Alaska's Constitution

A Citizen's Guide

Gordon Harrison

Alaska Legislative Affairs Agency

FIFTH EDITION

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PREFACE TO THE FIFTH EDITION

This publication first appeared as a booklet in 1982. I wrote it under contract with the Alaska Legislature to provide the public with an overview of the state constitution prior to the general election that year at which voters were asked if there should be a constitutional convention. A second edition, updated and expanded slightly, appeared in 1986. A third edition, updated and expanded substantially, appeared in 1992, prior to the vote on the question of calling a constitutional convention. A fourth edition appeared in 2003. Although there has been only one amendment to the constitution since then, there have been several important judicial decisions on constitutional questions and a number of constitutionally-relevant political developments in the last decade that warrant this fifth edition in 2012. And, again this year, voters must decide if a convention should be convened to propose revisions to the state constitution.

In the preface to the fourth edition I lamented the growing length of this publication. My concern was that it might become intimidating to the average citizen of the state, for whom it was originally intended. On the other hand, I wanted it to be useful as a reference for legislators, their staff, and other state employees whose work may require more detail about the constitution than the typical lay person might desire. Fortunately, this edition is not much longer than the last one.

I would like to thank Senator Linda Menard, Chair of the Alaska Legislative Council, for her support for this revision. Although *Alaska's Constitution: A Citizen's Guide* is published by the Legislative Affairs Agency, it has no standing as an official publication of state government and carries no endorsement by the legislature.

Gordon S. Harrison, Ph.D.
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INTRODUCTION

What does Alaska's constitution say? How well has it worked? What amendments have been made to it? How has the state supreme court interpreted its various provisions? The purpose of *Alaska's Constitution: A Citizen's Guide* is to help answer these questions. This book is about the origin and evolution of Alaska's constitution. It discusses how the delegates to Alaska's constitutional convention approached the subjects of the various articles; and it touches on the key ideas, words, phrases, judicial interpretations, and political history associated with the sections of each article. This book is a short guided tour through Alaska's basic law, written for the citizen who wants to learn more about the state constitution.

WHAT IS A STATE CONSTITUTION?

State constitutions create the framework of government in each of the fifty states. This framework is the same in all states. It involves a system of government with three branches: a legislative branch, typically composed of two chambers; an executive branch, with its numerous administrative agencies; and a judicial branch, with a supreme court and a system of lower courts. Each branch is largely independent of the others, but there are mutual checks and balances that prevent the concentration of too much power in one branch.

This basic system of state government dates from the American revolutionary period when the thirteen colonies created independent constitutional governments. We recognize it in the federal constitution, which was an amalgam of ideas and political principles expressed in the constitutions of the thirteen original states. The federal constitution was written in Philadelphia in 1787 when it became apparent that a strong central government was necessary for economic prosperity and military defense. The U.S. Constitution delegated certain powers to the new federal government and reserved others for the states. It also prohibited the federal government from violating basic personal rights and political freedoms.

While all state governments follow the general pattern established by the original states and the federal government, they vary widely in the details of structure and operation. For example, Nebraska has only one legislative chamber, whereas all the other states have two. Alaska has a total of 60 members in its legislature (20 senators and 40 representatives), whereas New Hampshire has 424. The heads of several executive departments are elected in most states, while they are appointed by the

governor in others (Alaska included). Also, various schemes are used to select and remove state judges. In sum, there are many interesting and important differences among state governments.

State constitutions also vary a great deal in length from state to state. Some documents are quite long and burdened with detail, while others are short and general. These characteristics depend upon the historical period during which a particular constitution was written and the unique social and political experience of each state. Alaska is among those states with a short constitution. It speaks only to the broad principles of governmental organization and operation and leaves the details of implementation to the legislature.

As a general rule, long and detailed constitutions need frequent amendment. This is because they attempt to describe the minutiae of governmental structure, procedures and public policy, which inevitably need changing as the political, social and economic life of society evolves. Short, general constitutions are more flexible in the face of change. They give the legislature and courts leeway to adapt general constitutional principles to conditions unforeseen by drafters of the original document.

Courts have historically played a major role in adapting constitutional language to changing social and economic conditions. It is the duty of the courts to interpret the constitution when disputes come before them that raise constitutional questions. This is one way that general constitutional language comes to have specific meaning. In their interpretation of constitutional provisions, the state courts may find that a law passed by the legislature, an ordinance adopted by a local government, or an administrative act of a governmental agency is contrary to the meaning of the state constitution and therefore cannot be enforced. The federal courts, moreover, can declare the laws of Congress or of the states unconstitutional if they are judged contrary to the U.S. Constitution.

This practice of scrutinizing the constitutionality of a law or administrative act when a suit is brought in court is called judicial review. Judicial review is profoundly important in our system of constitutional government even though there is no mention of it in the U.S. Constitution. One consequence of judicial review by the federal courts is that state constitutional provisions can be nullified if they conflict with the federal constitution. This is because the U.S. Constitution is the "supreme law of the land" and therefore superior to state constitutions as well as to acts of Congress, the federal executive branch, and state and local governments.

A great deal more could be said about the theory, operation, and history of constitutions in the United States, but there is not space for it here. The following analysis of Alaska's constitution will help provide an introduction to the general principles of constitutional government, as well as an explanation of the origin and application of Alaska's specific constitutional provisions.

THE BACKGROUND OF ALASKA'S CONSTITUTION

Alaska's constitution is a unique document that expresses traditional American ideals and political forms in a specific historical context. Therefore, an examination of the constitution must begin with the constitutional convention of 1955-1956 and the dominant social, economic and political influences of that time. These include the statehood movement, the experience of territorial government, the lack of institutional development in the territory, and contemporary constitutional theory.

Statehood Movement

The Alaska Constitution was written during the winter of 1955-1956 at a convention that was held in Fairbanks on the campus of the University of Alaska. The academic setting was chosen to inspire reflective deliberation and to escape the "smoke-filled rooms" of Juneau. Statehood was still three years away and, at the time, the prospects were not bright for quick congressional action. Writing a constitution at that time, rather than after Alaska was admitted to the Union, was a gambit in the battle for statehood: stalwarts hoped that a good constitution written and acclaimed by the people of the territory would help rally skeptics to their cause and promote statehood in Washington, D.C. Alaska was not the first to use this tactic; several other territories had adopted constitutions prior to statehood. Hawaii, also seeking statehood, had drafted a constitution in 1950.

The constitutional convention convened November 8, 1955, and adjourned February 6, 1956. The constitution was formally adopted by the convention delegates on February 5, 1956. Alaska voters ratified it on April 24, 1956, and it became law with the formal proclamation of statehood on January 3, 1959. Delegates to the constitutional convention were, for the most part, enthusiastic proponents of statehood. They shared the political idealism and aspirations that sustained the long statehood movement, and they brought to their deliberations in Fairbanks a sense of historical purpose. Absent from the convention was a faction hostile to statehood. (Although in the minority, some territorial residents regarded statehood as potential source of burdensome government and taxation, while, to corporate interests, statehood spelled the loss of influence over resource management that was exercised through political channels in Washington, D.C.) This community of values among the delegates did not mean they saw everything eye-to-eye or failed to argue differences of opinion. It did mean, however, that compromises were negotiable when disputes arose and that the convention was spared deep, bitter, divisive conflicts over basic policy issues.

The constitution was meant to provide a solid foundation for state government in Alaska, and in the meantime, it was also meant to help sell Congress on the statehood idea. The convention delegates were mindful of its public relations value. By the preparation of this document, Alaskans sought to

demonstrate to Congress that they possessed political maturity and the ability for self-government. This consideration further encouraged convention delegates to compromise their differences (which often meant deferring difficult decisions to the future legislature). Also, it prompted the delegates to adopt a short and general document similar to that of the United States Constitution; employ the most up-to-date and progressive forms of constitutional draftsmanship; make use of political symbolism (for example, there were fifty-five delegates to the convention, the same number that met in Philadelphia in 1787); and be impeccably democratic in their procedures (the convention itself was the most representative body in the history of the territory).

The statehood movement also influenced the constitution by orienting it to the *future.* Alaskans envisioned rapid growth and development of their state once they possessed the means of self-government. United States Supreme Court Justice Benjamin Cardozo once wrote that a good constitution states "not the rules for the passing hour but principles for an expanding future." Alaska's constitution was intended to accommodate an expanding future. One way it did this was through its broad, uncomplicated grants of power to the legislature. Thus, a keen awareness of the future helped the convention delegates create a flexible document.

Territorial Experience

Alaska's constitution creates an exceptionally strong governor and legislature, largely in reaction to the frustrations of weak governmental institutions during the territorial period. Congress limited the power of the Alaska territorial legislature, retaining federal control over matters of vital interest to the residents of the territory. For example, Congress withheld from the legislature the power to incur debt for public works projects and the power to manage the territory's fish, game, timber and minerals.

Executive authority in the territory was likewise frail, the consequence of its dispersal among far-flung agencies of the federal and territorial government. Officials of the U.S. Department of the Interior and the U.S. Department of Agriculture controlled the natural resources of Alaska. In part, this was a product of the longstanding belief in Washington, D.C., that the frontier zeal of Alaskans for economic development rendered them unfit for stewardship of the public's resources. But many Alaskans had come to the opinion that the notion of the federal government's superior vigilance as a trustee of the public interest was really a cloak for the institutional interests of bureaucrats and the economic interests of nonresident corporations exploiting those resources (principally Seattle and San Francisco salmon canning companies and east coast mining conglomerates). Alaskans long suspected a silent conspiracy between distant government managers and corporations to perpetuate federal domination.

Executive authority of the territorial government itself was fragmented and diffuse. The territorial legislature deliberately sought to isolate the governor, a presidential appointee, from the executive

machinery of the territory by creating a web of boards and commissions, and by providing for elected executive officers (attorney general, auditor, treasurer, commissioner of labor and highway engineer).

It is not surprising that when crafting their own charter for self-government, Alaska's constitutional convention delegates created strong legislative and executive branches of government. They avoided limitations, prohibitions and hedges on the power of the legislature to act, and they centralized executive power. These principles of legislative and executive organization were considered necessary to make government effective, accountable to the public, and free from the grip of special interests.

Lack of Institutional Development

At the time of the constitutional convention, Alaska was much less populated and developed than it is now. It was institutionally undeveloped as a consequence. There were cities and a few independent school and utility districts, but no counties. (The Territorial Organic Act of 1912 prevented the legislature from creating counties.) The federal government operated the courts. Thus, delegates to the constitutional convention did not have to contend with myriad entrenched local political jurisdictions and specialized local court systems. They had the opportunity to design a system of local government for Alaska before most areas of the state required local government. Elsewhere in the United States, the movement to reform metropolitan government was stalled by the defensive reactions of the many existing local governmental units and special service districts. Also, the delegates were able to create a unified state court system without having to overcome the resistance of an established system of independent town and village courts.

Contemporary Constitutional Theory

Alaska's constitution was written by territorial residents who reflected the political aspirations and experience of Alaskans. However, there is nothing parochial about the document. Indeed, it embodies the most modern and progressive concepts of state constitutional draftsmanship. The delegates were aware of the current thinking of political scientists and state constitutional lawyers. They commissioned studies by consultants (such as the Public Administration Service); they brought constitutional scholars from around the country to advise them; and they had at hand several new state constitutions (Missouri, 1945; New Jersey, 1947; and Hawaii, 1950). Indeed, a number of the experts at the Alaska convention had helped to write these new constitutions, and their assistance to the delegates was profoundly important.

In the decade prior to the convention, there was an outpouring of literature on constitutional revision from state and federal commissions, legal scholars and national organizations. Prominent among the latter was the National Municipal League of New York City, which had published periodically since

1921 a *Model State Constitution*. This draft constitution embodied the combined wisdom of leading political scientists, lawyers and practitioners of government at the state and local levels. Delegates to the Alaska convention had before them copies of the fifth edition (1948). Portions of the constitution they wrote are traceable to suggestions in the booklet. (The sixth and last edition of the *Model State Constitution* appeared in 1968. The National Municipal League is now the National Civic League.)

An active constitutional reform movement had emerged in the United States in the late 1930s. The role of state government had expanded dramatically in recent times, and many states found their constitutions standing in the path of progress. These long, complicated documents were typically the product of the nineteenth century and its popular distrust of politicians governing from smoke-filled rooms. The constitutions intentionally crippled legislative and executive authority, dispersed executive power and created inefficiencies in governmental operation. In the face of new demands for governmental services, lawmakers in these states had to turn again and again to the cumbersome and uncertain process of amendment to escape these constitutional fetters.

The constitutional reform movement stressed the need to simplify and shorten state constitutions and to allow the legislature and governor to get on with the business of government. Underlying the impetus for reform was a positive belief in the potential of government to solve contemporary problems. Delegates to the constitutional convention shared this view of state government as a positive force in the social and economic development of Alaska. They were confident in the wisdom and dedication of their fellow citizens to govern for the common good. They saw how special interests had thrived in the absence of strong political authority, and they wanted to assert the public interest. Thus, the delegates' vision of political growth and renewal in Alaska was in accord with the reigning ideals of the constitutional reform movement.

PREAMBLE

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

A preamble states the purpose of a document but it has no legal significance itself. The constitutions of all states but two (Vermont and West Virginia) have a preamble. Most of these are a variation of the preamble to the U.S. Constitution, which reads, "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America."

Alaska's preamble was drafted as a substitute to an imitative version presented to the convention by committee. Delegate Victor Rivers described the current preamble as a more fitting expression of the "thinking and the speaking and the heritage of our Alaska people . . . ." This preamble is one of the few to acknowledge the interdependence of the state with the other states in the federal system (which was a *Model State Constitution* recommendation for preambles). Like most other state constitutional preambles (but unlike the U.S. Constitution's), Alaska's preamble refers to God. A motion from the floor to strike the reference failed on a voice vote, as did a motion to substitute the words Almighty God.

This preamble does not acknowledge the presence of Alaska Natives—Indians, Aleuts and Eskimos—prior to the arrival of those who "pioneered" the land.

ARTICLE I

DECLARATION OF RIGHTS

All state constitutions contain a declaration of rights. Most of these, like Alaska's, evoke the Bill of Rights in the U.S. Constitution. Personal rights protected by the federal and state constitutions are basic to our political system for they guarantee to every citizen civil and political freedoms that we consider vital to human liberty. It is said that limited government is the essence of constitutional government: a constitution which protects the rights of citizens limits a government's power. Declarations of rights are placed at the beginning of state constitutions to herald their preeminence in the scheme of government.

Delegates to Alaska's constitutional convention were not tempted to venture far from the time-honored phrases of the federal constitution when drafting a declaration of rights for their new state. After all, the statement of rights in the U.S. Constitution had served the country well, and decades of judicial usage had given practical meaning to phrases such as "due process of law" and "equal protection of the laws." The delegates were wary of unnecessary innovation for they could not be sure of the ultimate legal interpretation of new language they might invent. Moreover, new terms and legal concepts they might advance could require numerous court cases over many years to clarify.

Also, in selecting rights to enshrine in the new state constitution, and in phrasing these rights, the convention delegates were mindful of the document's symbolic functions. Alaskans would beseech Congress for statehood with this document as proof of their political maturity and dedication to American constitutional principles. And, of course, the constitution was to symbolize governmental authority for Alaska's citizenry. Therefore, the delegates sought to express the nobility of the American democratic tradition with familiar words and concepts drawn directly from celebrated documents of our political history.

This is not to say that Alaska's declaration of rights is a carbon copy of the federal Bill of Rights. The delegates rearranged, restated, expanded, and embellished the rights found in the U.S. Constitution. They also combed the declarations of rights of the other state constitutions for concepts and wording to incorporate into Alaska's document. Consequently, several rights enshrined in the Alaska constitution are not found in the U.S. Constitution—for example, the right to equal opportunities (Section 1), the right to receive fair and just treatment in legislative investigations (Section 7), the right to be released on bail for most offenses (Section 11), and protection from debtor's prison (Section 17).

Article I

While the delegates borrowed freely from the phraseology of the *Model State Constitution* and from the constitutions of other states, they were discerning in the substantive innovations they imported: many of the novel rights and liberties protected by the constitutions of other states were passed over as more suitable for ordinary legislation or otherwise inappropriate for a basic law. (For example, Oregon's constitution protects prisoners from being treated with "unnecessary rigor," and Georgia's bars legislation pertaining to the social status of citizens.) The delegates avoided nontraditional social and economic "rights," such as the right to organize and bargain collectively (which is included in New Jersey's constitution and was recommended in the 1948 edition of the *Model State Constitution).* The delegates also rejected the suggestion that "economic" rights be included with civil and political rights in Section 3.

Over the years, Alaskans have amended Article I several times. In 1972, voters approved two constitutional amendments to Article I. One added the word "sex" to Section 3, which now states: "No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin." The second created an explicit right of privacy by adding Section 22, which states: "The right of the people to privacy is recognized and shall not be infringed." Both were discussed at the convention, but the delegates decided against including them in the constitution because they believed the rights were adequately safeguarded by the traditional guarantees of equal protection of the laws and freedom from unreasonable searches and seizures.

In 1988, the voters added Section 23 that declares: "This constitution does not prohibit the State from granting preferences, on the basis of Alaska residence, to residents of the state over nonresidents to the extent permitted by the Constitution of the United States." The provision was an attempt to protect "local hire" laws from being held unconstitutional on the basis of the equal protection clause of the state constitution. Convention delegates discussed the problem of nonresident contractors importing workers for jobs that could be performed by local people, but they did not contemplate using the constitution to put Alaskans at the head of the line. (Such an idea would have been unthinkable at a time when congressmen from other states held the key to statehood.)

Section 24 was added in 1994. It establishes a set of constitutional rights for victims of crime. Here the motivation was ensure that the rights of crime victims had the same constitutional standing as the rights of crime perpetrators. Section 25 was added in 1998. It states that same-sex marriages are not recognized by the state. This provision was to forestall a judicial ruling that same-sex marriages were protected under the right to privacy in Section 22.

In its interpretation of new and traditional rights, Alaska's supreme court can never provide a degree of protection below that provided by the United States Supreme Court under the federal constitution. The Fourteenth Amendment to the federal constitution, adopted in 1868, has gradually come to be interpreted to apply most of the Bill of Rights to the states. Thus, a citizen's basic civil rights would be protected by the federal constitution even if the state did not have its own constitutional declaration of rights. However, relying on its own state constitution, a state supreme court may

broaden and diversify the protections state citizens enjoy under federal law. The Alaska Supreme Court has declared: "We are not limited by decisions of the U.S. Supreme Court or the U.S. Constitution when we expound our state constitution; the Alaska constitution may have broader safeguards than the minimum federal standards" *(Roberts v. State,* 458 P.2d 340, 1969). In another opinion the court wrote: "The Alaska Supreme Court is free, and it is under a duty, to develop additional constitutional rights and privileges under the Alaska Constitution if it finds such fundamental rights and privileges to be within the intention and spirit of Alaska's local constitutional language . . . ." *(State v. Browder,* 486 P.2d 925, 1971). High courts in many other states have also used the declaration of rights in their own state constitutions to protect their citizens beyond the limits of the federal courts relying on federal law.

Thus, the declaration of rights in Alaska's constitution, though traditional in most respects, is a unique and independent source of political liberty for citizens of our state.

Section 1. Inherent Rights

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

The first phrase of this section expresses general principles of government that hearken back to the U.S. Declaration of Independence ("life, liberty and the pursuit of happiness"). It does not seem to create any enforceable rights. When a person sued the state on the grounds that the state personal income tax violated his right to life, liberty, the pursuit of happiness, and the rewards of his own industry, the Alaska Supreme Court ruled his claim "devoid of merit." It quoted the last phrase of this section ("that all persons have corresponding obligations to the people and to the state"), and said: "One of the 'corresponding obligations' is that of paying taxes should the legislature impose them" *(Cogan v. State,* 657 P.2d 396, 1983).

The second phrase incorporates into the state constitution the fundamental right of "equal protection" under the law which the Fourteenth Amendment to the U.S. Constitution prohibits the states from denying to the people. Alaska's version of this traditional guarantee mentions "equal rights and [equal] opportunities" first, followed by "[equal] protection under the law." The courts have not yet found any practical application of equal rights and equal opportunities, but there is a substantial body of state constitutional jurisprudence applying the concept of the equal protection under the law. (The Alaska Constitution uses "equal protection under the law;" the Fourteenth Amendment of the U.S. Constitution uses "equal protection of the laws.")

Because various statutes, regulations and ordinances so often affect people differently, there are frequent legal challenges to the constitutionality of these measures on the grounds that a person or group is denied equal protection of the laws. The principle of equal protection is not that distinctions between people are forbidden by the laws, but that unjust and unreasonable distinctions are forbidden. The task of the court is to decide whether a distinction is just or unjust, reasonable or unreasonable.

To make this decision, the court scrutinizes the purpose of the challenged law to see if it is legitimate, and then tests the remedies that the law relies upon to see if they are related to the purpose of the law and whether they are reasonably direct and effective. Then, it balances the government's purpose against the nature of the personal right being impaired. The more important the state's interest in the objective sought by the law or regulation, and the less significant the personal liberty involved, the more tolerant the court will be of differential treatment of various groups. Conversely, the less significant the state interest and the more significant the personal liberty at stake, the less tolerant the court will be of the government's action.

For example, the courts have held that the state's local option law—which permits communities to ban the sale and consumption of alcohol—does not violate the equal protection clause even though, as a result of the law, residents of some communities have greater access to alcoholic beverages than do residents of others. "Given the state's compelling interest in curbing alcohol abuse, the provisions of the local option law are reasonable and sufficiently related to the legislative goal of protecting the public health and welfare . . . ." *(Harrison v. State,* 687 P.2d 332, Alaska Ct. App., 1984). Likewise, a state law requiring disclosure of campaign contributions was found permissible because "the objective of an informed electorate is sufficiently compelling to overcome an interest in anonymous political expression" *(Messerli v. State,* 626 P.2d 81, 1980). The court upheld a dress code for attorneys that required wearing a coat and tie on the grounds that minimum standards of dress for attorneys (who are "officers of the court") were a traditional and reasonable rule of courtroom decorum *(Friedman v. District Court,* 611 P.2d 77, 1980). On the other hand, the court found that a school regulation against long hair was unconstitutional because the state's interest in such matters did not outweigh the right of an individual to wear his hair according to his own preferences *(Breese v. Smith,* 501 P.2d 159, 1972).

Recurring efforts by the legislature to link various state benefits and privileges to Alaska residency have raised "equal protection" issues. For example, in 1980 the Alaska legislature adopted two popular statutes: one repealed the state personal income tax and the other adopted a plan to distribute to Alaska residents a portion of income from the permanent fund. The value of benefits to individuals under the two laws was tied (by different formulas) to the number of years an individual had resided in Alaska. Both measures were challenged by newcomers to the state who argued that they were denied equal protection under Article I, Section I of the Alaska Constitution.

