

ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILES 8672

799 SCOMM27: INT. COMM. CONSTITUTIONAL CONVENTION 1979-80

natural resources.

In summary, A.S. 43.23.010 is inconsistent with our constitutional democracy. The problems incident to distribution of wealth have long been recognized. In Democracy in America, in 1835, Alexis De Tocqueville wrote:

"Thus the prosperity of the United States is the source of their most serious danger, since it tends to create in some of the federated states that intoxication which accompanies a rapid increase in fortune, and to awaken in others those feelings of envy, mistrust and regret which usually attend the loss of it."

(Alfred A. Knopf, Eleventh Printing (1972) edition, at 403). One check on the development of such conflicts is responsible legislative judgment. If this fails, the ultimate check, and balance, is the enforcement of the constitution by the courts.

D. JOHN McKAY

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APPENDIX II

RABINOWITZ, Justice, concurring.

Though I am in accord with the majority's views regarding the nature of the Alaska Homestead Act¹ as an appropriation which may not be enacted by the voters through the initiative process, I wish to add

33. We note that the applicant need not bear the cost of the survey. A survey must be made within five years of receiving the land, AS 38.05.440, yet the applicant may sell the land after one year.

34. If state-owned land were surveyed by private individuals, that would be valuable to the state. The value to the state is certainly insignificant, however, when the surveyed lands are in private ownership.

1. The Alaska Homestead Act, AS 38.05.410-540, created a new Article 13 of the Alaska Land Act, AS 38.05, entitled Homestead Grants of State Land.

2. AS 38.05.410 provides that "[a]ll vacant, unappropriated, and unreserved general grant land" is to remain classified and available as homestead entry land until thirty percent or 30,000,000 acres (whichever comes first) of the state general grant land (excluding trust land) has passed into private ownership under the terms of the Homestead Act.

3. A resident is defined by AS 38.05.530(4) as a person who is at least eighteen years of age and

(A) except for brief intervals, military service, attendance at an educational or training institution, or for absences for good cause, is physically present in the state for the required period;

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my separate views concerning appellees' equal protection arguments.

The Alaska Homestead Act, popularly known as the Beirne Initiative, provides grants of forty acres of state land² to Alaska residents³ who have resided continuously in the state for three years preceding application for land. Residents of five years duration are eligible to receive two forty-acre grants, and a person who has resided continuously within the state for ten years is entitled to four forty-acre parcels. Regardless of the length of time of residency, the Homestead Act provides that an individual is entitled to not more than one grant of forty acres per year, and no person may accumulate more than 160 acres combined total under the act.

I have concluded that these durational residency provisions violate the equal protection clause of the Alaska Constitution⁴ by infringing on the right to travel to this state and make one's home here. A review of the case law illustrates the important nature of the right to travel protected by the state constitution.

(B) maintains a place of residence in the state;

(C) has established residence for voting purposes in the state and is a registered voter;

(D) has not, within the period of required residency, claimed residency in another state; and

(E) shows by all attending circumstances that his intent is to make Alaska his permanent residence.

4. Art. 1, § 1, of the Alaska Constitution states:

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.

Additionally, art. VIII, § 17 provides specifically with regard to disposition of the state's natural resources:

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.

The protection extended by the Alaska Constitution to new residents of Alaska differs markedly from the level of protection afforded by the United States Constitution to new residents of a state against discriminatory treatment based solely on the duration of residency.⁵ In the past, this court consistently has subjected durational residency restrictions to strict scrutiny under the equal protection clause of the Alaska Constitution. This intensified review was premised on our conclusion that "the right to interstate travel is itself a fundamental right and any classification which serves to penalize the exercise of that right must be subjected to strict judicial scrutiny."⁶

State v. Van Dort, 502 P.2d 453 (Alaska 1972), was the first case to challenge a durational residency requirement under Alaska law. In *Van Dort* we considered a seventy-five-day residency requirement for voting in state elections and found it to be unconstitutional. We stated there:

It is our reading of [*Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972),] that all durational residency requirements are prima facie invalid as in contravention of the equal protection

clause because they penalize the right to travel and the right to vote in elections on an equal basis with other citizens in the jurisdiction.

Id. at 454. The state's argument that a seventy-five-day residency requirement for voting was justified by the compelling interest in guaranteeing that only bona fide residents participated in the election was rejected. Even recognizing Alaska's uniqueness in size, population and geography, its special economic, cultural and social problems, and the communication deficiencies between different parts of the state, we found that a less restrictive alternative was available to accomplish the state's objectives in administering proper elections. Thus, a thirty-day residency requirement expressly was approved in *Van Dort*; however, the seventy-five-day period challenged in the case was struck down since that particular classification served no compelling state interest.

In *State v. Wylie*, 516 P.2d 142 (Alaska 1973), we struck down certain state personnel regulations which gave an absolute hiring preference for state employment to per-

5. Under the United States Supreme Court's interpretation, the federal constitutional right to travel is not by itself a fundamental right which triggers application of the strict scrutiny tier of equal protection analysis. The rational basis standard applies to review of durational residency requirements unless, in addition, the discriminatory treatment of new residents either deters or penalizes the federal right of interstate migration. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974). See also *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975); *Starns v. Malkerson*, 326 F.Supp. 234 (D.Minn.1970), *aff'd*, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971). Deterrence of the right of interstate migration apparently never has been used by the Supreme Court as a ground for applying strict scrutiny (see *Shapiro v. Thompson*, 394 U.S. 618, 655, 89 S.Ct. 1322, 1342, 22 L.Ed.2d 600, 626 (1969) (Harlan, J., dissenting)), and the existence of a penalty on the exercise of the right requires a showing of the denial of a basic necessity of life or the denial of a separately protected fundamental right other than the right to travel. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974).

6. *State v. Wylie*, 516 P.2d 142, 147 (Alaska 1973). The constitutional right to travel interstate has not been identified with any particular textual source in the Alaska Constitution. Rather, the Alaska Supreme Court appears to be in agreement with Mr. Justice Stewart's discussion of the federal right to travel in *United States v. Guest*, 383 U.S. 745, 757-58, 86 S.Ct. 1170, 1178, 16 L.Ed.2d 239, 249 (1966) (footnote omitted):

The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. . . . [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.

Id. quoted in *State v. Wylie*, 516 P.2d 142, 145 n.5 (Alaska 1973). See also *Hicklin v. Orbeck*, 565 P.2d 159, 163 n.5 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978).

sons who had resided in Alaska for at least one year.⁷ We held in *Wylie* that the right of interstate travel is itself a fundamental right under the state constitution and that any classification which serves to penalize the exercise of that right must be subjected to strict scrutiny. At the time, this holding was based in part on our reading of the United States Supreme Court's opinion in *Dunn v. Blumstein*, 405 U.S. 330, 338, 92 S.Ct. 995, 1001, 31 L.Ed.2d 274, 282 (1972), in which the Court had expressed its similar view that the right to travel was a "fundamental personal right." However, *Wylie* established that aside from its status under the federal Constitution, the Alaska Constitution unambiguously protects the right of interstate migration as a fundamental interest such that strict judicial scrutiny must be applied to any burden on the exercise of that right.

Wylie significantly expanded the United States Supreme Court's prior applications of the "penalty" concept to measures interfering with the fundamental right of interstate migration by holding that any differential treatment based on length of residency would be viewed as a penalty in light of the fundamental nature of the right of mi-

gration guaranteed by the Alaska Constitution. In *Wylie*, we held that state personnel rules which granted hiring preferences to persons who have satisfied the durational residency requirement penalized interstate travel. In contrast, though the precise limits of penalty analysis under the United States Constitution had not been explored fully at the time this court decided *Wylie*, the United States Supreme Court subsequently declined to classify as a penalty on the right to travel any burden other than the denial of basic necessities of life. See *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974).⁸

In *State v. Adams*, 522 P.2d 1125 (Alaska 1974), we again differed from the United States Supreme Court's analysis of penalties on the right of interstate migration in holding that Alaska's one-year durational residency requirement for the initiation of divorce proceedings in state courts violated the equal protection clause of the Alaska Constitution. We reiterated in *Adams*:

All durational residency requirements inherently infringe upon the fundamental constitutional right of interstate travel.

(i. e., discrimination against new residents in hiring) to satisfy the compelling state interest standard of review. We concluded that "[t]here are certainly available to the state other means for lowering unemployment which impose a lesser burden on the constitutionally protected right to interstate travel." *Id.* at 149 (footnote omitted). We also held that the state's interest in preferring bona fide residents over non-residents in selecting public employees in order to improve the efficiency of state government by reducing personnel turnover was not substantial enough to warrant burdening the fundamental right of interstate travel.

It should be noted that in *Wylie*, as in the present case involving the Beirne Initiative, the state's interest in preferring bona fide residents over non-residents was not challenged. Thus, the court made no determination as to the permissibility of such a classification; it ruled only on the constitutionality of discriminating between classes of actual residents based on an irrebuttable presumption that those who had lived in Alaska for less than one year should not be treated as permanent residents regardless of other indicia of intent to establish permanent residence in the state.

7. At the time *State v. Wylie*, 516 P.2d 142 (Alaska 1973), was decided, the United States Supreme Court had decided two durational residency cases utilizing strict scrutiny review: *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), which invalidated a one-year durational residency requirement of the State of Connecticut for eligibility for aid to families with dependent children welfare assistance; and *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), which struck down Tennessee's one-year durational residency requirement for eligibility to vote in state elections. See also *Starns v. Malkerson*, 326 F.Supp. 234 (D.Minn.1970), *aff'd*, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971) (upholding on rational basis grounds Minnesota's one-year durational residency requirement for reduced tuition at the state university).

8. When we applied the strict scrutiny tier of equal protection judicial review in *State v. Wylie*, 516 P.2d 142 (Alaska 1973), the state's interests in upgrading Alaska's human resources, in reducing the level of unemployment within the state and in relieving the burden imposed by unemployment on the public purse were found not to be related sufficiently to the means selected for accomplishing the objec-

Hence, all such requirements are prima facie invalid and will be countenanced only when they serve a compelling state interest. There need be no actual deterrence to interstate migration to actuate strict scrutiny under the compelling state interest test. In our view, the nature of the benefit withheld by the state is relevant only to judging the relative importance of the competing state interest, not to determining the applicable standard of judicial review.

Applying strict scrutiny to the state's asserted public goals justifying the classification based on duration of residency, we found that the relationship between the goals and the means selected for furthering the objectives (the durational residency requirement) was substantially lacking. We held that the state's important interest in protecting the integrity of the basic family unit simply was not furthered by the differential treatment of new residents since it did nothing to preserve marriages of persons who had been in the state for more than one year. The state's interest in assuring the validity of its divorce decrees against collateral attacks on due process grounds, while substantial, could be satisfied by insuring that the domicile of the divorce-complainant was in this state. This reasonable, less restrictive alternative to the absolute requirement of residence of one year in the challenged divorce statute rendered the more restrictive standard less than compelling. The durational residency requirement thus failed to withstand strict scrutiny and was struck down.⁹

Following *Adams*, we decided the only Alaska right to travel case which has up-

held a durational residency requirement in the face of strict judicial scrutiny of equal protection claims. *Gilbert v. State*, 528 P.2d 1131 (Alaska 1974), involved a challenge to the state constitutional requirement, article II, § 2, of three-year residency in the state and one-year residency in the election district for eligibility to seek legislative office. The residency requirement was analyzed only under the equal protection clause of the federal Constitution since a provision of the Alaska Constitution was directly attacked by the appellant in the case. Nevertheless, we determined to apply the strict scrutiny tier of review based in part on our own prior cases relating to durational residency requirements. Two of the state's asserted justifications for the restrictions on candidacy for public office were found to be compelling: the interest of the state in assuring that those who govern it are acquainted with the diverse conditions, problems, and needs of those who are to be governed, and the interest of the electors in exposure of the potential candidate to the people during a period of time sufficient for the voters to become familiar with the candidate's knowledge, character, and reputation. In upholding the classification, we found that no viable less restrictive alternatives to the durational residency requirements imposed by the state constitution existed to fulfill the compelling state interests.

This court's most recent statement of the law relating to durational residency requirements was in *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978). *Hicklin* involved an

9. Subsequent to our invalidation of the one-year residency requirement in the state divorce statute, the United States Supreme Court addressed the identical issue in a case involving the State of Iowa's statutory requirement that a petitioner in a divorce action must be a resident of the state for one year preceding the filing of the petition. *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). The Supreme Court came to the opposite conclusion from our court in *Sosna*, however. Although the Court did not specifically identify the standard of review it was applying in upholding the durational residency requirement,

its analysis was couched in language suggesting application of the rational basis test. It found that the statute in question reasonably furthered three basic public purposes: protection of the rights of the defendant spouse in the divorce proceeding, avoidance of interference in matters in which another state has a paramount interest, and assurance that the state's own divorce decrees will be afforded full faith and credit by other states. It should be noted that the third of these rationales is identical to the state interest this court had found unpersuasive in *State v. Adams*, 522 P.2d 1125 (Alaska 1974).

equal protection challenge to the so-called "Alaska Hire" law which limited eligibility for petroleum and pipeline related jobs to residents of the state who had been physically present in Alaska, with certain exceptions, for one year.¹⁰ In holding that the proper standard for review of the durational residency preference in hiring was the strict scrutiny tier of equal protection analysis which applies to such residency requirements "because they penalize those who have exercised their fundamental right of interstate migration,"¹¹ we expressly considered and rejected the "basic necessities" reasoning of *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974). As already noted, *Memorial Hospital* had addressed a challenge under the federal Constitution and had limited application of strict scrutiny to durational residency cases in which the residency requirement penalized the right to travel by depriving the recent migrant of a basic necessity of life.¹² We noted that "[w]e have never used this 'basic necessity' reasoning,"¹³ and proceeded to subject the Alaska Hire law to strict scrutiny. The interests which the state sought to further through the hiring preference for one-year residents of the state in *Hicklin* were the

reduction of the unemployment rate for bona fide Alaska residents and the cultivation of Alaska's human resources through extraction of the state's natural resources. We invalidated the durational residency requirements because the correlation between the classification based on length of residence and the goals of the challenged statute was tenuous and, in any case, the durational residency requirement was not the least drastic means available for accomplishing the public goals of reduced unemployment and stabilization of the economy.¹⁴

In my view, under the test applied in *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), the three-year durational residency requirement imposed by the Beirne Initiative to qualify for land grants would fail. The general standard for judicial review of equal protection challenges arising under the state constitution was modified subsequent to the *Hicklin* decision, however. In *State v. Erickson*, 574 P.2d 1 (Alaska 1978), we abandoned the traditional two-tier approach to equal protection analysis which

10. The durational residency statute at issue in *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), was nearly identical to the Beirne Initiative's residency requirements. AS 38.40.090(1) provided:

'resident' means a person who

(A) except for brief intervals, military service, attendance at an educational or training institution, or for absences for good cause, is physically present in the state for a period of one year immediately before the time his status is determined;

(B) maintains a place of residence in the state;

(C) has established residency for voting purposes in the state;

(D) has not, within the period of required residency, claimed residency in another state; and

(E) shows by all attending circumstances that his intent is to make Alaska his permanent residence.

