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*1 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.

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

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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 ***18**

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 ***19** 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 ***20** 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 government ***21** 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 ***22** 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.

Nelson, *supra, at* 17-22

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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).
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See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1985).
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501 P.2d 159 (Alaska 1972).
85
Id. at 166.
86
Id. at 166-67; see Alaska Const. art. I, s 1, set forth in the Appendix.
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Breese, 501 P.2d at 174.
88
Id. at 169.

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Id. at 174.
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See, e.g., id. at 166 n.26.
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458 P.2d 340 (Alaska 1969).
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471 P.2d 386 (Alaska 1970).
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See *Breese*, 501 P.2d at 166-67.
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537 P.2d 494 (Alaska 1975).
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Id. at 504.
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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.
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Id. at 511.
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Id.
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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. s 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.
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471 P.2d 386 (Alaska 1970).
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See *Ravin*, 537 P.2d at 513 (Boochever, J., concurring).
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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 states.
Id. at 504 (majority opinion).
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Id. at 515 (Boochever, J., concurring).
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574 P.2d 1 (Alaska 1978).
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See supra part IV.A.
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See *Erickson*, 574 P.2d at 21.
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Id. at 21-22.
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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.
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570 P.2d 469 (Alaska 1977).
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See id. at 478-79.
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Id. at 480.
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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.

Nelson, *supra* at 41