ARTICLES

Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation

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This article rebuts recent criticism of efforts by state supreme courts to interpret state constitutional provisions differently than the United States Supreme Court interprets analogous provisions in the United States Constitution. This area of law, sometimes called New Judicial Federalism, has been the subject of considerable comment over the last twenty years. By focusing on equal protection, privacy, religious freedom and access to natural resources, the article examines Alaska's unique constitutional background and independent interpretation. This analysis of Alaskan constitutional rights reveals a viable and active brand of New Judicial Federalism. The article concludes that Alaska's independent approach to state constitutional law is an example of a constitutional discourse that is both uniquely local and nationally valuable.

I. INTRODUCTION

There where the mighty mountains bare their
fangs unto the moon,
There where the sullen sun-dogs glare in the

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snow-bright, bitter noon,
And the glacier-gutted streams sweep down at
the clarion call of June.
There where the livid tundras keep their tryst
with the tranquil snows;
There where the silences are spawned, and the
light of hell-fire flows
Into the bowl of the midnight sky, violet, amber
and rose.
There where the rapids churn and roar, and the
ice-flows bellowing run;
Where the tortured, twisted rivers of blood
rush to the setting sun —
I've packed my kit and I'm going, boys, ere
another day is done. . . .

—Robert W. Service[1]

> Regardless of what they may once have been, Americans are now a people who are so alike from state to state, and whose identity is so much associated with national values and institutions, that the notion of significant local variations in character and identity is just too implausible to take seriously as the basis for a distinct constitutional discourse.
>
> —Professor James A. Gardner[2]

The term "New Judicial Federalism" ("NJF")—also known as the "state law revolution," the "state bill of rights movement" or, more commonly, "state constitutionalism"—describes a trend in state courts to rely on state rather than federal constitutional law to decide cases, particularly cases involving individual rights.[3] This trend has reawakened many state courts to their inherent authority to construe state constitutional rights independently from the United States Constitution.[4] In recent years, a mass of commentary

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1. ROBERT W. SERVICE, *The Heart of the Sourdough, in* THE COMPLETE POEMS OF ROBERT SERVICE 19, 19-20 (1941).

2. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 818 (1992).

3. A state court exercising an independent NJF interpretation of a state constitutional provision is free to reach a conclusion different from the one the United States Supreme Court might reach when interpreting an analogous provision in the United States Constitution. There is no conflict if the federal minimum is enforced. *See, e.g.*, Peter J. Galie, *Other Supreme Court Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731, 732 (1982). This system of law results from the dual sovereignty and national supremacy concepts of American federalism established by the Constitution. *See generally* THE FEDERALIST No. 51 (J. Madison).

4. Galie, *supra* note 3, at 732. Various reasons for this state law revolution have been suggested. Perhaps the most commonly cited "cause" is the conserva-

has accumulated with respect to this area of the law.[5] While not the focus of any in-depth NJF analysis, the Alaska Supreme Court has been recognized for its activist approach to independent application of its state constitution.[6]

In a 1992 *Michigan Law Review* article, James A. Gardner, a professor at Western New England College School of Law, argued that NJF is a failed enterprise that has resulted in "a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements."[7] Professor Gardner reached this conclusion after conduct-

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tism of the Burger-Rehnquist Supreme Court. *See, e.g.*, Gardner, *supra* note 2, at 762. As the Court stopped and even retreated in the area of individual rights, litigants and judges began to examine state constitutions as sources of protection. This is particularly true in the area of positive individual rights. Such rights are more like grants or entitlements than the traditional negative or limiting protection of the Constitution. United States Supreme Court Justice William Brennan encouraged the movement with a 1977 law review article that urged state courts to forge ahead in the protection of individual rights through the use of state constitutional provisions. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *see also* Gardner, *supra* note 2, at 771.

5. *See generally* Saldana v. State, 846 P.2d 604 (Wyoming 1993) (presenting arguments for and against NJF); Shirley S. Abrahamson & Diane S. Gutmann, *The New Federalism: State Constitutions*, 71 JUDICATURE 88 (1987); Brennan, *supra* note 4; Ronald K.L. Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Charles E. Douglas, III, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123 (1978); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993); Yvonne Kaujen, *Reflections on Federalism: Protection Afforded by State Constitutions*, 27 GONZ. L. REV. 1 (1991-92); Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98 (1988); Burt Newborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989); Stewart G. Pollock, *Adequate and Independent Grounds as a Means of Balancing the Relation Between State and Federal Courts*, 63 TEX. L. REV. 972 (1985) (appearing in an NJF symposium issue); James G. Pope, *An Approach to State Constitutional Interpretation*, 24 RUTGERS L.J. 985 (1993); Robert F. Williams, *State Constitutional Law Process*, 24 WM. & MARY L. REV. 169 (1983).

6. *See, e.g.*, Stanley H. Friedelbaum, *The "New" Judicial Federalism*, *in* THE BOOK OF THE STATES 1992-93 247 (1991); Peter J. Galie, *State Constitutional Guarantees and the Alaska Supreme Court: Criminal Procedure Rights and the New Federalism, 1960-1981*, 18 GONZ. L. REV. 221, 223 (1982-83); John Kincaid, *The New Judicial Federalism*, 61 J. ST. GOV'T 163, 165 (Sept.-Oct. 1988); Barry Latzer, *The Hidden Conservativism of the State Court "Revolution"*, 74 JUDICATURE 190, 192 (1991).

7. Gardner, *supra* note 2, at 763. For commentary on Professor Gardner's article, see Roundtable, *Responses to James A. Gardner, The Failed Discourse of*

ing a one-year survey of the decisions of the highest courts in seven selected states. Based on this survey, he also concluded that the primary shortcoming in state constitutional analysis is a general "failure of state courts to develop a coherent discourse of state constitution law—that is, a language in which it is possible for participants in the legal system to make intelligible claims about the meaning of state constitutions."[8]

Professor Gardner's specific criticisms of state constitutional law included charges that state courts have "grudgingly" turned to their own constitutions,[9] that state constitutional decisions do not specify their constitutional bases,[10] that state decisions often simply follow federal decisions and fail to distinguish between state and federal constitutional bases for decisions,[11] and that state constitutional decisions are silent with respect to state constitutional history.[12] In other words, the states simply do not have an independent constitutional discourse. Professor Gardner concluded that "[t]he overwhelming impression left by an examination of state constitutional decisions 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."[13] In contrast to the "impoverished" condition of state constitutional law, Professor Gardner declares that the "federal constitutional discourse is extraordinarily rich."[14]

This article is intended as an Alaskan rebuttal of Professor Gardner's thesis. As an initial matter, his arguments suffer from an inherently flawed methodology. The proposition that a one-year, seven-state survey can render conclusive evidence about a twenty-five year NJF trend in fifty separate jurisdictions strains credulity. Not only does this methodology raise questions of statistical significance, it also reveals a latent assumption that states are basically fungible.

State Constitutionalism, 24 RUTGERS L.J. 927 (1993); David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274 (1992); Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMPLE L. REV. 1153 (1992).

8. Gardner, *supra* note 2, at 763-64.
9. *Id.* at 781.
10. *Id.* at 785.
11. *Id.* at 789.
12. *Id.* at 793.
13. *Id.* at 804.
14. *Id.* at 770.

This methodological flaw is evident in Professor Gardner's choice of seven states to represent the diversity of all fifty states. His conclusion that New York, Massachusetts, Virginia, Louisiana, California, Kansas and New Hampshire can effectively represent all states is surpassed in reductionism only by his assumption that five selected factors can account for all variations among the states.[15] Additionally, it is somewhat incongruous that Professor Gardner specifically rejects analysis of Alaska's constitutional discourse because the state has had insufficient "time necessary to develop a substantial body of constitutional law"[16] while he, at the same time, limits his study to a single year. As Professor Gardner recognizes in his exclusion of Alaska, discourse is, by its very nature, something that occurs over time; it is not something rationally limited to one year. This article will attempt to address this weakness in Gardner's analysis by surveying a single state, in detail, in order to demonstrate at least one clear exception to Professor Gardner's ultimate conclusion that "state constitutional law is . . . marginal to legal life."[17]

By examining Alaska's state constitutional jurisprudence, this article will demonstrate that at least one jurisdiction is distinctive in its community and enjoys a rich constitutional discourse of its own. This analysis will illustrate that NJF is a positive development that is engaged in a reasoned discourse about individual rights in the American system. This article will accomplish this objective by examining four areas of Alaskan constitutional rights law: equal protection, privacy, freedom of religion and natural resource rights. Perhaps after a review of state constitutional interpretation in Alaska, critics of NFJ will reconsider their call for what essentially amounts to the abandonment of federalism as a viable principle of our system of constitutional government.

II. BACKGROUND TO ALASKA AND ITS CONSTITUTION

Alaska is very different from the other forty-nine states. It is a land of vast proportions and contrasts. If superimposed on the continental United States, Alaska would stretch westward from

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15. For Professor Gardner's explanation of his sampling, see Gardner, *supra* note 2, at 779 n.64. His five relevant factors are state size, state age, founding history, constitutional continuity and constitutional text.

16. *Id.*

17. *Id.* at 837. For similar approaches relating to the states of Oregon and Washington, see Schuman, *supra* note 7, and Utter, *supra* note 7, respectively.

