THE *RAVIN* TEST

As both *Alaskans for Privacy* and *McNeil* point out, the Initiative is constitutional only if *Ravin* should be overruled, either on legal or factual grounds. The recent Alaska Supreme Court opinion in *Valley Hospital Association, Inc. v. Mat-Su Coalition for Choice*¹⁰¹ highlights the court’s continued commitment to an interpretation of the privacy amendment that “provides more protection of individual privacy rights than the United States Constitution.”¹⁰² Since *Ravin* is the cornerstone of this interpretation,¹⁰³ it is

98. *Id.* at 2162 (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)).

99. *Id.* at 2164.

100. In Alaska, the constitution can be amended by an affirmative two-thirds vote in both legislative houses followed by an affirmative majority vote in a popular election. See ALASKA CONST. art. XIII, § 1. Before the Voter Initiative passed, there had been several unsuccessful attempts in the state legislature to initiate a constitutional amendment that would have overruled *Ravin*. See Mauer, *supra* note 75, at B1.

101. 948 P.2d 963 (Alaska 1997).

102. *Id.* at 968. In *Valley Hospital*, the court was required to determine the constitutionality of a publicly supported hospital’s policy of prohibiting all elective abortions on its premises. The court examined the federal standard and found that, in light of the Supreme Court’s decision in *Planned Parenthood v. Casey*, “[a]rguably the prevailing federal view is that a state may regulate abortions so long as their regulation does not impose ‘an undue burden on a woman’s ability’ to decide to have an abortion.” *Id.* at 966 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 875 (1992)). Nevertheless, the court held that the Alaska Constitution protects reproductive rights according to the broad *Roe v. Wade*, 410 U.S. 113 (1973), standard rather than the more cramped *Casey* standard. *Valley Hosp. Ass’n, Inc.*, 948 P.2d at 966-67 (discussing *Casey*, 505 U.S. at 875 and *Roe*, 410 U.S. at 155).

extremely unlikely that the court would be willing to take a more narrow view of the privacy amendment that would no longer include protection for the private possession of marijuana. On the other hand, *Ravin's* findings of fact regarding the danger that marijuana use poses to the public welfare are now twenty-three years old. As Judge Thompson said in *McNeil*, "Science marches on. Perhaps there is now evidence to persuade the Court that the State does have an adequate justification to intrude on individual privacy."¹⁰⁴ In *McNeil*, the state did not argue the issue.¹⁰⁵ However, if the state faces another *Ravin* defense, it is sure to make this contention forcefully. Therefore, it is important to keep in mind several principles that the Alaska Supreme Court is likely to invoke if it is required to apply the *Ravin* test.

A. Preference for Autonomy

If an Alaska court reconsiders whether the privacy amendment protects the right to possess marijuana in private, it will apply the "close and substantial relationship" test that was developed in *Ravin*.¹⁰⁶ In applying the *Ravin* test, it is important to keep in mind the Alaska Supreme Court's view that

the authority of the state to exert control over individuals extends only to activities of the individual which affect others or the public at large as it relates to matters of public health or safety, or to provide for the general welfare. We believe this tenet to be basic to a free society. The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals.¹⁰⁷

The *Valley Hospital* court also considered an argument that the legislative history of the privacy amendment limits it to "protection from unwarranted surveillance and data collection by the State and private businesses." *Id.* at 969. However, after reviewing the scarce evidence available, the court concluded that "[t]he legislative history is insufficient to limit the general language of the privacy amendment." *Id.* This conclusion is consistent with previous Alaska Supreme Court decisions pointing out the lack of history associated with the privacy amendment. *See* *State v. Glass*, 583 P.2d 872 (Alaska 1978); *Gray v. State*, 525 P.2d 524 (Alaska 1974). Because of this lack of history, and the broad language employed by the amendment, it is fair for the court to assume that the legislature intended for courts to have wide leeway in determining the scope of the amendment.

103. *See supra* note 11 and accompanying text.

104. *State v. McNeil*, No. 1KE-93-947, slip op. at 6 (D. Alaska Oct. 29, 1993).

105. *See id.*

106. *Ravin v. State*, 537 P.2d 494, 498 (Alaska 1975).

107. *Id.* at 509.