The only differences between the statutory definition of an Alaska resident which was considered in the *Hicklin* case and the definition of resident in the Beirne Initiative are found in the duration of the residency required (one year in

the *Hicklin* case and a minimum of three years in the present case), and in the addition of registered voter status and the attainment of eighteen years of age as requirements for eligibility for land grants under the Beirne Initiative. See note 3 *supra*.

11. *Hicklin v. Orbeck*, 565 P.2d 159, 162 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978) (footnote omitted).

12. In *Hicklin*, *id.* we also rejected the rational basis test as applied in *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). See discussion of *Sosna* in note 9, *supra*.

13. *Hicklin v. Orbeck*, 565 P.2d 159, 163 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978).

14. It was pointed out in *Hicklin*, *id.* at 165, that "the least drastic, and also the most effective, means to help the unemployed and recent trainees to find jobs is to give an employment preference only to the unemployed and recent trainees."

had been followed in all our prior cases¹⁵ and adopted a new single test for evaluating equal protection claims under the Alaska Constitution. The new standard of review was explained in *Erickson* as follows:

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.

Id. at 12. Our task in applying the equal protection test adopted in *Erickson* has three steps: first, we must ascertain what the purposes of the challenged legislation are and whether they are within the legitimate police power of the state; second, we must examine the means used to accomplish

the legislative objectives and establish whether the means substantially further the legislative goals; and third, we must balance the importance of the state's interest in the means actually chosen to accomplish the legislative purpose against the nature of the constitutional right which has been infringed.¹⁶

The *Erickson* analysis begins by considering the purposes of the challenged act, viewing the Beirne Initiative as a whole as well as the circumstances which surrounded its enactment. Since the act was passed as an initiative by the people rather than by the legislature there is no relevant legislative history of its passage to resort to. However, the Beirne Initiative makes its objectives clear in the statement of purpose which constitutes section 1 of the Homestead Act.¹⁷ The purpose of the act, quite simply, is to accomplish the transfer of thirty percent or 30,000,000 acres of the state's vacant, unappropriated, and unreserved general grant lands into private ownership. The initiative finds that "individual land ownership is integral to the material well-being of the people and encourages more citizen awareness and involvement in the

15. We had previously expressed our increasing dissatisfaction with traditional equal protection analysis, however, in *Isakson v. Rick'y*, 550 P.2d 359, 362-63 (Alaska 1976); *Lynden Transport, Inc. v. State*, 532 P.2d 700, 706-07 (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). See generally T. Yarbrough, *The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-So-Fundamental "Rights" or "Interests" Through a Flexible Conception of Equal Protection*, Duke L.J. 143 (1977); G. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv.L.Rev. 1 (1972).

16. See *Erickson v. State*, 574 P.2d 1, 12 (Alaska 1978). See also *Dandridge v. Williams*, 397 U.S. 471, 508, 90 S.Ct. 1153, 1173, 25 L.Ed.2d 491, 515 (1970) (Marshall, J., dissenting).

17. Section 1 of the Beirne Initiative provides: The people find that only approximately one million acres of the 363 million total land acreage of Alaska is in private ownership on the effective date of this Act. The people further find that individual land ownership is integral to the material well-being of the people and encourages more citizen awareness and involvement in the affairs of the state.

Further, the people are cognizant that all land was privately owned at the time of the nation's founding and [believe] that private land ownership is integral to the American system. In addition, the people are aware that the Constitution of the State of Alaska declares that 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 (art. VIII, sec. 1), and further that the constitution permits the people to implement this policy by providing for the grant of state land (art. VIII, sec. 9). The people find that of the approximately 104 million acres to which the state is entitled under the Statehood Act, less than 75,000 acres have been made available by the state to citizens for settlement and development purposes, and that the failure to make more land available is a failure [to] implement the policy of art. VIII, sec. 1 of the Alaska Constitution. The people declare their purpose to make available to its citizens at least 30 percent or 30,000,000 acres of state land for settlement and development, and further [declare] that a policy of private land ownership is in the best interest of the people of the state.

affairs of the state." It further finds that the state unduly has delayed making public land available for private settlement and development purposes and enacts the grant program to facilitate the distribution of state land into private ownership.

The mechanism chosen for the transfer of land is a land grant initiated by filing an application which must have been recorded previously in the recording district where the land is located, together with proof of residency as required by the act and a \$100 filing fee. The applicant is required to publish notice of his application and to provide a land survey within five years after the right to possession attaches. The grantee is required only to hold the land grant for one year before he "may extract timber or materials on a commercial basis, sell, subdivide, or otherwise dispose of the land" There is no requirement that the grantee actually enter upon the land and make improvements.¹⁸

Only persons who meet the minimum residency requirements of the Beirne Initiative may apply for grants of state land. A three-year resident is eligible for one forty-acre grant, a five-year resident may apply for two such grants, and a ten-year resident is eligible for a maximum of four forty-acre grants of state land under the act.¹⁹ The justifications advanced by the state in support of this differential treatment based on duration of residency are basically twofold. First, it is asserted that the durational residency requirements insure that the recipients of benefits under the Beirne Initiative have earned the right to grants of state

land based on their contribution to the overall state welfare by voting and paying taxes for the required periods of time. Second, it is claimed that the durational residency requirements insure that the recipients of land grants are genuinely attached to the state since they already have demonstrated their willingness to remain in Alaska for a substantial period of time.

Judicial scrutiny of the closeness of fit between the means and permissible legislative objectives, and scrutiny of the relative necessity for utilizing the particular means selected as opposed to other means less restrictive of constitutional rights, vary in intensity with the character of the classification in question under *State v. Erickson*, 574 P.2d 1 (Alaska 1978). At the upper end of this flexible equal protection formula, where fundamental rights or suspect categories are involved, *Erickson* indicates that the results of this new test will be essentially the same as under the traditional strict scrutiny tier of equal protection doctrine which requires a "compelling state interest" in the means chosen. At the lower end of the scale, the intensity of scrutiny applied will be governed by the new, more demanding "rational basis" test articulated in *Isakson v. Rickey*, 550 P.2d 359 (Alaska 1976). In *Isakson* we held:

Under the rational basis test, in order for a classification to survive judicial scrutiny, the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the objects of the legislation, so that all persons simi-

explicitly provides that "no improvements may be required or restrictions imposed on homestead entry land, except as required by general law or home rule municipalities." See AS 38.08.060.

18. The Beirne Initiative has been titled the "Alaska Homestead Act" and the state land made available under the act is referred to as "homestead entry land," but this description of the act's purposes is somewhat inaccurate. Although the act does open up state land for transfer to private ownership and, presumably, at least some of that land will actually be settled, the Beirne Initiative contains no requirement that the grantee enter upon the land and live there in the traditional mode of homestead acts. See generally 43 U.S.C. §§ 161-302 (repealed by Pub.L. 94-579, 90 Stat. 2787, effective October 21, 1976). In fact, the initiative

19. It should be noted that the act limits the size of the yearly grant to forty acres regardless of the duration of residency; thus, five-year and ten-year state residents may accumulate their total grant land only at the rate of forty acres a year until their respective maximums are reached.

larly circumstanced shall be treated alike.²⁰

Isakson also concluded that "we will no longer hypothesize facts which would sustain otherwise questionable legislation as was the case under the traditional rational basis standard."²¹

The present challenge to the constitutionality of the durational residency requirements in the Beirne Initiative is the first post-*Erickson* case to come before this court on right-to-travel grounds. Thus, an important inquiry in this case is the determination of what standard of review should be applied. Our cases on this subject uniformly have expressed our opinion that the right of interstate migration is a fundamental constitutional guarantee which may not be infringed without showing a compelling state interest in retaining any durational residency requirement and the absence of less restrictive alternative means of accomplishing the state's legislative objectives. The uniquely important status of right-to-travel protection in the Alaska Constitution reflects, in part, an awareness of the distinctive character of this state in attracting many new residents to participate in Alaska's growth and expansion.²² The risk that longer-term Alaska residents would seek to insulate themselves from sharing the public

benefits of development of the state with the influx of relative newcomers already has been confronted directly in *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977), rev'd on other grounds, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978). Significantly, this court in *Hicklin* stood fast in expressly repudiating the United States Supreme Court's "basic necessities" limitation on applying strict scrutiny to right-to-travel cases and clearly stated that "it can no longer be disputed that [the right to travel into a different state and make one's home there] is a fundamental right calling for strict scrutiny."²³ In light of the consistent pronouncements by this court concerning the fundamental nature of the right to travel under our state constitution in prior cases, I believe there is a strong case presented in favor of continuing to apply the most stringent standard of review to durational residency classifications under the new, flexible equal protection test adopted in *State v. Erickson*, 574 P.2d 1 (Alaska 1978). However, even starting from the premise that the least intensive scrutiny available under *Erickson* applies, I do not think that the classification of Alaska residents into four groups of dissimilarly treated individuals based on duration of residency²⁴ for purposes of disbursing

20. *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976), quoting *State v. Wylie*, 516 P.2d 142, 145 (Alaska 1973) (footnote omitted).

21. *Id.* Isakson continued, quoting G. Gunther, Foreword: *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 85 Harv.L.Rev. at 20 (1972):

Judicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished. Judicial tolerance of overinclusive and underinclusive classifications is notably reduced. Legislative leeway for unexplained pragmatic experimentation is substantially narrowed.

See also *State v. Lewis*, 559 P.2d 630, 643 (Alaska 1977), cert. denied, 432 U.S. 901, 97 S.Ct. 2943, 53 L.Ed.2d 1073, which applies the Isakson "rational basis" standard of review.

22. See Note, *Durational Residency Requirements: The Alaskan Experience*, 6 U.C.L.A.—Alaska L.Rev. 50 (1976).

23. *Hicklin v. Orbeck*, 565 P.2d 159, 163 n.5 (Alaska 1977), rev'd on other grounds, 437 U.S.

518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978) (citations omitted).

In *Hicklin*, we also quoted art. VIII, § 2 of the Alaska Constitution which reads:

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. [emphasis added]

We concluded that "[this] section is not limited to those of Alaska's people who have been here for at least twelve months." *Id.* at 164 n.8.

24. The four classes of residents created by the Beirne Initiative are (1) those persons who have lived in Alaska for less than three years and who qualify for no state land; (2) those persons who have lived in Alaska for more than three years but less than five years and thereby qualify for one grant of forty acres of land; (3) persons who have resided in the state for more than five years but less than ten years, thus qualifying for two forty-acre grants of state land totalling eighty acres altogether; and (4) residents of ten years or longer who are

grants of state land is "reasonable, not arbitrary" and "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced [are] treated alike." ²⁵

The first rationale advanced for upholding the durational residency requirements of the Beirne Initiative is that they constitute a reasonable device for excluding from the benefits of the land grants those persons who have not made a substantial contribution to the state's economy and general welfare. The state cites *Starns v. Malkerson*, 326 F.Supp. 234 (D.Minn.1970), *aff'd*, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971), in support of its argument on this point. *Starns* upheld the University of Minnesota's regulation creating an irrebuttable presumption that any person who had resided in the state for less than one year was a non-resident and could not qualify for a reduced resident tuition rate at the state university. The rationale advanced in *Starns* was that the one-year waiting period for reduced tuition was an attempt to achieve partial cost equalization between those who had and those who had not contributed to the state's economy through employment, tax payments and expenditures within the state. The federal district court explained its holding as follows:

We believe that the State of Minnesota has the right to say that those new residents of the State shall make some contribution, tangible or intangible, towards the State's welfare for a period of twelve

eligible to receive four grants of forty acres each, or a total of 160 acres of state land.

25. *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976), quoting *State v. Wylie*, 516 P.2d 142, 145 (Alaska 1973). It should be noted here that the general equal protection guarantee in article I, § 1 of the Alaska Constitution is not the only constitutional equal protection clause applicable in the present case. Article VIII of the state constitution relating to natural resources contains a separate guarantee:

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.

months before becoming entitled to enjoy the same privileges as long-term residents possess to attend the University at a reduced resident's fee.

Id. at 241. Assuming that the Alaska Supreme Court would uphold a similar one-year residency requirement for reduced tuition in this state's university system, a premise that is not altogether inevitable under the new, "more demanding" rational basis test adopted in *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976), substantial differences remain between the holding in the *Starns* case and the durational residency requirements of the Beirne Initiative.