The Alaska Supreme Court agreed that the income tax statute, which gave a full repeal to taxpayers who had paid income taxes for the past three years, but gave only a partial repeal to those who had

paid income taxes for fewer than three years, violated the state's equal protection clause. It found the objectives advanced on behalf of the statute were illegitimate, feeble, or not in fact furthered by the statute, and they could not justify the discriminatory effect of the statute on new residents *(Williams v. Zobel,* 619 P.2d 422, 1980; this case is referred to as *Zobel I).*

However, the Alaska Supreme Court upheld the permanent fund dividend distribution scheme that gave to each person one cash dividend for each year of residency since statehood *(Williams v. Zobel,* 619 P.2d 448, 1980; *Zobel II).* It ruled that this plan for per capita cash payments which was weighted in favor of longer-term residents violated neither the state nor federal constitution because the objectives of the government were acceptable and the plan reasonably served those objectives. The statute's three objectives were to provide a mechanism for equitable distribution to Alaskans of a portion of the state's natural resource wealth belonging to them as Alaskans; to reduce population turnover by encouraging persons to maintain their residence in Alaska; and to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund.

But the Alaska court's ruling was reversed by the U.S. Supreme Court *(Zobel v. Williams,* 72 L. Ed.2d 672, 1982; *Zobel III).* It found that the state did not have a valid interest that was rationally served by the distinction it made among people with differing lengths of residency, and consequently the distribution plan violated the federal equal protection clause and the federal "privileges and immunities" clause (the latter because it interfered with free interstate travel of U.S. citizens).

When the Alaska Supreme Court was presented with a challenge to another state program that linked benefits with durational residency criteria, it deferred to the federal ruling in *Zobel III.* At issue was the original distribution scheme of the longevity bonus program, which made a cash payment to Alaska residents who were over 65 years old, who had lived in Alaska at the time of statehood, and who maintained 25 years of continuous domicile in Alaska. Based on the U.S. Supreme Court's reasoning in *Zobel III,* the state high court upheld the lower court's finding that the plan violated the equal protection clause of the U.S. Constitution *(Schafer v. Vest,* 680 P.2d 1169, 1984).

However, some durational residency requirements are legal. For example, a student must be domiciled for twelve months in the state before qualifying for resident tuition at the University of Alaska. Similarly, a person must live in the state for twelve months before qualifying for a resident sport hunting and fishing license. The state courts have used the same balancing test to adjudicate challenges to these durational residency requirements: Does the nature of the state's purpose in imposing the restriction outweigh the infringement of rights of the person who is adversely affected by them? Because durational residency requirements interfere with a citizen's fundamental right of interstate migration, the courts have required a strong state interest to justify them. Thus, for example, the Alaska Supreme Court struck down a state hiring preference given to one-year residents *(State v. Wylie,* 516 P.2d 142, 1973) but upheld a one-year requirement for becoming a candidate for city office, saying it is justified by the strong public interest in having the electorate be familiar with

candidates, and in having the candidates be familiar with the needs of the constituency *(Castner v. City of Homer,* 598 P.2d 953, 1979). In *Peloza v. Freas,* 871 P.2d 687, 1994, the court rejected as too long a three-year residency requirement for local city council. See the discussion of residency requirements for legislative office under Article II, Section 2.

In 1989, the legislature increased the minimum residency requirement for receiving a permanent fund dividend check from six months to two years. A superior court judge ruled in June 1990 that the two-year requirement was unconstitutional, but that a one-year requirement was legally acceptable. The state did not appeal the case to the Alaska Supreme Court for fear it would find the one-year limit excessive.

The constitutionality of laws that require employers to give preference to Alaska residents seeking jobs—so-called Alaska hire or local hire laws—have been challenged on the grounds that they violate the equal protection clauses of the state and federal constitutions. In 1988, an amendment was approved by the legislature and ratified by the voters (Article I, Section 23) specifically designed to remove the equal protection clause of the state constitution as an obstacle to Alaska hire laws. This amendment is discussed under Section 23 below. An ordinance adopted by the North Slope Borough in 1997 that gave local employment preference to Native Americans was declared unconstitutional by the Alaska Supreme Court as a violation of the equal protection clause of this section *(Malabed v. North Slope Borough* 70 P.3d 416, 2003; it was also rejected in federal courts*).*

A cost-of-living adjustment given to state retirees who remain in Alaska, but denied to state retirees who move to high-cost places outside Alaska, was challenged in a class action law suit as a violation of the equal protection clause. The Alaska Supreme Court upheld the allowance on the grounds that its purpose—encouraging retirees to continue to live in Alaska by partially offsetting Alaska's higher living costs—is legitimate, and that the allowance bears a fair and substantial relationship to the achievement of its purpose *(Public Employees' Retirement System v. Gallant,* 153 P.3d 346, 2007*).*

In 1999, several gay and lesbian couples sued the state of Alaska and the Municipality of Anchorage with the complaint that as public employees they were unconstitutionally denied certain employee benefits that were available to married couples. They argued that because Article I, Section 25 of the state constitution prevented them marrying, they could not qualify for the benefits and were therefore denied equal protection of the law. The Alaska Supreme Court agreed, and directed the state and city governments to treat same-sex couples similarly to married couples in their benefit programs *(Alaska Civil Liberties Union v. State,* 122 P.3d 781, 2005*).* This decision stirred the legislature to action. There was insufficient support to propose a constitutional amendment to prohibit state and municipal governments from providing employment benefits to same-sex partners of public employees, but there was enough support to call for an advisory vote at a special election on the question of whether the legislature should propose such an amendment for ratification at the 2008 general election. The special election was held on April 3, 2007. The measure passed by a margin of fifty-three percent, but as of 2012 a constitutional amendment has not been proposed.

The final phrase of Section 1 ("all persons have corresponding obligations to the people and to the State") is similar to language suggested in the 1948 edition of the *Model State Constitution:* "These rights carry with them certain corresponding duties to the state." (It is interesting to note that this suggested language was dropped from the declaration of rights in the 1968 edition of the *Model State Constitution,* which presents a "sparse" version intended to emphasize guarantees that are fully enforceable.) The phrase in the Alaska Constitution has been cited by the state supreme court to buttress the legality of taxation *(Cogan v. State,* 657 P.2d 396, 1983).

Section 2. Source of Government

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

These are preamble-like passages that state the theory of democratic government upon which American political institutions are based. The first sentence is found in more than 30 state constitutions, and a variation of it in several more. The second sentence is similar to language in the Georgia and North Carolina constitutions: "All government, of right, originates with the people, is founded on their will only, and is instituted solely for the good of the whole."

This section has been interpreted to buttress the people's right to vote with minimal interference from the state. In throwing out the result of a referendum election that may have been tainted by a biased summary of the measure on the ballot, the Alaska Supreme Court cited this section as evidence of the basic principle that "the people be afforded the opportunity of expressing their will on the multitudinous issues which confront them" *(Boucher v. Bomhoff,* 495 P.2d 77, 1972). An opinion of the Alaska attorney general states that this section would prevent the government from interfering with write-in voting (1963 Opinion Attorney General No. 30). In 1998, the Alaska Supreme Court rejected a challenge to a statutory change in the manner in which candidates' names were placed on the ballot. The new law replaced the practice of rotating the order of names with a random and fixed determination of the order. The plaintiff had alleged that it violated the requirement of this section that elections reflect the will of the people because it gave an unacceptable advantage to candidates whose names appeared first on the ballot (*Sonneman v. State,* 969 P.2d 632, 1998).

Section 3. Civil Rights

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

This section makes explicit the prohibitions against discrimination that are implied in the "equal protection" provision of Section 1 and the "due process" provision of Section 7. Few other state constitutions specifically mention civil or political rights, and the *Model State Constitution* was silent on civil and political rights. This provision in Alaska's constitution originated in contemporary versions of congressional statehood bills for Alaska (e.g. H.R. 2535 and H.R. 6178), which required that the constitution of the new state of Alaska make no distinction in civil and political rights on account of "race or color." The committee revised this language and expanded it to include "creed" and "national origin," perhaps drawing on the New Jersey Constitution, one of few with a comparable provision ("No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin").

The word "sex" was adopted by amendment in 1972. Whether to include the word in the original language was hotly debated at the constitutional convention, but the delegates decided to omit it. Delegate Mildred Hermann argued that the word "person" (in contrast to the traditional usage "man" and "men") was intentionally used throughout the constitution to refer to both sexes, and that the record of the Alaska legislature on female rights had always been progressive. To further avoid the possibility of any sex bias in the interpretation of the constitution, the delegates specified in Article XII, Section 10 that personal pronouns be construed as including either sex.

About one-third of the state constitutions explicitly prohibit sex-based discrimination (so-called "equal rights" clauses). For the most part, the relevant language was added by amendment or adopted in a revised constitution: women were explicitly included in the original civil rights sections of only the Utah and Wyoming constitutions.

The legislature has implemented the broad protection of this section as directed to do so in the second sentence. Chapter 80 in Title 18 of the Alaska Statutes spells out in detail unlawful discriminatory practices in employment, public accommodations, the sale and rental of housing, financing, and governmental operations. The statutes establish a State Commission on Human Rights with power to investigate formal complaints of discrimination and to order a remedy for violation of the law.

Section 4. Freedom of Religion

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

All state constitutions contain a declaration of religious freedom, and most of these, like Alaska's, are patterned on the first sentence of the Bill of Rights in the U.S. Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Alaska statehood

bills in Congress at the time of the convention required this phrase to be part of any constitution adopted by the new state of Alaska.

Although it reads "no law," this guarantee is broadly understood as a prohibition against administrative regulations as well as legislative enactments that violate the principle of religious freedom.

Here, as with other basic rights rooted in the U.S. Constitution, two centuries of federal case law have given practical meaning to religious freedom and set guidelines for permissible interference by governing authorities. (Such interference is allowable if the government can show a compelling reason for it.) There have been comparatively few Alaska cases construing the freedom of religion. One notable case involved an Athabaskan Indian who claimed as a defense for the charge of killing a moose out of season the religious necessity of serving moose meat at a funeral potlatch. The Alaska Supreme Court found that moose meat was as important in the celebration of the sacred funeral potlatch as are sacramental wine and wafers in a Christian communion service, and that the state failed to make a convincing case for prohibiting the taking of moose for this purpose when the hunting season was otherwise closed *(Frank v. State,* 604 P.2d 1068, 1979).

In another case involving this section, the Alaska Supreme Court upheld the lease of a Ketchikan hospital to a religious order. In upholding the lease to the Catholic church against a challenge that the lease violated the freedom of religion clause in the state constitution, the court noted that the facility, built with public money, would be run as a general hospital open to all and would not be used by a religious group to spread its faith or interfere with the religious beliefs of others *(Lien v. City of Ketchikan,* 383 P.2d 721, 1963). Also, the Alaska Supreme Court said that the City of Seward could lawfully prohibit through its zoning ordinance the operation of a church school in a residential neighborhood where the church was located. Such an ordinance was not an excessive burden on the church members' rights as long as other areas were available for the location of a church school, the court said *(Seward Chapel, Incorporated v. City of Seward,* 655 P.2d 1293, 1982). In *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274, 1994, the court ruled that an anti-discrimination ordinance requiring landlords to rent to unmarried couples did not violate a landlord's right to the free exercise of religion when the landlord objected to unmarried couples living together on religious grounds. This conclusion was reaffirmed in 2004 (*Thomas v. Anchorage Equal Rights Commission*, 102 P.3d 937, 2004).

Section 5. Freedom of Speech

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

The convention delegates selected this wording from the Idaho constitution, preferring it to the more terse and dramatic language of the first amendment of the federal constitution ("Congress shall make no law abridging the freedom of speech, or of the press") and to the wordy discourses found in numerous state constitutions (which frequently attempt to define libel). The clause "being responsible for the abuse of that right" (which appears in a number of other state constitutions) recognizes, as the courts have long recognized, that the freedom to speak and publish may be restrained in favor of other legitimate public interests: ". . . absolute freedom of speech and absolute privacy in all situations and on all occasions would in certain instances be incompatible with the preservation of other rights essential in a democracy," the Alaska Supreme Court said in *Messerli v. State* (626 P.2d 81, 1980). Nonetheless, Alaska's and federal courts have generally been reluctant to restrain speech unless it can be shown "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest" (*Anniskette v. State*, 489 P.2d 1012, 1971). Thus, for example, the Alaska Supreme Court found that freedom of speech was unconstitutionally abridged by a municipality's broad disorderly conduct ordinance *(Marks v. City of Anchorage,* 500 P.2d 644, 1972); by the exclusion of a homosexual advocacy group from a city directory of public and private organizations *(Alaska Gay Coalition v. Sullivan,* 578 P.2d 951, 1978); and by a ban on nude dancing in a bar *(Mickens v. City of Kodiak,* 640 P.2d 818, 1982).

The Alaska Supreme Court has ruled that campaign disclosure laws that require campaign contributors and sponsors of media advertising to report their activity do not violate the freedom of speech protected by this section because the state has a legitimate interest in promoting an informed electorate *(Messerli v. State,* 626 P.2d 81, 1980; *VECO International v. Alaska Public Offices Commission,* 753 P.2d 703, 1988). The court has also upheld most of the provisions of a comprehensive campaign finance law enacted by the legislature in 1996. The court ruled that the state's interest in preventing corrupt election campaigns was sufficiently legitimate to justify impairing to some degree the rights of free speech. It upheld a ban on contributions and independent expenditures by corporations and labor unions; restrictions on contributions by non-residents and lobbyists; limits on contributions from individuals, groups, and political parties; a prohibition on post-election contributions; and a prohibition on one candidate contributing to another. However, the court rejected a prohibition on contributions prior to an election year, and a prohibition on contributions during the legislative session (*State v. Alaska Civil Liberties Union*, 978 P.2d 597, 1999).

The right of free speech (as well as equal protection of the law) has been invoked in disputes involving restrictions on political parties and on individual candidates who wish to get their names on the ballot. The court has said that two factors facilitate free political speech: relatively easy access to the ballot by citizens who want to be candidates for public office, and candidates representing a wide spectrum of views. In response to a challenge by the Alaskan Independence Party, the Alaska Supreme Court struck down the minimum requirements set by statute for independent and party candidates to secure a place on the ballot. Independent, unaffiliated candidates had to present a petition signed by voters equal in number to three percent of the votes cast in the preceding election.

To qualify as a candidate of a political party, the party had to have polled at least ten percent of the votes cast for governor in the preceding election. The Alaska Supreme Court ruled that these requirements were unnecessarily restrictive *(Vogler v. Miller,* 651 P.2d 1, 1982; 660 P.2d 1192, 1983). The legislature then set the thresholds at one percent and three percent respectively. These thresholds were upheld by the Alaska Supreme Court in 2005 *(State, Division of Elections v. Metcalfe,* 110 P.3d 976, 2005; see also *Green Party of Alaska v. State, Div. of Elections*, 147 P.3d 728, 2006*).*

Disputes over methods of balloting in primary elections have also invoked rights of free speech. Prior to 2000, Alaska had a blanket primary system. There was one ballot under this system, and any voter could vote for a candidate from any party. The Republican Party of Alaska sought to change this system of casting ballots in primary elections in order to prevent voters who were registered in another party from voting for its candidates, and it sued in federal court asserting its rights of free speech and association under the U.S. Constitution. The state abandoned the blanket primary for two election cycles, but a suit was filed in state court to restore the blanket primary. The Alaska Supreme court upheld the constitutionality of the blanket primary *(O'Callaghan v. State*, 914 P.2d 1250, 1996), but a U.S. Supreme Court decision in 2000 *(California Democratic Party v. Jones*, 530 U.S.567, 2000), ruled the blanket primary unconstitutional because it violated the associational rights of political parties by requiring them to allow non-party members to participate in their primary even though they wished to exclude non-members. This decision rendered Alaska's blanket primary unconstitutional. The legislature responded with a primary system that used one ballot for each political party. Under this system each party could designate who could select its ballot at the polls. That is, a party could allow only its own registered members to select it; voters with any registration to select it; or voters with certain registrations to select it. After the 2002 election, which was held under this system, the Green Party and Republican Moderate Party sued to allow both parties to appear on a single ballot, alleging a violation of their right of free speech under this section. The Alaska Supreme Court sided with them, ruling that the prohibition against a combined ballot was a violation of freedom of speech *(State v. Green Party of Alaska,* 118 P.3d 1054, 2005*).*

Section 6. Assembly; Petition

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

This language is patterned after the First Amendment of the U.S. Constitution. The commentary on this section by the constitutional convention committee that drafted it noted: "This right to petition is broader than in the Federal Constitution, which limits the right to petition to grievances." The only case to reach the Alaska Supreme Court alleging a violation of this section involved a project labor agreement on a borough-funded construction job. Among several claims made by non-union workers was that the requirement to pay union dues and fees violated their right under this section to be free of

"forced association." The court found no merit in the claim (*Laborers Local No. 942 v. Lampkin*, 956 P.2d 422, 1998).

Section 7. Due Process

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

Here the famous "due process" clause of the Fourteenth Amendment of the Bill of Rights is enshrined in the Alaska Constitution. Through decades of decisions, the courts have given this clause a very broad and expansive meaning. It does not simply mean that a legislative body must pass a law before it may deprive someone of life, liberty, or property. It means that no government agency may treat a person arbitrarily or unreasonably. "Due process" demands justice and fair play at the hands of authority. The Alaska Supreme Court has said: "The term 'due process of law' is not susceptible to a precise definition or reduction to a mathematical formula. But in the course of judicial decisions it has come to express a basic concept of justice under law" *(Bachner v. Pearson,* 479 P.2d 319, 1970).

Guaranteed by this provision are open and impartial official procedures against accused people, whether they are standing trial in a criminal court, being deprived of property by an administrative agency ("property" may include a job, license or professional certification), or being subjected to an investigation that may tarnish their reputation. For example, the Alaska Supreme Court ruled that the dismissal by a school district of a non-tenured teacher without the opportunity for a hearing was unconstitutional, even though state law did not require a hearing *(Nichols v. Eckert,* 504 P.2d 1359, 1973). "Due process" also requires that laws and regulations be sufficiently precise for citizens to understand what they should not do, and for enforcement authorities to clearly recognize a violation. For example, a municipal ordinance against loitering for the purpose of prostitution was found unconstitutionally vague because it arbitrarily subjected former prostitutes to arrest who may have been merely "window shopping, strolling, or waiting for a bus" *(Brown v. Municipality of Anchorage,* 584 P.2d 35, 1978). Many defendants and plaintiffs have challenged authorities on grounds that they were denied due process of law, and there is a substantial body of judicial opinion as a result of these cases.

"Due process of law" in this section also means that Alaska residents have a right of access to the courts, and agencies of government may not impose unreasonable barriers to litigation, such as filing fees unaffordable by indigents *(see Varilek v. City of Houston,* 104 P.3d 849, 2004*).*

The second sentence in this section appears only in Alaska's constitution. The convention delegates wanted the principle of due process extended explicitly to legislative proceedings. This was done in reaction to the blustering anticommunist investigations of Senator Joseph McCarthy in the early

1950s. His hearings violated the basic principles of fair treatment which are well-established in judicial proceedings.

A violation of this section of Alaska's constitution was alleged by five legislators who sued two other legislators and the Alaska Legislative Council to stop an investigation by the council into the firing of the commissioner of public safety by Governor Palin in July 2008. The plaintiffs claimed that the investigation violated the right of the governor and other executive branch employees to fair and just treatment. The Alaska Supreme Court dismissed the suit on the grounds that the plaintiffs did not have standing to sue for the personal rights of other people who were fully capable of bringing suit if they believed their rights were transgressed *(Keller v. French*, 205 P.3d 299, 2009*)*.

Section 8. Grand Jury

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

The question of whether to adopt the grand jury system caused a measure of controversy at the constitutional convention, and the wisdom of the decision to do so has been debated in legal circles since. This section adopts for Alaska the use of the grand jury in serious state criminal cases. The U.S. Bill of Rights requires indictments by a grand jury in federal felony cases, but the U.S. Supreme Court has held that this federal procedure does not apply to the states via the Fourteenth Amendment. Thus, states are not required to use the grand jury indictment procedure; about one-half, including Alaska, have chosen to do so.

The grand jury helps protect against the government bringing frivolous and ungrounded criminal charges against a person. In the federal system, a grand jury of unbiased citizens must fairly consider the evidence before the accused may be put on trial for a high federal crime. An indictment, or formal accusation, is thus issued by the grand jury, not the prosecutor. The grand jury, like the rest of our legal institutions, is rooted deep in the history of English jurisprudence.

While the delegates to the constitutional convention decided to incorporate the grand jury procedure into state criminal procedures, they recognized the right of a person to waive a grand jury indictment in favor of indictment by the prosecutor (called indictment by "information"). This was because, at the time, the grand jury in smaller towns might sit for only a few weeks each year. A person charged

with a serious crime soon after the grand jury adjourned might have to wait for most of a year before a new grand jury would convene. Even if the accused went free on bail in the meantime, the wait was unreasonable and conflicted with the right to a speedy trial. Thus, an accused person might want to waive a grand jury indictment to get on with the matter.

Critics of the grand jury process argue that it is archaic and no longer serves a real purpose. They point to other procedural and professional safeguards that prevent the abuse of official power the grand jury is supposed to prevent. These critics would replace the grand jury with a less cumbersome charging procedure.

Grand juries may investigate crime, particularly cases of white-collar crime and political corruption where no victim is available to help police conduct an investigation. Investigative grand juries might also study the operation of public offices and institutions, for example, the condition of jails or mental hospitals. This type of grand jury still functions in many states, including some of those which have dropped the indicting grand jury. Delegates to the Alaska constitutional convention thought highly of the investigative grand jury, and assured its continuation in Alaska through the last sentence of this section.

An investigative grand jury led to impeachment proceedings against Governor William Sheffield (see Article II, Section 20). In that case the grand jury did not choose to indict the governor, but recommended that the legislature consider impeachment. This episode led to controversy about the release of grand jury investigation reports to the public when they do not result in indictments. The Alaska Judicial Council (Article IV, Sections 9 and 10) studied the matter and recommended guidelines for the release of such information which were adopted by the Alaska Supreme Court in its Rules of Court.

Section 9. Jeopardy and Self-Incrimination

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

This section states the two long-established principles of Anglo-American law that no person may be tried twice for the same crime ("double jeopardy") and that an accused person has the right to remain silent in the face of criminal accusations. Both are incorporated into the Alaska Constitution virtually verbatim from the U.S. Bill of Rights.

Constitutional protection from double jeopardy bars a prosecutor from repeatedly prosecuting a person for the same alleged offense. In the words of the Alaska Supreme Court: "The double jeopardy clause protects against a second prosecution for the same offense after acquittal; it protects against a

second prosecution for the same offense after conviction; and it protects against multiple punishments for the same offense" *(Calder v. State,* 619 P.2d 1026, 1980).

This protection, however, does not necessarily prevent an individual from being retried in the event of a mistrial. Nor does this constitutional protection prevent the government from seeking a civil penalty in addition to a criminal penalty for an offense, as the clause has been interpreted to apply only to criminal proceedings.