However, the court's position is not unabashedly libertarian – it added that “[t]he right of the individual to do as he pleases is not absolute, of course: it can be made to yield when it begins to infringe on the rights and welfare of others.”¹⁰⁸ Furthermore, the infringement does not have to be “present and immediate.”¹⁰⁹ In the instance of drug use, the *Ravin* court speculated that “a drug could so seriously develop in its user a withdrawal or amotivational syndrome, that widespread use of the drug could significantly debilitate the fabric of our society.”¹¹⁰ So, in attempting to demonstrate a “close and substantial relationship” between marijuana use and the public welfare, the state may point to evidence of the long-term harmful health effects of marijuana.¹¹¹ However, to meet its burden the state always must tie these effects to the public welfare in general; it does not have the authority to invade privacy merely to “protect the individual from his own folly.”¹¹²

B. Requirement of a Definite Threat to the Public Welfare

In applying the *Ravin* test, Alaska courts should remember that the state may not rely on hypothesis, mere potential risks, or speculation.¹¹³ Under typical scrutiny, “[t]here is a presumption in favor of public health measures; when there is substantial doubt as to the safety of a given substance or situation for the public health, controls intended to obviate the danger will usually be upheld.”¹¹⁴ There is no presumption of validity, however, when the public health regulation in question directly implicates a constitutional right.¹¹⁵ When it comes to state regulations that intrude upon the privacy of the home, “mere scientific doubts will not suffice. The state must demonstrate a need based on proof that the public health or welfare *will in fact suffer* if the controls are not applied.”¹¹⁶

Alaska appellate courts have applied the *Ravin* test to other drugs twice: once to cocaine and once to alcohol.¹¹⁷ In *State v. Er-*

108. *Id.*

109. *Id.*

110. *Id.*

111. *See id.*

112. *Ravin*, 537 P.2d at 508.

113. *See id.* at 511.

114. *Id.* at 510.

115. *See id.* at 511.

116. *Id.* (emphasis added).

117. Alaska appellate courts also have invoked *Ravin* twice in deciding weapons possession cases. *See Gibson v. State*, 930 P.2d 1300, 1302 (Alaska Ct. App. 1997) (holding that “[t]he potential for harm to health and safety resulting from

ickson,¹¹⁸ the defendants argued that, under the rules established in *Ravin*, they had a privacy right to possess cocaine within their own home.¹¹⁹ The Alaska Supreme Court looked at the scientific evidence regarding cocaine use and concluded that “there is a sufficiently close and substantial relationship between the means chosen to regulate cocaine and the legislative purpose of preventing harm to health and welfare so as to justify the prohibition of use of cocaine, even in the home.”¹²⁰ After examining the scientific evidence, the court distinguished *Ravin*, saying that they found “no authorities which state that the effects of cocaine are less harmful than marijuana, and it seems clear that cocaine is substantially more of a threat to health and welfare.”¹²¹ Among the factors that swayed the court were the possibility of an acute cocaine overdose, the chronic physical and psychological effects of cocaine use, and the correlation between cocaine use and the propensity to commit crime and violence.¹²²

In *Harrison v. State*,¹²³ the Alaska Court of Appeals applied the *Ravin* “close and substantial relationship” test when it faced the issue of whether a village may constitutionally proscribe the importation of alcohol.¹²⁴ Among defendant Harrison’s arguments was that the restriction violated his *Ravin* privacy right to consume alcohol in the home.¹²⁵ Although Harrison was convicted of importing alcohol into the community, the court agreed with him that “[s]ince there is a strong, if not direct, relationship between regulating importation of alcohol and regulating consumption of alcohol, . . . we must more closely examine the right to privacy asserted in this case.”¹²⁶ Nevertheless, the court found that the state had

the possession and use of firearms by intoxicated persons in their homes” permits a blanket prohibition on the use of firearms while intoxicated); *State v. Weaver*, 736 P.2d 781, 783 (Alaska Ct. App. 1987) (holding that the state may proscribe completely possession of gravity knives because “[s]ubstantial risk of harm to others and the furtherance of crime result from private possession of such weapons” (quoting legislative history)).

118. 574 P.2d 1 (Alaska 1978).

119. *See id.* at 21. Actually, the case involved seven defendants, who were all convicted for either selling or possessing cocaine in various places. *See id.* at 3 n.6. Hence, only some of the defendants were eligible to make a privacy claim.

120. *Id.* at 22.