A requirement of contribution through domicile in the state which funds an institution of higher education primarily out of tax revenues bears a relatively direct relationship to the rationale of cost equalization. The current residents of the state presumably carry the primary burden for providing the educational service and it is rational (under the deferential lower tier of federal equal protection scrutiny, at least) to require the new resident to pay more for a limited period of time to attend the state university in order to approximate the greater overall cost borne by the longer term resident for access to the same educational opportunity. In contrast, the distribution of land mandated by the Beirne Initiative constitutes the disposal of a permanent state asset the acquisition of which was unrelated to contributions of taxes and earnings by even the longest-term residents of Alaska. Of course, aside from the specif-

Alaska Const. art. VIII, § 17. Inclusion in the state constitution of this separate equal protection guarantee relating specifically to the disposal of natural resources evidences the constitutional framers' particular concern that the benefits from development of Alaska's large store of natural resources be shared by all persons similarly situated with respect to those resources and the purposes to be served by their disposal. This express indication of the importance attached to the interests of the people in the state's resources is thus an independent reason for rigorous scrutiny under *Erickson* of classifications differentiating between groups of residents where the distribution of natural resources is at stake. *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978).

ic funding sources of the state benefit in question, it is arguable that the longer-term resident has contributed more to the general welfare of the state over the course of his domicile in the state. However, in my view the asserted correlation between the contribution of the land grantee to the state's economy and the varying periods of residency required to become eligible for each incremental forty-acre grant of land under the Beirne Initiative is on its face too tenuous to satisfy the standard of review adopted in *State v. Erickson*, 574 P.2d 1 (Alaska 1978). The parties to this action have made available no additional data supporting this rationale. Therefore, this court is left in the position of hypothesizing facts to sustain the classification on cost-equalization grounds, an exercise we expressly declined to undertake in *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976). Further, if eligibility for land grants validly may be conditioned on participation in the state's economy for such extended periods of time as the initiative requires, the state apparently would not be prohibited from distributing all of its public benefits (other than those protected by federal equal protection guarantees) proportionately to the length of continued residence in the state. I think that, upon careful evaluation, it becomes clear that the cost-equalization rationale advanced in this case in support of the durational residency requirements accomplishes nothing more than the sanctioning of a bonus or reward for having been a resident of Alaska longer than certain other classes of persons. It would do violence to the meaning of the requirement in *Isakson v. Rickey*, *id.* at 362 (Alaska 1976), that the classification "'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation'" if this court were to uphold the durational

residency requirements of the Beirne Initiative on a cost-equalization rationale.

The second justification for the Beirne Initiative's durational residency requirements advanced by the state is that they insure that state land grants made available by the act actually end up in the hands of those who have demonstrated their genuine attachment to the state and their willingness to remain in Alaska and adapt to its uniquely rigorous climate and frontier characteristics. I do not think this rationale is supported by the express provisions of the Beirne Initiative. Despite its title,²⁶ the act is not a homestead law in the sense that the grantee must undertake to make improvements on the grant land or even to live on the land. In fact, under the terms of the initiative, a land grant applicant need not ever even visit the land acquired and can sell the land or otherwise dispose of it after holding it for one year. This scheme of land disposal may adequately serve the initiative's purpose of transferring state land to private ownership, but it certainly does not require that the land is ultimately developed by those with any degree of attachment to the State of Alaska or that people with experience in "Alaskan living" utilize the land. The three-year durational residency requirement adds nothing to the assurance of these objectives.

Further, residence of three years duration is not reasonably required to insure that only actual residents receive grant lands. Whether or not the state has a justifiable concern that state land be distributed to bona fide residents of Alaska to the exclusion of non-resident applicants,²⁷ requiring a minimum of three years actual domicile to establish bona fide residence status in this state simply bears no substantial relationship to the asserted purpose of the requirement. The Beirne Initiative itself includes other less onerous indicia of

26. See note 18 *supra*.

27. See generally *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978), which upheld large disparities in hunting license fees between residents of Montana and non-resident recreational hunters.

But see *Hicklin v. Orbeck*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), invalidating the "Alaska Hire" law's statutory preference for hiring of state residents for pipeline and other petroleum industry jobs.

resident status which easily may be used to distinguish the resident from the non-resident.²⁸

Given that the three-year durational residency requirement is not substantially related to the purpose of insuring that only bona fide residents with significant ties to the state receive the grant land, the five-year and ten-year requirements are even less relevant to this objective of the act. As stated before, the only conceivable relationship between the duration of residency in the case and the disposal of the state grant land is the notion that long-term Alaska residents deserve a reward for their continued residence. In my opinion, this connection does not meet the "fair and substantial relation" equal protection test of *Isakson*.²⁹

CONNOR, Justice, dissenting.

I.

On the question of whether the initiative makes an appropriation, I respectfully dissent.

In *Thomas v. Rosen*, 569 P.2d 793, 796 (Alaska 1977), we quoted favorably from

28. The initiative's other requirements of residency are set out in note 3 *supra*. Similar indicia of residency were approved in *Hicklin v. Orbeck*, 565 P.2d 159, 169-70 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978) (The United States Supreme Court invalidated the residency requirement portion of the "Alaska Hire" law but did not express its opinion on the appropriateness of the criteria employed to establish residence in a case where such a classification is proper.).

Though my disposition of this case on durational residency grounds makes it unnecessary for me to examine the validity of the remainder of the residency classification, I question particularly the requirement that a resident be a registered voter to qualify for a grant of land under the act. Resident aliens, who are not eligible to register to vote, would be excluded from the Beirne Initiative's land distribution scheme if this requirement were enforced. See *Nyquist v. Mau let*, 432 U.S. 1, 97 S.Ct. 2120, 53 L.Ed.2d 33 (1977); *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973); *Graham v. Richardson*, 403 U.S. 365, 91

State ex rel. Finnegan v. Dammann, 220 Wis. 143, 264 N.W. 622, 624 (1936), which in turn states:

"An appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner as the executive officers of the government are authorized to use that money, and no more, for that object, and no other."

Courts in other jurisdictions have also defined "appropriation" for state constitutional purposes as applying to the use of money.¹ But even more persuasive is the record of the proceedings of the Alaska Constitutional Convention. As originally proposed, the provision restricting the use of the initiative and referendum prohibited their use in "making or defeating appropriations of public funds."² The floor discussion shows that the main concern of the delegates was that the expenditure of public money should not be subject to direct legislation by the electorate.³

It appears that the committee on style and drafting eliminated the words "of public funds" from the constitutional provisions because the state can only appropriate public funds. The committee chairman, Dele-

S.Ct. 1848, 29 L.Ed.2d 534 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948); *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948); *C. D. R. Enterprises, Ltd. v. Board of Educ.*, 412 F.Supp. 1164 (E.D.N.Y.1976), *aff'd*, 429 U.S. 1031, 97 S.Ct. 721, 50 L.Ed.2d 742 (1977), all of which invalidate state discriminatory treatment of resident aliens. See also *Foley v. Connelle*, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978).

29. This test was also applied in: *State v. Erickson*, 574 P.2d 1 (Alaska 1978); *State v. Lewis*, 559 P.2d 630 (Alaska 1977), *cert. denied*, 432 U.S. 901, 97 S.Ct. 2943, 53 L.Ed.2d 1073.

1. *Dorsey v. Petrott*, 178 Md. 230, 13 A.2d 630 (1940); *Michigan Good Roads Federation v. Alger*, 333 Mich. 352, 53 N.W.2d 481 (1952).

2. Part 6, Appendices, December 9, 1955, at 1820, 23-24.

3. Part 2, Proceedings, December 16, 1955, at 931-33, 941-42.

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THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

----- draft -----

ISSUES OF CONSTITUTIONAL CHANGE

prepared for

Interim Committee on the Constitutional Convention
of the Alaska State Legislature
Sen. George Hohman and Rep. Brian Rogers, Co-chairmen

by

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221 E. 7th Ave., #204, Anchorage, Alaska 99501

December 7, 1979

----- draft -----

PREFACE

This paper is part of a series of studies sponsored by the Interim Committee on the Constitutional Convention to examine issues pertinent to the 1982 referendum on whether or not Alaska should hold a constitutional convention.

The current study reviews proposed and potential amendments to Alaska's constitution. It seeks to identify problems that have arisen, proposals that have been made formally and informally, and newly emerging issues. Discussion of a particular subject in no way implies its endorsement as an item for constitutional revision. Rather, the purpose here is to lay issues on the table for examination and further consideration.

The extent of consideration given individual topics does not necessarily reflect their significance. In some instances, minimal space is devoted to important issues because they have already been exposed to extensive public discussion. In other cases, a subject may be treated at greater length to help sharpen the issues and possibly help dispose of the matter.

Many proposed constitutional changes are not truly constitutional in nature; they are more appropriate subjects for action by the legislature. However, so long as they have been discussed as proposals for constitutional change, they are included.

I would like to emphasize that this paper is a draft. While I have tried to include all topics that I am aware of, the coverage may certainly not be complete. Accordingly, reviewers are encouraged to suggest additional topics for inclusion, preferably accompanied by an appropriate description and discussion of the change. Similarly, I would welcome any comment on or revision of any item that is covered in this draft.

My two previous papers cover (1) various aspects of calling and arranging a constitutional convention, and (2) considerations that need to be taken into account in deciding whether or not to call a new convention. The first dealt with the following topics: call by referendum, call by legislature, timing considerations, qualification of voters and delegates, convention size and apportionment, convention site, preparatory commission, and the like.

The second paper, prepared for the Conference on Alaska's Future Frontiers, reviewed the 1955-56 convention and the means it established to update the Alaska constitution, examined constitutional changes that have been suggested, and delved into the gamut of questions entailed in accomplishing desirable revisions and judging whether or not to call a new constitutional convention.

Two more papers are planned. One will take a look at Hawaii's 1978 constitutional convention. The purpose will be to examine the character of the revision process and the changes that were made. As Alaska, Hawaii wrote its constitution prior to becoming a state. Unlike Alaska, it has already held two conventions to revise the constitution. Last year's is particularly interesting, for it constituted an amalgam of people who were concerned about Hawaii's economy and its special culture and lifestyles, while reflecting an increasing populism and concern about government expansion. Its experience may, therefore, be particularly pertinent to Alaskans as they consider whether or not to make major revisions in the state constitutions.

Another paper will start examining issues^{of} constitutional revision broader and more basic than those treated in this paper. Instead of just looking at specific amendments, the new study will deal with the major philosophical and conceptual underpinnings of Alaska and its prospective future: relationship to the federal government, the total executive-legislative structure for governing the state, the urban-rural relationship and special consideration of Alaska lifestyles, now and in the future.

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ARTICLE I: DECLARATION OF RIGHTS

The constitution's first article defines the powers that belong to the people and sets the limits on what government can do.

In drafting this article, the 1955 constitutional convention generally followed traditional provisions contained in other state constitutions and in the first ten amendments to the U.S. Constitution. Reflecting the mood of the times, particularly in Alaska, a strong civil rights provision was included with a mandate for legislative implementation (Section 3).

An innovative provision adopted by the convention extended the standard "due process" clause to establish a new "right" -- a guarantee that all persons have the right to "fair and just treatment in the course of legislative and executive investigations" (Section 7). The provision, since adopted by other states, responded to concerns of the 1950's, the "McCarthy era."

Two provisions considered but rejected by the convention have since been included in the constitution. A delegate (male) proposed that the Section 3 civil rights guarantees -- "No persons is to be denied the enjoyment of any civil or political right because of race, color, creed, or national origin" -- be extended to also prohibit discrimination on account of sex. The amendment was defeated upon the argument (by a woman delegate) that Alaska was the first subdivision under the American flag to give women the right to suffrage and that the territory had amply provided for the political and civil rights of its women. In 1972, however, the word "sex" was added to the civil rights clause by constitutional amendment.

A "right to privacy" provision was extensively debated, but delegates could not agree on language that satisfied the majority and no action on the matter was taken. At the time, delegates were principally concerned about indiscriminate use of wiretapping and other electronic devices. Since then, concerns have broadened to the point that the voters of Alaska in 1972 amended the constitution to specify that "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section." (Section 22)

There have been no significant pressures for other amendments to Article I. Several proposals have been made to revise grand jury provisions and to add language that would protect Alaska culture and lifestyles. Other issues within the purview of this article are guarantee of economic rights, bail, penal administration, and provision for "right to life."

Section 3: Economic Rights

It was proposed during the 1955 convention that the civil rights section provide for protection of economic as well as civil and political rights. The purpose was to clearly cover the right of employment and equal opportunity for employment, especially for Alaska Natives. The proposal was not adopted for several reasons: some delegates worried that the "right to work" and collective bargaining issues would get mixed up in a civil rights clause; "civil" was considered to include "economic"; and protection of economic rights does not appear in the federal constitution nor that of any other state.

Since the constitution was written, the concept of equal employment opportunity has been widely accepted. It is now incorporated in federal and

state laws and is followed by most large-scale private employers. Some people, however, continue to believe that protection of economic rights is sufficiently important to be included in the state constitution.

Section 8: Grand Jury*

Existing language provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury..." The provision was modeled after the Fifth Amendment to the federal constitution, which had derived it from English criminal jurisprudence.

Changes to this section of the constitution have been proposed that vary only in degree of revision:

1. The grand jury indictment process should be replaced by a probable cause hearing procedure.
2. The grand jury process should be retained, but it should be complemented by a probable cause hearing procedure.

It has been widely agreed in recent years that the accepted function of the grand jury as a safeguard interposed between this state (prosecutor, district attorney) and a defendant is not generally being fulfilled in actual practice. Even though court rules have restricted some of the more undesirable practices, the grand jury is not deemed effective to protect the private citizen against malice or bad judgment on the part of the prosecutor. In addition, the grand jury indictment process is said to have become a focal point for technical and procedural attacks by defendants, causing delays in

* This discussion is based in part on the February 1975 report by Michael Rubenstein "The Grand Jury in Alaska: Tentative Recommendations to the Judicial Council."

the process of justice. Further, it is charged that prosecutors may use the grand jury to avoid accepting due responsibility for the decision whether or not to prosecute in certain close or sensitive cases. Also, the grand jury system is accused of unfairness to defendants because they are not allowed to be present at the proceedings to confront the witnesses testifying against them. Another argument is that grand juries do not appear to advance the progress of most cases toward final solution. Lastly, a grand jury is criticized as no longer playing a useful part in the adjudicative process and having become, in effect, little more than an historically-based ritual.