Georgia to California and northward from Texas to Minnesota.[18] The temperatures in interior Alaska can range from 100 degrees fahrenheit during the 24-hour days of summer to -80 degrees fahrenheit during the 24-hour nights of winter.[19] The elevation ranges from sea-level to over 20,000 feet on Denali (Mount McKinley).[20] Alaska is not bounded by the continental United States, but rather by Canada to the east, and to the south, west and north by the North Pacific Ocean, the Bering and Chukchi Seas, and the Arctic Ocean, respectively.[21] Approximately one-half million people live on approximately one-half million square miles. The people speak English, Haida, Tlingit, Tsimshian, Aleut and several dialects of Eskimo and Athabascan.[22] Alaskans live primarily either in very small towns or villages—often accessible only by air or water travel—or in one of the two largest cities in the state, Anchorage and Fairbanks. Juneau, a rather remote smaller city in southeast Alaska, is the capital.[23]

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 magnitude as to render suspect Professor Gardner's claim that significant local variation in America is implausible. Alaska's uniqueness, which begins with its physical features and its people, is so pervasive that it permeates its state constitution.

Alaska was purchased from Russia in 1867 for 7.2 million dollars.[24] It was governed as a federal territory until it achieved statehood in 1959.[25] The Constitution of the State of Alaska was drafted in the winter of 1955-56 at a state constitutional convention held at the University of Alaska-Fairbanks campus.[26] The resulting

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18. *See* GERALD A. MCBEATH & THOMAS A. MOREHOUSE, ALASKA POLITICS AND GOVERNMENT 7 (1994); CLAUS-M. NASKE & HERMAN E. SLOTNICK, ALASKA: A HISTORY OF THE 49TH STATE 5 (2d ed. 1987).

19. MCBEATH & MOREHOUSE, *supra* note 18, at 11.

20. *Id.* at 10.

21. *Id.* at 8-9.

22. THE ALASKA ALMANAC, FACTS ABOUT ALASKA 100 (1986).

23. *Id.* at 72.

24. NASKE & SLOTNICK, *supra* note 18, at 60-61.

25. MCBEATH & MOREHOUSE, *supra* note 18, at 29-50.

26. *Id.* at 48. For an analysis and history of the Alaska Constitutional Convention and the resultant Alaska Constitution, see VICTOR FISCHER, ALASKA'S CONSTITUTIONAL CONVENTION (1975); GORDON S. HARRISON, ALASKA'S CONSTITUTION: A CITIZEN'S GUIDE (3d ed. 1992).

document was ratified by the Alaskan electorate in 1956.[27] This constitution reflects the unique Alaskan viewpoint of the territorial drafters, as well as the advice of national experts and the example of the Model State Constitution.[28] The general orientation of the Alaska constitution is toward the future.[29] It envisions a positive governmental role in the development of the vast resources of the state.[30] This orientation stems, in part, from the pre-statehood status of the constitution; it was drafted in hopes of Alaska being admitted as a state. One of the main purposes of the convention was to produce a document that would demonstrate to Congress and the forty-eight states that Alaska was politically mature and able to govern itself.[31] Resulting from this desire to create a modern, workable constitution, the drafters followed the lessons of the constitutional reform movement of the 1930's and opted for a relatively short and simple document which granted positive authority to the legislature and the governor.[32]

The provisions for personal rights protection in the Alaska constitution are primarily contained in article I, entitled Declaration of Rights.[33] While the federal Bill of Rights obviously served as a model for the Declaration of Rights, the drafters consulted both the Model State Constitution and the constitutions of other states. As a result, the Declaration of Rights is not a carbon copy of the federal Bill of Rights. It is also noteworthy that, because of Alaska's status as a federal territory prior to statehood, the federal Bill of Rights was the only constitutional declaration of rights applicable to Alaska before its own constitution.[34]

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27. MCBEATH & MOREHOUSE, *supra* note 18, at 48.

28. HARRISON, *supra* note 26, at 3-7.

29. The delegates came to the convention on a non-partisan basis and generally embraced the goal of writing the best long-term, forward-looking constitution possible. Interview with Judge Seaborn J. Buckalew, Jr., retired Alaska Superior Court Judge, former territorial legislator, former territorial U.S. Attorney and Alaska Constitutional Convention Delegate, in Anchorage, Alaska (July 15, 1994).

30. *Id.*

31. *Id.*

32. *Id.*

33. Article I of the Alaska constitution is set out in full in the Appendix.

34. *See* Rassmussen v. United States, 197 U.S. 516 (1905) (stating that under the treaty with Russia and subsequent congressional legislation, Alaska was incorporated into the United States and the United States Constitution became applicable to the territory of Alaska).

In 1958, shortly after ratification, Professor P. Allan Dionisopoulos of Indiana University surveyed the "new" Alaska constitution.[35] He compared it to the Indiana constitution enacted in 1851 by considering civil rights and social welfare, executive--legislative relations, executive-administrative relations, the judiciary, popular participation, local governments, finance and taxation, and the amending process.[36] Professor Dionisopoulos found that

> [t]he Alaska Constitution is the product of a rugged, frontier community; yet its content fits a modern day, complex, industrial society. It combines the experience of other states with contemporary ideas on constitution-making, tradition with innovation, and the classical with the modern. While certain of its provisions are peculiar to the special situations in Alaska, this basic law may well serve as a model for constitutional revision in older states. Perhaps the Alaska Constitution has most nearly approximated the ideal.[37]

Clearly, the Alaska constitution is not merely a weak copy of the United States Constitution. The Alaska constitution was purposefully "customized" for the Alaskan experience, and it is within this context that the Alaska constitution has been interpreted.

III. INTERPRETATION OF THE ALASKA CONSTITUTION

Early in its existence, and well before the calls for NJF, the Alaska Supreme Court addressed the question of its independent authority to interpret the Alaska constitution. Just ten months after Alaska's courts became fully operational, the state's new supreme court decided *Knudsen v. City of Anchorage*.[38] Knudsen, a driver who lost his license under a city reckless driving ordinance, appealed his conviction by challenging the denial of his demand for

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The Alaska constitution addresses certain rights not covered in the federal constitution. For example, the Alaska constitution covers the right to equal opportunities, ALASKA CONST., art. I, § 1; the right to receive fair and just treatment in legislative hearings, *id.* § 7; special bail rights, *id.* § 11; and protection from debtor's prisons, *id.* § 17. Additionally, certain other areas of personal concern are addressed in separate articles. For instance, education is covered in article VII and the environment is a major topic of article VIII.

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

36. *Id.* at 35.

37. *Id.* at 54.

38. 358 P.2d 375 (Alaska 1960).

a jury trial. The issue on appeal was whether the state constitution's right to a jury trial in article I, section 11 followed federal constitutional practice. The court examined the records of Alaska's constitutional convention in addition to acts passed by Congress and the Alaska territorial legislature relating to the right to a jury trial.[39] The court concluded that the drafters of the state constitution intended that section 11 give Alaskans the same jury trial protection as that afforded by the federal Sixth Amendment, rather than the broader protection available to defendants in Alaska at the turn of the century before there was a territorial legislature.[40]

The question of whether *Knudsen* meant that state constitutional provisions were necessarily to follow the United States Supreme Court's interpretation of analogous federal provisions was answered some nine years later in *Roberts v. State*.[41] *Roberts* involved an appeal of a forgery conviction based on handwriting exemplars taken without the presence of previously appointed defense counsel. The Alaska Supreme Court found a violation of the defendant's constitutional right to counsel under article I, section 11. Declaring federal precedent distinguishable, the court specifically ruled that

> [w]e are not bound in expounding the Alaska Constitution's Declaration of Rights by the decisions of the United States Supreme Court, past or future, which expound identical or closely similar provisions of the United States Constitution. . . . To look only to the United States Supreme Court for constitutional guidance would be an abdication by this court of its constitutional responsibilities.[42]

The court expressly overruled inconsistent portions of *Knudsen* and provided guidance regarding the general right to counsel at a critical stage under the state constitution.[43]

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39. *Id.* at 377-81.

40. *Id.* at 379.

41. 458 P.2d 340 (Alaska 1969).

42. *Id.* at 342.

43. *Id.* at 349-350. There were two strong dissenting opinions in *Roberts*. *Id.* at 349-53 (Nesbett, C.J., dissenting); *id.* at 353-55 (Dimond, J., dissenting). Neither opinion challenged the authority of the court to independently interpret the state's constitution. Both instead agreed that the federal courts should only provide guidance. *Id.* at 349 (Nesbett, C.J., dissenting); *id.* at 355 (Dimond, J., dissenting). In fact, Chief Justice Nesbett, who wrote the earlier *Knudsen* opinion, noted that *Knudsen* never stood for the proposition that federal rulings on similar issues were binding on the state courts. *Knudsen* merely found that the decisions that were of record at the time of the constitutional convention were to be given great

Less than one year after *Roberts*, the Alaska Supreme Court again addressed independent interpretation of the right to jury trial provision of the state constitution. In *Baker v. City of Fairbanks*,[44] after a lengthy examination of the records of the constitutional convention, federal and state court decisions, the Federalist Papers, the Declaration of Independence and *Knudsen*, the court overruled *Knudsen* by holding that the state constitution requires a jury trial upon demand, except in the most minor traffic violation cases.[45]

The *Baker* court specifically recognized that, after *Knudsen* was decided, the United States Supreme Court made the Sixth Amendment provisions relating to jury trials applicable to the states.[46] However, this fact did not preclude the Alaska court from interpreting the rights guaranteed by the Alaska constitution to exceed the protections in the United States Constitution. The court's conclusions provide an apt summary of Alaska's general approach to state constitutional interpretation:

> 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 embedded in our constitutional law.[47]

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weight. This deference would not apply to United States Supreme Court cases decided after the convention. *Id.* at 349-50 (Nesbett, C.J., dissenting).

44. 471 P.2d 386 (Alaska 1970). It is worth noting that although Professor Gardner asserted that NJF is rooted in a response to the mid-1970s jurisprudence of the United States Supreme Court, Gardner, *supra* note 2, at 771, *Roberts* and *Baker* were 1969 and 1970 decisions, respectively.

45. *Baker*, 471 P.2d at 401-02.

46. *Id.* at 387-89 (analyzing Duncan v. Louisiana, 391 U.S. 145 (1968)).