121. *Id.* at 21.

122. *See id.* at 22.

123. 687 P.2d 332 (Alaska Ct. App. 1984).

124. *See id.* at 336-37. The village voted to prohibit the sale and importation of alcohol consistent with a local option statute passed by the Alaska legislature. *See id.* at 335-36.

125. *See id.* at 336.

126. *Id.* at 338.

“unmistakably established a correlation between alcohol consumption and poor health, death, family violence, child abuse, and crime.”¹²⁷ Based on this evidence, it held that the state had met its burden of demonstrating a justification for flatly proscribing alcohol.¹²⁸ The *Harrison* court also cited specific Alaska Supreme Court statements indicating that alcohol use was significantly more threatening to the public welfare than marijuana use.¹²⁹

C. *Stare Decisis*

A final factor to consider if the *Ravin* test is re-applied to the issue of marijuana is the important judicial principle of *stare decisis*. The principle of *stare decisis* holds that, in deciding whether to overrule precedent, there should be a strong preference for maintaining the current rule.¹³⁰ As stated by the United States Supreme Court, “the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”¹³¹ In applying the principle of *stare decisis*, the Alaska Supreme Court has held consistently that “[w]e do not lightly overrule our past decisions.”¹³² A previous decision should be overruled only if the court is “clearly convinced the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent.”¹³³

VI. NEW EVIDENCE REGARDING THE EFFECTS OF MARIJUANA USE?

Because the constitutionality of the Voter Initiative hinges on whether contemporary scientific evidence still shows marijuana to be relatively harmless, an extensive analysis of that evidence is appropriate to determine whether *Ravin* should be overruled on factual grounds. Throughout the twentieth century, there have been claims that marijuana use causes such undesirable behavior as psychosis and violent criminal rampages as well as more mundane so-

127. *Id.*

128. *See id.*

129. *See Harrison*, 687 P.2d at 338-39 (citing *Ravin v. State*, 537 P.2d 494, 509-10 (Alaska 1975); *State v. Erickson*, 574 P.2d 1, 22 (Alaska 1978)).

130. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992).

131. *Id.*

132. *State v. Dunlop*, 721 P.2d 604, 610 (Alaska 1986); *see also State v. Summerville*, 948 P.2d 469 (Alaska 1997).

133. *Dunlop*, 721 P.2d at 610 (quoting *Souter v. State*, 606 P.2d 399, 400 (Alaska 1980)).

cial ills like laziness and general immorality.¹³⁴ The *Ravin* court acknowledged many of these alleged dangers but dismissed the evidence as either inaccurate or inconclusive.¹³⁵ If the state today can show that the *Ravin* court was misled, and that scientific research since 1975 has conclusively demonstrated even a small fraction of the alleged dangers of marijuana use, then it has a much stronger argument for justifying complete prohibition. However, a review of the current evidence indicates that there are no newly discovered dangers of marijuana use that should compel the court to rule differently. Although many people still believe marijuana use has a devastating impact on society,¹³⁶ a recent book-length, comprehensive examination of the research by Lynn Zimmer, a sociologist, and John P. Morgan, a medical doctor, demonstrates that this is not the generally accepted view within the scientific community.¹³⁷ On the contrary, many medical experts, as well as legal scholars, policy analysts, and social scientists, maintain that there is no reliable evidence showing marijuana has an adverse effect on health,¹³⁸ or leads to dangerous or antisocial behavior.¹³⁹ While the

134. See generally JEROME L. HIMMELSTEIN, *THE STRANGE CAREER OF MARIJUANA* (1983) (discussing the history of marijuana control in the United States in the twentieth century).

135. See *Ravin v. State*, 537 P.2d 494, 505-08.

136. See, e.g., Congressional Testimony of Barry R. McCaffrey, Office of the National Drug Control Policy, to the House Judiciary Committee Subcommittee on Crime (1997 WL 14151535, Oct. 1, 1997).

