

ALASKA STATE LEGISLATURE

Interim:
600 East Railroad Avenue
Wasilla, Alaska 99654
Phone (907) 373-1842
Fax: (907) 373-4729*



Session:
State Capitol Building
Juneau, Alaska 99801-1182
Phone: (907) 465-2186
Fax: (907) 465-3818

REPRESENTATIVE WES KELLER DISTRICT 14

MEMO

To: Members of the House Education Committee

Fm: Representative Wes Keller

By: Jim Pound

Date: March 01, 2011

Re: Response to questions on Constitutionalism

Members of the Committee asked on Friday for a definition of Constitutionalism of which I indicated it is a fairly common term. We conducted some research using both legal and search engines. A simple Google Search generated nearly 2-million potential references. Based on research using legal and generic on-line search engines Constitutionalism is a commonly used term in both professional and non-professional circles.

This memorandum provides several scholarly examples of the discussion of Constitutionalism that should provide answers to the committee questions in preparation for the next hearing and passage from committee of CSHB 5.

If we can be of any assistance please do not hesitate to call.

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Thank you

In his book Constitutionalism, political scientist and constitutional scholar David Fellman (1907 – 2003), writes:

"Constitutionalism is descriptive of a complicated concept, deeply imbedded in historical experience, which subjects the officials who exercise governmental powers to the limitations of a higher law. Constitutionalism proclaims the desirability of the rule of law as opposed to rule by the arbitrary judgment or mere fiat of public officials.... Throughout the literature dealing with modern public law and the foundations of statecraft the central element of the concept of constitutionalism is that in political society government officials are not free to do anything they please in any manner they choose; they are bound to observe both the limitations on power and the procedures which are set out in the supreme, constitutional law of the community. It may therefore be said that the touchstone of constitutionalism is the concept of limited government under a higher law."

Professor Fellman continues:

"Whatever particular form of government a constitution delineates, however, it serves as the keystone of the arch of constitutionalism, except in those countries whose written constitutions are mere sham. Constitutionalism as a theory and in practice stands for the principle that there are—in a properly governed state—limitations upon those who exercise the powers of government, and that these limitations are spelled out in a body of higher law which is enforceable in a variety of ways, political and judicial. This is by no means a modern idea, for the concept of a higher law which spells out the basic norms of a political society is as old as Western civilization. That there are standards of rightness which transcend and control public officials, even current popular majorities, represents a critically significant element of man's endless quest for the good life.")

(David Fellman, "Constitutionalism"), vol 1, p. 485, 491-92 (1973-74)

Constitutionalism goes far beyond what can be perceived as just a legal term as it is in fact an "ism". We fully understand this concept since most of what we deal with in our daily lives involves beliefs. When you sit in a committee room or on the floor, you are surrounded by individuals with their beliefs, "isms" if you will. On a larger scale, the question that needs to be asked; What is the United States of America? What was the Soviet Union or is the Peoples Republic of China other than an "ism"? We believe our form of government is the best in the world and are very glad to export it to other countries by various means.

Constitutionalism in this country is not an unknown evil. Our founding documents created a nation that by world standards are is fairly new, although their roots can be traced back to even the Roman Empire.

Constitutionalism has prescriptive and descriptive uses. Law professor Gerhard Casper captured this aspect of the term in noting that: "Constitutionalism has both descriptive and prescriptive connotations. Used descriptively, it refers chiefly to the historical struggle for constitutional recognition of the people's right to 'consent' and certain other rights, freedoms, and privileges.... Used prescriptively ... its meaning incorporates those features of government seen as the essential elements of the ... Constitution."

Leonard Levy, ed., *Encyclopedia of the American Constitution*, (Gerhard Casper, "Constitutionalism"), vol 2, p. 473, 473 (1986) ISBN 9780028648804

Understanding of the two applications of constitutionalism is further explored by the following authors:

Descriptive use

One example of constitutionalism's descriptive use is law professor Bernard Schwartz's 5 volume compilation of sources seeking to trace the origins of the Federal bill of rights. Beginning with English antecedents going back to the Magna Carta (1215), Schwartz explores the presence and development of ideas of individual freedoms and privileges through colonial charters and legal understandings. Then, in carrying the story forward, he identifies revolutionary declarations and constitutions, documents and judicial decisions of the Confederation period and the formation of the federal Constitution. Finally, he turns to the debates over the federal Constitution's ratification that ultimately provided mounting pressure for a federal bill of rights. While hardly presenting a "straight-line," the account illustrates the historical struggle to recognize and enshrine constitutional rights and principles in a constitutional order.

Bernard Schwartz, *The Roots of the Bill of Rights* (5 vols., Chelsea House Publisher, 1980) [ISBN 9780877542070].

Prescriptive use

In contrast to describing what constitutions are, a prescriptive approach addresses what a constitution should be. As presented by Canadian philosopher Wil Waluchow, constitutionalism embodies "the idea ... that government can and should be legally limited in its powers, and that its authority depends on its observing these limitations. This idea brings with it a host of vexing questions of interest not only to legal scholars, but to anyone keen to explore the legal and philosophical foundations of the state."

Stanford Encyclopedia of Philosophy, Wil Waluchow (Constitutionalism) (Intro Jan 2001 (revised Feb 20, 2007).

Conclusion

As indicated earlier in this memo, the term Constitutionalism is, in the right circles a very common term. The concept dates back to Roman times but begins to be more properly defined by today's standards in the Magna Carta (1215). Historically, the United States' is founded on documents generally created during a 15 year period of time. These documents represent the true law of the land and rule of law. It is critical that our youth have a working knowledge of these documents, what they mean to this country, and how they should be read. Like many historical documents it takes an interpretative ability to read and fully understand the intent in the writing style of the time. Three hundred years from now people will do the same thing with our words. The key to interpretation is not to second guess the intent but to look at it from the perspective in which it is written.

Committee Substitute for House Bill Five will give our children the opportunity to learn how to review, understand, and lead using our countries founding documents. Public comment on the bill will go far beyond these halls, as it will trickle down to school boards around the state. What will end up in the classroom may look very much different than what we are visualizing. Some districts may impose a strict set of guidelines and examinations as they feel it is that important. Others may feel it is only a supplement to their current curriculums. The key is Constitutionalism will be in the forefront, and Alaskan's will be the leaders in bringing the goals of this country back to life.