The right of an accused individual to stand silent ("taking the Fifth Amendment" to the U.S. Bill of Rights) is perhaps the best-known constitutional protection. It is a reaction to the inquisitorial methods of medieval church courts. Immunity from testifying against oneself now forms the basis of modern criminal proceedings in the United States: the accused is presumed innocent until the government presents enough evidence to prove beyond a reasonable doubt that he or she is guilty. The government must make its case without requiring the defendant to cooperate.

The privilege against self-incrimination may be waived voluntarily. Confessions made freely, untainted by any coercion or intimidation, are admissible evidence in the courtroom. Incriminating statements made by suspects at the time of their arrest are valid only if the police made it clear to them that they had the right to remain silent and have the right to advice of an attorney. The privilege against self-incrimination pertains only to oral statements; it does not prohibit the prosecutor from using physical, nontestimonial evidence such as fingerprints and handwriting samples.

Although the clause mentions only criminal proceedings, it has been interpreted to extend the privilege against self-incrimination to other types of government investigations (e.g., legislative investigations) in which statements might later be used in a criminal case against the witness.

Section 10. Treason

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

This language is taken from Article III, Section 3 of the federal constitution (the word "State" being substituted for the original's "United States"). It defines treason and establishes the minimum evidence required to support a conviction; the intent was to prevent the government from prosecuting its opponents on fabricated charges of treason. Most state constitutions contain an identical provision. There has never been an indictment for treason in Alaska. There is no Alaska statute making treason a crime.

Section 11. Rights of Accused

> **In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve; except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.**

This section incorporates into Alaska's constitution several basic safeguards against oppressive criminal prosecution that are enunciated in the sixth article of the U.S. Bill of Rights. All of these safeguards—the right to a jury trial, a speedy trial, a public trial, an impartial jury, bail, confrontation, compulsory process, and assistance of counsel—have been delineated over the years by federal and state courts, and considerable legal doctrine exists on each one.

The right of the accused to a trial by a jury of fellow citizens anchors the judicial process in common sense notions of justice. In the words of the Alaska Supreme Court, a jury trial "holds a central position in the framework of American justice" *(State v. Browder,* 486 P.2d 925, 1971); it is a "barrier to the exercise of arbitrary power," and "a fundamental right, recognized as such throughout the nation by the constitutions of all the states and the federal government" *(Green v. State,* 462 P.2d 994, 1969). Furthermore, the institution of the jury, like the right to vote, "offers our citizens the opportunity to participate in the workings of our government, and serves to legitimize our system of justice in the eyes of both the public and the accused" *(Alvarado v. State,* 486 P.2d 891, 1971).

A defendant has a right to a jury trial in "criminal prosecutions," which have been defined to mean crimes that are serious enough to send someone to jail, that connote criminal conduct in the traditional sense of the term, or that may result in the loss of a valuable license, including a driver's license. Minor offenses do not require jury trials. These include such things as wrongful parking of motor vehicles, minor traffic violations, and violations which relate to the regulation of property, sanitation, building codes, fire codes, and other legal measures which can be considered regulatory rather than criminal in nature *(Baker v. City of Fairbanks,* 471 P.2d 386, 1970).

Alaska's constitutional requirement for a jury trial differs from the federal requirement in that it allows the legislature to provide for a jury of between six and twelve people in courts "not of record"—that is, in the district courts. Delegates at the constitutional convention were mindful of the expense of jury trials, and they were confident that six people could deliver just verdicts. (In territorial days defendants frequently waived a jury of twelve for a jury of six.) Missouri's new constitution (highly regarded by the legal community in Alaska and elsewhere as modern and progressive in its treatment of judicial matters) provided "that a jury for the trial of criminal and civil

cases in courts not of record may consist of less than twelve citizens as may be prescribed by law," and a number of other state constitutions (including Arizona, California, Colorado and Idaho) make a similar allowance. Thus, the delegates left the way open for the legislature to allow smaller juries for trials of lesser criminal offenses. Exercising the discretion given to it in this matter, the legislature has set district court juries at six members (AS 22.15.150).

Speedy trials serve the cause of justice in several ways. The Alaska Supreme Court has identified three main purposes of the speedy trial guarantee: "(1) it prevents harming a defendant through a weakening of his case as evidence and witnesses' memories fade with the passage of time; (2) it prevents prolonged pretrial incarceration; and (3) it limits the infliction of anxiety upon the accused because of long-standing charges" *(Nickerson v. State,* 492 P.2d 118, 1971). However, excessive haste may subvert justice: "While an adult defendant in a criminal case must be brought to trial within a reasonable time, due process requires that he may not be brought to trial too soon. He must be given a reasonable time to consult with his counsel and to prepare his defense" *(John Doe v. State,* 487 P.2d 47, 1971). The court has observed that "the essential ingredient is orderly expedition and not mere speed" *(Glasgow v. State,* 469 P.2d 683, 1970). Recognizing that each criminal case has its own circumstances (including delays sought by the defendant), the legislature has not imposed a strict quantitative definition of "speedy." However, the Alaska Supreme Court has adopted a court rule (Criminal Rule No. 45) that normally requires trial within 120 days of being charged. In one case, the Alaska Supreme Court found that a pre-trial delay of 14 months violated the constitutional right of the accused to a speedy trial *(Whitton v. State,* 506 P.2d 674, 1973).

Fairness cannot be determined unless trials are public. Indeed, the Anglo-American abhorrence of secret trials is so ingrained that we presume all secret criminal trials are unfair (although some exceptions are recognized, such as certain juvenile proceedings). "A public trial safeguards against attempts to employ the courts as instruments of persecution, restrains abuse of judicial power, brings the proceedings to the attention of key witnesses not known to the parties, and teaches the spectators about their government and gives them confidence in their judicial remedies" *(RLR v. State,* 487 P.2d 27, 1971).

The guarantee to a public trial gives the media extensive, but not totally unfettered, access to the courtroom. Coverage of the crime and information about the suspect that appears in the mass media create a potential source of bias for or against an accused person. A trial before a judge or jury exposed to sensational pre-trial publicity may not be a fair trial. In these situations it may become necessary to move the trial away from a community saturated with prejudicial press coverage (a so-called "change of venue").

Seeking a fair trial by removing a case to another jurisdiction may well be justified by the circumstances, but it must be done with circumspection. According to the longstanding doctrine of "vicinage," local trials are superior to trials held at a distance from the community where the crime occurs. Distant trials are not, in effect, public trials, and their verdicts do not rest on the common

sense judgment of the local populace. (One of the grievances of the American colonists against the king of England, expressed in the Declaration of Independence, was for "transporting us beyond seas to be tried for pretended offenses.") Alaska's constitution is unusual because it lacks an explicit requirement for a jury trial within the county or locale where the crime was committed. The federal constitution and most state constitutions contain such language. The sixth article of the U.S. Bill of Rights guarantees the right to an impartial jury trial "of the state or district wherein the crime shall have been committed . . . ." The Alaska Legislature has specified in statute the circumstances in which a trial may be moved from place to place within a judicial district or to another judicial district (AS 22.10.040).

Even a local trial may not be impartial if the composition of the jury is poorly representative of that community. These concerns led the Alaska Supreme Court to order a new trial for an Alaska Native convicted by an Anchorage jury of a crime committed in the rural community of Chignik. The court found that the urban culture of Anchorage was fundamentally dissimilar from that of Chignik, and the jury was representative only of Anchorage *(Alvarado v. State,* 486 P.2d 891, 1971).

In a similar case the state supreme court denied a new trial to a rural Alaska Native convicted by an Anchorage jury, but here the defendant was instrumental in moving the trial away from Dillingham, the regional center closest to the village in which the crime occurred *(Tugatuk v. State,* 626 P.2d 95, 1981). The court has not been sympathetic to claims that a jury must include members of the subgroup to which the accused belongs (for example, the Russian Orthodox Church in *Kelly v. State,* 652 P.2d 112, Alaska Ct. App., 1982). Generally speaking, the state and federal courts have held that juries must be selected randomly, so that no identifiable groups are excluded from the selection process (see, for example, *Erick v. State*, 642 P.2d 821, Alaska Ct. App., 1982). Thus, juries drawn in a manner that excludes a specific racial minority are unconstitutional; but an all-white jury properly drawn that convicts a member of a minority race is not.

The protection in Section 11 that "the accused is entitled to be informed of the nature and cause of the accusation" in a criminal proceeding is axiomatic in Anglo-American jurisprudence: without such knowledge the accused person could not mount a defense, nor would there be an ascertainable standard of guilt. Laws may be so vague (e.g., a prohibition against "hooliganism") that the accused does not know what constitutes criminal conduct, and is, in effect, deprived of the right to know the nature and cause of the charge. As such, they are repugnant to this constitutional provision.

Unlike the U.S. Constitution, most state constitutions guarantee the right to bail in addition to protection against excessive bail (see Section 12 below). Bail is a sum of money posted by a person who has been arrested; it is forfeited to the court if the person does not appear at trial or otherwise abide by orders of the court. The right to release before trial inheres in the fundamental notion that an accused person is innocent until proven guilty. That is, a defendant should not be incarcerated for a crime until after guilt has been established. Also, a person accused of a crime must be free before trial to prepare a defense. The exception in this section for "capital crimes" refers to crimes for which the

death penalty may be imposed. Because the death penalty was abolished in Alaska in 1957, all criminal offenses carry the right to bail.

Alaska's Supreme Court has ruled that the right to bail guaranteed by this section of the state constitution applies only to the period before trial; it does not extend to the post-conviction period (for example, between conviction and sentencing, or pending a hearing to revoke probation; *State v. Wassillie,* 606 P.2d 1279, 1980; *Martin v. State,* 517 P.2d 1389, 1974). It also has ruled that the right to bail does not mean an indigent person has a right to be released on his or her own recognizance because the person cannot afford to post bond *(Reeves v. State,* 411 P.2d 212, 1966).

There have been several unsuccessful attempts in the legislature over the years to amend the bail provisions of this section to restrict the right of bail for repeat criminal offenders.

The right of an accused person to be "confronted with the witnesses against him" secures the opportunity to disprove the government's case by cross-examination (that is, by the defendant questioning hostile witnesses). This constitutional protection of confrontation applies to documentary evidence as well as to testimony by individuals. "The right of confrontation protects two vital interests of the defendant. First, it guarantees him the opportunity to cross-examine the witnesses against him so as to test their sincerity, memory, ability to perceive and relate, and the factual basis of their statements. Second, it enables the defendant to demonstrate to the jury the witness's demeanor when confronted by the defendant so that the inherent veracity of the witness is displayed in the crucible of the courtroom" *(Lemon v. State,* 514 P.2d 1151, 1973).

Hearsay evidence (statements made by persons who do not appear as witnesses in court) is unacceptable because it violates the right of confrontation. For example, in the trial of two men accused of robbing a bar, two police officers testified that they heard a "Mr. Hyatt" say that he had been told by a third person that the two men were the robbers. Neither Mr. Hyatt nor the third person testified at the trial and therefore they could not be cross-examined. The Alaska Supreme Court ruled that the testimony was classic hearsay evidence that violated the right of confrontation *(Blue v. State,* 558 P.2d 636, 1977).

The constitutional right of confrontation in this section applies only to criminal proceedings. However, the state supreme court has declared that it is an important element of "due process" in administrative procedures, such as a hearing to revoke a driver's license for drunk driving: "The right to confront and cross-examine witnesses is one right, founded upon due process and fundamental fairness, which civil defendants do enjoy" *(Thorne v. Department of Public Safety,* 774 P.2d 1326, 1989).

The right of an accused person "to have compulsory process for obtaining witnesses in his favor" makes it possible for a defendant to summon to trial (by subpoena or court order) persons and documentary evidence needed to establish innocence. Without this right of compulsory process, the

defendant would be no match for the state, which can rely on ample legal and financial resources to bring its case to the courtroom. Judges are allowed to exercise discretion over the reasonableness of requests for witnesses and evidence under this provision.

The right of an accused person "to have the assistance of counsel for his defense" protects a defendant from an unjust conviction that may result from a lack of understanding of the law and the workings of the judicial system. Without assistance of counsel, "even the intelligent and educated layman . . . may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one" *(Alexander v. City of Anchorage,* 490 P.2d 910, 1971).

If the defendant cannot afford to hire a lawyer, the state must hire one or drop its case. In Alaska, indigent defendants are represented by lawyers working for the Public Defender Agency, an executive branch agency funded by the state government (AS 18.85). The courts have said that this representation may not be perfunctory: "The mere fact counsel represents an accused does not assure this constitutionally guaranteed assistance. The assistance must be 'effective' to be of any value" *(Risher v. State,* 523 P.2d 421, 1974).

Before taking a statement from a person who has been arrested, the police must inform the person of the constitutional right to remain silent and to be assisted by a lawyer appointed by the state if necessary (the so-called *Miranda* rights, after the U.S. Supreme Court case that enunciated these principles). The court must be satisfied that a person who waived these rights did so knowingly and voluntarily.

To be meaningful, a lawyer's assistance often must begin well before the time of trial. Federal and state courts have required that defendants be represented at all "critical stages" in the prosecution; this may be as early as a preindictment lineup of suspects immediately after a crime (see, for example, *Merrill v. State,* 423 P.2d 686, 1967; and *Blue v. State,* 558 P.2d 636, 1977). In *Roberts v. State* (458 P.2d 340, 1969), the Alaska Supreme Court ruled that the defendant was unconstitutionally denied his right to counsel when he reluctantly gave handwriting samples to police after they refused his request to consult his lawyer.

Section 12. Criminal Administration

> **Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crime, restitution from the offender, and the principle of reformation.**

The first sentence of this section is drawn verbatim from Article VIII of the U.S. Bill of Rights. The second sentence was amended in 1994 by changing the word "penal" to "criminal" and adding "community condemnation of the offender, the rights of victims of crimes, restitution from the offender."

There has been little litigation over the constitutionality of fines and bail at either the federal or state level. The provision is understood to mean that bail may not be set higher than the amount necessary to assure the defendant's presence at trial *(John Doe v. State,* 487 P.2d 47, 1971). Thus, a judge may not seek to keep a person incarcerated by setting an unreasonably high bail.

Some state constitutions contain, in addition to or instead of a prohibition against cruel and unusual punishment, an explicit requirement that penalties be scaled to the offense. The Alaska Supreme Court has said that this section does not require punishments to be strictly proportional to the seriousness of the crime, but it (along with Article I, Section 1) requires that they not be grossly disproportional (*Green v. State,* 390 P.2d 433, 1964). While a definition of "cruel and unusual punishment" clearly includes torture and other forms of barbarous treatment, it has been expanded over the years to encompass such things as the denial of essential medical treatment and psychiatric care to prisoners.

An Eskimo convicted of murder claimed that his imprisonment in any facility other than the Bethel jail amounted to cruel and unusual punishment because he spoke Yupik and virtually no English, ate a Native diet which was unavailable in other prisons, and had no experience outside the traditional life of Natives in southwest Alaska. The court was unsympathetic to his claim *(Abraham v. State,* 585 P.2d 526, 1978), as it was to the claim by another prisoner that the denial of conjugal visits was a form of cruel and unusual punishment *(McGinnis v. Stevens,* 543 P.2d 1221, 1975).

The second sentence of this section was amended in 1994. The original language stated: "Penal administration shall be based on the principle of reformation and the need for protecting the public." Underlying the change was a pervasive opinion that the courts had tended to put the interests of the prisoners ahead of those of the public. The commitment to reformation in this section has no counterpart in the U.S. Constitution. It expresses a progressive ideal of incarceration that became popular in the late 1800s. Several other state constitutions recognize a right to humane and rehabilitative treatment in prison. For example, Oregon's constitution, Article I, Section 15, states: "Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice."

The record is clear that in embracing the principle of reformation, delegates to Alaska's constitutional convention did not intend to abolish capital punishment (by using the argument, in the words of Delegate George McLaughlin, "that you cannot reform a dead man"). Delegate James Doogan stated that the reformation language "was more or less advisory or instructive to the penal institutions." Nonetheless, the Alaska Supreme Court has interpreted it to mean that state prisoners in Alaska have

a constitutional right to rehabilitation services *(Rust v. State,* 584 P.2d 38, 1978). This right was clarified in the *Abraham* case: the Eskimo who failed to convince the court that his incarceration outside of the Bethel area was unconstitutional did convince the court that he had a constitutional right while in prison to rehabilitative treatment for his alcoholism, as such treatment was the key to reforming his criminal behavior *(Abraham v. State,* 585 P.2d 526, 1978).

Prior to the 1994 amendment, Alaska's supreme court had enunciated specific sentencing goals that it said were inherent in the original twin constitutional principles of prisoner reformation and public protection. Known as the "Chaney criteria," these are the "rehabilitation of the offender into a noncriminal member of society, isolation of the offender from society to prevent criminal conduct during the period of confinement, deterrence of the offender himself after his release from confinement or other penological treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves" *(State v. Chaney,* 477 P.2d 441, 1970). Thus, the supreme court had established community condemnation of the offender as a sentencing objective prior to the adoption of the amendment in 1994. It has declared that this objective may not be used as a guise for retribution, which has no place in Alaska's constitutional scheme *(Smothers v. State,* 579 P.2d 1062, 1978).

The court has upheld presumptive sentences adopted by the legislature (AS 12.55.125) against challenges that they conflict with this section of the constitution and that they unconstitutionally infringe on the power of the judiciary *(Nell v. State,* 642 P.2d 1361, Alaska Ct. App., 1982).

Administration of Alaska's prisons has been influenced significantly by a class action suit brought by prisoners against the state alleging that overcrowding and other substandard prison conditions violated state statutes and regulations as well as federal and state constitutional provisions, including this section. Originally filed in 1981, the suit followed the pattern of such suits in many other states. It spawned an enormous amount of litigation and negotiation that eventually ended in a consent decree in 1990. The agreement in this *Cleary* case contained guidelines and standards for operating prisons, established ceilings on prison populations, enumerated rights and opportunities of prisoners, specified procedures for handling grievances, and guaranteed the availability of rehabilitation programs (*Cleary v. Smith, Final Settlement and Order,* No. 3AN-81-5274 CIV, 1990; see also *Smith v. Cleary,* 24 P.3d 1245, 2001). Unhappy about the court orders stemming from the *Cleary* case, the legislature adopted in 1999 the Alaska Prison Litigation Reform Act (AS 09.19.200) that sharply curtails the ability of the courts to intervene in the administration of prisons through civil litigation.

For a discussion of rights of crime victims, see Article I, Section 24.

Section 13. Habeas Corpus

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

A writ of habeas corpus is a means by which a person in jail may have the legality of his detention reviewed by a court. It is not a device to determine guilt or innocence; rather it is intended to determine whether due process was observed when a person was jailed. This is perhaps the oldest and most famous safeguard of personal liberty in the Anglo-American judicial tradition. Protection from the suspension of the writ of habeas corpus is found in the U.S. Constitution (Article I, Section 9) and the other state constitutions. This version differs from conventional statements of the right by the addition of "actual or imminent" before invasion to account for the conditions of modern warfare.

Section 14. Searches and Seizures

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

Here is the search-and-seizure article of the U.S. Bill of Rights (Article IV), with the addition of the words "and other property" and altered punctuation. Although this constitutional protection has at times resulted in popular outrage when felons have gone free because evidence of their guilt was obtained illegally by the police, it is one of the bulwarks of personal freedom. People living under totalitarian regimes who fear a knock on the door in the middle of the night readily grasp its significance. "The primary purpose of the constitutional guarantees furnished by this section is the protection of personal privacy and dignity against unwarranted intrusion by the state" *(Woods & Rohde, Incorporated* v. *State,* 565 P.2d 138, 1977).

Many criminals have, not surprisingly, appealed their convictions on the grounds that the evidence used against them violated this constitutional safeguard. Thus, the provision has undergone a great deal of judicial interpretation over the years to define such subjective concepts as "probable cause" (even the meaning of "search" has had to be established) and to balance the practical demands of police work with the underlying principle of personal privacy.

Evidence which has been seized unreasonably may not be used in court. This is the "exclusionary" doctrine that has thwarted many criminal convictions. The doctrine is not meant to protect against conviction of innocent people; it is rather, in the words of the Alaska Supreme Court, "a prophylactic

device to curb improper police conduct and to protect the integrity of the judicial process" *(Moreau v. State,* 588 P.2d 275, 1978).

To obtain a search warrant from the court, or to arrest (seize) a criminal suspect, the police must have more than good intentions: the facts and circumstances known to the officer "must be sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed" (a federal standard cited in numerous state cases, for example *Keller* v. *State,* 543 P.2d 1211, 1975).

The courts have delineated several exceptions to the general rule that a warrant must be in hand before the police may search a person or a person's belongings. These exceptions are for a search of abandoned property, a search in hot pursuit of a fleeing felon, a search to avoid destruction of a known seizable item, a limited pre-incarceration "inventory" search, a search undertaken with voluntary consent, a search in the rendition of emergency aid, a "stop and frisk" search, and a search incident to arrest.

At the Alaska constitutional convention, the delegates seriously considered, but finally rejected, an additional clause that would have extended this protection from unreasonable searches and seizures to include freedom from electronic surveillance and wiretapping. In the end, the delegates decided not to risk unnecessary restriction of legitimate law enforcement activities, and they trusted the legislature to establish safeguards against official abuse of electronic surveillance. However, the lingering apprehension of threats to personal privacy from modern technology found expression in the "right to privacy" amendment (Section 22, below) adopted in 1972. This amendment became a partial basis for the Alaska Supreme Court's adopting a rule requiring police to obtain prior court approval for many electronic monitoring situations *(State v. Glass,* 583 P.2d 872, 1978).

Section 15. Prohibited State Action

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

Article I, Section 10 of the U.S. Constitution prohibits states from passing laws of the type mentioned in the first two sentences of this section. Thus, the first two sentences are technically unnecessary because of the federal constitutional ban, but this reaffirmation of the prohibition nonetheless appears in most state constitutions (often in the legislative article because it limits the scope of legislative action). A bill of attainder is an act of the legislature that singles out a person or a group of people for punishment without a trial. Bills of attainder are prohibited because prosecutions are the business of the judicial system with its many procedural safeguards, not of the legislature. Bills of attainder are a rarity, but an instance of one occurred in Alaska. A member of the senate finance committee inserted

a rider in the 1980 appropriation bill that eliminated the position control number (a state personnel number assigned to an individual) belonging to an agency administrator whom the senator wanted removed. In a letter to the governor the attorney general advised against acting on the rider because it was legislative punishment of a specific individual and therefore amounted to a bill of attainder.

An *ex post facto* law is one that makes a crime an act that was innocent at the time it was committed, or increases the standard of punishment for a criminal act after the crime was committed. Without this constitutional protection, citizens would be vulnerable to vengeful prosecutors or legislatures. Also, the dictates of due process demand that people know whether their actions are considered criminal and, if so, the severity of punishment they may suffer as a result.