137. See LYNN ZIMMER & JOHN P. MORGAN, *MARIJUANA MYTHS, MARIJUANA FACTS: A REVIEW OF THE SCIENTIFIC EVIDENCE* (1997).

138. See, e.g., In re Marijuana Rescheduling Petition, No. 86-22 (Francis L. Young, Drug Enforcement Agency Administrative Law Judge, Sept. 6, 1988), reprinted in *MARIJUANA, MEDICINE, AND THE LAW* 440 (R.C. Randall ed., 1989) (“[M]arijuana is far safer than many foods we commonly consume. . . . Marijuana, in its natural form, is one of the safest therapeutically active substances known to man.”); STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA’S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* 51 (1993) (“[N]o reliable evidence has appeared that [regular, long-term marijuana] use has any adverse effect on [the user’s] physical health.”); LESTER GRINSPOON & JAMES B. BAKALAR, *MARIHUANA: THE FORBIDDEN MEDICINE* 234 (1997) (“[T]he evidence makes it increasingly clear that cannabis is relatively benign.”).

139. See, e.g., GRINSPOON & BAKALAR, *supra* note 138, at 246-47 (“Studies in the United States find no effects of fairly heavy mari[j]uana use on learning, perception, or motivation over periods as long as a year.”); INSTITUTE OF MEDICINE, *MARIJUANA AND HEALTH* 128 (1992) (“Both retrospective and experimental studies in human beings have failed to yield evidence that marijuana use leads to increased aggression.”); ZIMMER & MORGAN, *supra* note 137, at 125 (“None of the studies suggest that marijuana contributes substantially to highway accidents or fatalities.”).

state may be able to present some expert witnesses to testify that marijuana use is a serious public health threat, it will not be able to show that this is the accepted view of the scientific community.

A. Health Consequences of Marijuana Use

The *Ravin* court recognized that one way for the state to demonstrate a “close and substantial relationship” would be for it to show that significant health risks arise from marijuana use.¹⁴⁰ There are no known instances of a marijuana overdose, and most researchers believe such acute effects are impossible.¹⁴¹ Researchers have devoted a great deal of time and resources investigating a potential link between marijuana use and long-term health problems but “the findings are on the whole strikingly reassuring.”¹⁴² Although researchers can create some interesting effects in animals by giving them extremely high doses of THC (the psychoactive compound in marijuana), these types of experiments are not thought to have direct relevance to humans.¹⁴³

A study conducted on monkeys, that was made public shortly after *Ravin* was decided, has been cited widely as evidence that marijuana use causes brain damage.¹⁴⁴ However, a report issued by the National Academy of Sciences and commissioned by the National Institutes of Health and the Secretary of Health and Human Services cautioned against interpreting the study as proof that marijuana causes brain damage.¹⁴⁵ A 1991 study of monkeys that

140. *Ravin*, 537 P.2d at 504.

141. In studies of animals, the hypothetical lethal dose of marijuana was determined to be about 40,000 times the typical. See GRINSPOON & BAKALAR, *supra* note 138, at 235. This is much higher than the lethal:typical dose ratio for most other drugs and foods. For instance, the lethal dose of alcohol is between four and ten times the typical dose. See *id.* at 236.

142. *Id.* at 243.

143. See, e.g., ZIMMER & MORGAN, *supra* note 137, at 108-09 (describing experiments that have impaired animals' immune systems but only after they were given daily doses of THC 40, up to 1,000 times the equivalent typical human dose).

144. See R.G. Heath, *Marihuana and Delta-9-THC: Acute & Chronic Effects on Brain Function of Monkey*, in PHARMACOLOGY OF MARIHUANA 345-56 (M.C. Braude & S. Szara eds. 1976); R.G. Heath et al., *Cannabis Sativa: Effects on Brain Function & Ultrastructure in Rhesus Monkey*, 15 BIOLOGICAL PSYCHIATRY 657-90 (1980).

145. See INSTITUTE OF MEDICINE, *supra* note 139, at 81-82 (noting also that “the possibility that marijuana may produce chronic, ultra-structural changes in [the] brain has not been ruled out and should be investigated.”); see also ZIMMER & MORGAN, *supra* note 137, at 59-60 (further describing the study's suspect research methods).

arguably used better research methods “effectively repudiated all of [the previous study’s] findings” by detecting “no marijuana-related brain abnormalities at all.”¹⁴⁶ Furthermore, “more modern brain imaging technologies, such as the CAT scan . . . have found no evidence of brain damage in human marijuana users, even in subjects smoking an average of nine marijuana cigarettes per day.”¹⁴⁷