47. *Id.* at 401-02. This standard of interpretation has been praised by commentator Mary Cornelia Porter as a model of independent state judicial reasoning. MARY C. PORTER & G. ALAN TARR, STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 14-15 (1982).

IV. ALASKA'S CONSTITUTIONAL DISCOURSE

In his article, Professor Gardner defines constitutional discourse as "a language and set of conventions that allow a participant in the legal system to make an intelligible claim about the meaning of the constitution."[48] This definition seems limited. In contrast, Webster defines discourse as "the process of proceeding from one judgment to another in a logical sequence . . . the expression of ideas; [especially] formal and orderly expression in speech or writing."[49] This definition emphasizes a well-stated logical analysis which develops over time. In addition, Webster provides that a "discourse" involves a "verbal interchange of ideas."[50] Given the need for an exchange of ideas, Gardner's distinction between federal and state discourse is debilitating. The decisions of all jurisdictions of the American legal system use the same basic language to articulate specific points of law which may vary from jurisdiction to jurisdiction or even from circuit to circuit. The question of whether a discourse exists therefore turns on what is said with this common language.[51] Thus, 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, not just for Alaskans but also for the rest of the nation.

A. Equal Protection

Perhaps the most important aspect of Alaska's departure from federal constitutional analysis comes in equal protection law.

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48. Gardner, *supra* note 2, at 767.

49. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 647 (1981).

50. *Id.*

51. Several commentators have made significant contributions to the Alaskan discourse. For example, attorney Jeffrey Feldman and Professor Peter Galie have written articles detailing Alaska constitutional developments in criminal procedure. *See* Jeffrey M. Feldman, Criminal Procedure in Alaska, 9 UCLA-ALASKA L. REV. 109 (1980); Jeffrey M. Feldman, *Search and Seizure in Alaska: A Comprehensive Review*, 7 UCLA-ALASKA L. REV. 75 (1977); Galie, *supra* note 6. Professors Michael Wise and Stephen Green have written articles about Alaska equal protection and freedom of religion, respectively. Michael B. Wise, *Northern Lights—Equal Protection Analysis in Alaska*, 3 ALASKA L. REV. 1 (1986); Stephen K. Green, *Freedom of Religion in Alaska: Interpreting the Alaska Constitution*, 5 ALASKA L. REV. 237 (1988). For a discussion of Wise's article, see *infra* part IV.A. For an analysis of Green's article, see *infra* part IV.C.

Professor Michael B. Wise's article, *Northern Lights—Equal Protection Analysis in Alaska*,[52] provides a detailed picture of the constitutional discourse concerning Alaska's "sliding-scale" approach to equal protection under the state constitution. Wise points out that the analysis employed by the Alaska Supreme Court stems from dissatisfaction with the development of federal law and follows an approach suggested by Professor Gerald Gunther and Justice Thurgood Marshall.[53] The development of the sliding-scale test demonstrates that the Alaskan constitutional discourse is not static. Rather, this constitutional development in Alaska is a process concerned with finding better ways to resolve complex legal issues.

Historically, federal equal protection analysis languished in disuse until the Warren Court era.[54] The Warren Court eventually consolidated various approaches into a two-tier analysis. If the alleged denial of equal protection involved a protected classification or right, the activity received a high level of scrutiny.[55] If the alleged denial did not involve a protected class or right, the level of review was minimal, asking only if the classification could conceivably be justified by a rational explanation.[56] This two-tier approach received criticism from all sides, some finding the minimal level of review too deferential and others finding the protected rights overly broad and subjective.[57]

In his article, Wise noted that "the Burger Court muddied the waters and obscured the rigid doctrinal lines of the Warren Court's

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52. Wise, *supra* note 51.

53. *Id.* at 9, 17-21, 29.

54. The standard that developed over the years was far from precise. It varied from the test articulated in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), which basically sustained legislative classifications with any conceivable set of facts that would make them reasonable, to the standard outlined in F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920), which held that a classification must be reasonable, not arbitrary, and rest on some grounds with a fair and substantial relationship to the object of the legislation. Later, the Court developed a strict scrutiny standard for suspect classes, such as the racial classification involved in Korematsu v. United States, 323 U.S. 214 (1944), and a strict scrutiny standard for unequal treatment with respect to a basic liberty, such as the right to procreate involved in Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

55. Under the highest level of judicial scrutiny, the Court examined whether a given state action had a "compelling" end that was achieved through means deemed "necessary." *See* Wise, *supra* note 51, at 9.

56. *Id.* at 8.

57. *Id.* at 16-17.

approach."[58] Moreover, Wise argued, "the Court has determined cases without articulating a standard of review and applied a *sui generis* analysis that is neither as weak as rational basis review nor as strong as strict scrutiny. . . ."[59] In some cases, this type of review has been called intermediate or heightened review.[60] This approach has led to basic disarray in the pertinent discourse surrounding federal equal protection law.[61]

The United States Supreme Court has struggled with the middle ground of the two-tier equal protection test. The cases have taken an unpredictable path on such issues as gender, illegitimacy and citizenship status. Wise noted that "the equal protection doctrine of the past quarter century is laden with areas of controversy. Contemporary doctrine in particular is characterized by many starts and many stops, with all too few clear guidelines for enduring policy."[62] Wise described many criticisms of the multi-tier federal approach. In particular, he cited Justice Thurgood Marshall, who was both a persistent critic of the two-tier system and a proponent of an alternative approach, a balanced sliding scale.[63]

In the early years following statehood, Alaska courts followed federal equal protection analysis when adjudicating the state's own constitutional guarantee of equal protection. The first case to use the state constitution's equal protection clause to strike down a

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58. *Id.* at 11.

59. *Id.*

60. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

61. As evidence of this disarray, Professor Wise points to the case of City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). Wise, *supra* note 51, at 13 n.78. In this equal protection case, involving a city's zoning ordinances that essentially excluded retarded individuals from all residential districts in the community, Justice White rejected the intermediate level of scrutiny applied by the Fifth Circuit. *See City of Cleburne*, 473 U.S. at 442. Instead, he found the zoning improper under the rational-basis test. *Id.* at 447-50. The case was decided with five justices concurring in two separate opinions, none of which approved of the test applied by Justice White.

62. Wise, *supra* note 51, at 16.

63. *Id.* For Justice Marshall's own statement of his sliding-scale approach, see Dandridge v. Williams, 397 U.S. 471, 519-30 (1970) (Marshall, J., dissenting). Justice Marshall found fault with the *Dandridge* majority's labeling of the regulation as social and economic and, therefore, governed by the rational-basis level of analysis. He urged the court to use a balancing test because this type of case "simply def[ied] easy characterization in terms of one or the other of these 'tests.'" *Id.* at 520.

statutory provision occurred in 1963.[64] However, beginning in 1973, several cases included footnotes indicating "discontent" with the two-tier test's inflexibility and pointing out, with approval, Professor Gerald Gunther's call for a different approach.[65]

In 1975, the Alaska Supreme Court was still using a single analysis, the two-tiered federal standard. In *Lynden Transport, Inc. v. State*,[66] the court held that an Alaska statute was invalid under both the state and federal constitutions because it discriminated against nonresident motor carriers. However, in a footnote, the court expressed hope for a change at the federal level:

> It has been suggested that there is mounting discontent with the rigid two-tier formulation of the equal protection doctrine, and that the United States Supreme Court is prepared to use the clause more rigorously to invalidate legislation without expansion of "fundamental rights" or "suspect" categories and the concomitant resort to the "strict scrutiny" tests. We are in agreement with the view that the Supreme Court's recent equal protection decisions have shown a tendency toward less speculative, less deferential, more intensified means-to-end inquiry when it is applying the traditional rational basis test and we approve of this development.[67]

The court therefore appeared prepared to wait patiently for movement at the federal level of equal protection discourse.

One year later, however, the Alaska Supreme Court began to establish its own equal protection test in *Isakson v. Rickey*,[68] a case involving a challenge to a limited-entry scheme for Alaska's threatened fisheries. In invalidating the state's classification scheme, the court used a modified rational-basis standard that differed from the federal test by raising "the level of the lower tier from virtual abdication to genuine inquiry."[69]

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64. Leege v. Martin, 379 P.2d 447 (Alaska 1963) (relying on ALASKA CONST. art. I, § 1).

65. *See* Ravin v. State, 537 P.2d 494, 498 (Alaska 1975); Lynden Transport, Inc. v. State, 532 P.2d 700, 706 n.10 (Alaska 1975); State v. Adams, 522 P.2d 1125, 1127 n.12 (Alaska 1974); State v. Wylie, 516 P.2d 142, 145 n.4 (Alaska 1973). Each of the opinions cited Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

66. 532 P.2d 700 (Alaska 1975).

67. *Id.* at 706 n.10.

68. 550 P.2d 359 (Alaska 1976).

69. *Id.* at 363. In reality, the "new" test was only a step away from the federal standard, but was very similar to the old standard from F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). Professor Wise notes that *Isakson* also shows that

True independence in equal protection analysis came to the Alaska Supreme Court in 1978. In *State v. Erickson*,[70] which involved equal protection and privacy challenges to an Alaska statute classifying cocaine as a narcotic, the court declared its own equal protection standard. The court employed the following sliding-scale analysis:

> In cases involving federal constitutional questions, where fundamental rights and suspect categories are at issue, we are bound by the "compelling state interest" standard unless the test is altered by the United States Supreme Court. In applying the Alaska Constitution, however, there is no reason why we cannot use a single test. Such a test will be flexible and dependent upon the importance of the rights involved. Based on the nature of the right, a greater or lesser burden will be placed on the state to show that the classification has a fair and substantial relation to a legitimate governmental objective. Where fundamental rights or suspect categories are involved, the results of this test will be essentially the same as requiring a "compelling state interest"; but, by avoiding outright categorization of fundamental and non-fundamental rights, a more flexible, less result-oriented analysis may be made.[71]

Using the new test, the court sustained the drug classification with respect to the equal protection challenge.[72]

In *Erickson*, the court dealt with a number of complicated issues. Factually, the court weighed a large amount of debated scientific evidence about cocaine and other drugs. The equal protection claim centered on unequal treatment due to an inappropriate categorization of cocaine with other, more dangerous drugs.[73] Additionally, the court finally confronted the problem of having to apply federal equal protection analysis for federal protection while at the same time dealing with separate state protection.[74] The fact that the court found the two-tier analysis inadequate in cases not requiring upper-tier scrutiny led the court to employ a separate sliding scale test for claims under the state constitution.[75]

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the Alaska Supreme Court still was not ready to break with federal equal protection analysis. Wise, *supra* note 51, at 28.