There are two alternatives to the grand jury process. One is the "probable cause preliminary hearings" procedure, the other is the "information system." Under the preliminary hearing procedure, the prosecutor presents his proposed indictment and his witnesses before a judge rather than the grand jury. Witnesses are questioned as to facts which the prosecutor hopes will show probable cause to believe that a crime was committed and probable cause to believe that the defendant was the one who committed it. The defendant himself is present with his attorney, and an opportunity is provided for cross-examination of the witnesses. The defendant may testify and call his own witnesses, but he need not do so.

While this procedure could make it more difficult for the prosecutor to obtain a felony indictment, the process can lead to much more expeditious resolution of cases. It overcomes the problem that the grand jury, in most instances, does nothing to advance a case along the road to final disposition because the one-sided presentation that it is exposed to does not allow for

a realistic assessment of the probabilities of successful prosecution. Nor does it serve to bring both sides together in court early in the proceeding to confront each other and begin working for a final resolution. Preliminary hearings further both of these objectives.

Under the so-called "information system", a charging document is filed in court by the prosecutor. It is based upon his own conclusions without any grand jury or judge to screen the evidence. This approach eliminates the grand jury process as a "rubber stamp" step that serves no particular function. However, although the present system may be ineffective, the alternative of no check whatsoever upon initiating a prosecution would seem unacceptable from either the standpoint of justice or from that of efficient administration. (Section 3 now provides that grand jury indictment can be waived by an accused, in which case prosecution is by information. Similar waiver can be authorized under the probable cause and preliminary hearing approach.)

Preliminary hearings procedures have actually been instituted in Alaska by the court system. Those who have been involved in and observed the process have generally found that it worked quite satisfactorily, usually better than the grand jury system. A defendant could be represented by counsel and had greater assurance that their rights would be protected. Although prosecutors had to do more preparation, they have been able to explore the defendant's case and interrogate his witnesses. The principal problem was that more attorneys and time were required than in processing cases through grand juries. However, it is likely that in the long run more cases will be settled as a result of the preliminary hearing and the necessary

finding of probable cause. Thus, overall economies will be effected while justice is being better served.

Assuming that a change is desired in the procedure for initiating criminal prosecution, there are several ways of changing from the grand jury to the preliminary hearing system: by practice, supreme court rule, supreme court decision, or constitutional amendment. The judicial system has, in effect, begun to use the preliminary hearing, and its use could be readily expanded so long as the various parties and interests continue to be satisfied. The fastest and easiest way would be to institute the change by supreme court rule, which could continue to give a choice between the two methods. There are some who believe that a supreme court decision establishing the preliminary hearing method as a right for defendants will be forthcoming sooner or later.

In view of these alternatives, constitutional change can be viewed as applying a major remedy when simpler processes are available. Amending the constitution may, however, turnout to be the most expeditious way, especially if the supreme court has not acted prior to a convention, if and when one is held.

Section 11: Right to Release on Bail

An accused in a criminal prosecution is now entitled to be released on bail, "except for capital offenses when the proof is evident or the presumption great."

A proposal has been made to expand the exception to also disallow release on bail to persons who may cause a danger to other persons or the community.

This suggestion is designed to help prevent occurrences of criminal acts being performed by persons accused of criminal acts who are out on bail. A separate proposal would make ineligible for bail a person held for non-capital felony involving violence when the accused has been twice convicted of violent felonies. Bail could be denied only after a hearing and determination by a judge that there is evidence substantially showing guilt.

Section 12: Penal Administration

Part of the section provides: "Penal administration shall be based on the principle of reformation and upon the need for protecting the public." It has been proposed that this base should be expanded to include "just punishment" and "deterrents".

New Issue: "Right To Life"

Restriction of abortions has been proposed to the "right" of the unborn to be born and to live.

This matter was not an issue before the 1955-56 constitutional convention, as anti-abortion laws were extremely strict at that time. It is only since federal and state courts have upheld women's right to abort unwanted pregnancies that the issue has assumed massive and highly emotional proportions. One result has been a spate of statutory and appropriation restrictions on the expenditure of public funds to perform abortions. The impact has been principally to limit ability of poor women to obtain legal abortions.

"Right to life" advocates have two constitutional means of limiting abortions. First there could be a recognition and affirmation of the "right",

together with a directive to the legislature to implement the section; this would be akin to the privacy provision in Section 22. Second, a provision could be included to prohibit or restrict the use of public funds to support abortions.

Constitutional recourse could also be taken by advocates of women's free choice to avoid undesired pregnancies. Their objective can be achieved by establishing the "right" of women to obtain abortions and/or restricting the legislature from imposing any limitations on such a right.

Abortion is probably not appropriate constitutional matter, particularly as the U.S. Supreme Court has established women's basic right to this procedure. However, passions on this issue run strong, and the state constitution may well be seen as a vehicle for asserting one's position. Faced with the same issue, the state legislature has refused to enact limiting statutes or restrict appropriations.

It must be recognized that the whole abortion issue is highly controversial and divisive. It could easily wreak havoc with a convention referendum and a constitutional convention.

New Issue: Alaska/Native Culture and Lifestyles

If the constitution had been written in the mid-70s, Native rights, freedom of culture, and the right to subsist off the land would have received major attention. Such was one conclusion reached during the 1976 constitutional review conference.

(The subject was given attention during the 1969 Brookings seminars, and some interesting conclusions were reached. Rather than recite those, the

findings and recommendations of the Future Frontiers conference will be used to develop this further.)

(A broader discussion of Alaska Natives and the constitution will be found at the end of this paper.)

ARTICLE II: THE LEGISLATURE

In establishing the governmental structure, the constitutional convention of 1955-56 acted on the premise that just as individual prerogatives should be enhanced to the utmost, so government should function as effectively as possible. Accordingly, each branch -- the legislative, executive, and judiciary -- was to be effective and strong in its own right. Because its powers and structure were strictly limited by Congress, the territorial legislature was quite weak. Legislative reform was, therefore, one of the primary objectives of the statehood movement and the constitutional convention. As a result, constitutional provisions were designed to achieve a strong legislature and an effective legislative process, including a legislature of sixty members, annual salaries, annual sessions without limit on length, a legislative council, and restrictions on enactment of local and special legislation.

Proposals to revise the legislative article are directed both at further strengthening the legislative process and at creating limitations stricter than those provided in the constitution. Among both categories are suggestions for a unicameral legislative structure, increase in membership, revising qualifications and disqualifications of members, limiting salaries and length of sessions, and others.

Section 1: Unicameral Legislature

Alaska's Constitution provides for a senate with a membership of twenty and a house of representatives with a membership of forty. Extensive discussion was given during the constitutional convention to the alternative of

a single-house legislature. Principal arguments in behalf of a unicameral system were: a single chamber operates more effectively than two and is able to more thoroughly consider proposed legislation, while hasty action can be avoided by appropriate rules; conflict between two houses is eliminated, as is the need for conference committees; legislative responsibility is more definitely fixed; substantial savings can be achieved through a reduced staff; the power of special interest groups and lobbies to defeat legislation is reduced.

Arguments favoring the bicameral system claimed that it would retain a structure that has been proven in most states, preserve an effective system of checks and balances and a more deliberative process, and assure more representation for different groups. Further, proponents voiced fear that Congress (which had to approve the state constitution) would not look with favor upon a unicameral legislature, and they raised the spectre that Alaska voters also might not go along with the change from the traditional territorial system.

It was clear after a major debate that an overwhelming majority of delegates wanted to go with the bicameral system, and the issue became moot. However, the unicameral concept was built into the legislative process by specifying that the two houses would act in joint session on governor's appointments and vetoes.

The unicameral issue had actually been raised in Alaska prior to the constitutional convention. On two occasions, in the 1930s and 40s, bills were introduced providing for a single-house legislature. Both times the proposals failed, although a memorial to congress favoring unicameralism was

approved by the territorial house in 1945.

Since statehood, the issue has been raised a number of times in the state legislature. Repeated proposals for constitutional amendments originated in the house but either did not see house action or, if approved, were killed in the senate.

The arguments about legislative structure have essentially been the same as those during the constitutional convention. Additional pro-unicameral sentiment has, however, been engendered by the fact that since the one-man one-vote rule was established under the U.S. Supreme Court decision in *Baker vs. Carr*, the house and senate represent the same populations, a departure from the original constitutional concept of each house representing different constituencies. It has also been argued that standoffs and maneuvering between the two houses has been responsible for long legislative sessions, and that the last minute legislative rush and the use free conference committees have resulted in irresponsible legislative practices and in poor legislation.

As before, countering these positions is the position that separate houses tend to check each other, result in greater consideration of bills, and help avoid bad laws. Most significant so far has been senators' opposition to diluting the power they can exercise in a twenty-member body.

As a result of continuing frustration, house members (lead by Representative Bill Parker) brought a referendum before the voters to obtain an expression about their views on the subject. Since under the constitution an initiative cannot be used to amend the constitution, the vote was to be strictly advisory. However, its sponsors hoped that popular approval of a unicameral legislature might exert sufficient pressure on the state to support

a constitutional amendment.

At the election, voters approved the single-house legislature proposal by a vote of in favor and opposed. However, this action did not result in any follow-up by the legislature. Although, an amendment for a unicameral legislature was again introduced, the senate has so far again refused to put the proposition before the voters.

A change from a two-house to a single-house state legislature can only be put into affect by changing the Alaska constitution. History so far indicates that an amendment to effect such a change will not be agreed to by the state senate. Therefore, it is now fairly clear that bringing about the change to a unicameral legislative structure would require a constitutional convention.*

An alternative way to establish the unicameral system would be created if the constitution were changed to allow for amendments to be proposed and approved by the voters through the initiative process. This subject is discussed under Article XIII.

Section 1: Membership

A number of constitutional amendments have been proposed to provide for an odd number of legislators in each house. Proposals have also been made to also increase the total membership of each house. Thus, several suggestions would increase senate membership from twenty to twenty-five and house membership from forty to fifty-one. The purpose of increased membership is to

* Some time ago, after years of working for a single-house legislature, then state representative Ted Stevens decided to give up any attempt to obtain action by the legislature and, instead, urged the calling of a constitutional convention to effect a transition to a unicameral system.

spread legislative committee work among more people and to achieve smaller election districts. The principal reason for an odd number of members in each house of the legislature is to lessen problems of initial organization of each legislature that arise when parties or coalitions command equal number of votes. However, the matter of resultant districting difficulty needs to be addressed. At this time, with the house having twice as many members as the senate, senate districts can be multiples of or coterminous with house districts. If, as under the various proposals, the house membership is not double that of the senate, apportionment of legislative seats may become more complicated. Thus, unless the variance per member can be accommodated in a large multi-member district such as in Anchorage, either an excessive deviation from equal population standards may result, or a confusing differentiation between house and senate district boundaries may arise. These difficulties can be dealt with if the objective of odd-numbered memberships are considered more important.

Section 2: Members' Qualifications

SECTION 2: A member of the legislature shall be a qualified voter who has been a resident of Alaska for at least three years and of the district from which elected for at least one year, immediately preceeding his filing for office. A senator shall be at least twenty-five years of age and a representative at least twenty-one years of age.

Two changes have been proposed to this section. One would eliminate the age requirement, and the other would modify the district residence requirement to accommodate changes occurring as a result of legislative redistricting.

It has been variously propped that the constitution contain no minimum age requirement for legislators so that any qualified voter would be eligible

to serve in the legislature. This change can be effected by eliminating the last sentence in Section 2. This issue is pretty much one of personal philosophy. Recent years have shown that some of the youngest candidates elected made far more effective legislators than many of their elder colleagues. Terry Miller of Fairbanks and Terry Gardner of Ketchikan are prime examples. Under the present constitutional provision, neither met the age requirement to serve in the senate at a time of achieving high position in the house of representatives.

The stipulation that a member of the legislature must be a resident of the district from which elected for at least one year prior to filing for office could conceivably raise a problem for a legislator then in office when district boundaries are revised as a result of reapportionment. Accordingly, an amendment was considered in 1972 (SSJR 44) which would have provided that a legislator must have been "for at least six months, a resident of an area which, under the plan for redistributing and reapportionment in effect for the immediately preceding election, was a portion of the district from which he was elected." This somewhat cumbersome provision was not approved by the legislature, and to date no problems have arisen to necessitate the change. The original constitutional language would appear to be broad enough to cover the purpose of the proposed amendment.

Section 5: Disqualifications

SECTION 5: No legislator may hold any other office or position of profit under the United States or the State. During the term for which elected and for one year thereafter, no legislator may be nominated, elected, or appointed to any other office or position of profit which has been increased, while he was a member. This section shall not prevent any person from seeking or holding the office of governor, secretary of state, or member of Congress. This section shall not apply to employment by or election to a constitutional convention.

Several changes have been suggested to this section: eliminating the restriction against office holding under specified conditions; exempting educators from the restrictions of this section; and substituting "lieutenant governor" for "secretary of state" in the second sentence. When the constitution was amended in 1970 to effect the name change to lieutenant governor, amendment of this section was inadvertently omitted.

Proposals to revise the one-year restriction on state office holding are predicated on the idea that legislators frequently have the kind of background and experience that would make them valuable members of the state executive branch. Suggested changes range from eliminating the restriction altogether to exempting from the restriction any salary increases resulting from recommendations by a salary commission or from a collective bargaining agreement. The latter approach would be designed to differentiate salary increases resulting from third-party recommendations or across-the-board raises from legislative action affecting individual positions to which a legislator might aspire. Such action may, however, not be necessary since the state superior court, in *Jefferson vs. Strandberg*, ruled that the one year provision applies not to general, across-the-board pay increases but only to isolated pay actions for specific state positions.

A separate proposal would exempt application of the section to "employment as a teacher or school administrator by the state, a political subdivision of the state, or the University of Alaska." This suggested amendment is the result of an earlier court decision that employment by the state as a teacher constituted a "position of profit" and could not be maintained while serving as a legislator.

Section 7: Salary and Expenses

Establishment of legislative compensation caused much debate during the constitutional convention and has been a problematic issue ever since. The constitution simply provides that legislators receive annual salaries. Providing for level of compensation has been left to the legislature.