Probably the greatest long-term health threat from marijuana use is to the pulmonary system (assuming the marijuana is smoked).¹⁴⁸ By way of analogy, scientists have feared that frequent marijuana smoking over long periods may present similar risks as tobacco smoking.¹⁴⁹ Nevertheless, “[s]o far not a single case of lung cancer, emphysema, or other significant pulmonary pathology attributable to cannabis use has been reported in the United States.”¹⁵⁰ This is thought to be due to the fact that even heavy marijuana smokers expose their lungs to far less smoke than tobacco smokers¹⁵¹ and, “[f]or all smoking-related diseases, what matters most is the dose of smoke inhaled over time.”¹⁵² Zimmer and Morgan’s conclusion is thus that “[m]oderate smoking of marijuana appears to pose minimal danger to the lungs.”¹⁵³

B. Social Consequences of Marijuana Use

The *Ravin* court rejected theories that marijuana use results in violent criminal behavior.¹⁵⁴ According to Yale Law professors Steven B. Duke and Albert C. Gross, the court was correct in its hesitation to accept this claim: “This baseless nonsense has been thoroughly repudiated since the 1960s by virtually everyone with any knowledge of the drug. No one now claims that marijuana leads to violence.”¹⁵⁵ Studies indicate that marijuana actually has a tendency to make the user less aggressive.¹⁵⁶

The theory that marijuana is a “gateway drug” (*i.e.*, using marijuana causes the user to experiment with more harmful drugs)

146. ZIMMER & MORGAN, *supra* note 137, at 60.

147. *Id.* at 57-58.

148. *See* GRINSPOON & BAKALAR, *supra* note 138, at 250.

149. *See, e.g.*, INSTITUTE OF MEDICINE, *supra* note 139, at 57.

150. GRINSPOON & BAKALAR, *supra* note 138, at 250.

151. *See id.* at 250; ZIMMER & MORGAN, *supra* note 137, at 113.

152. ZIMMER & MORGAN, *supra* note 137, at 115.

153. *Id.* at 112.

154. *See* *Ravin v. State*, 537 P.2d 494, 507 (Alaska 1975).

155. DUKE & GROSS, *supra* note 138, at 45.

156. *See* INSTITUTE OF MEDICINE, *supra* note 139, at 128; ZIMMER & MORGAN, *supra* note 137, at 90-91.

has been greatly overstated in recent years. In fact, most people who use marijuana never use heroin or cocaine.¹⁵⁷ While it is true that nearly everyone who uses heroin and cocaine first tried marijuana, this does not prove that the marijuana use caused the “hard” drug use.¹⁵⁸ It merely confirms the obvious – people who try one illegal drug are more inclined to try other illegal drugs.¹⁵⁹

While marijuana use clearly has a demonstrated short-term impact on memory and cognitive functioning,¹⁶⁰ there is little evidence to support the view that there is any long-term damage. Three well-known studies conducted in Jamaica, Greece, and Costa Rica found no long-term differences in cognition between marijuana users and non-users.¹⁶¹ Other studies have claimed differences in cognition but found them only in heavy, long-term smokers.¹⁶² Even then, the results were not statistically extraordinary.¹⁶³ In addition, these studies have been criticized for not properly controlling for the fact that “high-dose long-term marijuana users are rare, . . . tend to be deviant in numerous ways, and . . . tend to use many other psychoactive drugs in addition to marijuana.”¹⁶⁴

The Jamaica, Costa Rica, and Greece studies also found that marijuana use had no detrimental effect on “the will to work or participate in society.”¹⁶⁵ More recent long-term studies conducted in the United States similarly have failed “to suggest that marijuana reduces people’s motivation to work, their employability, or their capacity to earn wages.”¹⁶⁶ Some studies of students have shown that moderate marijuana users get better grades than non-users.¹⁶⁷ While heavy users perform below the norm, a plausible explanation is that heavy marijuana use and the poor performance are both symptoms of more deeply-rooted problems.¹⁶⁸

The *Ravin* court seemed most concerned about heavy marijuana users who have a tendency to abuse the drug.¹⁶⁹ Like any

157. See GRINSPOON & BAKALAR, *supra* note 138, at 245.

158. *See id.*

159. *See id.*

160. See ZIMMER & MORGAN, *supra* note 137, at 72.

161. See GRINSPOON & BAKALAR, *supra* note 138, at 246.

162. *See id.*

163. See ZIMMER & MORGAN, *supra* note 137, at 76-79.

164. *Id.* at 73.