70. 574 P.2d 1 (Alaska 1978).

71. *Id.* at 11-12.

72. *Id.* at 17-18. The privacy challenge in *Erickson* is addressed *infra* at notes 104-08 and accompanying text.

73. *Erickson*, 547 P.2d at 7-10.

74. *Id.* at 11-12.

75. *Id.* at 12.

Subsequent cases refined the equal protection test outlined in *Erickson*. In *State v. Ostrosky*[76] and *Alaska Pacific Assurance Co. v. Brown*,[77] adjustments were made to the new test.[78] Moreover, credit was given to Justices Marshall and White for making suggestions that led to the development of this sliding-scale approach,[79] which now has become the well-established standard for equal protection issues in Alaska.[80]

This summary of the development of Alaska's equal protection standard reflects the care and thought of a state high court seriously attempting to interpret its own constitution in light of the

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76. 667 P.2d 1184 (Alaska 1983).

77. 687 P.2d 264 (Alaska 1984).

78. In *Brown*, Justice Rabinowitz set out the resultant test as follows:

> First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review. Thus, the initial inquiry under article I, section 1 of Alaska's constitution goes to the level of scrutiny. Depending upon the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation.
>
> Second, an examination must be undertaken of the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or at the high end of the scale, that the legislation was motivated by a compelling state interest.
>
> Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken. Once again, the state's burden will differ in accordance with the determination of the level of scrutiny under the first stage of analysis. At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between the means and ends must be closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.

Id. at 269-70 (citation omitted).

79. *Ostrosky*, 667 P.2d at 1193 n.13. Recent cases have emphasized the "sliding scale" test by name. *See, e.g.*, State v. Anthony, 810 P.2d 155, 157 (Alaska 1991).

80. For instance, in State Dept. of Revenue v. Casio, the court declared:

> Analysis under our state equal protection clause is considerably more fluid than under its federal counterpart. Instead of using three levels of scrutiny, we apply a sliding scale under which "[t]he applicable standard of review for a given case is to be determined by the importance of the individual right asserted and by the degree of suspicion with which we view the resultant classification scheme." As the right asserted becomes "more fundamental" or the classification scheme employed becomes "more constitutionally suspect," the challenged law "is subjected to more rigorous scrutiny at a more elevated position on our sliding scale."

858 P.2d 621, 629 (Alaska 1993) (citations omitted).

Alaskan issues presented by the cases it reviews. The resultant method of equal protection analysis is based on a reasoned progression of state court decisions and, at least to some degree, the lack of a coherent approach at the federal level. Moreover, the test has an ideological foundation in Alaskan society's own traditional concerns.[81] Given the shortcomings of federal equal protection analysis and the uniquely Alaskan circumstances informing the Alaska Supreme Court's decisions, interpretive independence has been a natural, and welcome, result.

B. Privacy

Alaska's right to privacy, particularly in the non-criminal context, has undergone development similar to Alaska's equal protection doctrine.[82] In fact, this right to privacy may be one of the most well-known indicators of Alaska's judicial independence. While the right to privacy is now embodied in a specific provision of the state constitution, it was not included in the original Declaration of Rights. Instead, article I, section 22 was added to the constitution in 1972. Prior to 1972, the right to privacy was viewed by most state courts as a matter of federal protection and not routinely addressed at the state level. In the federal courts, however, the concept was not well-defined and was found primarily in the right "to be let alone," the right of marital privacy, the privacy of the home, or some other penumbral definition.[83]

In 1972, the Alaska Supreme Court addressed the privacy issue when it decided a pre-amendment case, *Breese v. Smith.*[84] *Breese* involved a challenge by a student to school hair length regulations. After examining federal privacy protection and various state and federal cases, the court decided not to resolve the case on federal grounds because of the unsettled state of the privacy issue at the federal level. The *Breese* court instead decided that "avoidance of

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81. As noted in an earlier Alaska privacy rights case, these concerns include a desire for the "preservation of maximum individual choice, protection of minority sentiments, and appreciation for divergent lifestyles." Breese v. Smith, 501 P.2d 159, 169 (Alaska 1972).

82. For a ten-year perspective on the development of the right to privacy in Alaska, see 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).

83. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1985).

84. 501 P.2d 159 (Alaska 1972).

the federal thicket [was] the better course,"[85] and struck down the regulations on independent state grounds. Citing a general liberty right under article I, section 1 of the state constitution,[86] and noting the state's duty to open and maintain public schools,[87] the court found that the student had a "fundamental . . . right to select [his] own individual hair style[] without governmental direction."[88] It then determined that the state's interest in maintaining the regulation was insufficiently "compelling" to overcome the student's privacy right.[89]

The *Breese* court examined cases from federal and state courts as well as notes and articles by various commentators.[90] Citing *Roberts v. State*[91] and *Baker v. City of Fairbanks*,[92] the court characterized its decision as a matter of fulfilling its judicial obligation to move forward and develop additional rights under the state constitution without being constrained by federal decisions.[93] *Breese* therefore set the stage for the development of the right to privacy law under the explicit language of section 22.

In 1975 the Alaska Supreme Court decided the first major case under the 1972 privacy amendment. In *Ravin v. State*,[94] the court recognized the fundamental right to privacy in one's home. In reviewing a state statute that prohibited the possession of marijuana by an adult for personal use in the home, the court inquired whether the statute was designed to accomplish a legitimate governmental interest and whether the means chosen bore a close and substantial relationship to that interest.[95]

After an extensive review of the available scientific evidence,[96] the court found that the potential harm was not great

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85. *Id.* at 166.
86. *Id.* at 166-67; *see* ALASKA CONST. art. I, § 1, set forth in the Appendix.
87. *Breese*, 501 P.2d at 174.
88. *Id.* at 169.
89. *Id.* at 174.
90. *See, e.g., id.* at 166 n.26.
91. 458 P.2d 340 (Alaska 1969).
92. 471 P.2d 386 (Alaska 1970).
93. *See Breese*, 501 P.2d at 166-67.
94. 537 P.2d 494 (Alaska 1975).
95. *Id.* at 504.
96. As part of its analysis, the court considered evidence, including the state's justifications that marijuana is a psychoactive drug, it is harmful, heavy use entails a concomitant risk, it is capable of precipitating a psychotic reaction in at least some circumstances and its use adversely affects the user's ability to operate an automobile. *Id.* at 504-11.

enough to show a close and substantial relationship between the state's interest in public welfare and marijuana use in the home.[97] However, the court did not find constitutional protection for the buying or selling of marijuana, the use of marijuana in a public place, or the possession of a large amount of marijuana at home.[98] Furthermore, the court did not hold that the possession or ingestion of marijuana was a fundamental right itself; rather, the court found that the privacy of one's home afforded protection from this type of governmental intrusion.[99]

In his concurring opinion in *Ravin*, Justice Boochever noted that federal privacy law was particularly unsettled and, citing *Baker v. City of Fairbanks*,[100] argued that it was therefore appropriate for the court to use independence and initiative in interpreting the privacy provision of the state constitution.[101] He also urged a broader interpretation than that found under the United States Constitution because, unlike the United States Constitution, "the citizens of Alaska, with their emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution."[102] To achieve such broad protection, Justice

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97. *Id.* at 511.

98. *Id.*

99. *Id.* at 504. In 1990, Alaskans approved an initiative for a new statute recriminalizing the possession of marijuana in a private location. *The 1990 Elections: State by State*, N.Y. TIMES, Nov. 8, 1990, at B9. The resultant statute, *see* ALASKA STAT. § 11.71.060 (Supp. 1994), while not yet before the state supreme court, would probably survive a constitutional challenge on the same grounds as the cocaine regulation in *Erickson*. New evidence as to the dangers of marijuana produced during the initiative drive has changed the balance from that present in 1975, when *Ravin* was decided.

Interestingly, Professor Gardner cites the *Ravin* case and the subsequent 1990 initiative for the proposition that "the Alaskan character for rugged individuality did not hold out for long against the nationwide hardening in attitudes against drug use." Gardner, *supra* note 2, at 828 n.283. Perhaps if Gardner had examined the constitutional development surrounding this issue, he might have seen the case and initiative as part of a lively constitutional discourse rather than a sign of Alaskans' lost individuality.

100. 471 P.2d 386 (Alaska 1970).

101. *See Ravin*, 537 P.2d at 513 (Boochever, J., concurring).

102. *Id.* at 514-15. The *Ravin* majority also noted the unique lifestyle in Alaska:

> Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or continue to live here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our other sister

Boochever argued for the use of "a single flexible test,"[103] which was, in reality, a sliding-scale analysis.