The initial constitutional convention proposal called for an annual legislative salary equal to one-third of the governor's salary. However, objection was raised both to the payment of an annual salary and to the amount. Extensive debate took place on both issues, with a string of amendments presented to establish a daily rate and to limit both salary and per diem to a different percentage of the governor's salary.

A strong majority accepted the concept of an annual salary because the legislators perform legislative duties whether in session or not. There was also a feeling that daily compensation would encourage longer sessions, whereas an annual salary would encourage legislators to conclude their business with as much dispatch as the public interest would permit.

Most veteran legislators in the convention supported a high level of compensation to attract good people and compensate them for actual expenses and for loss of other income. The majority of those who had never been in the legislature supported a lower compensation.

Discussion about the level of an annual salaries dealt with a variety of ratios of a hypothetical gubernatorial salary. Relating these rates to different lengths of sessions (delegates expected that initial sessions after statehood might last up to five months, after which only one or two months might be required) and then computing daily income resulted in projections

of compensation that could range anywhere from \$20 to several hundred dollars a day. In the end, the delegates agreed by a very close vote to set and provide for an annual salary without constitutional limitation. This action was taken in the interest of obtaining good legislators with high pay, while avoiding a fixed ceiling that might be unacceptable to the public and be overly inflexible.

Lack of constitutional directive or guidance on the level of compensation has, however, put legislators in the difficult position of establishing their own pay. Whether they do it directly or through a vehicle such as a salary commission, the public expresses much resentment about high salaries even when these may seem quite reasonable to legislators. In fact, voters in a 1976 referendum defeated a pay bill that had been enacted by the legislature, thus accentuating the issue.

Whether a truly satisfactory constitutional resolution of the issue can be evolved is somewhat questionable. While some would establish a limitation on legislative salaries, experience in other states has shown that where a specific amount is set in a constitution it quickly becomes obsolete. Changing the established salary by constitutional amendment is virtually impossible.

Setting a ration between legislative salaries and that of a governor may be somewhat more feasible now than when the constitution was written. The character and scope of legislative service is much clearer now than prior to and in the early years of statehood. Thus, a practical ratio might be established now, whereas in 1955-56 delegates struggled vainly to do so.

An independent salary commission provides a potential vehicle for handling the compensation issue. But such commissions have quite often come forth with substantial salary increases that proved highly unpopular with the public and put extreme pressure on legislators at both federal and state levels to override or restrict their recommendations for political reasons.

Section 8: Session Limit

No limit on the length of legislative sessions is established in the state constitution. As sessions have become longer in duration over recent years, a series of resolutions have been introduced to restrict their duration. However, none of the proposed constitutional amendments have been approved by the legislature.

At the 1978 general election, the legislature asked Alaskans to cast an advisory vote on establishing a maximum 120 day length for regular legislative sessions; provision was included for a ten day extension by concurrent vote of each house. The actual proposition asked voters whether a constitutional amendment to that effect should be placed before the qualified voters at the 1980 general election. Voters approved the proposition by a margin of 3 to 1.

Arguments in behalf of a session limit focus principally on the increased order and speed that would result from everyone being aware of timing requirements and session deadlines. Opponents argue that the increased complexity of state business necessitates availability of adequate time for legislative consideration, and that specific closing dates would work into the hands of

powerful lobbies that would have an easier time killing legislation they dislike.

Actually, both sides to the issue agree that shorter sessions are desirable, and the principal question is whether a constitutional limit needs to be established. An alternative to setting a maximum session length is establishing stricter guidelines and deadlines for legislative work and increased recourse to and greater effectiveness of interim committee work.

Several variants to session limit proposals have been submitted and discussed in the past. Among these is a proposal to recess the legislature 65 days after the governor submits his budget, unless the legislature by extraordinary majority votes to proceed without a recess. The legislature would subsequently reconvene in special session, with the principal order of business being the general appropriations bill. The purpose of this approach is to get the regular business of the legislature out of the way, permit interim work on the budget, and then concentrate exclusively upon the budget after recess.

Section 11: Interim Committees

The governor's authority to make budget revisions after the legislature enacts the annual appropriations bill has been a matter of controversy for a number of years. Legislative attempts to have the budget and audit committee exercise approval rights over budget transfers and over expenditure of federal and other program receipts have been struck down by the courts as unconstitutional. To accomplish its objective, the legislature then

proposed that the constitution be amended to establish an interim committee to approve state budget revisions jointly with the governor. Voters defeated this proposed constitutional amendment by a 3 to 2 margin.

The issue in this controversy is the question of whose prerogatives are being abrogated under the present system and whose would be limited if a change were effected. In other words, it is a question of executive versus legislative power.

The legislative argument is that gubernatorial transfer of funds from an appropriated purpose to another constitutes an amendment of a legislatively enacted appropriations bill. However, even though the constitution authorizes interim committees, it does not specifically provide for delegation of legislative powers to such committees. Accordingly, legislators favor a constitutional change that would authorize the legislature to establish an interim committee to approve state budget revisions.

Countervailing arguments are based principally on opposition to legislative interference with executive branch control and efficiency, which are responsibilities of the governor. Adequate legislative control is deemed to exist in the initial appropriation process and subsequent legislative audit of state expenditures.

According to the state supreme court, this is strictly a constitutional issue. Since Alaska voters have only recently turned down a constitutional amendment, the only potential recourse on this issue would appear to be via revision in constitutional convention.

Section 15: Action Upon Veto

(anything needed on this subject?)

New Issue: Free Conference Committees

Much criticism has been levied in recent years at the effects of legislative use of free conference committees. Such committees are utilized to resolve differences between bills passed by the two houses of the legislature. Composed of members appointed from each house, a free conference committee has extensive authority to revise the legislation approved by the two bodies, frequently bringing forth a version quite different from either of the original bills it considered. Bills reported by the committees are subject to approval by both houses.

Critics of free conference committees deem that these bodies become "super legislatures", because they effectively function beyond control of the membership. This results from committees usually holding their results until the very end of the session. Usually dealing with some of the most important legislation, committee reports then have to be dealt with during an adjournment rush that provides little time, if any, for consideration of the changes made. The result has been characterized as embodying the worst possible features of a unicameral legislative system, one functioning without proper rules and safeguards.

Despite criticisms, conference committees are needed in a bicameral legislature to help adjust differences between legislation emanating from the two houses. The committees are established under legislative rules.

There is no constitutional language dealing with such committees. And none seems required, since problems and abuses could be dealt with by the legislature if its members so desired. It is only in the case of continued ill feeling about the use of free conference committees that a constitutional convention, if one were called, might deal with the issue. A legislatively-sponsored amendment is, of course, highly unlikely.

ARTICLE III: THE EXECUTIVE

Constitutional provisions for the executive branch were designed to establish a strong executive to complement a strong legislature and an independent judiciary.

Under territorial government, executive authority was highly defused. Many functions were under direct federal agency jurisdiction, such as road building and fish and game. Other functions fell under federally appointed officials, who included the governor, Secretary of Alaska, judges, district attorney, etc. To dilute the authority of the federally appointed chief executive, the legislature provided for a number of elected officials (attorney general, treasurer, highway engineer, and commissioner of labor) and established dozens of boards and commissions as a further means of bypassing federal control.

Government then was neither responsible nor responsive to the people of Alaska. As a result, convention delegates were ready to make basic structural changes so the people could hold the governor wholly responsible for the conduct of state administration. There was consensus, both within the convention and throughout public hearings, that the constitution should provide a strong executive who would appoint state department heads. The governor was to be responsible for his entire administration.

Some critics have since argued that governors have too much power under the constitution, although others have held that state executives have actually not utilized their authorities and responsibilities sufficiently to serve the people well. In these times, a strong governor is considered

by many important to upholding the state's interest in dealing with the federal government.

Generally, observers have deemed the executive article to have served Alaska well, as evidenced by the lack of any substantive amendments. The only change has been to rename the "secretary of state" as "lieutenant governor".

Sections 4 & 5: Governor's Term of Office and Tenure

The constitution establishes the governor's term of office at four years (Section 4) and authorizes the governor to serve two full four-year terms (Section 5). Incumbent governor Jay Hammond has suggested that state governors serve a single six-year term. The principal reason for the proposal is to eliminate a governor's concerns about reelection and, with the compromises and political expediencies that such concerns usually beget. It has also been suggested that too large a part of a four year term is devoted to becoming an effective governor and that the end of the term, and reelection time, approaches too soon after that. A six-year term would permit the government to implement the policies upon which he was elected.

Opponents of this idea argue that a six year term is too long and that voters should have an earlier opportunity to effect a change in administration if they so desire. The brief history of the state demonstrates that voters are quite ready to change governors before they have completed two full successive terms; in fact, Hammond is the only exception.

Section 7: Lieutenant Governor

Members of the constitutional convention committee on the executive branch did not want a lieutenant governor who would mainly "lay corner-stones and address chamber of commerce luncheons". To prevent that, they proposed that the position be closely tied to that of the governor, assuring both a working relationship and a logical succession. The idea was accepted in the constitution, which provides that the people would have the opportunity to select their lieutenant governor by vote in the primary and that he then run jointly with the governor in the general election, thus assuring that both would be of the same political party while having been popularly selected. This decision was arrived at after considering other alternatives such as an independently elected lieutenant governor or one appointed by the governor.

Although there has not been much public discussion of the lieutenant governor's role or method of selection (except during election times by candidates for that office), most panelists evaluating the executive branch during the 1976 constitutional review conference were of the opinion that the lieutenant governor should be selected by the gubernatorial candidate prior to the election and then run as a team. References to the existing selection process described it as "ridiculous, a sham" where the two candidates "run in a half-baked fashion together" (John Hellenthal), a "non-buddy system" which "guarantees the second best" and creates a testing ground for "grade D" politicians (John Havelock), a system where if something happens to the governor "we'd wind up with the second, third, fourth, tenth best person" (Andy Warwick). Reference was also made to clashes between incumbents in

the two top offices and even occasional hatred between them.

No constitutional amendment to change the lieutenant governor selection process has been introduced so far. The present method was devised by the constitutional convention to overcome the practice of ticket balancing that also frequently results in not such good candidates in the second elective position. Under the current method at least, the lieutenant governor candidates, as well as the candidate for governor, is initially selected by the voters in primary election. (Independent candidates, who do not run in the primary, do run on a self-selected basis.)

Section 13: Succession

Constitutional provision is made for succession of the lieutenant governor in case of a vacancy in the office of the governor. Further provision is to be made by the legislature for succession to the governor's office and for an acting governor in the event the lieutenant governor is unable to succeed to the office or act as governor. (What is the problem? Why further constitutional language proposed? What?)

Section 25: Election of Attorney General

Heads of all principal executive departments are appointed by the governor. That constitutional provision includes the office of attorney general, head of the state department of law. However, proposals for election of the attorney general have been made many times since statehood.

Election, rather than gubernatorial appointment, is usually favored by those who are displeased with activities of the state administration, including the governor's political opposition. But, even when the "outs" have advocated making the attorney general an elective office, they quickly abandoned the idea once they were "in". For internally, the appointive method seems to work well for the operation of the executive branch, with the attorney general usually one of the closest policy advisors to the governor. That has not, however, let the issue die, for there are still continuing questions about the various roles of the attorney general, particularly those pertaining to the administration of justice.

1955 convention delegates discussed at length whether the attorney general should be elected or appointed. A problem in that debate was lack of agreement about functions of an attorney general. Some viewed his role as strictly that of a legal advisor to the governor and to other officers in the executive branch. Others believed he performed similar functions with respect to the legislature. Yet others felt that because the attorney general prosecutes cases on behalf of the state, he should be independent of those (including the governor) responsible for administering the state's police functions. And some further argued that a major purpose of the attorney general's office was to keep the executive honest. Despite these disagreements about functions and responsibilities, however, delegates overwhelmingly rejected proposals for making the attorney general elective or subject to nomination through the judicial council in a method similar to that provided for judges.

It would be difficult to resolve the attorney general issue without reaching at least some agreement about the role of that office. One possible approach would be to establish two separate offices or departments to divide responsibilities for functioning as legal counsel to the executive branch and for administration of justice.

Election of the attorney general remains another option, though it would be viable only if that office were divorced from serving as the governor's legal advisor. The election option had been rejected by the constitutional convention principally to avoid politicizing state administration of justice and potentially creating power conflicts between the governor and attorney general.

Further proposals have been made to elect district attorneys and state prosecutors. This idea had not even been considered by constitution writers as it would have been counter to the basic principle of focusing responsibilities in a limited number of department heads and, ultimately, in the governor. The arguments applied against election of the attorney general and judges -- opening positions involved in the administration of justice to all the undesirable aspects of partisan and elective politics -- would certainly have also been brought to bear to defeat such proposals in the convention.

ARTICLE IV: THE JUDICIARY

Alaska has a unified judicial system under the constitution. It consists of the supreme court, superior court, and other courts established by the legislature. The entire court system is under the rule-making authority of the supreme court; the chief justice is the administrative head of all state courts.

Three amendments to the judiciary article have been adopted. Two of them, approved in 1970, were designed to avoid abuse of power by the chief justice. An amendment to Section 2 provided for selection of the chief justice by a majority vote of the supreme court justice, rather than having him designated by the governor; it also limited service as chief justice to one consecutive three-year term. Section 16 was changed to specify that the court's administrative director serves at the pleasure of the whole supreme court, rather than just at the pleasure of the chief justice. In 1968, the original section dealing with removal of incapacitated judges was repealed, and a new section creating a commission on judicial qualifications and establishing a revised process was enacted in its place.

Other proposed revisions to the article have dealt with election of judges and composition of the judicial council.

Section 5 & 6: Selection and Retention of Judges

The existing judiciary article of the constitution embodies a nonpartisan plan for selecting judges that is based on the American Bar Association and Missouri Plan models. Under it, the governor appoints judges from nominees

presented to him by the judicial council, which is composed of three laymen appointed by the governor with the consent of the legislature, three attorneys named by the organized state bar and the chief justice, who serves as chairman. Three years after his first appointment, a judge must submit his name to the voters for approval or rejection. Once approved, a superior court judge goes before the voters for reconfirmation every six years, and a supreme court justice stands for popular approval every ten years. The purpose of this provision is to make judges responsible to the people without subjecting them to partisan politics or competitive campaigns for election or reelection.