165. GRINSPOON & BAKALAR, *supra* note 138, at 246; *see also* ZIMMER & MORGAN, *supra* note 137, at 65.

166. ZIMMER & MORGAN, *supra* note 137, at 65.

167. See DUKE & GROSS, *supra* note 138, at 49.

168. *See id.*

169. *See Ravin v. State*, 537 P.2d 494, 507 (Alaska 1975).

drug, marijuana can be, and is, abused. However, marijuana lacks a large potential for abuse and the rate of long-term frequent users is low.¹⁷⁰ The probable explanation for this fact is that marijuana is not physically addictive, in the sense that even long-time heavy users who subsequently quit experience only very mild physical symptoms of withdrawal.¹⁷¹ In fact, two different pharmacologists recently ranked marijuana as having equal to or less dependence potential than caffeine, and less dependence potential than nicotine, alcohol, heroin, or cocaine.¹⁷² Even when marijuana use does become chronic, an “unhealthy and often unwanted preoccupation with [the] drug” that has a destructive impact on the user’s life is less likely to occur than with the chronic use of most other recreational drugs.¹⁷³ And, according to Lester Grinspoon, “[m]ost people who develop a dependency on mari[j]uana would also be likely to develop other dependencies because of anxiety, depression, or feeling of inadequacy. The original condition is likely to matter more in this regard than the attempt to relieve it by means of the drug.”¹⁷⁴ So, while surely marijuana is a problem for some people, marijuana abuse does not appear to be a problem for society.

C. *Harrison* and *Erickson* Distinguished

A look back at the reasoning by which Alaska courts have permitted the state to fully prohibit cocaine and alcohol confirms that marijuana, based on what researchers know today, does not present a similar danger to the public welfare.¹⁷⁵ *State v. Erickson*,¹⁷⁶ which dealt with cocaine, is distinguishable in that there are no known instances of an acute overdose from marijuana use and the chronic physical and psychological effects of marijuana use are insignificant in comparison with cocaine use. *Harrison v. State*,¹⁷⁷ which allowed a complete prohibition on alcohol, also is distinguished easily because there is no evidence linking marijuana use to the types of social ills associated with alcohol use.¹⁷⁸

Based on what is currently known about marijuana, the state will have a very difficult time proving that marijuana is so harmful that it can be constitutionally proscribed. Today, just as when

170. See ZIMMER & MORGAN, *supra* note 137, at 27.

171. See *id.* at 29; GRINSPOON & BAKALAR, *supra* note 138, at 244.

172. See ZIMMER & MORGAN, *supra* note 137, at 28-29.

173. GRINSPOON & BAKALAR, *supra* note 138, at 244.

174. *Id.* at 244-45.

175. See *supra* notes 155-74 and accompanying text.

176. 574 P.2d 1 (Alaska 1978).

177. 687 P.2d 332 (Alaska Ct. App. 1984).

178. See *id.* at 335.

Ravin was decided, there is little concrete data to support the view that marijuana use creates a substantial danger to the public welfare.¹⁷⁹ The *Ravin* court demanded that if the state is to intrude into the privacy of the home, it must do so armed with definitive knowledge that the intrusion is for the good of the public welfare.¹⁸⁰ There is no consensus among the scientific community that marijuana use even presents much of a health threat to the user, let alone that its private use imposes a clear danger to society as a whole.¹⁸¹ The state cannot meet its burden, and *Ravin* is just as factually valid today as when it was first decided.

VII. POSSIBLE WAYS TO RECONCILE THE CONFLICT?

A. Judicial Process

Despite the fact that the state likely cannot justify prohibiting private marijuana possession, the current version of Alaska Statutes section 11.71.060¹⁸² has not been struck down and still is nominally enforced. The normal channels of the judicial system provide the most desirable way to resolve a serious issue as to a law's constitutionality. Aside from *Alaskans for Privacy v. State*¹⁸³ and *State v. McNeil*,¹⁸⁴ however, there have been no court decisions determining the proper effect of the Initiative. And these decisions have no precedential effect on other courts because they were not appealed.¹⁸⁵

There are a number of possible reasons why the constitutionality of a prosecution under the Initiative has not yet been tested in an appellate court. One reason is that the Alaska court's search and seizure decisions make it difficult to apprehend people who privately grow marijuana.¹⁸⁶ Another reason is that, even if it were