A follow-up case to *Ravin* was decided by the Alaska Supreme Court in 1978. In *State v. Erickson*,[104] the court ruled on whether the ingestion of cocaine in the home was protected by the right to privacy. The court's approach was substantially similar to the sliding-scale test used to address equal protection issues.[105] The test balances the infringing governmental conduct with the privacy interest in question. In *Erickson*, the privacy interest was similar to the one previously addressed in *Ravin* because it involved the use of illicit drugs in the defendant's own home.[106] In *Erickson*, however, the drug in question was cocaine rather than marijuana. The court found the dangers presented by cocaine to exceed those posed by marijuana use.[107] Accordingly, the drug user's privacy interest was outweighed by the societal need to regulate the demonstrated dangers of cocaine.[108]

In the area of informational privacy, the Alaska Supreme Court has also employed a balancing test that appears to be yet another form of the sliding-scale standard. For example, in the 1977 case of *Falcon v. Alaska Public Offices Commission*,[109] a doctor challenged the requirement that he, as a member of a school board, had to release a list of the names of his patients to the commission. The court found that, while the doctor did not have a personal privacy stake in the list, the patients did.[110] The court balanced the state's interest in promoting fair and honest govern-

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states.

Id. at 504 (majority opinion).

103. *Id.* at 515 (Boochever, J., concurring).

104. 574 P.2d 1 (Alaska 1978).

105. *See supra* part IV.A.

106. *See Erickson*, 574 P.2d at 21.

107. *Id.* at 21-22.

108. While the discourse regarding the standards for equal protection and privacy claims has been complicated by cases raising both issues, the standards that have emerged are very similar, that is, a balancing test in both instances. The standard for equal protection claims as articulated in Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269-70 (Alaska 1984), is the substantial equivalent of the privacy test laid out in *Erickson*, namely, "[w]here the right to privacy is manifested in terms of interests more squarely within personal autonomy, the balance requires a heavier burden on the State to sustain the legislation in light of the right involved." *Erickson*, 574 P.2d at 22 n.144.

109. 570 P.2d 469 (Alaska 1977).

110. *See id.* at 478-79.

ment with the patients' interest in concealing their identity and held that, until the state's means to its valid purpose provided some form of screening, the regulation must be suspended.[111] Moreover, in more recent cases involving information and privacy, the court has cited the *Falcon* balancing approach in applying a "compelling interest" test. The test applied in these privacy cases, however, is not the old two-prong test, but rather reflects a balancing approach as used in *Falcon*.[112]

Privacy law in Alaska is still developing. With respect to privacy in the home, a balancing or sliding-scale type of test is fairly well established. Nevertheless, in areas such as informational privacy, the court appears to be working to develop a balancing analysis.[113] Alaska's discourse on the right to privacy reflects both the state's independence and its unique tradition of emphasizing individual liberties. Alaska's discourse concerning privacy

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111. *Id.* at 480.

112. *See* Messerli v. State, 626 P.2d 81 (Alaska 1980) (challenging campaign disclosure law on privacy, free speech and free press grounds). With this combination of rights, the *Messerli* court applied a strict compelling interest standard on the state's interest in general. The court held that the disclosures could be required only if adequate procedural safeguards were established. In discussing privacy, the court cited *Breese* for the proposition that the right to privacy is not absolute. *Id.* at 84. Given the combination of rights involved, *Messerli* can be viewed to illustrate balancing at the upper end or compelling interest level of review. The case also illustrates several areas where the Alaska constitution provides broader protections than the United States Constitution. *Id.* at 83.

State v. Oliver, 636 P.2d 1156 (Alaska 1981) also illustrates the court's application of a compelling interest test by balancing the privacy interests of a tax protestor claiming that a state requirement for the filing of a W-2 form violated the state right to privacy. The *Oliver* court noted that the information was neither highly sensitive nor intended to be kept confidential, and the court therefore concluded that the state's interest outweighed the protestor's. *Id.* at 1167-68. The court used language similar to that found in *Falcon* regarding the balancing of interests. *Id.* at 1167.

113. Criminal procedure as well as search and seizure law are related to the privacy issue. Both these areas of Alaska law are developing separately from the privacy issues discussed above. However, it is noteworthy for this discussion that even in the criminal context, the Alaska Supreme Court has used section 22 to exclude a warrantless wireless recording, even though such a recording would be admissible under the federal constitution. State v. Glass, 583 P.2d 872 (Alaska 1978). In doing so, the court stated that section 22 "affords broader protection than the penumbral right inferred from other [federal and state] constitutional provisions. Were that not the case, there would have been no need to amend the constitution." *Id.* at 879 (footnotes omitted).

rights has involved not only an examination of the right itself but also the development of the test for judicial evaluation of the right. In cultivating this discourse, Alaska exemplifies the essence of NJF as well as the benefits of departing from the federal path.

C. Freedom of Religion

Freedom of religion is an important and illuminating area of Alaska's constitutional jurisprudence. As described in Professor Steven K. Green's 1988 article in the *Alaska Law Review*, *Freedom of Religion in Alaska: Interpreting the Alaska Constitution*,[114] the constitutional discourse regarding religious freedom has developed on two primary fronts. First, the Alaska Supreme Court has interpreted the constitution's "free exercise" clause[115] broadly, thus affording a high degree of protection. In contrast, a more restrictive view is evident under the "establishment" clause.[116] The role of religion in Alaska is also mentioned in other parts of the state constitution. For example, the preamble to the constitution proclaims gratitude to God and states that one purpose of the constitution is "to secure and transmit to succeeding generations the heritage of political, civil and religious liberty within the Union of States."[117]

The free exercise standard in Alaska was enunciated in *Frank v. State*,[118] a case involving some uniquely Alaskan facts. Following the death of an Athabascan native in a central Alaskan village, preparations were made by the villagers for a funeral potlatch.[119] Carlos Frank and other villagers formed hunting parties for the purpose of taking a moose for the potlatch. One cow moose was taken and Frank assisted in bringing it to the village. At the time of the taking, moose were out of season. Moreover, there was no season at all for cow moose that year. Frank admitted his part in the moose-taking, claimed that the game regulations were an

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114. Green, *supra* note 51 (providing an in-depth view of Alaskan freedom of religion in a constitutional context).

115. ALASKA CONST. art. I, § 4.

116. *Id.*

117. *Id.* pmbl.

118. 604 P.2d 1068 (Alaska 1979).

119. The funeral potlatch is a traditional "ceremony of several days' duration culminating in a feast eaten after burial of the deceased, which is shared by members of the village and others who come from sometimes distant locations." *Id.* at 1069. Burial is delayed until the participants can gather. *Id.*

abridgment of his freedom of religion, but was nonetheless convicted.[120]

The Alaska Supreme Court reversed Frank's conviction, finding first that article I, section 4 of the state constitution and the First Amendment of the United States Constitution protected Frank's conduct.[121] The court further found that the state failed to demonstrate reasons that justified prohibiting Frank's conduct in light of these protections.[122] The court found that the freedom to believe is absolute and that the freedom to act on one's religious beliefs may be controlled by the state only on the basis of a compelling state interest.[123] While the decision discussed and, to some degree, incorporated federal First Amendment analysis, the court placed great weight on the specifics of the Alaskan way of life, such as Athabascan customs and the tradition of hunting regulation.[124]

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120. *Id.*

121. *Id.* at 1071-73.

122. *Id.* at 1073-75. This decision was based on agreement with the United States Supreme Court's standard for exempting religious activities from generally applicable laws as outlined in Wisconsin v. Yoder, 406 U.S. 205 (1972). The *Yoder* test requires that (1) religion is involved, (2) the conduct is religiously based and (3) the claimant is sincere. *Id.* at 215-16.

123. *Frank*, 604 P.2d at 1070, 1073. The compelling state interest must rise to the level of protection from a "'substantial threat to public safety, peace or order.'" *Id.* at 1070 (quoting Sherbert v. Verner, 374 U.S. 398, 403 (1963)).

124. While the court noted no absolute religious right other than the right to hold the belief itself, it reviewed the extensive record regarding the Athabascan beliefs and, specifically, the funeral potlatch. *Id.* at 1071-73. The court found that the facts of the moose hunt in Frank's case met the three prongs of the *Yoder* test. In particular, the court noted that the trial court's finding that the moose meat was not essential was subject to question. Likening the moose meat to the wine and wafer of Christian sacraments, the court found that absolute necessity was not the standard to be followed. *Id.* at 1072. A deeply rooted religious belief was sufficient to bring a practice within the protection of the free exercise clause. *Id.* at 1072-73. The court also noted that "[t]he determination of orthodoxy is not the business of a secular court." *Id.* at 1073 (citations omitted).

The court then examined the interests claimed by the state. The game resources of Alaska were recognized as valuable and unique, such that the state had an interest in a healthy moose population. *Id.* However, the court looked at whether an exemption for Frank's activity would cause this interest to suffer and noted that the state did not argue that a religious exception would result in the taking of a biologically significant number of moose. *Id.* at 1073-74.

The court also rejected the state's claim that an exemption would result in widespread civil disobedience regarding game laws because of the sensitivity of game allocation in the state. The court found this argument too speculative to

Frank signifies that the Alaskan right to the free exercise of religion has the weight to withstand even the challenge of an important government interest. This is confirmed by subsequent decisions. For example, the court has ruled that an employee cannot be forced to pay union dues if such payment violates the employee's religious beliefs.[125] The court reasoned that the employee should not be fired but rather should be allowed to remit the dues amount to a charity.[126] The free exercise clause also prevents the government from discriminating because of religious beliefs.[127]

On the other hand, as pointed out in *Frank*, the right to religious practice is not absolute under the Alaskan constitution. In *Seward Chapel, Inc. v. City of Seward*,[128] zoning ordinances forbidding the operation of a school on church property were upheld because the school was not entitled to an exemption to a facially neutral law. As noted by Professor Green, the key to this decision was the fact that the desire to operate the school was not based on a religious tenet but rather on convenience and economic concerns.[129] The court therefore found that the zoning ordinance was reasonable and not an infringement on the freedom of religion.[130] In contrast, Green observed, recent federal cases

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constrain the freedom of religion. *Id.* It also rejected the state's claim that an exemption would amount to the establishment of a religion in contravention of the establishment clauses of the federal and state constitutions. The court held that the purpose of these clauses is to prevent state sponsorship, financial support and active involvement in religious matters. An exemption for funeral moose hunts, in the court's view, did not rise to that level. *Id.* at 1074-75. Citing regulations from other states with religious accommodations as examples, the court suggested that the state could carefully design regulations to accommodate the state's game management and other concerns without infringing on religious freedoms. *Id.* at 1075.