Although the alternative of electing judges was debated at the 1955 convention, the appointment process was approved by 51 to 2 vote. Despite that overwhelming approval of the appointment process by convention delegates, the proposal to elect judges rises periodically. Numerous resolutions have been introduced in the legislature to provide for election of judges. The argument for this method is generally related to achieving greater responsiveness of judges to the public wishes and values. The counterargument, of course, is the reverse side of the coin: elections would subject judges to partisan politics and competitive campaigns for election or reelection. It has been estimated that at least 90 percent of state bar association favor the judicial appointment system over elections.

In the retention election held three years after initial appointment and periodically thereafter, judges run unopposed on a non-partisan ballot. The reconfirmation process has been criticized because without traditional party

guidelines and the clash of personalities, the generally low visibility of court-related issues precludes voters from making an informed decision about on-the-bench performance of a judge. Unless they hear news of serious criminal charges concerning an incumbent judge, typical voters will either cast an automatic "yes" ballot or not bother to vote at all. Inevitably, the outcome of such "merit retention" election has been a heavy majority in favor of retention, subject only to the possibility that some special interest group might mount enough of a campaign against a judge to provide the decisive element in a low-turnout, majority "no" vote.

The validity of these criticisms turns in large part upon the problem whether the public is informed about the record and qualifications of retention candidates. A recent survey sponsored by the judicial council showed that Alaska voters do want to know more about the justices and judges they are voting on. In particular, people want to know more about judges' performance records, their personal attributes, and their positions on key laws and issues. Alaska is the only state that has a statutory requirement for judicial evaluation.

To deal with the problem of providing information to the public, the legislature in 1975 required the Alaska judicial council to evaluate judges and provide the information to voters. Currently, the council evaluates judges according to a list of criteria that includes legal knowledge, reasoning ability, sentencing factors, equal treatment of all individuals, restraint from favoritism, a basic sense of fairness and compassion, willingness to work diligently, and integrity. Evaluations themselves are determined with the help of polls among a variety of groups, including attorneys, peace officers,

and jurors who have served under a particular judge. Rural problems have arisen in evaluation of judicial performance, due primarily to lack of objective measures. The judicial council is now investigating measures to bring about more effective and useful evaluations and better means of informing the public.

Giving more information may not, however, still the criticism of the retention process. The record to date shows that only one justice has been rejected by the voters, a person respected by his peers and by knowledgeable attorneys; on the other hand, judicial council recommendations for non-retention of judges have been ignored by voters. It has, therefore, been suggested that the judicial qualifications commission would provide a more valuable and efficient instrument for screening out judges who should be removed or disciplined. A further suggestion is that the commission also be entrusted with initial screening of judgeship candidates, so that both the nominating and the evaluation responsibilities would be lodged in the same body, thus assuring consistent application of standards.

Section 8: Judicial Council

The judicial council performs a key role in the selection of judges and conducts studies for improvement of the administration of justice. The council consists of seven members: three attorney members appointed for six year terms by the board of governors of the Alaska Bar Association, three non-attorney members appointed for six-year terms by the governor subject to confirmation by the legislature, and the chief justice of the supreme court, who is chairman of the council.

At the end of the constitutional convention, some criticism of the judicial article was voiced by a group of convention consultants. Specifically, they felt that the article went "a long way toward withdrawing the judicial branch from the control of the people of this state and placing it under that of the organized bar. No state constitution has ever gone this far in placing one of the three coordinate branches of the government beyond the reach of democratic controls. We feel that in its desire to preserve the integrity of the courts, the convention has gone farther than is necessary or safe in putting them in the hands of a private professional group, however public-spirited its members may be." The consultants suggested a number of revisions that would, in their view, democratize the proposed system by providing for legislative confirmation of attorney members of the judicial council, adding a superior court judge and another lay member to the membership of the council, and other changes. In view of the late hour of their suggestions, none of them reached full convention consideration.

Among more recent proposals for revision in the membership of the judicial council was one to increase its membership from seven to fifteen. The change proposed by Senator Hjalmar Kerttula in 1969 would have left the three attorney members, increased the number of non-attorney members from three to five, and provided for non-attorney members of the legislature, two from each house; in addition, one superior court judge and one district court judge would be appointed for six-year terms by the chief justice. Although, these proposals for council expansion have been made to reduce the

influence of the bar association, Alaska judicial council executive director Michael Rubenstein and other legal specialists believe the present composition is satisfactory and that lay members are not over-powered or dominated by lawyers. Rather, he sees the lay members as having full understanding of what goes on and as being characterized by individualistic, independent thinking and common sense attitudes. Thus, he sees council composition as being quite satisfactory.

Section 10: Commission on Judicial Qualifications

The commission is composed of five judges (one supreme court, three superior court, and one district court), two attorneys selected by the state bar association and two lay individuals appointed by the governor and confirmed by the legislature. Suggestion has been made that the commission's composition be changed by constitutional amendment to include only three judges and to increasing attorney and lay membership to three each, leaving the total commission membership at nine. This is deemed to provide a better balance and would accord with the American Bar Association model for judicial qualification commissions.

ARTICLE V: SUFFRAGE AND ELECTIONS

Voter qualification provisions set forth in the first section of this article has been amended three times, more changes than have been made to any other section of the constitution. In 1966, an amendment was approved to permit the residency requirements for voting for the President and Vice-President of the United States to be prescribed by law. A 1970 change lowered the voting age from 20 to 18, something that was proposed during but not approved by the 1955-56 constitutional convention. The third amendment, also approved in 1970, eliminated the requirement of ability to read or speak the English language as a prerequisite to voting.

No further changes to this article have been proposed during the past decade. Has anything constitutional in nature emerged from legislature and lieutenant governor deliberations on electoral^{al} reforms?

ARTICLE VI: LEGISLATIVE APPORTIONMENT

Alaska's original constitution established an apportionment system under which the house of representatives largely, but not completely, based on population. The senate was designed to reflect geographic/regional components of Alaska. The districting and apportionment provisions of the 1955-56 constitution were evolved after much dissension and through hard fought compromise between those who pursued the one-man one-vote principle (which had not yet been sustained by the U.S. Supreme Court) and those who were concerned that people of sparsely settled and remote areas also be represented in the legislature.

Now, however, much of the article is obsolete in view of the U.S. Supreme Court's one-man one-vote rule (Baker vs. Carr). Thus, the use of "methods of equal proportions" (Sections 5, 6, and 7) and limitation on changes in senate districts and apportionment (Section 7) are no longer in force. It is problematical what degree of freedom, if any, the Alaska constitution can have to deviate from a one-man one-vote under the U.S. constitution. Strong arguments have been made that the geographic and demographic characteristics of Alaska are such as to necessitate adjustments to usher rural areas and native population of adequate representation. This problem will become ever more serious as urban concentrations in Alaska continue to grow and include an ever increasing proportion of Alaska's total population.

It is questionable what constitutional changes can be made in Alaska to resolve this situation. Probably all that can be done with the article is to delete and revise obsolete and inapplicable matter.

ARTICLE VII: HEALTH, EDUCATION & WELFARE

Section 1: Public Education

In part, Section 1 provides: "No money shall be paid from public funds for the direct benefit of any religious or other private educational institution." An even tougher provision (which would have prohibited "direct and indirect" benefits to any religious or other private educational institution) was rejected in order not to restrict help to children to attain the fullest level of individual development through programs, such as free lunches and bus transportation. However, court interpretation of the constitution has strictly limited the assistance that could be provided to non-public institutions, in effect maintaining a very strict line between expenditures for public and private educational purposes.

The constitutional provision was primarily aimed at institutions and was not meant to restrict assistance available to students. Furthermore, convention consideration of this issue was directed exclusively at primary and secondary school education, whereas current questions revolve mainly around state aid to higher education.

Section 2: University of Alaska

An issue that may well require constitutional resolution is the emerging conflict between the legislature and the University of Alaska. The University claims that under Section 2, it has special status within the overall structure of state government and that legislative authority over the university and the board of regents is limited. The issue is now before the court as

a result of a lawsuit brought by the University of Alaska to establish its freedom from legislative control. While the state supreme court may eventually rule on the respective authorities under the constitution, a change in the constitution's language may be necessary to resolve the conflict and accommodate the disparate interests, a resolution that can probably not emerge from the legislature, since it is a direct party in interest.

Section 2 of Article VII reads:

The University of Alaska is hereby established as the state university and constituted as a body corporate. It shall have title to all real and personal property now or hereafter set aside for or conveyed to it. Its property shall be administered and disposed of according to law.

The university has claimed that the legislature is given only limited jurisdiction under this provision and that the manner in which it manages its finances is not subject to specification by law. The legislature, on the other hand, has continued to specify in significant detail how the university will administer its funds, and has thus established a basis for controlling operations of the university.

A proposed constitutional amendment was introduced in the legislature to specify that funds appropriated to the University of Alaska, as well as its property, shall be administered and disposed of according to law.

ARTICLE VIII: NATURAL RESOURCES

According to terms of Alaska statehood bills pending at the time of the 1955 convention, more than 100 million acres of land would be transferred from federal to state ownership upon statehood. Alaska would also receive title to submerged lands in contiguous waters and to lands under inland navigable waters. The state would assume ownership of all mineral resources on and under its land. It would take control over commercial and sport fisheries and wildlife resources. Thus, it is no wonder that the drafting of provisions covering the natural resources of the future state was viewed as one of the great challenges for the constitutional convention.

In preparing the natural resources article, the convention was conscious of how the federal government as well as older state governments had failed to conserve and properly develop land and water resources. Likewise, the convention was mindful of the inadequacy of federal management of Alaska's resources. It recognized the need to provide a harmonious balance between consumption and preservation of resources, while at the same time preventing inappropriate exploitation or subversion of resources by special interests.

In drafting the resources article, the convention had no precedents to work with. Most state constitutions are silent on the subject. The few that deal with it cover only limited topics such as water rights, minerals, or land management. As a result, Alaskans had to "invent" their own constitutional provisions. This they did on the basis of modern resource

management principles and their own experience in Alaska.

An important factor to remember is that both the federal government and Alaskans in general viewed resources as the future economic foundation for the state. In order to assure its financial viability, the statehood bills being considered by congress were providing Alaska with a far greater share of federal lands than had been granted to any other state. Delegates and others similarly saw resources as the means by which the people and the state government would eventually be supported.

The '50s were a period of optimism and hope for Alaskans. The economy had been booming as the result of defense activities, and population had increased significantly. At the same time, Alaska was still a very undeveloped country with less than 200,000 people. The resultant emphasis was on economic development, and this direction is clearly reflected in Section 1 of the resources article:

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 pursues this statement of policy through a broad statement of legislative 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.

In this context, "conservation" refers to wise use of resources rather than their preservation, and "maximum benefit of its people" was designed to emphasize the greatest economic benefit to the most citizens. Further sections of the article pursued these basic concepts.

Conditions have significantly changed since the constitution was written and Alaska became a state. The dream of resource based economy has been realized: oil development has made Alaska a wealthy state. Although, economic diversification is still a goal being pursued, the viability of the state is no longer an issue. Concurrently with wealth, and partly as a result of it, there is an increasing concern about the quality of life and the environment. While partly reflecting national trends, it is also a factor closely related to the special characteristics of Alaska's people and their values.

As a result of these changes, the policies underlying the constitution natural resources article have been called into question. Various proposals have been made to change the statement of policy included in Section 1. Thus, one proposal would have substituted "wise use" for "maximum use" of natural resources as the basis of state policy and would have substituted the policy of protecting the natural environment for the present statement encouraging settlement of land and development of resources. (SSJR 60, Sixth Legislature, Second Session). While not all would substitute an environmental philosophy for the development thrust underlying the present constitution, others too have suggested creating more of a balance between these principles.

Some of the resource management concepts have also been called into question. For example, Section 4 specifies that replenishable resources -- fish, forests, wildlife, and others -- should be managed for "sustained yield." Delegates realized that the meaning of this term was vague and subject to

individual interpretation. And so it has proven, providing no basis for establishing specific standards or gauging limits for management purposes. The problem has been compounded by the evolution of such variances as "optimum sustained yield", "maximum sustained yield", and the like.

Similarly, delegates wanted the concept of "multiple use" of land applied wherever practicable. However, application of this concept is not easy in the real world. Emphasis on highest and best use has been increasingly substituted as a management principle, even though popular lip service continues to be given to the multiple use idea. The reason for the change is the infrequency of situations where different uses of land can be truly compatible and carried on concurrently. It has been found that realistically one use or another is considered better or preferred, with other uses then occurring so long as they do not interfere with the principal use.

The significance of any of these issues may be questioned. State management of its resources has not blatantly followed constitutional concepts when these were obviously inapplicable. The policy language of Article VIII is sufficiently qualified to allow for significant leeway. Thus, Section 1 modifies the land settlement and resource development policy by stating that their maximum use would have to be "consistent with the public interest." Similarly, the development emphasis of Section 2 is stated to be "for the maximum benefit of its people," and where the "maximum benefit" might lie on the side of environmental preservation, then the result could obviously move in the direction of non-development. Likewise, although the sustained yield and multiple use principles may be difficult to define, in

practice resource managers have had significant flexibility in administering state land and resource programs. Which, of course, leads to another criticism levied at the resources article: its lack of effective guidelines for managing the state's resources and environment.

Major developments of the past fifteen years were, of course, not taken into account by the constitution writers, principally Alaska Native land claims, major oil development, and the national energy crisis. Some participants at the 1976 constitutional review conference expressed the opinion that these are sufficiently significant to justify a review and updating of the resources article, if not necessarily the entire constitution.