Litigation at the federal and state levels over *ex post facto* laws has primarily concerned measures that stiffen criminal penalties. For example, in Alaska, a person whose driving license was revoked for three years after a third drunk driving conviction argued that the penalty was unconstitutional because his first two convictions occurred before a new presumptive sentencing law set a three-year revocation for the third offense. The Alaska Supreme Court, citing federal precedent, stated that the three-year revocation should be considered the sentence for the latest crime, which was more serious because it was a repetitive one, not for the earlier crimes. Therefore, the presumptive sentencing law did not amount to an *ex post facto* law *(Danks v. State,* 619 P.2d 720, 1980; also see *Carter v. State*, 625 P.2d 313, Alaska Ct. App., 1981). In another case, the Alaska Supreme Court ruled that a man indicted for sexual abuse could be prosecuted under a law that extended the number of years a person can be held liable for that crime (the statute of limitation), even though he could not have been indicted had the old statute of limitation been still in effect *(State v. Creekpaum,* 753 P.2d 1139, 1988). The court upheld a statute denying permanent fund dividends to convicted felons when challenged as an *ex post facto* law by a felon who was convicted before the law was adopted (*State v. Anthony,* 816 P.2d 1377, 1991), and it also upheld the state's sex offender registration act against an *ex post facto* challenge by a man convicted of a sex offense before the act took effect (*Patterson v. State,* 985 P.2d 1007, Alaska Ct. App., 1999).

The federal prohibition against state laws impairing the obligation of contracts was originally intended to block legislation that forgave debtors their debts. Seemingly far-reaching, this prohibition has been interpreted over the years in federal and state (non-Alaska) cases to render it far less a barrier to state action than it appears on its face. States may, and frequently do, adopt laws that interfere with the obligation of contracts when the laws are intended to protect the public health and welfare or the economic interest of the state. For example, the taking of property under a state's power of eminent domain (see Section 18 below), state tax laws, and state economic regulations often impair existing contracts, but they are not illegal.

A constitutional prohibition on grants of special privileges or immunities is found in many state constitutions and was present in the Territorial Organic Act of 1912 (see also Article II, Section 19). Its genesis was the proclivity of nineteenth century legislators to dispense favors to special interests.

The provision has not been interpreted to mean, however, that laws may never selectively confer benefits on certain groups or classes of people. That laws benefit members of society differentially is not objectionable, provided there is a rational and legitimate basis for the distinction (just as the "equal protection" clause does not prohibit laws from affecting people differently). This provision has not kept state and local governments from issuing franchises for the operation of public utilities, transportation services and other businesses. (Such franchises are, among other things, terminable and revocable.) The "common use" clause of Article VIII, Section 3 prohibits special privileges in connection with the use of natural resources.

A provision comparable to the last sentence of this section is not found in the U.S. Constitution, but it appears in some 20 state constitutions. "Corruption of blood and forfeiture of estate" refers to the feudal doctrine under which a person convicted of treason or a felony lost his estate to his lord and could not inherit property from his ancestors or pass it on to his heirs. The principle is now long-recognized that the punishment for a crime should not reach beyond the guilty individual, nor should it affect the right to property that has been or will be acquired legitimately.

Section 16. Civil Suits; Trial by Jury

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

Many state constitutions guarantee the right to a jury trial in both civil and criminal cases in the same breath. (The Illinois Constitution is typical: "The right of trial by jury as heretofore enjoyed shall remain inviolate.") However, Alaska's constitution guarantees the right of a jury trial in criminal cases in Section 11, and in civil cases here.

The point of departure for this section is Article VII of the U.S. Bill of Rights which says, in part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." But the delegates worded it to their satisfaction, substituting "civil cases" for "suits at common law," and "a jury of twelve" for "a jury." By specifying that the jury trial in civil cases be "preserved to the same extent as it existed at common law," the delegates followed the tradition of avoiding the creation of a new right to a jury trial where one was not already recognized. The delegates debated at some length the wisdom of establishing a minimum dollar figure in the constitution, but in the end they decided that only by doing so would they effectively guarantee the right to a jury trial. (Otherwise, the legislature could set the threshold at such a high level that many people would be excluded.)

The practice of allowing jury verdicts of less than unanimity in civil cases is not unusual. The Missouri Constitution, for example, allows verdicts by two-thirds majority, and the New Jersey Constitution by five-sixths. Also, in territorial Alaska and elsewhere, it was common practice to allow civil cases to be heard by juries of fewer than 12 in the lower courts. The Alaska legislature has specified a jury of six in the district courts for civil and criminal cases (AS 22.15.150), and it allows five-sixths of any jury to render a verdict in civil cases (AS 09.20.100).

Section 17. Imprisonment for Debt

> **There shall be no imprisonment for debt. This section does not prohibit civil arrest of absconding debtors.**

This protection is found in most state constitutions. It reflects the common law abhorrence of "debtors' prison." The U.S. Constitution does not contain an explicit protection against imprisonment for debt, but an attempt at such imprisonment would probably run afoul of the due process clause and the protection against cruel and unusual punishment.

At the Alaska constitutional convention, the committee draft of this section contained an exception for fraud, which is found in most other state constitutional versions of this protection. But the delegates preferred the exception for absconding debtors, which is found in three other state constitutions. They did not want to shield from the law those who skipped town without paying their bills, even though they had the money to pay. Generally speaking, courts have interpreted this protection from imprisonment for debt to apply only to debts arising from private contracts. Thus, for example, it does not apply to willful avoidance of fines and similar criminal penalties, nor does it apply to the defiance of court orders to pay child support or divorce settlements.

Section 18. Eminent Domain

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

Eminent domain is the inherent right of government to take private property for a public purpose. Alaska's constitution here requires the state government to compensate fairly the owners of property it condemns under the power of eminent domain (see also Article VIII, Section 18). Every state constitution and the U.S. Constitution (Fifth Amendment) require just compensation to the owner of property condemned by the government.

The most common eminent domain action is the acquisition of rights-of-way for road and highway construction, although the power is occasionally exercised to acquire land for schools, public

buildings, pipelines and utility transmission lines. There is substantial statutory law governing its use (e.g., AS 09.55.240). The state has delegated its power of eminent domain to municipalities, public corporations, and public and private utilities, but all are bound by this requirement to pay just compensation.

"Property" taken by the state is usually land, but the term has been held to apply to personal property and even intangible property. For example, the Alaska Supreme Court ruled that a lawyer could not be required to provide counsel to an indigent defendant without reasonable compensation, as "labor is property" *(DeLisio v. Alaska Superior Court,* 740 P.2d 437, 1987). However, the court two years later denied a claim by state workers that the executive branch's unilateral increase of the work week (from 37.5 to 40.0 hours after an impasse over a labor agreement) constituted an unlawful taking of property under this section *(Alaska Public Employees Assn. v. Department of Administration,* 776 P.2d 1030, 1989).

The definition of a "taking" of private property is not always a straightforward matter. The state may do something that indirectly diminishes the value of private property, and the owners may demand compensation for this so-called "inverse condemnation." Here the problem is that governments routinely adopt regulations in the interest of public health and safety that indirectly cost people money. Zoning ordinances and building codes, for example, burden property owners economically. Can the exercise of the government's police powers constitute a "taking" of private property that must be compensated? It can if the effect is confiscatory or unduly heavy. These issues were presented in a suit brought after the state changed to one-way the flow of traffic in front of a business that depended on easy accessibility to vehicle traffic. The Alaska Supreme Court noted that "the difference between a noncompensable exercise of the police power and a compensable taking is often one merely of degree," but did not consider the flow of traffic in front of a business a property right that required compensation *(B & G Meats, Incorporated v. State,* 601 P.2d 252, 1979). However, the court agreed with the claim that airplane noise caused by the state's construction of a new airport runway amounted to the condemnation of an aerial easement, thus lowering the value of residential property (*State v. Doyle*, 735 P.2d 733, 1987).

"Damage" to property by the state is to be compensated as well as taking of property. (Approximately half of the state constitutions include damage in their requirement for eminent domain compensation; damage is not included in the Fifth Amendment of the U.S. Constitution.) There has been little judicial interpretation of this term. The Alaska Supreme Court has said, however, that it includes the temporary loss of profits from a business that must be relocated because of an eminent domain action by the state *(State v. Hammer,* 550 P.2d 820, 1976; see also *Bakke v. State*, 744 P.2d 655, 1987).

The Alaska Supreme Court has defined "just compensation" to mean fair market value: "The law in Alaska is that 'fair market value,' or the price a willing buyer would pay a willing seller for property, is the appropriate measure of 'just compensation'" *(State v. Alaska Continental Development Corporation,* 630 P.2d 977, 1980). The property owner is entitled to an appraisal of fair market value

at the highest and best use of the property, but not to a valuation based on a speculative future use. Nor may the property owner assert a value based on the use to which the property will be put by the state: "It is a basic tenet of eminent domain law that just compensation is determined by what the owner has lost and not by what the condemnor has gained" *(Gackstetter v. State*, 618 P.2d 564, 1980).

Section 19. Right to Keep and Bear Arms

> **A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State.**

The second sentence of this section was added by amendment in 1994. It makes explicit that the first sentence, which comes directly from the Article II of the U.S. Bill of Rights, creates a personal right to possess a firearm unconnected with service in an official militia. U.S. Supreme Court decisions in 2008 and 2010 accomplished the same purpose as the 1994 amendment to Alaska's constitution. Federal and state courts have ruled consistently that these constitutional guarantees do not prevent states from the reasonable regulation of firearms, such as requiring registration of handguns, prohibiting convicted felons from possessing firearms, and prohibiting concealed weapons. The Alaska Court of Appeals has upheld the state's prohibition against felons possessing a concealable firearm *(Wilson v. State*, 207 P.3d 565, 2009*)*. It has also ruled that a state law prohibiting a felon from living in a house where there is a firearm, and a state law prohibiting an intoxicated person from possessing a firearm, do not violate this section (*Morgan v. State*, 943 P.2d 1208, Alaska Ct. App., 1997; and *Gibson v. State*, 930 P.2d 1300, Alaska Ct. App., 1997).

Section 20. Quartering Soldiers

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

This archaic provision about the quartering of soldiers is derived from Article III of the U.S. Bill of Rights. (The subject was a grievance of the American colonists against British rule.) Most states have a similar provision, and its inclusion in the Alaska Constitution reveals the strong influence of tradition on the convention delegates. This section requires consent of the owner, or "occupant," of the house. Only four constitutions contain this additional requirement, but its significance is academic since there has never been a serious state or federal case alleging a breach of this citizen protection.

The second sentence has no direct counterpart in the U.S. Constitution, but the principle is embodied in the federal provision that the president is the commander and chief of the army and navy (Article II, Section 2). Virtually all state constitutions contain a similar statement, which expresses a basic tenet of democratic government.

Section 21. Construction

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

That Article I may omit mention of some rights does not mean that these rights are surrendered by the people. This provision is common in state constitutions, and it is a principle recognized by Article Nine of the Bill of Rights: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." These provisions have been used very seldom by state or federal courts. In Alaska, it has only been recognized as protecting the right of representing oneself in court proceedings. The Alaska Supreme Court allowed a prisoner to act as his own attorney in post-conviction proceedings, provided that he was capable of presenting his case in a rational and coherent manner, he recognized what he was giving up by declining the assistance of counsel, and he could conduct himself with a minimum of courtroom decorum. "At the time that the Alaska Constitution was enacted and became effective, the right of self-representation was so well established that it must be regarded as a right 'retained by the people'" *(McCracken v. State,* 518 P.2d 85, 1974).

Section 22. Right of Privacy

> **The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.**

This section was added to the constitution by amendment in 1972. It was prompted by fear of the potential for misuse of computerized information systems, which were then in their infancy. Delegates to the constitutional convention 16 years earlier had also been concerned about the potential for technological intrusion in the lives of ordinary citizens, but then the fear was electronic surveillance and wiretapping. They considered, but ultimately rejected, inclusion of the following language in the section dealing with unreasonable searches and seizures: "The right of privacy of the individual shall not be invaded by use of any electronic or other scientific transmitting, listening or sound recording device for the purpose of gathering incriminating evidence. Evidence so obtained shall not be admissible in judicial or legislative hearings."

In the early 1970s, the Alaska Department of Public Safety was developing the Alaska Justice Information System, a computerized database of information on the criminal history of individuals. Fearful that such a system was the precursor of a "Big Brother" government information bureaucracy, legislators responded with this constitutional amendment, which was handily ratified by the voters.

Alaska is one of a small group of states with a constitutional right of privacy: similar provisions can be found in the constitutions of Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina and Washington. (Some of these were added by amendment at approximately the same time as Alaska's.) The U.S. Constitution does not contain an explicit right of privacy. However, in recent years the U.S. Supreme Court has ruled that basic privacy rights are inferred from the First, Third, Fourth, Fifth and Ninth Amendments.

Like other basic constitutional rights, the right of privacy is not absolute. Reasonable interferences with privacy are tolerated, as are, for example, reasonable restraints on the right of free speech. To judge the acceptability of government interference with citizens' privacy, the courts use the same balancing test applied in other cases where it is alleged that the state has trampled a person's rights: the more significant the right involved, the more important the state's interest must be in adopting the restrictive law or regulation.

The first major judicial interpretation of the new constitutional right of privacy in Alaska arose from a case not involving electronic intrusion but the use of marijuana in the home. In this landmark case that overturned a state law making it illegal to possess marijuana under any circumstances, the Alaska Supreme Court found privacy in the home to be of the highest importance and the most deserving of constitutional protection, and it found the state's case for regulating the personal use of small amounts of marijuana to be less than compelling *(Ravin v. State,* 537 P.2d 494, 1975). In subsequent cases, however, the court upheld the state laws against the possession of small amounts of marijuana in public (saying the right of personal privacy in public places is of lesser constitutional significance; *Belgarde v. State,* 543 P.2d 206, 1975) and against the possession of small amounts of cocaine in the home (saying the harmful societal effects of cocaine are serious enough to justify the state's regulation of the substance, even in the home; *State v. Erickson,* 574 P.2d 1, 1978). The supreme court upheld a Juneau ordinance that prohibited smoking in private clubs that served food or alcohol. The court said that a club was not an extension of the home, and that the ordinance did not violate the state constitutional right to privacy *(Fraternal Order of Eagles v. City and Borough of Juneau,* 254 P.3d 348, 2011).

Alaska's constitutional right to privacy has also been interpreted to protect a woman's access to an abortion. In 1992, the governing board of a private hospital in the city of Palmer adopted a policy to prohibit abortions in their facility, relying on a state law that said neither a person nor hospital would be liable for refusing to participate in an abortion. A lawsuit successfully contested the board's decision: the Alaska Supreme Court said that the hospital, which was licensed by the state and received substantial amounts of public money, must allow abortions to be performed, and the portion

of the state law upon which the board relied was unconstitutional *(Valley Hospital Association v. Mat-Su Coalition for Choice,* 948 P.2d 963, 1997). In subsequent cases the court ruled that reproductive rights protected by this section extend to minors *(State v. Planned Parenthood of Alaska,* 35 P.3d 30, 2001, and 171 P.3d 577, 2007). At issue in these cases was a 1997 state law requiring a minor to obtain her parent's consent in order to obtain an abortion. The court ruled that the law violated the minor's right of privacy, but suggested that a law simply requiring notification of the minor's parents prior to an abortion would not offend the privacy protections of this section. A law requiring parental notification was adopted by an initiative that appeared on the ballot at the primary election on August 24, 2010. (Another court decision dealing with abortion, which prohibited the state's Medicaid program from denying medically necessary abortions to needy women, was decided on the basis of a violation of the equal protection clause of Section 1 of this article; see *State v. Planned Parenthood of Alaska,* 28 P.3d 904, 2001.*)*

Most privacy cases arise in the context of searches and seizures (see Section 14 above). Of these, a leading case is *State v. Glass* (583 P.2d 872, 1978), in which the Alaska Supreme Court ruled that the state could not use as evidence a recording, made without a warrant, of a conversation between the defendant and an informant who possessed a wireless transmitter. Although the U.S. Supreme Court had ruled that recordings of this type were admissible evidence, the Alaska Supreme Court found that Alaska's constitutional protection was broader than the inferred right of privacy from the federal constitution: "Were that not the case, there would have been no need to amend the constitution." Eighteen years after *Glass*, the court of appeals ruled that a warrantless, surreptitious video recording without sound also violated the right to privacy (*State v. Page,* 911 P.2d 513, Alaska Ct. App., 1996). In these and similar cases the court uses a test enunciated in *Glass* that asks if the defendant had a reasonable expectation of privacy in the place and activity at issue. For example, the court has determined that fishermen do not have a reasonable expectation that catches stored in the holds of their vessels will be protected from warrantless searches *(Dye v. State,* 650 P.2d 418, Alaska Ct. App., 1982). A theater box office employee caught stealing on a hidden surveillance camera did not have a reasonable expectation of privacy selling tickets to the public (*Cowles v. State*, 23 P.3d 1168, 2001).

Section 23. Resident Preference

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

This section of Article I was passed by the legislature and ratified by the voters in 1988. It was intended to prevent the equal protection clause of Article I, Section 1 from becoming a snag in state courts for local hire (also referred to as "Alaska hire") legislation—that is, legislation that would give preference to job applicants who are residents of the state. Efforts by the legislature to impose a local hire law on employers had been repeatedly frustrated in the courts.

The first Alaska hire effort to be declared unconstitutional was a set of regulations promulgated prior to 1972 under the State Personnel Act (AS 39.25) that gave a preference in the filling of state government positions to Alaskans who had lived in the state for 12 months or more. The Alaska Supreme Court nullified the regulations in 1973 on the grounds that they unreasonably restricted interstate travel, a fundamental right protected by the privileges and immunities clause of the U.S. Constitution *(State v. Wylie,* 516 P.2d 142, 1973).

In 1972, the legislature adopted two Alaska hire laws. One of these was AS 38.40, "Local Hire Under State Leases," a provision of the land laws requiring all state oil and gas leases, as well as easements or right-of-way permits for oil or gas pipelines, to contain a clause giving a preference to qualified Alaskans in employment arising from the lease or permit. An Alaska resident was defined as a person who had been physically present in the state for 12 months, who maintained a place of residence in the state, who was registered to vote, who had not claimed residency elsewhere, and who intended to be a permanent resident.

Not long after the Alaska Department of Labor began to enforce the measure by issuing residency cards in 1975, a suit was brought by several nonresident workers who argued that the law violated the equal protection clauses of the state and federal constitutions and the privileges and immunities clause of the federal constitution. The Alaska Supreme Court ruled that the one-year durational residency requirement violated the privileges and immunities clause of the federal constitution, but it did not find the preference for residents over nonresidents offensive to either the state or federal constitutions. The court justified Alaska hire by the principle that "a state may prefer its residents in dealing with natural resources that it owns" *(Hicklin v. Orbeck,* 565 P.2d 159, 1977).

The state's high court decision was appealed to the U.S. Supreme Court where it was reversed by a unanimous opinion of the justices. They held that the Alaska hire law violated the privileges and immunities clause of the U.S. Constitution. The court said the state failed to show that nonresidents were a source of Alaska's high unemployment (in contrast to such factors as lack of education and job training and geographic remoteness from job opportunities). Moreover, the law was not sufficiently related to the ostensible problem of nonresident competition for jobs (the law discriminated in favor of employed Alaskans as well as unemployed Alaskans). In addition, Alaska's ownership of resources was insufficient justification for discrimination against nonresidents (the law affected employers who had no connection with the state's oil and gas, performed no work on state land, held no contractual relationship with the state, and received no payment from the state). The U.S. Supreme Court wrote: "If Alaska is to attempt to ease its unemployment problem by forcing employers within the State to discriminate against nonresidents—again, a policy which may present serious constitutional questions—the means by which it does so must be more closely tailored to aid the unemployed the Act is intended to benefit" *(Hicklin v. Orbeck,* 57 L.Ed.2d 397, 1978).

The other Alaska hire law enacted in 1972 was AS 36.10, which required that 95 percent of the work force on state-funded construction projects be *bona fide* Alaska residents. In 1983, a Montana

ironworker was fired from his job on a state-funded school construction project after his employer received notice that the 95 percent resident employment standard of AS 36.10 was not being met. He sued the state, alleging that the Alaska hire law violated the equal protection clauses of the state and federal constitutions and the privileges and immunities clauses of the federal constitution. The Alaska Supreme Court, which now had before it the U.S. Supreme Court decision in *Hicklin*, held that the law violated the U.S. privileges and immunities clause. It said that the state failed to prove by a preponderance of evidence that nonresidents were a significant source of unemployment in Alaska and that "the preference . . . is closely tailored to alleviate unemployment in the construction industry in the State of Alaska" *(Robison v. Francis*, 713 P.2d 259, 1986).

In response to this ruling, the state legislature amended AS 36.10 in 1986 to give hiring preferences only to those Alaska residents who needed them most. Henceforth, preferential treatment on public works projects was to be granted only to residents of areas of underemployment or economic distress, and to economically disadvantaged minority or female residents of an area. Specific preconditions necessary to trigger these preferences had to be certified by the commissioner of the department.

Advocates of Alaska hire believed that the new measure had a better chance of being upheld by the U.S. Supreme Court than by the Alaska Supreme Court. Although success in the U.S. high court was problematical, the prospect of success in the state court was considered dim. A separate concurring opinion of Alaska Supreme Court Justice Edmond Burke in *Robison v. Francis* argued that the state high court should have decided that case on the basis of the law's violation of "the clear and unambiguous language" of Article I, Section I of the Alaska Constitution: "A decision by this court that the local hire law violates the Alaska Constitution would bring this case to an immediate end . . . ." Defeat in state courts on the basis of the state constitution would preclude the federal court from ever reviewing the new Alaska hire law. Thus alarmed that the equal protection clause of the state constitution would not tolerate Alaska hire legislation, lawmakers moved to amend the constitution with this section.

As it happened, the amendment did not save the 1986 local hire law from the equal protection clause of the Alaska Constitution. A contractor working on a state-funded construction project in a zone which was declared economically distressed challenged the new law, and the contractor was later joined by two Alaska residents who alleged their jobs were put in jeopardy by the Alaska hire measure. The Alaska Supreme Court overturned the law, ruling that the discrimination was too loosely related to the purpose of the law to satisfy the equal protection guarantee of Article I, Section 1 of the Alaska Constitution *(State v. Enserch*, 787 P.2d 624, 1989). Because the case concerned the rights of a resident corporation and resident workers, the federal privileges and immunities clause was irrelevant, as was this section of the Alaska Constitution, which authorizes discrimination only against nonresidents.