125. Wonzell v. Alaska Wood Products, Inc., 601 P. 2d 584, 585 (Alaska 1979).

126. *Id.* at 585.

127. In 1968, the Alaska Supreme Court ruled that belief in a supreme being is not required for competency of a witness at trial. Flores v. State, 443 P.2d 73, 77-78 (Alaska 1968). The Alaska Supreme Court has also held that the consideration of the mother's religious beliefs in a child custody case would impermissibly violate her right to free exercise of religion. Johnson v. Johnson, 504 P.2d 71 (Alaska 1977).

128. 655 P.2d 1293 (Alaska 1982).

129. *See* Green, *supra* note 51, at 248.

130. *Seward Chapel*, 655 P.2d at 1302; *see also* Hearning v. Eason, 739 P.2d 167 (Alaska 1987). The *Hearning* court held that the Alaska Nonprofit Corporation Act applied to a dispute over the tenure of a Baptist minister in Fairbanks,

demonstrate that the freedom to practice one's religion may be more limited under the federal constitution than under the Alaska constitution.[131]

The state establishment clause has been the source of litigation in several contexts. The main area of dispute has been aid to sectarian institutions. Another contentious area is that of governmental favoritism. While not part of the Declaration of Rights, two other provisions of the Alaska constitution are often considered in conjunction with establishment clause questions. The first prohibits direct benefits to religion;[132] the second prohibits tax money or appropriations from being used in any way other than for a public purpose.[133]

The first case addressing the issue of aid to religion was decided in 1961, not long after statehood. In *Matthews v. Quinton*,[134] the Alaska Supreme Court specifically rejected the federal approach[135] and found that the state establishment clause prohibited state-funded transportation for parochial school students.[136]

Alaska. The issue was whether the Act, which allowed proxy voting, applied to church business meetings in the absence of a contrary proxy provision in the church bylaws. The court found that the church had failed to support its claim that proxy voting violated its religious rules. *Id.* at 169. The court's decision appears similar to the neutral principles approach followed in federal courts. *See* Green, *supra* note 51, at 249. Most recently, the Alaska Supreme Court held that a landlord's religious views regarding marriage were not protected by the state freedom of religion clause to the extent that the landlord was not permitted to discriminate against unmarried tenants. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994).

131. *See* Green, *supra* note 51, at 258 n.9 (citing O'Lone v. Shabazz, 482 U.S. 342 (1987) (finding that freedom of religion does not require special Islamic worshipping privileges in state prisons)); *see also* Employment Div., Or. Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (refusing to extend federal constitutional protection to the religious use of peyote by American Indians); Lyng v. Northwest Indian Cemetery Protection Ass'n, 485 U.S. 439 (1988) (denying a religious freedom claim that sought to prevent logging on Indian burial grounds).

132. *See* ALASKA CONST. art. VII, § 1.

133. *See id.* art. IX, § 6.

134. 362 P.2d 932 (Alaska 1961).

135. The federal approach to aid to religious schools is contained in Everson v. Board of Educ., 330 U.S. 1 (1947).

136. *Matthews*, 362 P.2d at 942-43. Interestingly, this case arose when a student at a parochial school, who had been receiving free transportation under a territorial statute, brought suit to force the continued practice when local officials refused to provide the free transportation after statehood. *Id.* at 933-34. The Alaska Supreme Court found that the transportation was a direct benefit to the

Professor Green pointed out that two years later the court relaxed its interpretation.[137] In a decision written by Justice Dimond, the dissenter in *Matthews*, the Alaska Supreme Court held that a hospital building erected with federal, state and local funds could be leased for ten years at one dollar per year to a non-profit religious corporation.[138] The court looked at the arrangement as a simple agreement with a charitable corporation designed to serve the public interest. The fact that the charity was religious in orientation did not change the service to the public.[139] This decision suggested a more accommodating approach to the public purpose aspect of the establishment issue.

This suggestion, however, did not precipitate a movement toward relaxing the separation between church and state in Alaska. In *Sheldon Jackson College v. State*,[140] the court set up a four-part test to assist in clarifying the hazy line between direct and indirect benefits. The test involved (1) the breadth of class benefitted, (2) the nature of the use of the funds, (3) the magnitude of the religious benefit and (4) whether the program merely acted as a channel for the religious organization.[141] The tuition assistance program at Sheldon Jackson College, a private school, failed on all counts and was rejected by the court as violative of the direct benefit provision of the state constitution.[142]

The Alaska Supreme Court addressed the issue of governmental promotion of, or detrimental action toward, a particular religion in a 1979 child custody dispute. In *Bonjour v. Bonjour*,[143] the court ruled that the awarding of custody to a father solely because of religious beliefs was impermissible under the establishment clause.[144] According to the court, trial courts must remain strictly neutral as to a child's religious needs. This result paralleled the caution against court involvement in determining orthodoxy noted earlier in *Frank v. State*.[145]

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parochial school and that the activity was not for a public purpose. *Id.* at 940-41.

137. Green, *supra* note 51, at 250.

138. Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963).

139. *Id.* at 724.

140. 599 P.2d 127 (Alaska 1979).

141. *Id.* at 130.

142. *Id.* at 131-32.

143. 592 P.2d 1233 (Alaska 1979).

144. *Id.* at 1241-44.

145. 604 P.2d 1068 (Alaska 1979).

Finally, religion presents another related issue under the Alaska constitution. Unlike the federal and many state constitutions, Alaska's constitution mandates a tax exemption for religious property and specifically grants the legislature broad powers in defining exempt entities.[146] Many cases in this area involve application of the legislature's requirement that the property be used exclusively for a religious purpose. For example, the court held that a church-owned radio station that sold some commercial air time did not qualify under the exclusive-use requirement even though profits were used for church purposes.[147] The requirements for this tax exemption are therefore strictly construed by the court and involve some consideration of the establishment clause analysis.[148]

In summary, the Alaska Supreme Court has, on the one hand, given the state free exercise clause a broad reading. The standard set in *Frank*, originally based on the court's reading of both state and federal constitutional provisions, provides strict protection for the exercise of religion. This protective interpretation has continued even in light of less protective First Amendment decisions by the United States Supreme Court. In contrast, the Alaska Supreme Court has ruled against assistance to religion under a rather strict interpretation of the establishment clause. Assistance that the federal courts would generally allow has been rejected on more than one occasion. Additionally, in its tax exemption rulings the Alaska Supreme Court has narrowly construed the exemption when it is used for religious purposes. Taken together, these interpretations evidence a clear and consistent stand for the separation of church and state in the Alaskan discourse on religious freedom.

While the Alaska Supreme Court frequently cites federal cases, the Alaskan discourse is Alaska-centered and not bound by the federal approach, an approach in a well-documented state of

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146. *See* ALASKA CONST. art IX, § 4.

147. Evangelical Covenant Church of Am. v. Nome, 394 P.2d 882 (Alaska 1964).

148. *See* Green, *supra* note 51, at 254-57. In Greater Anchorage Area Borough v. Sisters of Charity of House of Providence, 553 P.2d 467 (Alaska 1976), the court established the general standard to be applied in evaluating tax exemption cases, namely, (1) that the exemption is narrowly construed, (2) that the taxpayer has the burden and the exemption is not automatic but dependent on an affirmative showing, and (3) that both the actual use and the owner's use are considered in the exclusive use determination. *Id.* at 469-70.

disarray.[149] Alaska's example reflects a constitutional protection for religion that is consistently based on the separation of the state from any religion. This consistency is in sharp contrast to the flounderings of the federal courts. Alaska's independence in the area of religious freedom may well provide future guidance on issues such as school prayer and financing that continue to loom on the nation's horizon.

As Professor Green points out, religious rights and diversity are important traditions in Alaska.[150] This is seen in the constitutional discourse on the Alaskan freedom of religion. Green's comments summarize the results of this discourse:

> Through these decisions, the Alaska court has guaranteed the right of people to practice their beliefs, religious or otherwise, free from government intrusion or oversight. Religious organizations are free to proselytize while disbelievers are spared the burden of adhering to a particular system of belief. Furthermore, abstaining from supporting or endorsing religion, government allows religion to flourish on its own. This is what Thomas Jefferson intended when he wrote that "religion is a matter which lies solely between man and his God."[151]

D. Natural Resource Rights[152]

Article VIII of the Alaska constitution, entitled Natural Resources, is unique among state and federal constitutions. This article was born out of the realization by those at the 1956 Alaska Constitutional Convention that the state's future would depend on the successful development of all of its natural resources.[153] Article VIII is not only long and detailed, but definitely pro-development in orientation. However, the convention delegates were also concerned with ensuring that development was for the long-term benefit of Alaska's people, in essence viewing natural

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149. As Professor Mark Tushnet confirms in his thoughtful book on interpretation of the United States Constitution, including the disarray surrounding the freedom of religion at that level, "contemporary constitutional law just does not know how to handle problems of religion." MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 248 (1988).

150. Green, *supra* note 51, at 237.

151. *Id.* at 260 (citation omitted).

152. Much of the following discussion parallels the analysis in Stephen M. White, *"Equal Access" to Alaska's Fish and Wildlife*, 11 ALASKA L. REV. 277 (1994).