* * *

Aside from issues of major policy directions and emphases, there do not appear to be significant problems with the resources article. Only one amendment has been made so far: revising the prohibition of exclusive rights of fisheries to permit establishing a limited fisheries entry program when in the interest of conservation, protecting the economic welfare of fishermen, or promoting agriculture.

A few other issues might, however, arise in a current review of natural resources article provisions.

Section 3: Common Use of Resources

Section 3 provides: "Wherever occurring in the natural state, fish, wildlife, and waters are reserved to the people for common use." With increasing population and resultant greater pressures on game, relatively fewer

wildlife resources are available to the people of Alaska. This has created problems and conflicts, particularly between sports hunters and people depending on game to meet their basic food needs. The common use provision of Section 3 has been to argue against giving subsistence users a preferential right to game. Thus, in

the superior court found that sportsmen and other hunters from outside a region could not be prevented from taking game in an area that the state was by regulation reserving to local subsistence users. (But wouldn't Section 17 regarding equal application of regulations to all people similarly situated provide a ready way of providing for subsistence users; should the state wish to do that?)

Section 9: Land Disposal

A broad grant of authority is given to the legislature under Section 9 to provide for the sale or grant of state lands; Section 8 authorizes the leasing of lands. There are no policies, directions, or restrictions that would provide a basis for specific programs of land disposal by the state.

The only constitutional issue might arise in response to popular pressures for large scale land disposal. Dissatisfied with the level of state land transfers to individuals, advocates of increased state land divestiture might resort to the constitution as a means toward attaining their objective. (An initiative designed to promote land disposal, the so-called Beirne initiative of 1978, was ruled unconstitutional by the supreme court under Section 7 of Article XI, which prohibits the use of initiatives

to make appropriations.) While not specific, the constitution is certainly broad enough now to accomodate any policy or level of land distribution.

ARTICLE IX: FINANCE AND TAXATION

The finance and taxation article has been revised only once. It was amended in 1976 to establish the permanent fund as a means of preserving some of the state's oil revenues to provide income in the future.

Principal constitutional issues are potential establishment of limits on taxes and expenditures, increases in the share of petroleum revenues accruing to the permanent fund, and possible changes in the process of incurring state debt.

Section 1: Taxing Power

Alaska's constitution contains no limitation on the state's ability to levy taxes. Section 1 basically requires that the power of taxation will not be surrendered, suspended, or contracted away. Section 2 states that property of non-resident citizens may not be taxed at a higher rate than that owned by residents of the state.

Elimination or significant reduction of state income taxes has been proposed in legislation and in a pending initiative. Elimination and reduction of property taxes, now levied principally by municipalities, have also been suggested. Other proposals for sharing current oil wealth with citizens are also under discussion.

Some action in the area appears likely during the 1980 legislative session. No constitutional amendments to restrict taxation have been proposed. Since no taxes are levied by the constitution, the direct recourse,

of course, is through the legislative route. Lack of legislative action may, however, lead to public pressures for constitutional tax limitation.

Section 8: State Debt

Every two years, Alaska voters are asked to approve a large array of general obligation bonds. This they are required to do under the Section 8 provision that: "No state debt shall be contracted unless authorized by law for capital improvements and ratified by a majority of the qualified voters of the State who vote on the question." Section 9 exempts revenue bonds from the requirement for voter approval.

Bond issues are placed before the electorate as a result of legislative action. Generally, the legislature groups capital projects by major categories that provide something for each region and balance various interests. The result has been approval of almost all bond propositions.

This process has come under increasing criticism, for no one assumes responsibility for bonding proposals and increasing the state debt. The governor makes his recommendations to the legislature, which sometimes accepts his suggestions but generally develops its own bonding packages. Thus, the governor is only suggesting projects for legislative consideration.

Legislators, however, also assume no responsibility. All they do is put the propositions before the voters for approval. The voters, in turn, assume the legislature had a purpose in proposing the particular bond packages and so, since the proposals always contain something for everybody, they add their stamp of approval.

A discussion pertinent to this issue occurred during the 1955 constitutional convention. It was proposed that contracting of debt be authorized

either by two-thirds vote in each house of the legislature or, as now provided in the constitution, by majority approval in the legislature and voter ratification in statewide referendum. It was pointed out that a number of states already authorized borrowing by a super-majority vote and that this alternative would streamline bond consideration and save money in instances before approving a bond issue not supported by the required majority of legislatures.

The convention, however, chose to require that the public vote in all instances on creation of general obligation debt. Experience since then does indicate that the alternative would put a far greater responsibility on legislators when approving an increase in state debt. Furthermore, it would alert voters to obvious questions in those instances where lack of extraordinary majority in the legislature forces bond issues onto the ballot.

Section 12: Budget

In November 1978, the governor identified creation of a constitutional limit on the size of the state budget as his top legislative priority for 1979. He did not, however, pursue the proposal.

Actually, the governor already has the means to limit growth of the state budget and of state government. Under the constitution (Section 12), the governor initiates the state budget. Experience over the years has shown that this budget becomes the basis for legislative consideration of expenditures, and the final budget is usually predicated on the governor's proposals. Even more important to the control of expenditures is the

governor's constitutional authority to exercise his veto power to strike or reduce items in appropriation bills (Article II, Section 15). Thus, control of excessive budget growth is within the power of the governor.

Popular desire to limit budget growth beyond any controls exercised by the governor and the legislature may well lead to proposals for establishing constitutional limitations. Few states, however, have so far found the kind of limiting language that does not concurrently hamstring effective, and frequently economical, operations of government.

Section 15: Permanent Fund

Restrictions against earmarking of state revenues were considered to be the most innovative feature of the constitution's finance article. In prohibiting dedication of funds (unless earmarking existed at time of ratification of the constitution or was required to participate in a federal program) delegates were following a principal tenet of public finance. Experience had shown that proliferation of dedicated funds could create a situation when neither the governor nor the legislature has any real control over the finances of a state. Thus, in one state the legislature was free to appropriate only 17 percent of tax collections; the rest were dedicated. Before statehood, close to 30 percent of territorial funds were earmarked.

Appearance of massive oil revenues gave rise to a constitutional amendment, approved in 1976, to authorize establishment of the Alaska permanent fund. Its objective was to save at least part of the state's mineral revenues for the future. The new Section 15 of the finance article

requires that at least 25 percent of all mineral lease rentals, royalties, royalty sale proceeds bonuses and federal mineral revenue sharing payments, be placed in the permanent fund. The principal of the fund is to be used only for income producing investments as specified by the legislature. Income from the permanent fund is to be deposited in the general fund unless otherwise provided by the legislature. Revenue from the sources now going into the permanent fund constitute only about half of direct state income from petroleum resources; the balance is derived from severance and property taxes. The share of oil and gas revenues being set aside is thus actually only one eighth ($1/8$) of the total being received by the state. Proposals have been made to increase this amount to anywhere from one fourth ($1/4$) to one half ($1/2$) of total petroleum income received by the state.

While the legislature can deposit into the permanent fund more than the constitutionally specified minimum of petroleum revenues, such action would in no way guarantee that subsequent legislatures would follow similar action. Since part of the philosophy behind establishing a permanent fund is to segregate the fund from other monies available for legislative appropriation, an amendment of Section 15 would be required to effect a mandatory appropriation beyond the current ratio.

ARTICLE X: LOCAL GOVERNMENT

It took many years for the local governance system established under the constitution to be accepted by the general public. At the time of statehood, local government units consisted only of cities, independent school districts in the larger urban areas, and a few public utility districts; Congress had prohibited Alaska from creating counties. The constitution established a new areawide unit -- the borough -- and specified that the local government system will consist only of cities and boroughs. It was several years following statehood before implementation of the borough concept began. The legislature, as the constitutional convention, saw the borough as an evolving governmental form that would adapt itself to the differing needs of the various areas and regions of the state. Due to school bonding problems, however, the mandatory borough law was enacted in 1963 to create boroughs in Alaska's major urban areas. The people in these areas were generally not in favor of creating the new borough units, principally because need for them had not yet been established.

Fifteen years later, boroughs are an accepted part of the governmental system of Alaska. The continuing conflicts between boroughs and cities that characterized the first ten years have pretty well evaporated. Aside from time itself, a big factor in this has been city-borough unification.

However, the borough system has not yet been implemented in rural areas; the only non-urban borough is on the North Slope. The process of dividing the single unorganized borough into regional unorganized boroughs, as

contemplated by the constitutional convention, has begun. If this process is carried on, citizens in rural areas will obtain the instrumentalities for participating in local governance that is contemplated under Article X. Once the unorganized borough problem is dealt with in a manner suited to rural Alaska, the basic implementation of the article will be complete.

At this juncture in time, no constitutional issues face the local government article. The rural borough situation can be dealt with by the legislature. Extension and expansion of home rule powers of local government can also be accomplished by law. The only topic falling into the constitutional realm is one of philosophy: to what extent should greater reliance be placed on the local end of the government spectrum -- should more state powers and state funds be channeled to local governments -- is this an appropriate means of holding down the growth of state government, of "big government"?

ARTICLE XI: INITIATIVE, REFERENDUM AND RECALL

Of this article's three components, constitutional revision suggestions have been made only in the case of the initiative. The referendum and recall provisions have been used in only a few instances. The initiative, however, has proven a fairly popular instrument, its use increasing greatly during the last few years.

Depending on people's point of view, initiative petition requirements should either be tightened or relaxed. Under the constitution, a petition requires signatures equal in number to ten percent of those who voted in the preceding general election and resident in at least two-thirds of the state's election districts. The various capital move initiatives have shown that it is easy enough for a dedicated group to obtain this percentage and distribution of signatures. More novel ideas have had a more difficult time meeting qualifications. It is not likely, however, that any particular set of different signature requirements would have a major effect upon the popularity of the initiative device.

Suggestions have also been made to establish stronger safeguards against legislative rescission of initiatives enacted by the voters. The record in this matter has been quite uneven. In the case of capital move initiatives, the legislature has generally refused to make any changes in popularly enacted laws, even when and where authorized by the constitution to do so. On the other hand, advocates of election reform have held that the legislature has been excessively liberal in revising initiatives beyond original language and intent. Here again, drawing clear lines would seem to be particularly difficult.

Similarly complex is the matter of assuring proper wording and constitutionality of initiative proposals. As it is, a bill drafted by proponents of an initiative is not subjected to any kind of legal or drafting review or scrutiny prior to being put before the voters for enactment. This sets the basis, as with the Beirne land disposal initiative, for a potential supreme court finding of unconstitutionality. Similarly, poor drafting has also caused the serious implementation problems of other initiatives. These complications can be overcome by subjecting proposed initiative legislation to review by either the attorney general or legislative counsel or both prior to presentation to the voters. A constitutional amendment would be required to accomplish this.

It is interesting to note that the National Municipal League, which publishes the model State Constitution, is currently recommending the so called "indirect" initiative in preference to the "direct" initiative. Under the "direct" initiative, a measure can be placed on a ballot simply by obtaining signatures of a set percentage of registered voters or some similar requirement. NML argues that all too often "direct" initiative measures are ambiguously worded, violate either the state or federal constitution, or involve side effects their authors may not have intended. This happens because the language has not been subject to the scrutiny, debate, and compromise typical of the legislative process. MNL suggests that the "indirect" initiative is less likely to involve such problems. The "indirect" method requires submission of an initiative to the legislature, where it will be subject to examination and debate. If approved

by the legislature, it becomes law just as any other bill. If the legislature refuses to approve it or changes the initiative bill in a way unacceptable to the sponsors, the latter still have the right to have the measure submitted to the people for a vote.

Under this differentiation, Alaska would be classified as having the "indirect" initiative, since an initiative is placed on the ballot only if the legislature fails to enact substantially the same measure as the proposed initiative law. Obviously, however, that has not eliminated the problem of initiatives that are poorly worded or constitutionally inadequate.

ARTICLE XII: GENERAL PROVISIONS

This article has given cause to no issues or suggestions for change. However, it is in the context of this article that two major state issues might arise as constitutional matter. These are the relationship between the State of Alaska and the United States of America and the location of the state capital.

Section 13 provides: "All provisions of the act admitting Alaska to the Union which reserves rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property, are consented to fully by the State and its people." In effect, the people of Alaska agreed to become a state just as any other state of the Union. Despite this agreement entered into in the 1950s, many Alaskans have increasingly felt that Alaska's sovereignty as a state has not been respected by the federal government. This has resulted in a movement for Alaska's independence from the United States, as well as an initiative designed to review the relationship between Alaska and the United States. While nothing specific has yet emerged that could provide the basis for a different relationship, it is the provision for consent to the act admitting Alaska to the Union that provides a context for further discussion of this issue.

In the state constitution, location of Alaska's capital is dealt with in Article XV, transitional measures. It was placed there as a compromise between those delegates who wanted to affirm Juneau's continuance as the capital city within the body of the constitution and those who wanted to

specify that the matter be left to a future capital location study commission or be left out of the constitution altogether. Delegates decided to postpone the capital location decision until after statehood so as not to make it a divisive issue in constitutional ratification and statehood. To do this, they included a transitional provision for Juneau to be Alaska's capital. However, because transitional measures only have the force of the law, the question of capital location has been subject to repeated initiatives. The matter may still not become a constitutional issue unless those who wish to keep the capital in Juneau or those who are trying to get it moved decide that the only way they can assure success for their cause is by establishing it via constitutional mandate.

ARTICLE XIII: AMENDMENT AND REVISION

Alaska's constitution provides three methods of changing the state's constitution:

1. Amendments can be initiated by two-thirds vote of both houses of the legislature.
2. The legislature may call constitutional convention.
3. A constitutional convention may be called by the state's voters approving the proposition in a referendum after any ten-year period during which no convention had been held.

In each case, constitutional changes are subject to ratification by the voters.

Delegates to the 1955-56 convention provided for constitutional call by referendum in order to overcome a problem then evident in the majority of states: legislative unwillingness to deal with changing conditions. This was shown principally in their resistance to legislative reapportionment and to constitutional changes that would reflect the changing demography of the United States and of individual states. Of course, that was before *Baker v. Carr*, which established the one-man one-vote principle and resulted in legislatures that were at last representative of their states' populations. Today, the ten-year referendum may not be as crucial as it was two decades ago. Proposals to extend the period to as long as twenty years, as were made during the convention, might be more pertinent today.