Section 24. Rights of Crime Victims

> **Crime victims, as defined by law, shall have the following rights as provided by law: the right to be reasonably protected from the accused through the imposition of appropriate bail or conditions of release by the court; the right to confer with the prosecution; the right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process; the right to timely disposition of the case following the arrest of the accused; the right to obtain information about and be allowed to be present at all criminal or juvenile proceedings where the accused has the right to be present; the right to be allowed to be heard, upon request, at sentencing, before or after conviction or juvenile adjudication, and at any proceeding where the accused's release from custody is considered; the right to restitution from the accused; and the right to be informed, upon request, of the accused's escape or release from custody before or after conviction or juvenile adjudication.**

This section was added by an amendment in 1994, which also inserted new language into Section 12. It gives constitutional status to rights that were heretofore recognized only in statute, if at all. In general, the amendment reflects a popular perception that the rights of crime victims tended to be overlooked in the criminal justice system, partly because of a lack of constitutional attention to them. The legislature has implemented this amendment by creating the Office of Victims' Rights (AS 24.65) headed by a crime victims' advocate whose job it is to "assist crime victims in obtaining the rights crime victims are guaranteed under the constitution and laws of the state with regard to the contacts crime victims have with the justice agencies of the state." The office is in the legislative branch of government. Statutory victims' rights are enumerated primarily in AS 12.61.010, but elsewhere as well (for example, AS 18.66.110).

Although a victim has the right to be present at the trial of the defendant, the prosecutor may not exploit that presence to arouse sympathy or compassion in a manner that could prejudice the juror's fair consideration of the evidence in a case (discussed in *Phillips v. State,* 70 P.3d 1128, 2003). This section does not grant to either a crime victim or the Office of Victims' Rights a right to appeal a defendant's sentence *(Cooper v. District Court, 133 P.3d 692, 2006).*

The desire to emphasize the rights of the public over those of criminals was behind an unsuccessful attempt to amend the constitution in 1998 to explicitly deny to prisoners civil rights under Article I of the Alaska Constitution. The Alaska Supreme Court removed that amendment from the ballot in *Bess v. Ulmer* (985 P.2d 979, 1999), as discussed below in Article XIII, Section 1.

Section 25. Marriage

> **To be valid or recognized in this State, a marriage may exist only between one man and one woman.**

This section was added by amendment in 1998. It was the reaction to a preliminary ruling by a superior court judge in 1998 that suggested the state constitutional right to privacy may confer on Alaskans a fundamental right to choose marriage partners regardless of gender. The legislative resolution for this amendment contained a second sentence which read: "No provision of this constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex." The Alaska Supreme Court ordered that it be deleted from the amendment appearing on the ballot because it was unnecessary to harmonize the first sentence with other parts of the constitution, and because it could be interpreted to criminalize same-sex marriages. The first sentence simply prohibits the State from recognizing such marriages. (See *Bess v. Ulmer*, 985 P.2d 979, 1999.)

ARTICLE II

THE LEGISLATURE

The legislature is one of three branches of government in the American constitutional system. This system is built around the twin doctrines of "separation of powers" and "checks and balances." Separation of powers refers to the principle that the three functions of government—legislative, executive and judicial—should be performed by separate and equal bodies. Checks and balances are limited exceptions to the separation of powers that permit one branch to have a specific role in the activities of another branch. These exceptions—authorized by the constitution or sanctioned by tradition—are intended to prevent the concentration of excessive power in one branch of government.

Thus, under the separation of powers doctrine, the legislature makes laws, the executive implements them, and the judiciary interprets and applies them in specific situations. Under the principle of checks and balances, the constitution authorizes the executive to exercise certain functions in the legislative and judicial areas, such as vetoing bills passed by the legislature and appointing judges. It authorizes the legislature to exercise certain functions in the executive and judicial areas, such as approving appointments to major executive departments and changing certain court rules. It authorizes the judiciary to exercise oversight over legislative and administrative actions to insure their conformity with the laws and constitution of the state. One consequence of the separation of powers is an inherent tension between the three branches of government as each guards against unauthorized encroachments on its power by the others.

There is no formal statement of the separation of powers doctrine in the Alaska Constitution: as in the U.S. Constitution, it is implied from the creation of the three branches of government and the powers assigned to them ("this state recognizes the separation of powers doctrine," *Public Defender Agency v. Superior Court*, 534 P.2d 947, 1975). In some state constitutions, however, a "distribution of power" clause sets forth the doctrine. For example, Article III, Section 1 of New Jersey's constitution states:

> The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

In constitutional theory, the "sovereign" power of the state resides in the legislature. Accordingly, the legislature does not need a grant of power: it may do anything that is not expressly prohibited by the constitution. All state constitutions prohibit legislative invasion of basic rights (usually enumerated in the first article, as in Alaska's constitution). Virtually all state constitutions prohibit local and special acts (Article II, Section 19) and the borrowing of money for capital projects without prior approval of the voters (Article IX, Section 8). However, many state constitutions go considerably further, limiting legislative power directly, by explicitly prohibiting action; and indirectly, by preempting legislative action through detailed, statute-like provisions. This is not the case in Alaska.

Convention delegates created a strong legislature with the power and resources to act decisively and effectively. In doing so, the delegates trusted the legislature to act responsibly. Thus, while many state constitutions reflect profound suspicion of the legislature, Alaska's constitution declares confidence in the legislative body: it is small, it meets annually, its members are paid a salary and it may arrange for its own supporting services. Most importantly, the legislature has broad discretion to fashion the details of government structure and operation—details which are specified in the constitutions of many other states.

This article of Alaska's constitution vests the legislative power of the state in a bicameral legislature. It provides for the basic structure, composition and procedures of the legislature. It also specifies use of the veto, which is the main legislative power conferred on the governor. Two important amendments restraining legislative prerogatives have been ratified by sizable majorities of the electorate, one in 1982 and the other in 1984. Both of these amendments expressed a more skeptical view of the legislature than that held by the convention delegates. One imposed a ceiling on annual appropriations (see Article IX, Section 16); the second imposed a 120-day limit on the length of regular legislative sessions (see Section 8 below).

Section 1. Legislative Power; Membership

> **The legislative power of the State is vested in a legislature consisting of a senate with a membership of twenty and a house of representatives with a membership of forty.**

Here the legislative power of the state is vested in a legislature with twenty senators and forty representatives. All state constitutions have a vesting provision. Such a provision implies that no other authority, public or private, may exercise legislative power. But, in fact, all legislatures routinely delegate legislative powers to agencies of the executive branch that are charged with implementing laws. When agencies adopt regulations, for example, they are performing a legislative function.

The courts have allowed the legislature to delegate power to administrators if this power is accompanied by explicit guidelines and policy directions. Delegations of legislative power must be sufficiently narrow and specific to give the administrative agent reasonable standards to follow and the courts a basis for determining when the agent has exceeded the bounds of the delegated authority. Measures that fail this test are unconstitutional. For example, the Alaska Supreme Court struck down a section of the Executive Budget Act (AS 37.07.080(g)(2)) which authorized the governor to withhold or reduce expenditures if the governor should determine that estimated receipts and surpluses are insufficient to provide for appropriations. In 1986, in the face of collapsing oil prices that presented a budgetary crisis, Governor William Sheffield used this authority to issue an executive order restricting spending. The Fairbanks North Star Borough sued, alleging that the statutory authority for the governor's action was unconstitutional because it represented an illegal delegation of legislative power. The supreme court agreed, finding that the statute provided inadequate standards and principles to guide the governor in reducing spending in a fiscal emergency *(State v. Fairbanks North Star Borough,* 736 P.2d 1140, 1987). The legislature subsequently passed an appropriation bill that validated the governor's reductions; and it has since amended the Executive Budget Act.

On the other hand, the Alaska Supreme Court has upheld the legality of several legislatively created boards that were challenged on the grounds (among others) that their enabling statutes delegated excessive authority to administrators (see, for example, *DeArmond v. Alaska State Development Corporation,* 376 P.2d 717, 1962; and *Walker v. Alaska State Mortgage Association,* 416 P.2d 245, 1966).

Alaska's legislature is bicameral: it has a house of representatives and a senate. The alternative to a bicameral legislature is a unicameral (one house) legislature. Several delegates to the Alaska constitutional convention argued in favor of a single-body legislature, but the concept was rejected in favor of the traditional two-house legislature. However, Alaska's constitution is unusual in its frequent use of joint legislative sessions. For example, joint sessions are required for the confirmation of executive appointments, for overriding vetoes, and for other purposes (see, for example. Article II, Section 16; Article III, Sections 19, 20, 23, 25 and 26; Article IV, Sections 8 and 10; in contrast, see Article X**,** Section 12). The frequent requirement for joint sessions may reflect a residual interest in the unicameral concept on the part of the convention delegates.

Alaska voters have twice been presented with a ballot proposition that asks their opinion of the unicameral concept. In 1937, voters rejected a measure that urged Congress to amend the Territorial Organic Act of 1912 by eliminating the territorial senate. In 1976, they approved an advisory ballot proposition urging the legislature to put before them a unicameral constitutional amendment for ratification. Although the proposition passed, the legislature did not pursue the matter.

At 60 members, Alaska's legislature is among the smallest in the United States: only Nebraska, with 49 members in its unicameral legislature, is smaller. New Hampshire is the largest with 424; the average is about 150. Alaska had a small legislature throughout its territorial history. The territorial

legislature was created by Congress in 1912 with only twenty-four members—eight senators and sixteen representatives. The body was increased to forty members—sixteen senators and twenty-four representatives—by an act of Congress in 1942. (This measure also reapportioned the house of representatives on the basis of population; until then, each of the four judicial divisions had the same number of representatives, regardless of their population.) Alaska's delegate to Congress, Anthony J. Dimond, promoted this enlargement of the territorial legislature because of his frustration with the small size of the senate and the inordinate power it conferred on a handful of conservative members to kill progressive legislation. In a senate of eight, four members (one-sixth of all legislators) could thwart the will of the legislative majority.

Currently, any ten senators may prevent a bill from passing. (Even fewer can reject measures requiring a supermajority—for example, procedural motions and resolutions proposing constitutional amendments, which require more than a simple majority of votes to pass.) That a minority of the legislature can stymie bills favored by the majority of the legislature is an inherent feature of bicameral systems that accounts, in part at least, for the periodic renewal of interest in the unicameral idea.

At the general election of November 2, 2010, voters rejected a proposed constitutional amendment that would have increased the number of representatives by four and the number of senators by two. This amendment was intended to decrease the geographic size and socioeconomic diversity of house districts that would be drawn by the redistricting board following the decennial census in 2010. (There would have been forty-four house districts instead of forty; see Article VI.) The amendment failed.

Section 2. Members' Qualifications

> **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 preceding 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.**

These qualifications for holding legislative office are typical of those in other states. State residency requirements vary from one to five years, although some state constitutions have no formal state residency requirement. These qualifications for office omit mention of U.S. citizenship (compare Article III, Section 2), but Article V, Section 1 requires U.S. citizenship to be a qualified voter. Therefore, a legislator must be a U.S. citizen.

In Alaska, the minimum age for a representative (21) is lower than for a senator (25). These particular age qualifications are found in approximately one-quarter of the states. Several other states also specify different ages for the two legislative bodies (the state with the widest spread is New

Hampshire, where a representative must be at least 18 years old and a senator must be at least 30). About half the states require a minimum age of 18, 21 or 25 years for both offices.

Approximately half the state constitutions, including Alaska's, require a legislator to have lived for at least one year in the election district for which he or she files for office (a few require six months, and one sixty days). Many constitutions do not specify a district residency requirement as a qualification for legislative office, but they usually require a minimum residency in the district to qualify as a voter (which a legislator must be).

A candidate for the senate in Alaska once challenged the residency requirements in this section, arguing that they abridged his rights of equal protection and effective petition of the government. Usually hostile to residency requirements, the state supreme court upheld the requirements in this case, stating that three years of residency served a legitimate interest in ensuring that legislators had resided in the state long enough to understand its history, geography, needs and problems. Further, the court ruled that the one-year residency requirement in the election district is appropriate not only for the candidate to come to know something of his district, but the voters of the district to know something of the character, habits, and reputation of the candidate *(Gilbert v. State,* 526 P.2d 1131, 1974).

Several attempts were made to impose term limits on legislative and congressional candidates by initiative during the 1990s. The position of the attorney general was that the initiatives pertaining to state legislators amended Sections 2, 3, and 5 of Article II of the state constitution and were unconstitutional because the constitution may not be amended by initiative. The courts addressed the issue in 1994 when the lieutenant governor denied certification of one such initiative petition and the sponsors sued. The courts agreed with the state's position (*Alaskans for Legislative Reform v. State*, 887 P.2d 960, 1994). (See Article XI, Section 1.)

Section 3. Election and Terms

> **Legislators shall be elected at general elections. Their terms begin on the fourth Monday of the January following election unless otherwise provided by law. The term of representatives shall be two years, and the term of senators, four years. One-half of the senators shall be elected every two years.**

A two-year term for representatives is the standard in all but five states (where it is a four-year term); a four-year term for senators is the standard in all but twelve (where it is a two-year term). Alaska's territorial legislature also had two-year terms for representatives and four-year terms for senators.

The legislature has exercised its discretion to set the beginning of these terms. The law now specifies: "The term of each member of the legislature begins on the third Tuesday in January" (AS 24.05.080).

These terms of office coincide with the dates of the convening of the legislature (see Section 8 below). With very few exceptions, other state legislatures also convene sometime in January.

Section 4. Vacancies

> **A vacancy in the legislature shall be filled for the unexpired term as provided by law. If no provision is made, the governor shall fill the vacancy by appointment.**

The legislature may determine how vacant seats are filled. Accordingly, it has provided that the governor appoints a person to serve the remainder of the term of the vacant seat, although vacancies have been left open under some circumstances. If a vacancy in the senate leaves an unexpired term of more than two years, five months, the governor must call a special election. The law also provides that all gubernatorial appointees must be "a member of the same political party which nominated the predecessor in office, and shall be subject to confirmation by a majority of the members of the legislature who are members of the same political party which nominated the predecessor in office and of the same house as was the predecessor." The full details of these provisions are found in AS 15.40.320-470. They have been used without controversy many times.

However, in 1987, Governor Cowper's appointee to fill the unexpired term of a deceased Fairbanks senator was rejected by the senate Republicans in a caucus called during the interim to hold the confirmation vote. Governor Cowper took the matter to court, where he challenged the constitutionality of the confirmation provisions of the statute. Governor Cowper argued that the legislature could not delegate responsibility for confirmation to a committee, that the entire senate had to vote to confirm an appointee, and it had to hold the vote in open session. These legal issues were never resolved, however, because the governor and senate Republicans agreed on a compromise appointee and the suit was dropped. Questions about the legality of a nominee being confirmed by a political caucus were again raised in a conflict between Governor Palin and a senate Democratic caucus over filling a senate seat in 2009, but again a compromise was reached and the matter never went to court.

In 1988, a closely contested election for an Anchorage house seat was set aside by the Alaska Supreme Court, and a new election called. As an interim measure, the governor appointed a person to serve until the winner of the special election was certified. In that case, the interim appointment was confirmed by the entire house of representatives, rather than by the party caucus, because the definition of "vacancy"—death, resignation, impeachment, recall and so on—in (AS 15.80 (40)) does not include this cause of vacancy). Although this section suggests that the governor's appointee need not be confirmed by the legislature when "no provision is made" in law to the contrary, under Article II, Section 12 the legislature remains the sole judge of its members.

Section 5. Disqualifications

> **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 created, or the salary or emoluments of which have 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.**

The first sentence of this section is the prohibition against "dual office holding" by legislators common in state constitutions (some of which also prohibit employment by a foreign government or by another state). Dual office holding is also prohibited by the Alaska Constitution for the governor (Article III, Section 6) and for the judiciary (Article IV, Section 14; see also Article IV, Section 8). The constitution recognizes only two exceptions: Article XII, Section 3 exempts service in the armed forces of the United States or the state, and the last sentence of the present section exempts employment by or election to a constitutional convention.

In ruling that a legislator could not also be employed as a teacher in the state-operated school system, the Alaska Supreme Court described the prohibition against dual office holding as an effort "to guard against conflicts of interest, self-aggrandizement, concentration of power, and dilution of separation of powers . . . . The rationale underlying such prohibitions can be attributed to the desire to encourage and preserve independence and integrity of action and decision on the part of individual members of our state government" *(Begich v. Jefferson,* 441 P.2d 27, 1968).

Alaska legislators may not serve on committees, boards or commissions in the executive branch that exercise executive power (such as the state bond committee) or that have attributes of state agencies (such as the Alaska Statehood Commission). Such service would violate the prohibition against dual office holding and the separation of powers doctrine. Membership on a joint legislative-executive committee may be permissible if its only purpose is to exchange ideas or information, or to give advice (See 1977 Informal Opinion Attorney General, November 16; and 1980 Opinion of the Attorney General No. 21, September 24).

The second sentence of this section seeks to prevent improper motives on the part of legislators when creating positions and raising salaries. In 1975, Governor Hammond appointed as commissioner of the Department of Administration a person who had served within one year in a legislature that raised the salary for that office. His appointment was challenged in court as a violation of this provision, and he argued (among other things) that a showing of improper intent was necessary before this section could be applied. The Alaska Supreme Court upheld the challenge, saying that this provision of the constitution is designed not merely to prevent an individual legislator from profiting by an action

taken with bad motives, but to prevent all legislators from being influenced by either conscious or unconscious motives *(Warwick v. State,* 548 P.2d 384, 1976).

Over the years, several legislators have resigned their seats to take a position in the executive branch that was technically created by the governor after the legislator left office. Public criticism after Governor Parnell appointed a former legislator under these circumstances in 2010 prompted the attorney general to advise the governor that a court might view the practice as an evasion of the prohibition in this section. The appointee resigned.

General pay raises for state employees are not uncommon, and consequently many legislators are barred from state employment for a year after the end of their legislative service. In 1980, a proposed amendment to the constitution was put before the voters that would have eliminated this provision of Section 5, but it was defeated.

Members of the 1955 territorial legislature were prevented by a territorial prohibition on dual office holding from running for election to the constitutional convention (*Kederick v. Heintzleman*, 132 F. Supp. 582, 15 Alaska 582, 1955), which is doubtless why the delegates thought to include the exception in the last sentence of Section 5.

When a 1970 amendment to the constitution changed the title secretary of state to lieutenant governor, this section was inadvertently omitted and it still refers to the secretary of state.

Section 6. Immunities

> **Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session. Members attending, going to, or returning from legislative sessions are not subject to civil process and are privileged from arrest except for felony or breach of the peace.**

Immunities of this kind are granted to members of state legislative bodies as a general principle of law, although the federal constitution (Article I, Section 6) and most state constitutions explicitly extend them to legislators. These immunities protect the public's interest in having members express themselves freely in the legislature without fear of retribution, and devote themselves to state business without the distraction of legal harassment. It also buttresses the principle of separation of powers by protecting the legislative branch from inquiries and actions against legislators by the executive and judicial branches.

The purpose of the first sentence is to ensure free speech and debate in the legislative assembly by protecting members from civil and criminal prosecutions that might arise from their devotion to the

work of the body. This immunity applies to all things said and done in pursuit of legislative duties, whether occurring in open meetings or behind closed doors. It is conferred on legislative staff engaged in these legislative duties. It also applies to members of local government assemblies (*Breck v. Ulmer*, 745 P.2d 66, 1987). The court emphasized that the long-standing principle of parliamentary immunity should be interpreted literally in the decision of *State v. Dankworth* (672 P.2d 148, Alaska Ct. App., 1983). Here the attorney general prosecuted a state senator for his attempt to insert in the budget an appropriation to purchase a surplus construction camp of which he was part owner. The state argued that because the senator's action was covert, and his intent criminal, he should forfeit his legislative immunity. The justices demurred: if the senator's actions were legislative in nature, and they clearly were, then he was immune from prosecution by the terms of this section. They wrote: "If the motives for a legislator's legislative activities are suspect, the constitution requires that the remedy be public exposure; if the suspicions are sustained, the sanction is to be administered either at the ballot box or in the legislature itself."

Immunity extends to the activities of legislators in preparation for their core legislative duties. Thus, the senate president could not be compelled to give testimony about his meeting with the governor prior to calling a joint session of the legislature (*Kerttula v. Abood*, 686 P.2d 1197, 1984; see commentary on Article III, Section 17). A claim of defamation by a state employee against legislators who released a committee report containing information about his dispute with his employer was dismissed by the court on the grounds that the legislators were engaged in the legislative process and therefore immune from suit (*Whalen v. Hanley*, 63 P.3d 254, 2003).

Alaska's constitution is unusual in that it explicitly limits the grant of legislative immunity to sessions, and the coming and going to sessions, of the legislature. The original committee draft of this section presented to the constitutional convention was amended on the floor to insert the phrase "while the legislature is in session." This was to forestall McCarthy-like abuse of the immunity privilege by legislators conducting investigative hearings between sessions (see discussion of legislative immunity in the *Kerttula* decision).

Section 12 of the Territorial Organic Act of 1912 was the predecessor to this provision in Alaska. It stated: "That no member of the legislature shall be held to answer before any other tribunal for any words uttered in the exercise of his legislative functions. That the members of the legislature shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during their attendance upon the sessions of the respective houses, and in going to and returning from the same: Provided, that such privilege as to going and returning shall not cover a period of more than ten days each way, except in the second division, when it shall extend to twenty days each way, and the fourth division to fifteen days each way."

Section 7. Salary and Expenses

> **Legislators shall receive annual salaries. They may receive a per diem allowance for expenses while in session and are entitled to travel expenses going to and from sessions. Presiding officers may receive additional compensation.**

How legislators should be compensated, and how much this compensation should be, are questions that vexed Congress when it authorized a legislature for Alaska in 1912, as well as delegates to the state constitutional convention more than 50 years later. And the issue of legislative pay has been vexatious since statehood. The difficulty is not simply one of placing the proper value on legislative service; instead, it also concerns the effect of legislative pay on the composition and performance of the legislature. While most people agree that legislative membership should represent something of a public service contribution by citizens, they also are reluctant to make it a wholly volunteer affair, for then legislative service would devolve to the rich and privileged. Thus, pay should be sufficient to attract to office qualified, capable men and women from all walks of life, yet it should not be such that it becomes the primary motivation for seeking and retaining office.

The question of how compensation might affect the length and efficiency of legislative sessions has dominated debate about whether to pay legislators for the actual number of days the assembly sits, or to pay them an annual salary. The former method is seen to create an incentive for unduly long sessions and the latter for unduly short sessions. After considerable discussion in 1912, Congress opted for per diem payments for Alaska's territorial legislators. In 1956, the constitutional convention opted for an annual salary, considered the progressive approach (for example, the *Model State Constitution* called for annual salaries). The convention delegates declined to establish the salary level in the constitution, either as an amount or as a formula (such as a percentage of the governor's salary), and allowed the legislature to set its own salary.