179. See *Ravin*, 537 P.2d at 504.

180. See *id.*

181. See *supra* notes 142-74 and accompanying text.

182. ALASKA STAT. § 11.71.060 (Michie 1996).

183. No. 3AN-91-1746 (D. Alaska Jan. 21, 1992).

184. No. 1KE-93-947 (D. Alaska Oct. 29, 1993).

185. See *Ostrosky v. Alaska*, 913 F.2d 590, 596 (9th Cir. 1990) ("Alaska superior court decisions are not binding on other Alaska superior courts.").

186. See, e.g., *Lloyd v. State*, 914 P.2d 1282 (Alaska Ct. App. 1996) (reversing a conviction for growing marijuana because there was not enough corroborative evidence to support the informant affidavit relied upon to acquire the search warrant); *Carter v. State*, 910 P.2d 619 (Alaska Ct. App. 1996) (reversing a conviction for growing marijuana because neither anonymous tips to the police nor increased electricity bills of the accused established enough probable cause to support the search warrant).

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legally practicable for law enforcement agencies to target private possession of marijuana, the finite amount of resources available to those agencies requires them to prioritize the crimes they choose to investigate vigorously.¹⁸⁷ Even when private possession cases are prosecuted, the usual result is that the defendant ends up accepting a tempting plea bargain.¹⁸⁸ Finally, it is possible that prosecutors and law enforcement officials intentionally are not pressing the issue because they recognize that *Ravin* probably would be upheld.¹⁸⁹

B. Executive Action

Until the current viability of *Ravin* is tested in the courts, the executive branch may not be obligated to enforce the Initiative if it determines that it is unconstitutional. The Office of Legal Counsel to the President of the United States has written an opinion discussing the federal executive branch's options if it is presented with an arguably unconstitutional law.¹⁹⁰ Although not directly applicable to Alaska, the O.L.C. opinion is of interest to the Governor of Alaska if he believes that the Initiative may not be constitutional.

According to the O.L.C. opinion

in serving as the executive created by the Constitution, the President is required to act in accordance with the laws – including the Constitution, which takes precedence over other forms of law. . . . The President should presume that enactments are constitutional. There will be some occasions, however, when a statute appears to conflict with the Constitution. In such cases, the President can and should exercise his independent judgment to determine whether the statute is constitutional.¹⁹¹

If the President, after exercising his independent judgment, determines that a statute is unconstitutional, he should make a prediction as to how the Supreme Court would decide the issue.¹⁹² If he believes the Supreme Court would hold the statute constitutional,

187. See *Mowing the Grass (Alaska Re-Criminalizes Possession of Marijuana)*, TIME, Nov. 19, 1990, at 47 (“Officials say they will not budget much money for [the Voter Initiative’s] enforcement, and supporters of the referendum expect the police to arrest offenders only if they find marijuana in the course of investigating another incident.”).

188. Telephone interview with Cindy Cooper, Assistant Attorney General for Alaska, Criminal Division, Jan. 21, 1998.

189. Interview with William P. Bryson, Attorney for Alaskans for Privacy, Mar. 18, 1998 in Anchorage, Alaska.

190. See 18 U.S. Op. Off. Legal Counsel No. 35 (1994).

191. *Id.* at 2.

192. See *id.*

the President should enforce it despite his personal reservations.¹⁹³ On the other hand, if he “determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.”¹⁹⁴

Using the O.L.C. opinion as a model for how the executive branch of Alaska should treat a potentially unconstitutional law, the Governor should not be required to enforce the law if he personally believes it is inconsistent with the Alaska Constitution and determines that the Alaska Supreme Court would agree. As of yet, the executive branch of Alaska has taken no official view as to the Initiative’s constitutionality.¹⁹⁵ When the Initiative first was proposed, the Alaska Attorney General did observe that, “[b]ecause this amendment could result in the prosecution of an individual for the use or display of marijuana in the home, it may be argued that the measure, if passed, is unconstitutional [because of the Alaska Supreme Court’s opinion in *Ravin*].”¹⁹⁶ However, the Attorney General declined to decide at that time whether the Initiative actually was unconstitutional because “a review of the substantive constitutionality of a bill . . . must await post-enactment litigation.”¹⁹⁷