Probably a more current question is whether the constitution should authorize amendments via the initiative process. Convention delegates

specifically withheld that authority under the constitution. They deemed the changing of the constitution of sufficient gravity to require an extraordinary majority of the legislature or deliberation by a constitutional convention, with voter ratification in both instances. Authorizing amendment by existing constitutional initiative could bring about revision of this state's fundamental law without the benefit of careful deliberation and drafting either as part of the legislative or constitutional process. It would appear, therefore, that while amending the constitution through initiative might be a popular device, it could hold serious dangers to the integrity and quality of the constitution itself.

A way of overcoming some of the possible disadvantages and dangers of using the initiative to amend the constitution would be by (1) subjecting proposed changes to review by the attorney general or the courts prior to a vote on the initiated amendment and (2) requiring an extraordinary majority for approval of the amendment, either two-thirds or three-fourths affirmative vote of those voting on the issue or participating in the election.

(Note: The subjects of constitutional revision and organizing a constitutional convention are dealt with in separate papers.)

ELIMINATION OF OBSOLETE MATTER

Approximately one-third of the constitution consists of materials that need not be part of Alaska's constitution. Eliminating these parts would help streamline the constitution and reduce it to articles and sections pertinent to Alaska today and in the future. The cleanup of the constitution would principally affect the following parts:

Article XIV: Apportionment Schedule

This article was initially included in the constitution to delineate election districts and senate districts. Districts for electing members of the house of representatives were designed to stand until the first reapportionment. Senate districts were to remain, in accordance with Article VI, essentially the same, even though modifications could be made to reflect changes in election districts.

Under the U.S. Supreme Court, a decision establishing the one-man one-vote rule (*Baker v. Carr*), both house and senate districts have to be apportioned on a strict population basis. Accordingly, the original senate districts are of no continuing significance, and reapportionment had in any case resulted in revision of house district.

The apportionment schedule currently in the state constitution is that established by the reapportionment proclamation of the governor dated June 14, 1974, as modified by the Alaska Supreme Court in *Groh v. Egan*, 526 P. 2d 863 (9/13/74). There is no reason whatsoever for reapportionment schedules to be a part of the constitution. They simply reflect a proclamation of the governor and in no way constitute constitutional matter.

Article XV: Schedule of Transitional Measures

This article was included in the constitution to provide an orderly transition from the territorial to the state form of government. This transition has long been effected. Most provisions, such as election of the first legislature and establishment of the courts, are irrelevant today. If any provisions have any continuing pertinence (e.g., saving of existing rights and liabilities), they could be included in Article XII, General Provisions.

Should a new convention be held and major revisions made in the constitution, new transitional measures might, of course, be required.

Ordinances

Convention delegates appended three ordinances to the constitution. They dealt with ratification of the constitution, establishment of the Alaska-Tennessee Plan, and abolition of fish traps. These ordinances have served the purpose and are now obsolete. They need no longer be attached to the constitution.

Miscellaneous Provisions

There are a number of additional sections that probably need not be in the constitution. Thus, Article XII, Section 13, consents to the act admitting Alaska to the Union. Despite this provision, the statehood act required another vote on the part of Alaska's people agreeing to the terms and conditions of the act of admission. This was done, and the constitutional provision is irrelevant.

In an entirely different category is a provision such as Article I, Section 20, which provides that members of the armed forces shall not in time of peace be quartered in any house without the consent of the owner or occupant, a provision included in the U.S. Constitution in response to abuses during American colonial days. Topics such as these don't need to be in a modern constitution.

A NEW CONSTITUTIONAL CONVENTION FOR ALASKA?

(Some interim thoughts)

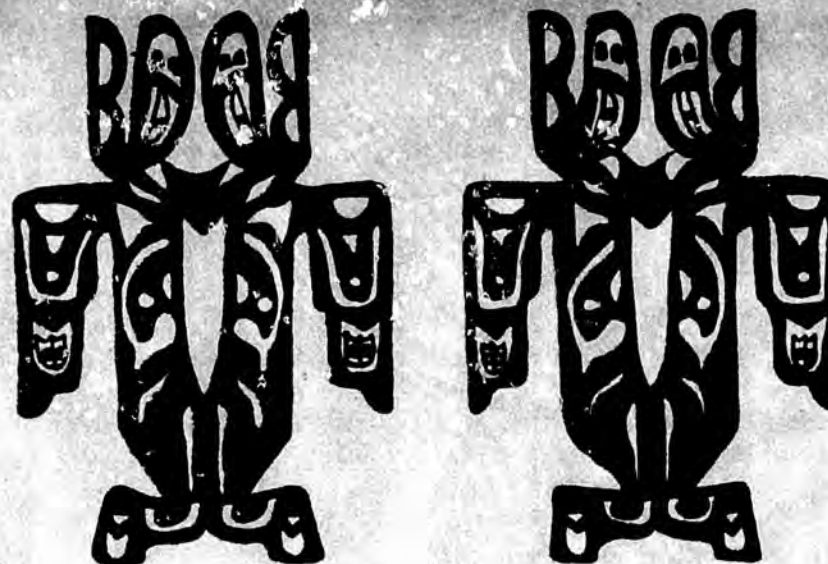
by
Victor Fischer

Alaska's constitution was written twenty-four years ago as part of the statehood movement. Since 1959, the constitution has functioned as the fundamental law of the State of Alaska. The question before us now is whether the guarantees of individual rights, the structure of government, and other parts of the constitution are still adequate to serve the state and the people today in the foreseeable future. Or should we consider revising the constitution in view of changed values and different conditions in Alaska?

This question is real, for in 1982 Alaskans are scheduled to ballot on whether or not to hold a new constitutional convention. Their answer may have far-reaching effects on Alaska's future. It is, therefore, none too early to consider the issues entailed in calling a convention and to evaluate alternative courses that we might pursue.

The Interim Committee on the Constitutional Convention was established by the 1979 legislature to explore the issues entailed in providing answers to these questions and to make recommendations to the legislature about the means of preparing for the forthcoming convention referendum; the committee is co-chaired by Senator George Hohman and Representative Brian Rogers. Part of the material in this paper is derived from my work for this committee.

Accomplishing an objective analysis of constitutional convention issues may not be easy. Alaska's life nowadays abounds with a multitude of issues of importance to significant numbers of people: the fiscal situation of the state — too much money now, not enough in the future, give it away, lower taxes, save it; oil and gas development vs. environmental protection; jobs, unemployment, local hire; right-to-life vs. abortion choice; economic development — petrochemicals, renewable resources, mining, etc.; loans, subsidies, incentives; land distribution; growth and development vs.



subsistence and protection of lifestyles; big government, lack of adequate services; federal domination of Alaska; capital move; etc., etc., endlessly.

Some of these issues existed in the 1950's, when the constitution was adopted and statehood came to Alaska. But the mood is quite different now from what it was then. The unity, spirit, idealism, and deep belief in democracy that characterized and sustained the statehood movement and motivated the constitutional convention do not exist in Alaska today. And nothing has taken their place, at least nothing positive or constructive. Rather, public dialogue and responsiveness to issues are characterized by dissension, divisiveness, anger, and extremism. Whereas twenty-plus years ago a common general philosophy and broad purpose underlay the striving for statehood, as the nation, Alaska is now characterized by single or narrow issue campaigns that ignore everything else about them. And added to all that is a negativism and know-nothingism that characterizes the reaction of many media, groups, and individuals to any consideration of public issues or of the future of the state, its communities and neighborhoods.

This current climate is not particularly healthy for considering the basic philosophies and structures upon which the state's

democratic institutions are founded. And yet, it is possible that the very consideration of state goals and purposes that would accompany preparations for and the conduct of a constitutional convention might help overcome the "malaise" that is said to characterize our public spirit today. Above all, the choice doesn't exist: the constitution requires that we decide whether or not to have a convention, and our purpose should be to make the best of this requirement, to try and make a positive opportunity of it.

Toward that end, this paper reviews Alaska's only constitutional convention and the means it established to update the document, examines constitutional changes that have been suggested, and delves into possible ways of dealing with the gamut of questions entailed in accomplishing desirable revisions and judging whether or not to call a new constitutional convention.

1955-56 Constitutional Convention

Political scientists and constitutional experts consider Alaska's constitution the best in all the states, a true model. In discussing the results of the 1955-56 Alaska constitution writing process, the nation's top specialist on state constitution, John Bebout, stated:

The convention produced a document that was a rare blend of the classic principles embodied first and best in the U.S. constitution and of modern or innovative features altogether compatible with those principles which made the Alaska constitution more distinctly appropriate to its time and place than any other state constitution.

A number of factors helped determine the character and quality of the Alaska constitution. It was written as part of and in furtherance of statehood, and the idealism inherent in the statehood movement served to inspire convention delegates and Alaska's people. Statehood was the cause and goal of the constitutional convention, and those planning the document saw the necessity to draft a constitution that would clearly demonstrate to the nation and to the Congress that Alaska was politically mature and ready to assume the responsibilities of managing a state.

Once delegates met in convention, statehood was no longer their principal aim, although it provided the context for their work.

Rather, creating the best possible foundation for the future state became the overpowering and all-encompassing purpose. The enthusiasm, dedication, and idealism aroused by the statehood issue were thus turned toward drafting a constitution that would serve Alaska's future.

Another aspect of the Alaska convention that contributed to the success of its product was the fact that it took place before statehood was achieved. It functioned outside the realm of conventional political pressures and realities. The convention was future oriented and had little to do with current territorial affairs: it did not directly affect jobs, business, or allocation of power. Delegates were viewed as a group of idealists working for great cause and dealing with issues that generated, with few exceptions, no pressures from those lobbies and special interests that regularly pursue their particular objectives at legislative sessions. This kind of detachment could have been dangerous, but since it was carried out by men and women who were realists as well as idealists, it provided a milieu that engendered freedom and creativity.

Out of this environment emerged a stated intent that the constitution be a document of fundamental principles of basic government and contain only the framework for state government. Drafting the constitution was largely predicated on making each branch of state government effective and strong in its own right. The underlying purpose was to achieve not just an adequate system of checks and balances in the traditional sense, but also to bring about the establishment of executive, legislative, and judicial branches that each function effectively and adequately serve the needs of the state and its citizens. At the same time, personal rights and the individual liberties of the people were to be assured through a strong and liberal bill of rights. I believe these objectives were achieved quite successfully.

Amendment and Revision

Despite high-minded aims and the resultant well-regarded document, convention delegates never considered that the constitution they created was at all sacrosanct. Throughout, delegates strove to deal with general concepts, allowing for future flexibility and adjustment. The constitution itself was designed not to be static. Its vitality was to be achieved by designing a general structure of state

government adaptable to changing needs and conditions. And, in case these measures proved inadequate, they provided for an amendment and revision process to make possible changes in the constitution itself.

Amendments to the constitution are made by two-thirds vote of each house of the legislature and voter approval by majority vote. Since statehood, sixteen amendments have been so recommended by the legislature and ratified by Alaska voters. These amendments dealt with such basic issues as the right of privacy, non-discrimination on account of sex, voter qualifications, limited entry in fisheries, and establishment of the Alaska Permanent Fund. These and other changes demonstrate that updating of the constitution and meeting current needs can take place through the amendment process.

Individual amendments are, however, but one method of changing the constitution: it can also be revised by calling a constitutional convention. There are two ways of obtaining a state constitutional convention. The legislature may call a convention at any time by simple majority vote. Alternatively, Alaska voters can decide to hold a convention. If during any ten year period a convention has not been held, the question: "Shall there be a Constitutional Convention?" is placed on the ballot at the next general election. A majority "yes" vote results in a convention. On the other hand, if a majority votes in the negative, the question is not placed on the ballot again until the end of the next ten year period.

The provision for convention call by referendum was principally in response to problems that generally don't exist anymore. When the constitution was written in 1955-56, most state legislatures were extremely malapportioned, with urban areas highly under-represented. As a result, legislatures avoided constitutional conventions and did not modernize their constitutions in fear that revision could result in reapportionment and loss of legislators' seats. Alaska convention delegates wanted to assure that the constitution would be responsive to the needs and the will of the people even if the legislature were unresponsive to them. Since the constitution was written, however, the U.S. Supreme Court, in *Baker vs. Carr*, established the one-man one-vote rule, requiring state legislatures to be apportioned strictly in accordance with popula-

tion. In theory, at least, the legislature is fully representative of the people and will represent them both in enacting legislation and, as necessary, amending the constitution.

Even though we are now only in our twentieth year of statehood, Alaskans have already twice voted on the question of calling a constitutional convention. The first decennial referendum on the issue was held in 1970. The trouble then was that the question "as required by the Constitution of the State of Alaska", Article III, Section 3 was posed thus: "Shall there be a constitutional convention?" The convention call was narrowly approved by the voters. Upon a challenge, the Supreme Court held that by adding "As required by the Constitution..." to the constitutionally required language, the phrasing of the proposition was sufficiently biased to justify nullifying the referendum. When voters once more balloted on the question in November, 1972, the convention call was rejected.

Alaskans are once more faced with the decision of whether or not to call a convention. In November 1982, unless the legislature initiates a convention in the interim, the ten-year question will be on the ballot at the general election: "Shall there be a Constitutional Convention?" The rest of this paper is devoted to considerations that should go into possible responses to this question.

Potential Subjects of Constitution Change

Alaska has so far utilized only the amendment process to make changes in the constitution; we have not yet had the experience of constitutional revision via the amendment process.

The difference between changing the constitution by amendment as against convention is great indeed. When the legislature recommends an amendment it deals with a specific item, such as the manner of selecting the chief justice of the Supreme Court. While the subject matter may be broader than that, it is certain to be confined to a specific topic.

A constitutional convention, on the other hand, has plenary powers, subject only to ratification by the people. This means that a convention, whether called by referendum or by the legislature, can amend or revise any and all parts of the constitution. In other words,