Public opinion is not indifferent to legislative salaries, however, and it has tended to keep them depressed. Public reaction twice thwarted efforts by legislators to increase their pay. In 1975, the legislature enacted a pay bill that increased salaries and retirement benefits for legislators, judges and the heads of principal departments (ch 205 SLA 1975). A referendum petition to reject the measure was certified for the ballot, and it passed by an overwhelming majority of the voters at the primary election in August 1976 (see additional commentary on this matter under Article XII, Section 7). In 1983, the legislature again increased its pay (ch 83 SLA 1983), this time substantially increasing the annual salary and eliminating the payment for daily living expenses. Opponents of the measure circulated an initiative petition that reduced legislators' pay to pre-1983 levels. It was certified for the ballot, but before the election in 1986, the legislature enacted a law substantially the same as the initiative (ch 124 SLA 1986) and the lieutenant governor withdrew the initiative from the ballot (see Article XI, Section 4).

In the aftermath of both of these conflicts over legislative compensation, the legislature created a salary commission of public members—the Alaska Salary Commission in 1976, and the Alaska Officers' Compensation Commission in 1986. These commissions were to review legislative salaries and make recommendations. The commissions were only advisory, and their work had little impact. Legislators' annual salaries remained static for years on end, but in the meantime their compensation was augmented by per diem payments which legislators could claim for work on legislative business between sessions. In 2008, the legislature again created a public salary commission, also called the Alaska Officers' Compensation Commission, and this time empowered it to set salaries for legislators (as well as for the governor and cabinet), subject to a legislative veto (AS.39.23.500). This means that the commission's recommendations become law unless the legislature passes a bill that rejects them. In 2009, the commission recommended an annual salary of $50,400 for legislators and the suspension of per diem payments during the interim. At the time, annual legislative salaries were $24,012 (set in 1991), but because of claims for per diem during the interim the effective average compensation was considerably higher. Also, compensation varied widely among legislators because some legislators claimed little or no interim per diem and others claimed it for many days. The commission's recommendations were not rejected and became law. Legislators continue to receive per diem payments and certain other expenses during sessions.

Section 8. Regular Sessions

> **The legislature shall convene in regular session each year on the fourth Monday in January, but the month and day may be changed by law. The legislature shall adjourn from regular session no later than one hundred twenty consecutive calendar days from the date it convenes except that a regular session may be extended once for up to ten consecutive calendar days. An extension of the regular session requires the affirmative vote of at least two-thirds of the membership of each house of the legislature. The legislature shall adopt as part of the uniform rules of procedure deadlines for scheduling session work not inconsistent with provisions controlling the length of the session.**

The first sentence of this section provides for annual sessions of the legislature. Virtually all of the states now have annual legislative sessions, but at the time of the constitutional convention biennial sessions with a limit of 90 days were common. The ability to meet annually, in order to keep abreast of current developments and administrative activity, is generally considered necessary for a legislature to be an effective policy-making body and to avoid being dominated by the executive branch.

In 2007, the legislature set the beginning of regular sessions (beginning in 2008) to the third Tuesday in January at 1:00 p.m. (AS 24.05.090). (Prior to this change in the law, the beginning of the

legislature in gubernatorial election years was set a week later than other years to give the new governor extra time to prepare for the beginning of session.)

The second sentence establishes a limit of 120 days after convening for each regular session (with one ten-day extension if agreed to by two-thirds of each house). This limit was imposed by a constitutional amendment ratified by the voters in 1984. Until that time, the constitution did not limit the length of sessions. The framers of the constitution adopted the progressive view that the legislature should not be rushed in its deliberations, as the business of state government is too complex to be transacted in hurried, infrequent sessions. (About two-thirds of state constitutions impose some limit on the length of sessions.) Delegates feared that constraints on the length (and frequency) of sessions might result in ill-conceived or imprudent measures as well as a legislative disadvantage *vis-à-vis* the executive.

In the early years of statehood, legislative sessions of 70 to 80 days were typical. The first session to exceed 90 days was in 1969. Thereafter, they became progressively longer (the availability of oil revenue was not coincidental). In 1981, the regular session lasted 165 days. Alaskans both inside and outside the legislature grew increasingly skeptical that all of this time was spent productively. In 1978, the legislature asked Alaskans to cast an advisory vote on whether a constitutional amendment limiting sessions to 120 days should be placed on the ballot at the 1980 election. The voters responded strongly in the affirmative. Three years later, the legislature acted to put an amendment before the electorate at the 1984 general election. It was ratified by a large majority (150,999 to 46,099).

In May 1986, at the end of the 120th day of the second regular session of the fourteenth legislature, legislative leaders stopped the clock in order to complete business before the adjournment deadline. A suit was filed challenging the legality of the 29 laws passed after midnight. The Alaska Supreme Court rejected the challenge, holding that the day the legislature convenes should not be counted against the 120-day limit, so the legislature has, in effect, a total of 121 days in which to transact business *(Alaska Christian Bible Institute v. State*, 772 P.2d 1079, 1989). Even with an extra day, the legislature often failed to complete its business on time. It used several means to continue working. It had the governor call it into special session (as authorized by Section 9 of this article and Article III, Section 17); it called itself into special session (as authorized by Section 9 of this article); and it used the mechanism described in this section to extend the session for a ten-day period.

At the general election of 2006, voters approved an initiative that limits regular legislative sessions to 90 days. The law took effect in 2008. Although unpopular with many members, the legislature has honored the stricture (as of 2012). However, special sessions lasting 30 days have often followed adjournment of the 90-day regular session. The legislature could formally repeal the measure because two years have passed since its adoption (Article XI, Section 6). If the legislature failed to adjourn within the statutory 90-day period, it is unlikely that a court would intervene or question the legality

of anything it passed during the extension. In view of judicial deference to the internal procedures of the legislature, a court would probably recognize only the constitutional limit of 121 days.

The call for deadlines for scheduling session work, found in the last sentence of this section, is an effort to mitigate the perennial problem of a logjam of legislation at the end of the session. (Many of the bills that pass the legislature are enacted in the closing days of the session, often in long, wearisome meetings which are not conducive to the studious deliberation of each item.)

Section 9. Special Sessions

> **Special sessions may be called by the governor or by vote of two-thirds of the legislators. The vote may be conducted by the legislative council or as prescribed by law. At special sessions called by the governor, legislation shall be limited to subjects designated in his proclamation calling the session, to subjects presented by him, and the reconsideration of bills vetoed by him after adjournment of the last regular session. Special sessions are limited to thirty days.**

All constitutions make allowance for special sessions so the legislature can respond quickly to emergencies. This section authorizes the governor or the legislature to call special sessions. Prior to statehood, only the governor could call Alaska's territorial legislature into extraordinary session, and in about 20 states today the legislature is powerless to call special sessions. This authority was another means by which the constitutional convention delegates sought to equalize powers between the legislative and executive branches. (Note that the governor is also authorized by Article III, Section 17 to convene the legislature at any time, including a joint session.)

When meeting in special session called by the governor, the legislature may consider only those subjects placed before it by the governor. The delegates included this proviso as a means of keeping special sessions within bounds while not seriously handicapping the legislature, which may call its own session with its own agenda. Also, in theory the proper subject matter of a special session is a true emergency; routine legislation requires ample time for study, public testimony and reflection. The 30-day limit reinforces the expectation that special sessions are to have a narrow focus.

The words in the third sentence ("and the reconsideration of bills vetoed by him after adjournment of the last regular session") were added in 1976 by amendment. The legislature sought this amendment to expand its opportunity to override the governor's vetoes (and perhaps to discourage the governor from calling special sessions as well). See also Section 16 below.

Procedures for calling special sessions have been clarified in statute (AS 24.05.100). Accordingly, a call by the governor must give legislators 15 days' notice. A call by the legislature must be preceded by a poll of the members conducted by the presiding officer of each house. The presiding officers

may initiate a poll of their respective members if they jointly agree to do so, but they must conduct the vote if one-quarter of their members request one in writing. A session will be held if 40 legislators of the 60 total in both houses vote in favor of the call. A two-thirds majority in each house is not required. The law also allows special sessions to meet at any location in the state.

Special sessions are not uncommon in Alaska, but they have become more frequent, and their duration greater, in recent years. In the first ten years of statehood, only two special sessions were called; one lasted three days and the other six. In the decade from 2000 to 2010, fourteen were called, several of which lasted the 30-day limit. Although intended for emergency or extraordinary situations, most special sessions are called to finish business not completed within the time limit of the regular session. Most special sessions are called by the governor: only six of the thirty-five special sessions held by 2011 were called by the legislature. Subsistence has been the topic of six special sessions. A special session was called by the legislature in 1985 to consider impeaching Governor Sheffield (see Section 20).

Article III, Section 17 authorizes the governor to "convene the legislature" whenever the governor considers it in the public interest to do so. The relationship of that provision to this one is ambiguous (see commentary under Article III, Section 17).

Section 10. Adjournment

> **Neither house may adjourn or recess for longer than three days unless the other concurs. If the two houses cannot agree on the time of adjournment and either house certifies the disagreement to the governor, he may adjourn the legislature.**

The first sentence prevents one house from halting legislative business by unilaterally adjourning. The second sentence prevents the two houses from becoming deadlocked over the matter of adjournment. Thus, one house cannot keep the legislature in session if the other house *and* the governor want the legislature to adjourn. These safeguards against the possibility of a stalemate over adjournment are found in many constitutions. Article II, Section 3 of the U.S. Constitution gives to the president the power to adjourn Congress "to such time as he shall think proper."

This mechanism for certifying disagreement over adjournment to the governor was used in 2011 when both houses independently requested the governor to adjourn the first regular 90-day session of the 27th legislature. The house and senate had reached a contentious impasse over the capital budget. Governor Parnell issued an executive proclamation adjourning the legislature and at the same time issued an executive proclamation calling a special session. In 1993, at the end of the first session of the 18th legislature, the house certified disagreement over adjournment, but the governor did not act. Other disagreements between the two houses over adjournment have happened from time to time.

Occasionally one house will simply adjourn out from under the other. So far, a constitutional crisis has been avoided by one house reconvening within three days or the other house adjourning within three days.

Section 11. Interim Committees

> **There shall be a legislative council, and the legislature may establish other interim committees. The council and other interim committees may meet between legislative sessions. They may perform duties and employ personnel as provided by the legislature. Their members may receive an allowance for expenses while performing their duties.**

This section authorizes the legislature to carry on business between sessions with the help of staff. This power was considered essential for the legislature to be an effective body and the counterbalance to a strong governor. At the time of the constitutional convention, the concept of a legislative council was becoming popular nationwide as a means of strengthening the legislative branch by giving it organizational continuity between sessions, leadership in the area of policy making, and professional research and bill-drafting services. The Alaska Territorial Legislature had created a legislative council in 1953, and the delegates considered it such a successful innovation that they did not want to leave to chance its continuation under statehood. (The *Model State Constitution* devoted four separate sections to the subject of a legislative council in its otherwise terse legislative article.)

Today, the Alaska Legislative Council oversees the work of the Legislative Affairs Agency, which performs day-to-day administrative functions for the legislature such as accounting, property management, data processing, public information, teleconferencing, printing, bill drafting, research, and maintaining a reference library. The council does not play a role in policy development. It is composed of fourteen legislators, seven from each house, including the president of the senate and the speaker of the house. The council is now one of four permanent interim committees of the legislature. The others are the legislative budget and audit committee (which oversees the legislative auditor and the legislative finance division), the administrative regulation review committee, and the ethics committee.

The second sentence of this section allows interim committees to meet between sessions. Does this suggest that special committees and the regular standing committees (finance, state affairs, judiciary, and others) must confine their activity to the session? The legislature has not read this section to restrict the activities of standing or special committees, which routinely work between sessions.

During the 1970s, a major political controversy over budgetary matters developed between the legislative and executive branches, and a solution was sought in amendments to this section. The controversy concerned the ability of the legislative budget and audit committee to jointly review and

approve with the governor budget revisions when the legislature was not in session. This had been a common practice in Alaska and elsewhere until questions about its constitutionality were raised around the country. State courts elsewhere ruled that it violated the separation of powers doctrine and constituted an improper delegation of legislative power to a committee. In 1977, the Alaska legislature amended the Executive Budget Act to authorize the legislative budget and audit committee to review and authorize budget revisions jointly with the governor between sessions (ch 74 SLA 1977). The governor vetoed the bill as "clearly unconstitutional." The legislature overrode the veto and shortly thereafter took the administration to court over the matter *(Kelley v. Hammond,* Civil Action No 77-4, Juneau Superior Court). The lower court sided with the governor, who then persuaded the legislature to put the matter before the voters as a constitutional amendment, and the suit was dismissed.

Voters defeated the proposed amendment at the general election in 1978. A second attempt was made in 1980, when the voters rejected essentially the same amendment by an even wider margin. Consequently, the entire legislature must act on all appropriations and any subsequent modifications of them.

Section 12. Rules

> **The houses of each legislature shall adopt uniform rules of procedure. Each house may choose its officers and employees. Each is the judge of the election and qualifications of its members and may expel a member with the concurrence of two-thirds of its members. Each shall keep a journal of its proceedings. A majority of the membership of each house constitutes a quorum to do business, but a smaller number may adjourn from day to day and may compel attendance of absent members. The legislature shall regulate lobbying.**

All legislative bodies have rules of procedure to give order to the conduct of business and protect the rights of minority factions. Rules establish the priority and manner of consideration of questions, and they assure members of adequate notice of meetings and an opportunity to participate. Every governmental body has an inherent right to regulate its own procedure, subject to constitutional provisions. Thus, this section of Alaska's constitution, requiring both legislative chambers to operate under "uniform rules of procedure," is understood to apply only to actions that involve both chambers, such as procedures for handling resolutions at joint sessions. These rules are adopted by the houses early in the first regular session. Each house also adopts its own procedures that govern its internal operation.

The courts generally refuse to enforce legislative rules except in extraordinary circumstances (for example, if a violation were to infringe upon the constitutional rights of a person who is not a member of the legislature). Alaska's supreme court refused to review the allegation that the leaders of a

legislative "coup" in 1981 to replace the speaker of the house violated the joint rules *(Malone v. Meekins,* 650 P.2d 351, 1982); that the conduct of a joint session to confirm executive appointees violated the joint rules *(Abood v. Gorsuch,* 703 P.2d 1158, 1985); and that closed meetings of the legislature violated the joint rules *(Abood v. League of Women Voters of Alaska,* 743 P.2d 333, 1987). In *Meekins,* the court said:

> [W]e can think of few actions which would be more intrusive into the legislative process than for a court to function as a sort of super parliamentarian to decide the varied and often obscure points of parliamentary law which may be raised in the course of a legislative day. Thus, even though the Uniform Rules . . . may have been violated, such violation is solely the business of the legislature and does not give rise to a justiciable claim.

The second sentence in Section 12 means that each house has the exclusive power to choose and remove its own officers without any participation by the other house, and that a majority vote is all that is required to do so (see the *Meekins* decision).

The third sentence is a traditional legislative prerogative. The legislature's constitutional authority to seat or expel members remains undiminished even though Article V, Section 3 directs the legislature to establish procedures in law for resolving contested elections, including the right of appeal to the courts. The legislature has established such procedures (AS 15.20.540-560; see Article V, Section 3).

There is only one instance in Alaska of a legislator being expelled. On March 2, 1982, the senate expelled a member who had been convicted of attempting to bribe another legislator.

The journals kept by the house and senate are official records of actions taken during each day of the session. They are not verbatim reports of discussion and debate.

A quorum is the minimum number of members required to be present before a legislative chamber can conduct official business. In Alaska, a quorum is a majority of each house. A quorum has the unquestioned right to compel the attendance of absent members. When exercised, this is referred to as a call of the house. (According to the authoritative *Mason's Legislative Manual,* "The absence of the power of a legislative body to compel the attendance of all members at all times would destroy its ability to function as a legislative body.") This section of Alaska's constitution gives the right to compel attendance to fewer members than a quorum. A similar provision is found in most state constitutions.

Alaska's constitution does not specify a quorum requirement for joint sessions of the legislature. By implication, therefore, a quorum consists of a simple majority of all legislative members, or 31. When in joint session, each house loses its separate identity, and the body becomes unicameral. The

question of a quorum for joint sessions was among the issues litigated in the aftermath of the joint session called by the governor in 1983 (see *Abood v. Gorsuch*, 703 P.2d 1158, 1985).

The mandate to regulate lobbying reflects the convention's strong distrust of special interests. Alaska Statute 24.45 complies with this directive by requiring lobbyists to register and disclose their incomes and expenses for lobbying.

Section 13. Form of Bills

> **Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations. The subject of each bill shall be expressed in the title. The enacting clause shall be: "Be it enacted by the Legislature of the State of Alaska."**

These provisions help safeguard the integrity of the legislative process. The first sentence states the "single subject rule," which requires that separate subjects be dealt with in separate bills. This familiar constitutional provision is to prevent logrolling and deception through the concealment of extraneous matter in bills that might already be burdened by arcane material. In the words of the Alaska Supreme Court, the purpose of the single subject rule is to bar "the inclusion of incongruous and unrelated matters in the same bill to get support for it which the several subjects might not separately command [logrolling], and to guard against inadvertence, stealth and fraud in legislation" *(Suber v. Alaska State Bond Commission,* 414 P.2d 546, 1966).

The Alaska Supreme Court has consistently construed the single-subject rule broadly, in deference to the judgment of the legislature on how best to structure individual pieces of legislation. For example, the state supreme court upheld the legality of a bill authorizing the sale of bonds for correctional facilities and public safety buildings. It said that complying with the one-subject rule of this section required only that the matters treated in legislation fall under one general idea and be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject *(Short v. State,* 600 P.2d 20, 1979). In this vein, the court upheld the constitutionality of a bill dealing with the general subject of "lands," although its several sections were otherwise unrelated *(State v. First National Bank of Anchorage,* 660 P.2d 406, 1982); the court of appeals found an amendment that changed a driving-while-intoxicated statute to be sufficiently germane to a bill changing liquor laws, since both dealt with "intoxicating liquor" *(Van Brunt v. State,* 646 P.2d 872, Alaska Ct. App., 1982); and the supreme court upheld a bill that authorized bonds to finance flood control and small boat harbor projects on grounds that both pertained to the development of water resources and were funded by grants from the same federal agency *(Gellert v. State,* 522 P.2d 1120, 1974; see also *Galbraith v. State,* 693 P.2d 880, Alaska Ct. App. 1985.)

Note that the single-subject rule works in conjunction with the provision in Section 15 specifying the governor may veto bills only in their entirety (except appropriation bills). If bills could embrace more than one subject, the governor's veto power would be compromised because the legislature could pair a subject that the governor opposed with one that he favored. The governor would need to possess item veto power over substantive legislation well as over appropriations to exercise full and effective veto power.

The second sentence states the "confinement rule" that requires appropriation bills to be confined to appropriations, although they may encompass many subjects. Thus, substantive law may not appear in, or be changed by, an appropriation bill. The purpose of this rule is to prevent logrolling, to protect the governor's veto power, and to prevent substantive law from being enacted unintentionally or intentionally in the guise of an appropriation. An example of logrolling in this situation might be the combining with a popular appropriation a proposed law that would be defeated if it stood alone (or vice versa), or the combination of an appropriation and a statutory measure, neither of which could be approved individually. The confinement rule protects the governor's veto power because without it the governor might be loath to veto an appropriation badly needed for the continued operation of a state program in order to strike an offensive statutory change that the measure also makes.

The rule also prevents fraud and carelessness. The connection between an appropriation and substantive law may be subtle, sufficiently so that only a few knowing legislators, or none at all, may perceive it when the roll is called. This subtlety is illustrated by an appropriation made in 1980 to the Department of Health and Social Services for a study of minority hire. The superior court found that it violated the confinement rule because the department had no statutory authority in that area. "Because the appropriation purports to confer on that department a power which it has not been given, it attempts to amend general law" *(Alaska Legislature v. Hammond,* Case No. 1JU 80 1163, Juneau; 1983). To ensure that legislators comprehend the consequences of their action, the confinement rule required, in this case, two separate acts: a statutory expansion of the powers of the department to encompass the subject of the study, and an appropriation for the study.

The legislature often attaches a statement of intent to specific appropriations to explain how the money is to be spent. However, it may not go beyond an expression of the general intent of the legislature. The supreme court has said that intent language violates the confinement rule if it has the effect of administering a program; if it enacts or amends existing law; if it is more than the minimum necessary to explain how the appropriation is to be spent; if it is not germane to an appropriations bill; or if it extends beyond the life of the appropriation. Thus, for example, the court struck from certain appropriations to the Alaska Seafood Marketing Institute a statement of intent requiring the agency to relocate high-salary employees from Washington state to Alaska (*Alaska Legislative Council v. Knowles*, 21 P.3d 367, 2001).

The third sentence, requiring the subject of each bill to be stated in its title, further safeguards legislators and the public against deceitful legislation and facilitates their grasp of matters under consideration.

Requiring the explicit clause, "Be it enacted by the Legislature of the State of Alaska," does more than guarantee uniformity and continuity in the format of legislation. It notifies legislators and the public that the measure at hand does not merely express an opinion, state a sentiment, or offer advice of the body, but is a bill that when enacted becomes the law of the land.

Alaska's constitution does not have an "origination" clause, whereby bills raising taxes or generating revenues must originate in the lower house. Such a requirement, derived from Article I, Section 7 of the U.S. Constitution, is found in a number of state constitutions.

Section 14. Passage of Bills

> **The legislature shall establish the procedure for enactment of bills into law. No bill may become law unless it has passed three readings in each house on three separate days, except that any bill may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it. No bill may become law without an affirmative vote of a majority of the membership of each house. The yeas and nays on final passage shall be entered in the journal.**

These formalities and those required by Section 13 give ordered procedure to the enactment of bills, to "engender a responsible legislative process worthy of the public trust" *(Plumley v. Hale, M.D.,* 594 P.2d 497, 1979). The three-reading rule helps assure that bills will receive deliberation and that the legislature will know what it is voting on. (Only the titles of bills are actually read, not the full text.) Amendments made to the text of a bill at the second or third reading are valid even though the amended bill is not read thereafter on three different days; amended bills must be read anew three times only if the amendment changes the subject of the original bill *(Van Brunt v. State,* 653 P.2d 343, Alaska Ct. App., 1982). Delegates at the constitutional convention debated at some length the wisdom of allowing legislators to advance a bill from second to third reading on the third day, some fearing more the prospect of steamrolling legislation than the inconvenience of delay. In the end, they compromised with the provision that a bill could be advanced from second to third reading on the same day if three-fourths of the body agreed to do so (a mechanism that is used often by the legislature).

The last sentence of this section assures that the required majority has voted to pass a bill, and that there is a public record of the vote cast by each legislator. The meaning of "final passage" is the subject of the Alaska Supreme Court decision in *Plumley v. Hale, M.D.* (594 P.2d 497, 1979), a case

that questioned the legality of a measure that was the product of a free conference committee and adopted by the house with a voice vote instead of a roll call vote. The court said that final passage "refers to that vote which is the final one in a particular house with regard to a particular bill. Such a final vote may occur at various stages. It may be on the third reading of a bill; it may be the vote to concur in the amendments adopted by the second house; it may be the vote to recede from amendments not concurred in by the other house; or it may be the vote to adopt the amendments proposed by a conference committee." Whether the vote one chamber takes on a bill is its final passage may be uncertain until the other chamber acts on it. Thus, the chambers must call the roll whenever the vote has the potential of being the last vote they take on the measure.