153. *See* FISCHER, *supra* note 26, at 129-30.

resources as a public trust.[154] These two concerns are reflected in several sections of article VIII.[155] Given the importance of natural resources to the state and the resultant constitutional embodiment of these concerns, it is not surprising that the use and protection of natural resources has become a significant part of Alaska's constitutional discourse. This is particularly true of recent decisions by the Alaska Supreme Court. This discourse has taken

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154. *See* HARRISON, *supra* note 26, at 150. E.L. ("Bob") Bartlett, Alaska's pre-statehood delegate to Congress, delivered the keynote address at the opening of the Alaska Constitutional Convention on November 8, 1955. In his address, Bartlett urged the delegates to address the natural resources of Alaska because they would be "writ[ing] on a clean slate in the field of resources policy . . . [and, therefore, they had] an opportunity to establish resources policy geared to the growth of a magnificent economy and the welfare of a people." FISCHER, *supra* note 26, at 26 (quoting Alaska Legislative Council, Alaska Constitutional Convention Proceedings, Part 6, Appendix II (1965)).

155. Article VIII provides, in pertinent part:

> *Section 1. Statement of Policy*
> It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.
> *Section 2. General Authority*
> The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the state, including land and waters, for the maximum benefit of its people.
> *Section 3. Common Use*
> Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.
> *Section 4. Sustained Yield*
> Fish, forests, wildlife, grasslands and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustainable yield principle, subject to preferences among beneficial uses.
> . . .
> *Section 15. No Exclusive Right of Fishery*
> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.
> *Section 16. Protection of Rights*
> No person shall be involuntarily divested of his right to the use of waters, his interest in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law.
> *Section 17. Uniform Application*
> Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

ALASKA CONST. art. VIII., §§ 1-4, 15-17.

place largely in a vacuum at the federal constitutional level and has centered primarily on the unique characteristics of the Alaska constitution.

With respect to the basic thrust of article VIII, the Alaska Supreme Court addressed the seeming contradiction between development and conservation in the 1981 case of *Kenai Peninsula Fisherman's Cooperative Ass'n v. State*.[156] In *Kenai Peninsula*, the court ruled that the terms "conserving" and "developing" both embody concepts of utilization of resources.[157] The court's definition attempted to provide compatibility in viewing conservation as controlled utilization that is designed to prevent exploitation, destruction or neglect and, at the same time, viewing development as management to make a resource available for use.[158]

In *Alaska Fish Spotters Ass'n v. State Department of Fish & Game*,[159] the Alaska Supreme Court further developed this area of constitutional discourse when it reviewed a claim by aerial fish spotters that state regulations violated their constitutional rights under article VIII. Specifically, the fish spotters claimed that the ban violated section 3's common use rights, section 15's no exclusive use right, section 17's uniform application clause, and article I, section 1's equal protection clause. The court rejected the plaintiff's common use claim based on article VIII, section 2's authority to conserve the natural resources of Alaska.[160] It also rejected the remainder of the claims, stating that the regulation was applicable to all citizens and did not create an exclusive use or a special privilege.[161]

Highlighting the importance of Alaska's unique constitutional development, the three sections of article VIII examined in *Alaska Fish Spotters Ass'n* are collectively known as the natural resource "equal access clauses."[162] These provisions are frequently discussed together, especially when examining proper resource management or distributing the "preferences among beneficial uses" noted in article VIII, section 4.[163] Accordingly, much of the

156. 628 P.2d 897 (1981).
157. *Id.* at 903.
158. *Id.*
159. 838 P.2d 798 (Alaska 1992).
160. *Id.* at 802.
161. *Id.* at 803-04.
162. White, *supra* note 152, at 277.
163. *See, e.g.*, Tongass Sport Fishing Ass'n v. State, 866 P.2d 1314, 1318 (Alaska 1994) (upholding a regulation allocating the number of chinook salmon harvested

constitutional discourse relating to natural resources involves allocation schemes intended to balance natural resource use and conservation.

An example of a recent attempt to strike this balance came in *Owsichek v. State Guide Licensing and Control Board.*[164] *Owsichek* involved a game management scheme in which a limited number of guides would be granted exclusive licenses to lead hunting expeditions in designated "exclusive guide areas."[165] The Alaska Supreme Court determined that the scheme struck an impermissible balance between resource use and conservation by running afoul of the "anti-monopoly" spirit of the common use clause in article VIII, section 3.[166] The court indicated that resources could permissibly be allocated and controlled;[167] however, any allocation scheme must be consistent with the common law principles constitutionalized in article VIII which "impos[e] upon the state a public trust duty with regard to the management of fish, wildlife and waters."[168]

Other types of resource allocation schemes have been reviewed and approved under article VIII. For example, allocation of salmon between commercial interests and sport fishermen was upheld in *Kenai Peninsula.*[169] In addition, fishing regulations affecting gear types and participation in different fisheries have been challenged under the natural resources equal access clauses.[170] The Alaska Supreme Court upheld such regulatory

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by commercial and sport fishers as not violative of the equal access clauses because the mandate of the Board of Fisheries was a "managed utilization" of resources, which includes the ability to allocate resources among beneficial uses).

164. 763 P.2d 488 (Alaska 1988).

165. *Id.* at 489.

166. *Id.* at 496.

167. *Id.* at 492.

168. *Id.* at 493.

169. 628 P.2d 897, 899 (Alaska 1981).

170. Natural resource management schemes that limit the number of participants are commonly used in Alaska. However, such schemes were not considered constitutional under the original language of article VIII, section 15. State v. Ostrosky, 667 P.2d 1184, 1189 (Alaska 1983). In 1972 an amendment to the state constitution added to section 15 the current second sentence, which authorizes limited-entry types of management. *Id.* at 1188. An effort to repeal the law implementing the amendment failed in 1976. In 1983 the law survived constitutional scrutiny. *Id.* at 1190.

schemes in *Meier v. State Board of Fisheries*[171] and *State v. Herbert.*[172] Finally, in *Gilbert v. State Department of Fish & Game*,[173] different catch allocations for neighboring districts were found permissible under the equal access provisions because the districts, while similar in location, were biologically not similarly situated.[174]

A 1994 article by Stephen M. White in the *Alaska Law Review*[175] explored the development of the constitutional discourse relating to the three natural resource equal access sections. Mr. White's analysis, which detailed the judicial development in this important area of Alaska law, reached a conclusion with a familiar theme: "The equal access clauses are unique to Alaska's constitution and . . . [are] based on established, historic principles arising under the public trust doctrine, pre-statehood fish and wildlife management policy and equal protection analysis."[176]

Invariably, the discourse regarding the Alaska constitution turns to Alaska itself. Without a functional NJF approach, essential elements of Alaskan life would be lost in the process of constitutional interpretation. Article VIII reflects a unique aspect of Alaska—its natural resources and the concern of Alaskans for resource conservation and development. This concern for the natural resources of Alaska is reflected in Alaskan constitutional discourse.

E. Alaska's Discourse and Professor Gardner's Criticism

To a large degree, Professor Gardner's criticism of state constitutional discourse centers on the linkage between state and federal constitutional jurisprudence.[177] He claims that the state courts have turned to their own constitutions grudgingly and with little enthusiasm for specifying independent state constitutional

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171. 739 P.2d 172, 175 (Alaska 1987) (upholding a regulation requiring salmon fishermen in the Bristol Bay area who wished to transfer from one district to another to register in the new district at least 48 hours before transferring and cease fishing during that 48-hour period).

172. 803 P.2d 863, 867 (Alaska 1990) (upholding a regulation creating "super-exclusive" use fisheries and preventing fishermen from operating in more than one such fishery).

173. 803 P.2d 391 (Alaska 1990).

174. *Id.* at 399-400.

175. White, *supra* note 152.

176. *Id.* at 299.

177. *See* Gardner, *supra* note 2, at 804.

bases for their decisions.[178] Professor Gardner's chief criticism, therefore, is that the states are not really independent constitutional actors. This criticism misses the mark with respect to Alaska.

While it is true that the Alaska cases reviewed herein have generally considered federal law as a starting point for constitutional adjudications, for a number of reasons this approach is neither surprising nor debilitating to a valid constitutional discourse. First, in most of these cases, the litigants are entitled to both federal and state constitutional protections. This is particularly true in the equal protection, privacy and freedom of religion contexts. The court necessarily considers both constitutional levels because, to one extent or another, both constitutions address these claims. However, this in no way renders the resultant discourse any less legitimate. Quite to the contrary, the Alaskan discourse reflects the complexity of constitutional law in a federal system.

The interplay between state and federal constitutional texts in equal protection, privacy and freedom of religion cases contrasts with the constitutional analysis of natural resources issues. The lack of discussion of federal constitutional matters in the natural resources area reflects the fact that resource matters are not addressed at the federal level in any way similar to other individual rights concerns. A state such as Alaska will therefore generally decide resources issues without resorting to federal constitutional law.

Alaska also has a rather unique history in that, in its territorial days, the federal Bill of Rights was fully applicable.[179] Therefore, part of Alaska's constitutional history has always been federal. On the other hand, when Alaskans drafted their own constitution it was not a carbon copy of the federal version. The early constitutional interpretation cases discussed above[180] examined the role of federal constitutional history in the interpretation of the state constitution. The clear result was an approach that considered federal constitutional law, yet understood it as distinct from state constitutional law.

Another significant factor noted in Alaska's state constitutional discourse is the disarray of federal law in several significant areas that has necessitated reliance on state constitutional analysis. The

178. *Id.* at 781-94.
179. *See supra* note 34 and accompanying text.
180. *See supra* part III.

federal two-tiered equal protection test is a prime example of federal protection becoming mired in an approach that has been the subject of criticism and dissent.[181] While Professor Gardner might challenge the Alaska sliding-scale test as merely an opportunistic, results-oriented adoption of Justice Marshall's views of equal protection jurisprudence, quite the opposite is true. Review of the discourse associated with this test reveals a long process of development. The ultimate catalyst for Alaska's independent equal protection test was the need for a method of protecting interests that were not necessarily fundamental at the federal level but, nonetheless, valued and important in Alaska. It is perhaps particularly significant that several of the cases crucial to the development of Alaska's equal protection approach, of which *Isakson v. Rickey*[182] and *State v. Ostrosky*[183] are examples, involved natural resources.