The Initiative was enacted eight years ago, and the Alaska executive branch still has not issued any further opinion as to its constitutionality. If the executive branch believes that the Initiative is constitutional, the very existence of *Ravin* demands that it issue an opinion explaining why the specific holding in *Ravin* is no longer applicable to marijuana.¹⁹⁸ On the other hand, if the Attorney General’s office believes that the Initiative is unconstitutional, it should issue an opinion to that effect. According to the standards outlined in the O.L.C. opinion, it then may explicitly decline to enforce the Initiative to the extent that it requires an invasion of the privacy of the home.¹⁹⁹

193. *See id.*

194. *Id.*

195. There is precedent in Alaska for the Attorney General’s office to determine that an enacted voter initiative is clearly unconstitutional and should not be enforced. *See* 1983 Alaska Op. Atty. Gen. No. 2 (opining that the “Tundra Rebellion” voter initiative of 1982 should not be enforced because it unconstitutionally delegated ownership of land to the state).

196. 1989 Alaska Op. Atty. Gen. 227.

197. *Id.*

198. Presumably such an opinion would argue that new evidence as to the effects of marijuana demonstrate that *Ravin*’s factual findings are clearly invalid today.

199. *See supra* notes 179-82 and accompanying text.

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C. Legislative Action

The legislature can resolve the situation by re-enacting the previous codification of *Ravin* if it so desires. After two years, the Alaska legislature is free to alter or repeal a voter initiative at its discretion.²⁰⁰ There is recent precedent in Arizona of the state legislature almost immediately revoking an approved voter initiative.²⁰¹ Of course, Alaska voters could resolve the situation by passing a new initiative invalidating the Voter Initiative of 1990. A voter initiative that, among other things, will “unambiguously restore adult Alaskans’ rights to marijuana in accordance with the privacy clause in our state constitution” will appear on the ballot in the 1998 election.²⁰²

VIII. CONCLUSION

Ravin v. State is one of the landmarks in the Alaska Supreme Court’s interpretation of the constitutional privacy amendment passed in 1972. It is also a key decision in Alaska’s rise to Justice Brennan’s challenge to the states to “step into the breach [left by the Supreme Court’s withdrawal of constitutional protection].”²⁰³ Alaska has been one of the states to most successfully make use of its unique identity in interpreting its constitution, and *Ravin* was pivotal to this success.

Clearly, *Ravin* was a politically unpopular decision to many. It thrust perhaps unwanted national controversy on Alaska, and it made some Alaskans morally uncomfortable. Surely, if the justices who decided *Ravin* were in the more politically accountable branches of government, they would have not been so quick to legalize small amounts of marijuana for private use. But, the beauty of the American system of government is that the judicial branch is not accountable to the majority, it is accountable to the law – first and foremost to the Constitution. The constitutional nature of American law is anti-democratic in that it thwarts the strict will of the majority, but this feature of the system was deemed necessary

200. ALASKA CONST. art. XI, § 6.

201. See Shaun McKinnon, *Lawmakers Put Medicinal Pot Law on Hold*, ARIZONA DAILY STAR, April 16, 1997, at 1A (reporting that the Arizona legislature had enacted a law negating the effect of a recently passed voter initiative (Proposition 200) that allowed doctors to prescribe marijuana, L.S.D., and heroin for medicinal use).

202. See H. Thompson Prentzel III, *Marijuana Initiative Makes Moral, Fiscal Sense*, ANCHORAGE DAILY NEWS, Jan. 10, 1998, at B8 (editorializing in favor of a voter initiative legalizing drugs for medicinal purposes).

203. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

by the founders in order to ensure the rights of unpopular minorities. Time and time again the founders' decision has been vindicated as essential to a truly free society. If allowed to succeed, the attempt by the voters to invalidate *Ravin*, while an understandable political maneuver by a group of concerned citizens, would be a potentially dangerous trend. *Ravin* should stand as good law until and unless the Alaska Supreme Court decides otherwise.

Ultimately, the limited actual enforcement of private marijuana possession means both *Ravin* and the Initiative that attempted to invalidate it have a great deal of symbolic value. *Ravin* is a symbol that Alaska should be proud to endorse, a symbol of the value Alaska places on personal autonomy and of the independent manner in which Alaska courts will interpret the Alaska Constitution.

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