A bill is a proposed law. A resolution is an expression of the will of the legislative chamber that enacts it. It does not become a law, and therefore the constitution does not require a resolution to follow the procedures of this and other sections dealing with the enactment of laws. Proposed constitutional amendments, for example, are handled by the legislature as resolutions, and they are not subject to the governor's veto (see Article XIII, Section 1).

A long-standing dispute between the legislative and executive branches has concerned the use of joint resolutions of the legislature to attempt to annul administrative regulations that the legislature believes do not comport with the original intent of the legislation that the regulations implement. This dispute found its way to court, where the legislature lost. The Alaska Supreme Court said that acts of the legislature which bind others outside the legislature must take the form of a bill and follow the procedures of a bill as required by this section and Section 13, and that they must be subject to the governor's veto *(State v. ALIVE Voluntary*, 606 P.2d 769, 1980). The court's ruling prohibits an unauthorized legislative veto, at least by means of a resolution (the legislative veto is explicitly authorized for specific purposes by Article III, Section 23, and Article X, Section 12). In response to this setback in court, the legislature put before the voters in 1980 a constitutional amendment that would permit the annulment of regulations by joint resolution, but it was not ratified. Similar amendments were rejected by the voters in 1984 and again in 1986.

The comparable provision in the Territorial Organic Act of 1912 stated: "That a bill in order to become law shall have three separate readings in each house, the final passage of which in each house shall be by a majority vote of all members to which such house in entitled, taken by ayes and noes, and entered upon its journal" (Section 13).

Section 15. Veto

> **The governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin.**

The veto is an important check on the legislative branch by the governor. It allows the governor to block, or at a minimum to force reconsideration of, legislation that he believes to be hasty, unwise, ill-considered, poorly written, or illegal. It doubtless is used on occasion for less high-minded reasons, such as retribution. In any case, the veto power makes the governor a major participant in the legislative process. The U.S. president and the governors of all of the states possess the veto power.

By this provision, Alaska's governor may exercise the veto only over an entire bill, not over individual parts of it, except in the case of appropriation bills. With regard to the latter, Alaska's governor may veto or reduce individual items.

The power to veto line items in appropriation bills is common among the states; approximately 40 state constitutions grant it to the governor. (By contrast, the U.S. president does not possess line item veto power). Line item veto power greatly enhances the governor's influence over the appropriation process. Appropriation bills are exempt from the single-subject requirement of Section 13, although they must be confined to appropriations. Without the power to veto line items, the governor would not be able to control logrolling in the budget bill. That is, he might let many items that he objected to become law rather than repeatedly veto entire appropriation bills, which could mire the legislative process and deny state agencies their operating funds.

Twice the courts have been asked to address the question of what constitutes an "item" that may be struck or reduced in an appropriation bill. In 1977, the court said that Governor Hammond could not reduce the amount of a general obligation bond bill passed by the legislature because a bond bill is not an appropriation bill and its amount is not an item. He could only veto the entire measure (*Thomas v. Rosen*, 569 P.2d 793, 1977). In 2001, the court defined an "item" in an appropriation bill as "a sum of money dedicated to a particular purpose." Thus, the governor may not strike descriptive intent language that accompanies an item in an appropriation bill using his authority in this section to strike or reduce an item (*Alaska Legislative Council v. Knowles*, 21 P.3d 367, 2001).

The prerogative of the Alaska governor to reduce items in appropriation bills is not so common in other states. Only nine other state constitutions grant this power, or a variation of it, to the governor. The provision did not appear in the committee draft of this section at the constitutional convention; it was added by an amendment from the floor. The power to reduce, as well as veto, line items was recommended in the *Model State Constitution* and was considered by many of the delegates to be a progressive measure that enhanced the governor's powers of fiscal management.

This section requires the governor to explain vetoes, so legislators may determine what, if any, modifications to the bill will make it acceptable to the governor, and whether the governor's objections are sufficiently persuasive to let the veto stand. How detailed must the governor's explanation be? "Minimally coherent" said the court in its decision in *Alaska Legislative Council v. Knowles* (21 P.3d 367, 2001), where the court also expressed a reluctance to referee this type of dispute: "The legislature, through knowledge accumulated in dealing with the governor, is capable of

interpreting the sufficiency of an objection, and is thus able to decide whether to enact an amended appropriation or to seek a veto override."

Veto authority of the governor under Territorial Organic Act of 1912, in Section 4, was similar to this section except that it did not include reduction of appropriations: "That, except as herein provided, all bills passed by the legislature shall, in order to be valid, be signed by the governor . . . . If the governor does not approve such bill, he may return it, with his objections, to the legislature. He may veto any specific item or items in any bill which appropriates money for specific purposes, but shall veto other bills, if at all, as a whole."

Section 16. Action Upon Veto

> **Upon receipt of a veto message during a regular session of the legislature, the legislature shall meet immediately in joint session and reconsider passage of the vetoed bill or item. Bills to raise revenue and appropriation bills or items, although vetoed, become law by affirmative vote of three-fourths of the membership of the legislature. Other vetoed bills become law by affirmative vote of two-thirds of the membership of the legislature. Bills vetoed after adjournment of the first regular session of the legislature shall be reconsidered by the legislature sitting as one body no later than the fifth day of the next regular or special session of that legislature. Bills vetoed after adjournment of the second regular session shall be reconsidered by the legislature sitting as one body no later than the fifth day of a special session of that legislature, if one is called. The vote on reconsideration of a vetoed bill shall be entered on the journals of both houses.**

This section allows the legislature to override the governor's veto of a bill or appropriation. The override procedures work in conjunction with Section 17, which specifies the time limits for the governor's veto action.

The override procedures envision two situations: one is the return of a vetoed bill while the legislature is still in session; the second is the return of a vetoed bill after the legislature has adjourned. In the first case, the procedure is straightforward: the legislature "immediately" convenes in joint session to reconsider the bill. In the second case, where the legislature has adjourned when the vetoed bill is returned, the situation is more complicated. It is also more common, as the majority of bills that pass the legislature do so in the last few days of the session, so the governor has not considered them until well after the legislators have left the capital.

Originally, the constitution did not specify procedures for reconsidering bills after adjournment. Presumably, the legislature would have to call a special session to reconsider the vetoed bills. This

ambiguity led to a constitutional amendment in 1976 which inserted the words "during a regular session of the legislature" in the first sentence and added the fourth and fifth sentences (it also amended Section 9). Now, the legislature still has to call a special session to consider a veto if the veto occurs after the end of a second regular session, but it now must reconsider by the fifth day of the second session bills vetoed after the end of the first session. A new legislature may not reconsider vetoed bills of a previous legislature. The problem of reconsidering vetoed bills after the legislature has adjourned is addressed in some states by an "automatic special session" clause, which requires the legislature to reconvene after the end of a regular session to consider vetoed bills (see, for example Article 3, Section 2 of Connecticut's constitution).

This section requires the legislature to reconsider vetoed bills within the first five days of a special session. What if the vetoed bill is not transmitted to the house of origin by the end of the fifth day of the special session? In that situation, must the legislature act within five days of receiving the bill? These questions were presented in *Legislative Council v. Knowles*, 988 P.2d 604, 1999. The lower court answered yes, but the supreme court dismissed the suit on the grounds that the governor could not sue the legislature (see the discussion of this case under Article III, Section 16) so there is not a definitive answer to date.

The requirement in this section that the legislature vote as one body is unusual among the states; most require a two-thirds or three-fifths supermajority in each house (either of the total membership or of those present). This was the case with the Territorial Act of 1912: Section 14 required a two-thirds vote of each house to override. The provision in Alaska's constitution for a joint session was meant to make overriding a veto easier than requiring a supermajority in each house, but of course the two houses must agree to meet in a joint session. Thus, one reluctant chamber may thwart the intent of this provision by declining to do so.

Another unusual feature of this section is the requirement for a larger supermajority—three-fourths of the membership—to override a vetoed appropriation item. Few other states make the distinction between a bill dealing with substantive law and an appropriation bill. For purposes of this section, what constitutes an appropriation? This question was before the court in litigation surrounding a bill passed by the legislature that granted state land to the University of Alaska. Governor Knowles vetoed the bill. The legislature voted to override the veto, which it did with a two-thirds margin but not a three-fourths margin. The governor asserted that the bill constituted an appropriation because it transferred a state asset (in this case land), and therefore the vote to override failed. The legislature sued, and the court sided with the legislature. It said that in the context of this section and the preceding section, an appropriation bill means a bill that transfers money *(Legislative Council ex rel State Legislature v. Knowles*, 86 P.3d 891, 2004). This narrow, monetary definition of an appropriation differs from a broader definition the court has given to the term in the context of Article XI, Section 7, where the transfer of state land is considered an appropriation and disallowed as a subject of an initiative.

The requirement in the first sentence of this section for an immediate joint session to reconsider a vetoed bill is to permit those who favored the bill to begin working on a substitute that would accommodate the objections of the governor, should the veto be sustained.

Comparatively few vetoed bills are reconsidered by the legislature because of the difficulty of obtaining a two-thirds supermajority vote. By 2011, some 450 bills had been vetoed by Alaska governors since statehood, and fewer than 100 of these vetoes were reconsidered. Of those reconsidered, about half were overridden and half sustained. Only a few vetoed appropriations have ever been overridden.

Section 17. Bills Not Signed

> **A bill becomes law if, while the legislature is in session, the governor neither signs nor vetoes it within fifteen days, Sundays excepted, after its delivery to him. If the legislature is not in session and the governor neither signs nor vetoes a bill within twenty days, Sundays excepted, after its delivery to him, the bill becomes law.**

This section prohibits the "pocket veto" and establishes time limits within which the governor must act on a bill after it is passed by the legislature and presented to him. Some constitutions allow a bill to die if the governor neither signs it nor vetoes it within a certain number of days ("pocket veto"); Alaska's does not. Here, a bill becomes law without the governor's signature if the governor does not veto it or sign it.

State constitutions typically give the governor more time to act on a bill after the legislature adjourns. This is because many bills are passed in the closing days of the session, and the governor presumably needs more time to deal with this deluge of legislation. Alaska's governor has 20 days, excluding Sundays, to act after the transmittal of a bill if the legislature has adjourned; 15 days if it has not. (The governor has 20 days, except Sundays, to act on a bill transmitted before adjournment but still held by the governor at the time of adjournment.) Note that these limits begin to run from the date the bill is presented to the governor, not, as in some states, from the date it is passed or the date of adjournment. In practice, bills may not be delivered to the governor for days or weeks after their passage or adjournment of the session; sometimes this delay occurs by agreement between the governor and house speaker or senate president.

The 15-day limit is a generous one, comparatively speaking. Many states limit the governor to three or five days to return a bill to the legislature if the legislature is still meeting. This enhances the ability of the legislature to override vetoes, as the tendency is for legislation to be passed late in the session.

Section 18. Effective Date

> **Laws passed by the legislature become effective ninety days after enactment. The legislature may, by concurrence of two-thirds of the membership of each house, provide for another effective date.**

The 90-day interval between the date a law is enacted and date it takes effect is intended to provide a fair opportunity to those who must live by the new law to learn of it and make preparation. Several other state constitutions specify a 90-day interval; none specify a longer period of time. Some state constitutions specify an interval that begins to run with adjournment of the legislature, but, because Alaska's constitutional convention delegates did not set a limit on the length of the legislative session, they preferred an interval that began to run from enactment because it offered more certainty to the public about when a law takes effect.

"Enactment" is different from passage by the legislature; it occurs when the governor signs the bill, when the legislature overrides a veto of the bill, or when the time periods specified in Section 17 expire without the governor either signing or vetoing the bill. (See AS 01.10.070.)

Special circumstances are necessary to justify an effective date other than the standard one set out here. This presumption is behind the requirement for a supermajority vote to deviate from the 90-day interval. Some constitutions require the legislature to formally find that a state of emergency exists in order to hasten the effective date of a law. On the other hand, some constitutions are silent altogether on effective dates and leave the matter to the legislature.

Occasionally, laws will contain a section that explicitly makes them retroactive to a certain date (such as a tax law to take effect from the beginning of the year). This retroactive clause is distinct from the effective date clause and does not need a two-thirds majority vote (*Arco Alaska, Inc. v. State*, 824 P.2d 708, 1992). A retroactive law is not, on its face, unconstitutional, even in the several states that have an explicit prohibition against retroactive legislation. However, such laws are often unfair (how can people be reasonably expected to obey a law that does not exist?), and they may be struck down in violation of "due process" and "equal protection" guarantees. Alaska Statutes 01.10.090 declares: "No statute is retrospective unless expressly declared therein." Article I, Section 15 prohibits *ex post facto* laws, which are laws that work retroactively to make a criminal act out of conduct that was innocent at the time, or to increase the penalties for an offense after it was committed.

Alaska's territorial legislature operated under a similar "constitutional" provision. Regarding each bill passed by the legislature, Section 14 of the Territorial Organic Act of 1912 provided: "If he [the governor] approves it, he shall sign it and it shall become a law at the expiration of ninety days thereafter, unless sooner given effect by a two-thirds vote of said legislature."

Section 19. Local or Special Acts

> **The legislature shall pass no local or special act if a general act can be made applicable. Whether a general act can be made applicable shall be subject to judicial determination. Local acts necessitating appropriations by a political subdivision may not become effective unless approved by a majority of the qualified voters voting thereon in the subdivision affected.**

That a prohibition against special and local legislation is found in about three-fourths of the state constitutions suggests the seriousness of the problem that this type of legislation caused in the past. For the most part, special and local acts amounted to legislative dispensation of favors and preferences to powerful interests—personal, corporate, or municipal (an abuse of the legislative process by "picking favorites"). Also, disparate treatment of classes of people or geographical areas offended the doctrine of "equal protection of the laws," and, at a minimum, cluttered and confused the statute books.

Several state constitutions enumerate forbidden subjects of private, special and local laws. The Illinois Constitution, for example, lists twenty-three subjects that are off limits, including granting divorces, changing names of persons or places, intervening in county and township affairs, impaneling grand juries, conducting an election and remitting fines and forfeitures (Article IV, Section 22). The New Jersey Constitution lists fourteen prohibited subjects (Article IV, Section 7, paragraphs 1 and 9). Among the acts proscribed in both these state constitutions is the "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever" (a matter covered in Article I, Section 15 of Alaska's constitution, and also a part of the territorial charter, see below). No doubt in the interests of brevity and flexibility, the drafters of the Alaska Constitution preferred the general statement of this section, which follows closely the language suggested in the *Model State Constitution.*

Alaska courts have held that this prohibition against local acts does not invalidate laws that operate only on limited geographical areas if the laws are reasonably related to a matter of statewide concern or common interest—for example, the location of the state capital *(Boucher v. Engstrom,* 528 P.2d 456, 1974). In cases where no statewide or common interest is involved, a law is invalid under this section if a general law is possible. Thus, in 1975, the Alaska Supreme Court struck down as "local and special" an act of the legislature which established special procedures for the formation of the proposed Eagle River-Chugiak Borough in the Anchorage area *(Abrams v. State,* 534 P.2d 91, 1975). In a subsequent case, the high court upheld a law that affirmed a land trade negotiated among the state, the Cook Inlet Regional Corporation, and the federal government. The law dealt with specific lands and specific groups, but the court considered the circumstances unique and the law acceptable as "a general legislative treatment of complex problems of pressing importance and of statewide concern" *(State v. Lewis,* 559 P.2d 630, 1977). In the case *Walters v. Cease* (394 P.2d 670, 1964), the Alaska Supreme Court ruled that the Mandatory Borough Act of 1963, which incorporated eight

specifically designated and defined areas of the state as organized boroughs, was "local and special" legislation, and therefore could not be subject to a referendum under Article XI, Section 7. However, the court was silent on the constitutionality of the measure under this section.

Also, the Alaska Supreme Court has upheld acts which focus on a single entity, and are not of general or statewide application, if they "fairly and substantially relate to legitimate state purposes." On this basis, the court ruled that a law altering specific oil leases on the North Slope was not special legislation *(Baxley v. State*, 958 P.2d 422, 1998*).*

Among the limitations on legislative power enumerated in Section 9 of the Territorial Organic Act of 1912 was the following: "nor shall the legislature pass local or special laws in any of the cases enumerated in the Act of July thirtieth, eighteen hundred and eighty-six." This act was reproduced in each edition of the territorial session laws. It listed 24 subjects removed from the ambit of the legislature, including the grant of any special or exclusive privilege, immunity or franchise. For many years this prohibition against local and special acts was interpreted by the attorney general of the territory to prohibit the legislature from making a public works appropriation to a specific city. Rather, the legislature was required to make a general appropriation to an executive department which would then allocate funds to specific projects.

Presumably, the prohibition against local and special acts in this section applies to appropriations as well as to other types of legislation. The attorney general warned, for example, that designating loan recipients would be illegal (memorandum of the attorney general, "Appropriating Money for a Loan to the White Pass and Yukon Route," May 14, 1980).

Section 20. Impeachment

> **All civil officers of the State are subject to impeachment by the legislature. Impeachment shall originate in the senate and must be approved by a two-thirds vote of its members. The motion for impeachment shall list fully the basis for the proceeding. Trial on impeachment shall be conducted by the house of representatives. A supreme court justice designated by the court shall preside at the trial. Concurrence of two-thirds of the members of the house is required for a judgment of impeachment. The judgment may not extend beyond removal from office, but shall not prevent proceedings in the courts on the same or related charges.**

Virtually every state constitution grants the legislature the power to remove the governor and other principal elected and appointed officials by means of impeachment. Some constitutions also allow removal of lesser officials for cause by concurrent resolution—a process called joint address or legislative address—but the Alaska constitutional convention delegates rejected this option. Unusual

features of Alaska's impeachment provision are its application to "all civil officers of the state" rather than just the highest elected and appointed officeholders; origination of impeachment in the senate and trial in the house (it is the opposite in the U.S. Constitution and most state constitutions); and omission of a definition of impeachable offenses (compare Article IV, Section 12, which specifies "malfeasance and misfeasance" as impeachable offenses for judges).

Impeachment is rarely used at either the federal or state level. However, in 1985 in Alaska, a grand jury report alleged that Governor William Sheffield attempted to steer a state office lease to a political supporter, and recommended that the legislature initiate impeachment proceedings against him. The legislature convened in special session and began a hearing on impeachment. Since there is no statutory implementation of this constitutional section, it was necessary to deal with such important preliminary questions as what constitutes an impeachable offense; what standard of proof is required; what procedures should be followed by the senate and house; and whether the impeachment was reviewable by the courts. In the end, the senate rules committee, which heard the evidence, did not find sufficient cause for the full senate and house to proceed with the matter.

Section 21. Suits Against The State

The legislature shall establish procedures for suits against the State.

The long-standing common law doctrine of sovereign immunity ("The king can do no wrong") prevents the government from being sued. However, the federal government and state governments have waived through statute their immunity from suit in certain types of cases. A few state constitutions still prohibit all suits against the state, but even here various exceptions and evasions have been devised so that justice may be served. This section, which commands the legislature to establish procedures for suits against the state, is different from most other state constitutional provisions, which typically allow for the waiver of sovereign immunity.

The Alaska legislature has complied with this constitutional directive in AS 09.50.250, which authorizes a person or corporation to bring a contract, quasi-contract, or tort claim against the state. This law is based on the federal tort claims act. Like its federal counterpart, the state statute contains certain exceptions to the waiver of immunity, one of which is for the exercise of policy-making discretion by state officials. That is, if a state official adopts a discretionary policy, the state may not be sued over the consequences of the decision. Thus, for example, the state could not be sued for its decision not to regulate traffic near a school that allegedly contributed to the death of a pupil (*Jennings v. State*, 566 P.2d 1304, 1977). On the other hand, once a decision is made to do something, the state is obligated to do it with reasonable care, such as maintain a road in winter (*State v. Abbott*, 498 P.2d 712, 1972). The court uses a "planning-operational test, under which decisions that rise to the level of planning or policy-making are considered discretionary acts which do not give

rise to tort liability, while decisions that are merely operational in nature are not considered to be discretionary acts and therefore are not immune from liability."

The state's limited waiver of sovereign immunity does not extend to suits against the state in federal court. It does not mean that money judgments against the state are paid automatically. These may require a legislative appropriation (AS 09.50.270).

ARTICLE III

THE EXECUTIVE

Article III creates the executive branch of government and vests the governor with the executive power of the state. It specifies the method of electing the governor and lieutenant governor, the powers and duties of these officers (including some legislative powers of the governor not addressed in Article II) and the framework of the executive branch. This article endows Alaska's governor with exceptionally strong formal powers. For example, the governor appoints all department heads. Typically, several department heads, including the attorney general, are popularly elected in other states. Commentary by the committee of delegates who drafted the article said: "The intention throughout the article is to centralize authority and responsibility for the administration of government and the enforcement of laws in a single elected official." The constitutional convention delegates created a strong governor for the same reason they created a strong legislature: they believed that effective and responsible state government required that each branch have broad and uncomplicated powers to carry out its respective duties.

Few state constitutions grant as much authority to the governor as does Alaska's. This is because most of the other constitutions were written with a history of tyrannical or corrupt executives in mind. Alaska's experience was different. Here, historically, government authority was diffuse and remote from the people. Alaska's territorial governor was an employee of the U.S. Department of the Interior appointed by the U.S. president; he shared executive authority with large federal bureaucracies; and his influence was deliberately diluted by the territorial legislature through its creation of commissions or elected offices to oversee administrative functions which fell within its purview. The delegates sought to remedy these defects with a hierarchical administrative system superintended by one elected official.

Also, at the time of the convention, strong executives were the progressive constitutional ideal (they remain so today). They localize political accountability (when things go awry, there is someone to blame), and they facilitate the management of large organizations. Strong executive powers were the centerpiece of the National Municipal League's *Model State Constitution*, and they were recommended in studies prepared for the Alaska constitutional convention. Two recent constitutions of the day, those of New Jersey (1947) and Hawaii (1950), created strong executives. Indeed, the key provisions of Article III, Sections 22-25, which create a centralized administrative structure directly accountable to the governor, follow closely the New Jersey and Hawaii precedents.

Article III is the primary, but not the exclusive, source of the governor's formal powers. Additional grants of executive power are found, for example, in Article II (veto power in Section 15 and authority to call special legislative sessions in Section 9) and Article IX (responsibility for preparation of an executive budget in Section 12).

Unlike the first two articles of the constitution, this article has been the subject of comparatively little judicial interpretation.

Section 1. Executive Power

> **The executive power of the State is vested in the governor.**

This section and Section 16 directly grant to the governor the executive power of the state. All of the powers necessary for the governor to carry out the executive function, except those that are explicitly prohibited, are implied by these two sections.