Similarly, Alaska's right to privacy has progressed from rejecting the "federal thicket" in *Breese v Smith*, to recognizing an Alaskan liberty right to be "let alone," to the adoption of a specific right to privacy in the Alaska Constitution. As with the equal protection cases, the Alaska right to privacy is applied through a balancing of the interests involved in any particular case. Also, as seen in *Frank v. State*,[184] Alaska's discourse regarding the state freedom of religion begins with the First Amendment. However, as federal law moves away from a particular point, state law need not necessarily follow. A state may begin with a federally described test and use it to interpret independent state constitutional principles.

These cases illustrate that Alaska, far from grudgingly, has actively adopted its own way of interpreting its constitution. Part of that method has been to build on the federal discourse that is undeniably part of its own unique constitutional history. Professor Gardner may be correct in making two particular criticisms of NJF. First, state courts appear to be remiss in failing to delineate clearly the basis of their decisions.[185] The *Erickson* case, with its interplay of equal protection and privacy, is an example of difficulty in this area. Second, courts sometimes do not designate whether the

181. *See supra* notes 57-63 and accompanying text.
182. 550 P.2d 359 (Alaska 1976).
183. 667 P.2d 1184 (Alaska 1983).
184. 604 P.2d 1068 (Alaska 1979).
185. *See* Gardner, *supra* note 2, at 785.

basis for a particular decision is derived from federal or state constitutional protections.[186] *Frank*, for example, could be clearer in this regard. However, on the main, Alaska's discourse has clearly illustrated an early willingness to approach state constitutional interpretation independently. Perfection is not required; instead, progress and development are the goals of discourse.[187]

V. CONCLUSION

The New Judicial Federalism is alive and well in Alaska. While this survey covers only four areas of Alaska law governing individual rights, these areas clearly demonstrate that the Alaska Supreme Court has, for some time, been dedicated to a principled discourse focused on the protection of individual rights under the state constitution. The development of independent standards in these areas is a clear example of the results of an ongoing discourse. Moreover, these results have been achieved through a discourse that is in many ways rather young. After all, Alaska has only been a state for less than forty years.

Since Alaska's recent past is that of a federal territory, it is natural that federal decisions are initially referenced for guidance in most areas of the law. Additionally, the supremacy of federal law necessitates some inquiry into whether any federal provisions apply. However, the Alaska Supreme Court has never shied away from referring to a wide variety of sources for guidance in reaching its decisions. Instead, the law of other states and even English law are often cited in the court's constitutional opinions.

Regarding the views expressed by Professor Gardner, I submit that he is wrong about NJF, particularly with respect to Alaska, and he may well be wrong about other states as well. The Alaskan experience outlined above rebuts Gardner's arguments that Americans are national and not state oriented, that state constitutions do not define a distinctive coherent way of life, and that state

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186. *Id.*

187. *See* Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 44-49 (1989). Justice Utter notes that Justice Brandeis's dissent in New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), designates the states as laboratories for the federal system and finds Brandeis's view to be a compelling argument for independent state analysis. Utter also argues that the United States Supreme Court can learn from such independent analysis. Utter, *supra*, at 47.

constitutionalism is not compatible with a national constitution.[188] The cases discussed herein demonstrate that Alaska's constitutional discourse, while always mindful of the federal approach, is independent and has been independent since Alaska's early days of statehood.

Not only does location set Alaska apart from the rest of the nation, but the unique day-to-day activities of Alaskans often impact state constitutional interpretation. Many of the cases discussed in this article could only arise in Alaska. Alaska's diverse population, with its mix of new and old immigrants and various clans of Indian and Eskimo peoples, forms a distinctive social fabric that, when combined with its geographic distance from the rest of the United States, demands a strong state orientation.

If one thing is clear about the Alaska constitution, it is that it was designed for the future of a state that would depend on the development of its natural resources. The state constitution is therefore tailored for Alaska. In particular, article VIII is much more than a novelty; its principles are tested every day. Often the important cases involving individual rights have also involved natural resources. For example, *Frank* in the freedom of religion area and *Isakson* in the equal protection area both arose as disputes over the use of natural resources. The Alaska constitution was thus designed for the type of people who would settle in the state and reflects the value they place upon individual freedom.

Finally, Professor Gardner is also mistaken regarding the compatibility of the federal and state systems. Perhaps the clearest point demonstrated by the cases discussed in this article is that the federal and state systems are so intertwined that any constitutional discourse must necessarily reflect an interaction between the two. To that extent, Gardner is wrong about the lack of state constitutional discourse. In Alaska, reasoned decisions are being made every day based on provisions of the state constitution as understood through the universal language that has developed against the backdrop of federal constitutional interpretation. However, as Alaska's constitutional jurisprudence demonstrates, just because the language is universal does not mean that the standards and concepts are universally applicable.

The development of the sliding-scale and balancing tests in the equal protection and privacy areas is a prime example of the

188. Gardner, *supra* note 2, at 818.

Alaskan discourse. While the federal two-tiered test provides the baseline for the state court's experience, both the state constitution and general principles of federalism provide for a case-by-case development of a test that is more appropriate for Alaska. Particularly in the case of equal protection, the court, the commentators, and even some justices of the United States Supreme Court have long recognized the need for something between the prongs of the two-tier test in order to protect individual rights. Alaska's constitutional discourse described above reflects the thought and effort that one state has invested in studying these issues. The result has been a different, some might say better, test. This type of development is a fundamental function of the states—to be laboratories for the federal system.

In fact, the development of Alaska's independent approach to state constitutional review is itself part of the very discourse that Professor Gardner has not recognized. The fruits of this discourse have provided Alaskans with a strong source of protection for individual rights: their own state constitution. Perhaps the reason Professor Gardner is missing this discourse in NJF is that he is not looking in the right place. For as Professor Wise has recognized, "[a]s the Alaska Supreme Court continues to apply its sliding scale approach independently, other jurisdictions would do well to take note. Perhaps these northern lights are more than just an interesting phenomenon; perhaps they are a north star that could guide other courts."[189]

189. Wise, *supra* note 51, at 47.

APPENDIX I
The Constitution of the State of Alaska

Preamble

We the people of Alaska, grateful to God and to those who founded our nation and pioneered this great land, in order to secure and transmit to succeeding generations our heritage of political, civil, and religious liberty within the Union of States, do ordain and establish this constitution for the State of Alaska.

Article I—Declaration of Rights[190]

Section 1—Inherent Rights

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the state.

Section 2—Source of Government

All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole.

Section 3—Civil Rights

No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin. The legislature shall implement this section.

Section 4—Freedom of Religion

No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.

Section 5—Freedom of Speech

Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

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190. Alaska has amended article I three times since 1956. In 1972, article I was twice amended to insure greater protection in the areas of equal protection and privacy. Specifically, section 3 was modified to include gender under the protection of equal civil and political rights, *see* HARRISON, *supra* note 26, at 10, 12, and section 22 was added to recognize explicitly the right to personal privacy, *see id.* at 10, 18. Finally, section 23 was added in 1988 to permit the state to grant preferences based on Alaska residence to state residents to the extent permitted by the United States Constitution. ALASKA CONST. art. I, § 23.

Section 6—Assembly; Petition

The right of the people peaceably to assemble, and petition the government shall never be abridged.

Section 7—Due Process

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Section 8—Grand Jury

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces in the time of war or public danger. Indictment may be waived by the accused. In that case the prosecution shall be by information. The grand jury shall consist of at least twelve citizens, a majority of whom concurring may return an indictment. The power of grand juries to investigate and make recommendations concerning public welfare or safety shall never be suspended.

Section 9—Jeopardy and Self-Incrimination

No person shall be put in jeopardy twice for the same offense. No person shall be compelled in any criminal proceeding to be a witness against himself.

Section 10—Treason

Treason against the State consists only in levying war against it, or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

Section 11—Rights of Accused

In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve or less than six in courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 12—Excessive Punishment

Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted. Penal

administration shall be based on the principle of reformation and upon the need for protecting the public.

Section 13—Habeas Corpus

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or actual or imminent invasion, the public safety requires it.

Section 14—Searches and Seizures

The right of the people to be secure in their persons, houses and other property, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 15—Prohibited State Action

No bill of attainder or ex post facto law shall be passed. No law impairing the obligation of contracts, and no law making any irrevocable grant of special privileges or immunities shall be passed. No conviction shall work corruption of blood or forfeiture of estate.

Section 16—Civil Suits; Trial by Jury

In civil cases where the amount in controversy exceeds two hundred fifty dollars, the right of trial by jury of twelve is preserved to the same extent as it existed at common law. The legislature may make provision for a verdict by not less than three-fourths of the jury and, in courts not of record, may provide for a jury of not less than six or more than twelve.

Section 17—Imprisonment for Debt

There shall be no imprisonment for debt. This section does nor prohibit civil arrest of absconding debtors.

Section 18—Eminent Domain

Private property shall not be taken or damaged for public use without just compensation.

Section 19—Right to Bear Arms

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Section 20—Quartering Soldiers

No member of the armed forces shall in time of peace be quartered in any house without the consent of the owner or occupant, or in time of war except as prescribed by law. The military shall be in strict subordination to civil power.

Section 21—Construction

The enumeration of rights in this constitution shall not impair or deny others retained by the people.

Section 22—Right of Privacy

The right of privacy shall not be infringed. The legislature shall implement this section.

Section 23—Resident Preference

This constitution does not prohibit the State from granting preferences, on the basis of Alaska residence, to residents of the State over nonresidents to the extent permitted by the Constitution of the United States.