Section 2. Governor's Qualifications

> **The governor shall be at least thirty years of age and a qualified voter of the State. He shall have been a resident of Alaska at least seven years immediately preceding his filing for office, and he shall have been a citizen of the United States for at least seven years.**

These qualifications for the office of governor are typical of those found in other state constitutions. The large majority of states establish the same minimum age qualification; only one has a higher minimum (Oklahoma, 31 years); the lowest minimum age is 18 years (California and Washington); and seven states do not specify a minimum age. While most states require the governor to be a U.S. citizen, only a few, including Alaska, require a minimum number of years of U.S. citizenship (New Jersey and Mississippi require 21). State residency requirements in other states range from two to 10 years.

The U.S. president must be at least 35 years old, a natural-born citizen, and a U.S. resident for 14 years.

Section 3. Election

> **The governor shall be chosen by the qualified voters of the State at a general election. The candidate receiving the greatest number of votes shall be governor.**

This provision makes the office of governor elective. All state governors are elected directly by the voters. It specifies that a plurality rather than a majority of the votes cast in the election is decisive; that is, the candidate for governor who receives the highest number of votes wins, whether that number of votes is more or less than 50 percent of the total number of votes cast. Plurality elections are prevalent in this country because they are considered a bulwark of the two-party system. A majority rule (which requires the winning candidate to receive at least one more than half of the votes cast, and usually involves a run-off election) is used in only a few states for executive offices. In close electoral contests between two major candidates, comparatively few votes for a third-party or write-in candidate can deny a majority to the person polling the largest number of votes. In contests with three or more major candidates, a plurality win is almost assured. About half of the gubernatorial elections in Alaska since statehood were won with pluralities. On two occasions that plurality was less than 40 percent: in 1978, Jay Hammond received 38.2 percent of the votes cast and, in 1990, Walter Hickel received 38.8 percent.

Note that the constitution does not dictate that the plurality rule shall also govern the election of legislators—Article II, Section 3 is silent on the matter. It says merely, "Legislators shall be elected at general elections." Statutes provides for a plurality in all elections, except that ballot propositions and judicial retention elections require a majority of the votes cast (AS 15.15.450).

Gubernatorial elections in Alaska occur in even-numbered years between presidential elections. This schedule is a coincidence of the timing of statehood, but it is considered desirable. Constitutional reformers recommended this arrangement as a means of focusing the attention of the electorate on state issues and obtaining a judgment on the performance of the state administration rather than a judgment on the national administration.

Section 4. Term of Office

> **The term of office of the governor is four years, beginning at noon on the first Monday in December following his election and ending at noon on the first Monday in December four years later.**

All but two states have a four-year term for governor (in New Hampshire and Vermont the term is two years). A measure often discussed but not yet adopted anywhere is a single six-year term for governor. It is thought this would eliminate the political pressures associated with running for reelection. However, it could also reduce the electoral accountability of the governor's office.

Alaska's constitution sets the beginning of the governor's term early in December to give the incoming governor some time to prepare a budget and legislative proposals before the legislature convenes in January. In years following a gubernatorial election, the legislature convenes one week later than in other years in order to give a new governor additional time to prepare for the session (see

Article II, Section 8). Like Alaska's, Hawaii's constitution also provides for a December inaugural, but most state constitutions begin the governor's term in January.

Section 5. Limit on Tenure

> **No person who has been elected governor for two full successive terms shall be again eligible to hold that office until one full term has intervened.**

This prohibition against serving more than two successive terms seeks to prevent the accumulation of excessive power and the entrenchment in office of a governor and retinue of appointed officials. A term limit encourages political competition and increases access to the political process. Many state constitutions limit an individual to two four-year terms as governor; others, like Alaska's, limit an individual to two *successive* terms (that is, two terms one after the other). Also, the limit applies to two full terms to which the person was elected. Thus, a person who may succeed to the office of governor in Alaska is eligible for two full elected terms immediately after completing a predecessor's unexpired term. The Twenty-second Amendment to the U.S. Constitution (ratified in 1951) limits the U.S. president to two terms and counts as one of those terms any service longer than two years as president through succession.

William Egan, Alaska's first governor, served three terms (1959-1962; 1962-1966; and 1970-1974). Although elected in November 1958, Egan's first term did not begin until after Alaska officially became a state on January 3, 1959. Thus, this term was about one month short of a full term (according to Section 4, the term of office of the governor begins on the first Monday in December following the election). Governor Egan stood for re-election in 1966. His apparent violation of the spirit of this term limit, if not its letter, may have contributed to his defeat by Walter Hickel, who made a campaign issue of the matter.

Article II does not limit the number of terms that a legislator may serve, although a number of initiative proposals have been made, unsuccessfully, to impose such a limit (see discussion of legislative term limits under Article XI, Section 1).

Section 6. Dual Office Holding

> **The governor shall not hold any other office or position of profit under the United States, the State, or its political subdivisions.**

The rationale for this prohibition against dual office holding by the governor is similar to that which applies to legislators (see Article II, Section 5; see also Article IV, Section 14). It is intended to

prevent conflicts of interest that may compromise independent judgment, to prevent the accumulation of excessive power, and to protect the separation of powers.

Section 7. Lieutenant Governor Duties

> **There shall be a lieutenant governor. He shall have the same qualifications as the governor and serve for the same term. He shall perform such duties as may be prescribed by law and may be delegated to him by the governor.**

The primary purpose of a lieutenant governor is to provide a successor to the governor if that office becomes temporarily or permanently vacant. An amendment to the constitution in 1970 changed the title of this office from secretary of state to lieutenant governor, because the new title was thought to carry more prestige and was the title of comparable offices in other states. Some states have both an elective lieutenant governor and an elective secretary of state. The *Model State Constitution* recommended against including either office, and the delegates to the convention seriously questioned whether a second elective executive position was really necessary. Indeed, at one point in the extensive debate on the contents of this section, they voted to eliminate the office altogether. In the end, the delegates decided it was desirable to have an elected successor to the governor. The alternative would be an appointed successor, or one of the presiding officers of the legislature, who are elected but only by the voters of one district. All but five states have a lieutenant governor.

The delegates envisioned a busy lieutenant governor whose work would be an integral part of the operation of the executive branch (but who would not preside over the senate, as is the case in many states). They left to the governor and legislature the task of specifying the duties. However, the delegates clearly assumed that the lieutenant governor (secretary of state) would be involved in the administration of elections—a traditional function of the office of secretary of state—because elsewhere in the constitution they charged that office with responsibilities for preparing the ballot (see Article XI, Sections 2-6; and Article XIII, Sections 1, 3).

Contrary to the expectation of those who drafted the constitution, Alaska's governors have not delegated significant administrative duties or policy-making responsibilities to the lieutenant governor. Nor has the legislature prescribed much for that officeholder to do: administer state election laws, appoint notaries public, serve as custodian of the state seal, and perform certain ministerial duties relating to the promulgation of regulations under the Administrative Procedure Act.

The latest edition of the *Model State Constitution* recommends a line of succession through the presiding officers of the legislature rather than "providing for a stand-by officer, such as a lieutenant governor, for whom generally few useful duties may be found . . . ."

Section 8. Lieutenant Governor Election

> **The lieutenant governor shall be nominated in the manner provided by law for nominating candidates for other elective offices. In the general election the votes cast for a candidate for governor shall be considered as cast also for the candidate for lieutenant governor running jointly with him. The candidate whose name appears on the ballot jointly with that of the successful candidate for governor shall be elected lieutenant governor.**

Candidates for the office of lieutenant government must appear on the primary ballot. The party candidate with the highest number of votes becomes that party's nominee, who is paired with the party's nominee for governor and the two of them stand in the general election together. This scheme was chosen by the delegates over the proposal submitted by the committee on the executive branch, by which candidates for governor would handpick a running mate much the way candidates for U.S. president handpick their running mates for vice-president. The delegates also rejected a proposal for the lieutenant governor to be elected independently of the governor, because this method might produce a governor and lieutenant governor of different parties.

The tandem method of electing the governor and lieutenant governor is currently used by a number of states.

Section 9. Acting Governor

> **In case of the temporary absence of the governor from office, the lieutenant governor shall serve as acting governor.**

This section provides for the temporary assumption of the duties of governor by the lieutenant governor, in contrast to the permanent succession to office treated in Sections 10, 11 and 12. Most state constitutions make a similar allowance, but usually for a temporary absence "from the state" by the governor, rather than "from office," as in this section. The phrase "from office" was substituted for the more traditional words by an amendment on the floor of the convention because it was recognized that with modern communications it was possible for the governor to fulfill the duties of office while temporarily out of the state, and that a governor could be absent from office while remaining in state. However, the vagueness of term "absence from office" could conceivably create problems in applying this section.

Alaska's first elected governor, William Egan, fell ill shortly after he assumed office in January 1959. His illness kept him in a Seattle hospital until April, during which time Lieutenant Governor Hugh Wade served as acting governor.

Section 10. Succession; Failure to Qualify

> **If the governor-elect dies, resigns, or is disqualified, the lieutenant governor elected with him shall succeed to the office of governor for the full term. If the governor-elect fails to assume office for any other reason, the lieutenant governor elected with him shall serve as acting governor, and shall succeed to the office if the governor-elect does not assume his office within six months of the beginning of the term.**

The delegates sought to anticipate all possible contingencies in the succession provisions. Here they dealt with the possibility of a governor-elect failing to assume office. If the governor-elect does not assume office within six months after the term begins, the office is forfeited to the lieutenant governor.

Section 11. Vacancy

> **In case of a vacancy in the office of governor for any reason, the lieutenant governor shall succeed to the office for the remainder of the term.**

If a permanent vacancy in the office of governor should occur, the lieutenant governor becomes governor (in contrast to acting governor, as in the case of a temporary vacancy) for the remainder of the term. Some constitutions provide for a special election to fill the office for the remainder of the term, but not Alaska's (except for the unusual situation in which a non-elected lieutenant governor succeeds to the governorship—see Section 13). A permanent vacancy could arise from death, resignation, impeachment, conviction of a felony, or from a disability that resulted in a declaration of vacancy under Section 12.

In 1969, Governor Walter Hickel resigned the office of governor to assume the office of Secretary of the U.S. Department of the Interior. Lieutenant Governor Keith Miller succeeded to the office of governor for the remainder of the term. In 2009, Governor Sarah Palin resigned and Lieutenant Governor Sean Parnell succeeded to the office of governor.

Section 12. Absence

> **Whenever for a period of six months, a governor has been continuously absent from office, or has been unable to discharge the duties of his office by reason of mental or physical disability, the office shall be deemed vacant. The procedure for determining absence and disability shall be prescribed by law.**

This section deals with the potentially thorny issue of a disabled chief executive (the thorniness being the officeholder who does not recognize his mental disability, or who does not consider his physical condition to be disabling). To avoid a tedious recitation of procedures similar to those found in several state constitutions and in the Twenty-fifth Amendment to the U.S. Constitution, the drafters of the constitution assigned to the legislature responsibility for specifying how the office of governor could be declared vacant. The legislature has not yet done so, which may be unfortunate if the task became complicated by the circumstances of a particular situation warranting the use of this section.

Section 13. Further Succession

> **Provision shall be made by law for succession to the office of governor and for an acting governor in the event that the lieutenant governor is unable to succeed to the office or act as governor. No election of a lieutenant governor shall be held except at the time of electing a governor.**

The legislature has provided, pursuant to this section, that after taking office the governor is to appoint a successor to the lieutenant governor "from among the officers who head principal departments of the state government or otherwise," who must be confirmed by a majority of the legislature meeting in joint session (AS 44.19.040). In the event that a vacancy occurs in the office of lieutenant governor, the designated person succeeds to that office. If the regularly elected lieutenant governor succeeds to the office of governor and then vacates that office for some reason, the appointed lieutenant governor becomes acting governor only until a special election is held to elect a new governor and lieutenant governor. (See AS 44.19.044.)

In July 2009, Sarah Palin resigned the office of governor. At the time, she designated a department head to succeed the lieutenant governor, who would become governor. This created confusion, because she had previously designated a successor to the office of lieutenant governor, who had been confirmed by the legislature. The matter was resolved by a compromise that allowed the new appointee to function as "acting lieutenant governor" until he could be confirmed.

Section 14. Title and Authority

> **When the lieutenant governor succeeds to the office of governor, he shall have the title, powers, duties, and emoluments of that office.**

This section removes any ambiguity about the power and role of the person who occupies the position of governor by virtue of permanent succession. In some states a person who succeeds to the office of governor becomes "acting governor" for the remainder of the term, and there have been disputes about the range of his powers.

Section 15. Compensation

> **The compensation of the governor and the lieutenant governor shall be prescribed by law and shall not be diminished during their term of office, unless by general law applying to all salaried officers of the State.**

The legislature may not attempt to pressure the governor or drive him from office by reducing his compensation. A similar provision protects judges (Article IV, Section 13). This protection is a safeguard of the separation of powers. In 2008, the legislature created the Alaska Officers' Compensation Commission with authority to set the salary for legislators, the governor, the lieutenant governor, and the heads of the principal departments, subject to a legislative veto (AS. 39.23.500; see also Article II, Section 7). In 2011, the commission recommended an annual salary for the governor of $145,000 and for the lieutenant governor a salary of $115,000. These recommendations were not rejected by the legislature and became law.

Section 16. Governor's Authority

> **The governor shall be responsible for the faithful execution of the laws. He may, by appropriate court action or proceeding brought in the name of the State, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right by any officer, department, or agency of the State or any of its political subdivisions. This authority shall not be construed to authorize any action or proceeding against the legislature.**

The first sentence is a common provision, derived from the U.S. Constitution, found in virtually every state constitution. The governor must also sign an oath of office to uphold the U.S. and Alaska constitutions (Article XII, Section 5). The second sentence augments the governor's repertoire of powers to assure the faithful execution of the laws. It was first adopted in the 1947 New Jersey constitution, and thereafter it was carried as a recommendation in the *Model State Constitution*. To this day, only Alaska and New Jersey contain such a provision. It authorizes the governor to sue to enforce the constitution and the law, and to restrain state agencies from unconstitutional conduct.

The last sentence bars the governor from suing the legislature. This was made clear in the case *Alaska Legislative Council v. Knowles*, 988 P.2d 604, 1999. Here the governor sued the Legislative Council to seek a judicial determination that a legislative vote to override a veto was untimely under Article II, Section 16 and therefore invalid (see discussion under Article II, Section 16). The Alaska Supreme Court turned away the governor's arguments that he was suing in his own name as head of the executive branch, not in the name of the state, and that he was suing the Legislative Council, an agent of the legislature, not the legislature itself. For the governor to litigate disputes with the legislature

about the constitutionality of its actions, it is now clear that he must do so indirectly, for example, by suing the commissioner whose job it is to enforce the law (as in *State ex rel. Hammond v. Allen*, 625 P.2d 844, 1981), or by failing to enforce the measure altogether and provoking a suit by the legislature (as in *Bradner v. Hammond*, 553 P.2d 1, 1976). There is no constitutional prohibition against the legislature suing the governor.

Section 17. Convening Legislature

> **Whenever the governor considers it in the public interest, he may convene the legislature, either house, or the two houses in joint session.**

It is clear that the governor can use this section to get both houses of the legislature to meet jointly, or to get one or both houses to meet separately, while a session of the legislature is underway. For example, Governor William Sheffield used this authority to call a joint session of the legislature (which was still in regular session) in June 1983 for the purpose of considering the confirmation of his cabinet appointments. As it happened, the joint session was acrimonious; the governor's appointees were confirmed, but only after the senate president compelled the attendance of absent members with the help of the state troopers (see *Kerttula v. Abood,* 686 P.2d 1197, 1984; and *Shultz v. Sundberg*, 759 F.2d 714, 1985).

Not so clear is whether this section is an independent source of power for the governor to convene meetings of the legislature if it is not already in session. Presumably, the governor would use Article II, Section 9 to convene a special session if a regular session had adjourned (note that special sessions are limited to 30 days; no limits are specified here). In 1987, on the 120th day of the regular session, Governor Steve Cowper invoked this section to "convene the Legislature into session" so the two houses could complete work on budget bills (governor's proclamation of May 18, 1987). This had the effect of extending the regular session, although the only explicit authority to extend a regular session is given to the legislature in Article II Section 8. Special sessions have subsequently been called by governors to give the legislature time to finish its work; this section and Article II, Section 9 are cited as authority to do so.

Section 18. Messages to Legislature

> **The governor shall, at the beginning of each session, and may at other times, give the legislature information concerning the affairs of the State and recommend the measures he considers necessary.**

In Alaska, as in most states, the governor is required to address the legislature at the beginning of each session. Here he is authorized to address it at other times as well. While this power is not, on its

face, a substantive one, it enhances the governor's authority because it gives the governor the opportunity to raise public policy issues and initiate debate about them. The governor's message may help set the agenda of the legislature.

The power of the governor to introduce bills in the legislature derives from this provision and from a statute (AS 24.08.060(b)). Letters transmitting bills from the governor to the legislature typically begin with a reference to Article III, Section 18.

Section 19. Military Authority

> **The governor is commander-in-chief of the armed forces of the State. He may call out these forces to execute the laws, suppress or prevent insurrection or lawless violence, or repel invasion. The governor, as provided by law, shall appoint all general and flag officers of the armed forces of the State, subject to confirmation by a majority of the members of the legislature in joint session. He shall appoint and commission all other officers.**

This is a common constitutional provision. It reasserts the subordination of military to civilian power that appears in Article I, Section 20. The governor is commander-in-chief of the armed forces of the state (the Alaska Air National Guard and Army National Guard) when these forces are engaged in activities within the state and not activated by a call to federal service (in which case the governor ceases to have control over them). National Guard units are only nominally state organizations; standards for their training, equipping and organizing, as well as most of their financial support, come from the federal government.

The governor has broad power to use the National Guard to help "execute the laws," including authorizing the National Guard to assist local police in enforcing drug laws (*Wallace v. State*, 933 P.2d 1157, Alaska Ct. App., 1997). Use of the guard under this section must be under all of the constraints of civil law. Backing up the police with National Guard troops in an effort to restore public order, for example, is different from declaring martial law under Section 20.

Section 20. Martial Law

> **The governor may proclaim martial law when the public safety requires it in case of rebellion or actual or imminent invasion. Martial law shall not continue for longer than twenty days without the approval of a majority of the members of the legislature in joint session.**

The right to declare martial law is a basic attribute of sovereignty. Under a declaration of martial law, military authority supersedes normal civil authority, and officers of the militia may take all action that is reasonably necessary to restore public order and civil government. Here the governor of Alaska is authorized to proclaim martial law, but only to suppress rebellion or cope with an actual or imminent invasion. (It is hard to imagine an actual invasion of Alaska that federal military authorities would be content to let state troops repel.) Martial law may not last beyond 20 days without the legislature affirming the urgency of the situation. If the legislature were not in session at the end of the 20 days, the governor would have to convene a special joint session to secure permission to prolong the condition of martial law.

Section 21. Executive Clemency

> **Subject to procedure prescribed by law, the governor may grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures. This power shall not extend to impeachment. A parole system shall be provided by law.**

Granting pardons and reprieves is a traditional executive function. The phrase "subject to procedure prescribed by law" or its functional equivalent is included in many state constitutions to encourage the creation of some kind of public process for the exercise of executive clemency as a safeguard against its abuse for political or other reasons. The New Jersey constitution, for example, provides that "a commission or other body may be established by law to aid and advise the governor in the exercise of executive clemency." The Alaska legislature has not yet prescribed procedures for the governor's use of the clemency power.

Parole is not a form of clemency; it relaxes the requirement of physical confinement for the duration of a sentence, but it does not commute or curtail the sentence itself. The Alaska legislature has provided a detailed system of parole that includes a parole board (see AS 33.16).

Section 22. Executive Branch

> **All executive and administrative offices, departments, and agencies of the state government and their respective functions, powers, and duties shall be allocated by law among and within not more than twenty principal departments, so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may be established by law and need not be allocated within a principal department.**

Limiting the number of executive departments to 20 expresses the constitutional objective of keeping the executive branch streamlined, efficient, and manageable. It reflects modern notions of efficient management, such as the desirability of integrating all administrative units engaged in essentially the same activity, and giving administrators relatively few direct subordinates. A restriction on the executive branch to 20 principal departments was recommended in the *Model State Constitution* and had already been incorporated into several constitutions at the time of Alaska's constitutional convention. This version follows closely that found in the New Jersey constitution.

Most state constitutions create a number of specific executive offices (such as state treasurer, auditor or comptroller, attorney general, commissioner of land, insurance commissioner, superintendent of public instruction, and others) and impose directly or indirectly a basic organizational scheme on the executive branch. Except for the mandate to create an agency for local government affairs (see Article X**,** Section 14), Alaska's constitution leaves the organization of the executive branch to the discretion of the legislature, with the sole limitation that there be no more than 20 principal departments. Alaska presently has 14 principal departments (excluding the office of the governor), and has never had more than 15 at one time.

Section 23. Reorganization

> **The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.**

This provision bolsters the governor's management powers by simplifying the task of altering the organization of the executive branch. It does not apply to the organization of the legislative or judicial branches. The organization of the executive branch is a legislative function, and without this provision, the governor would be required to introduce a bill to accomplish any organizational objectives. A bill would require the expenditure of time and political resources; it would require a majority vote in both houses; and in the end it might not be entirely to the governor's liking. While the procedure in this section does not guarantee success, it definitely biases the outcome in favor of the governor's plan.

Use of the executive order to restructure the administrative system, subject to the legislature's review, was first adopted by Congress in the Reorganization Act of 1932. It became a popular modernization reform in the states thereafter. Today, most governors and the U.S. president possess it, as a matter of

either constitutional or statutory law. Changes to those aspects of executive agency structure and organization that are not set in statute do not require the use of this procedure by the governor.

Apart from the legislature's power to confirm certain executive appointments (Section 25), this is one of two authorizations of the "legislative veto" in Alaska's constitution; the other is in Article X**,** Section 12 regarding decisions of the local boundary commission (note also the legislature's power over court rules in Article IV, Section 15). Exercise of the legislative veto is easier here than under Article X, Section 12, because the vote occurs in joint session (that is, 31 legislators are required to disapprove an executive reorganization, rather than the 11 senators and 21 representatives required to disapprove a boundary change). The State Officers Compensation Commission, whose recommendations become law unless rejected by the legislature, is an example of a statutory legislative veto (AS 39.23.500).

Section 24. Supervision

> **Each principal department shall be under the supervision of the governor.**

This short, unadorned sentence gives the governor unambiguous supervisory power over the agencies of the executive branch. A corollary of this provision is that the governor is answerable for the actions of his subordinates. Accountability of the governor is greatly diminished in those states with "plural executives," that is, those with directly elected department heads and commissioners.

Section 25. Department Heads

> **The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state. The heads of all principal departments shall be citizens of the United States.**

Here is elaboration of the streamlined design of the executive branch, with administrative authority concentrated in the hands of the governor. The first sentence enunciates the principle that departments should be headed by one person, rather than by a board or commission, in order to facilitate efficient decision making, administration and agency accountability, yet it leaves the way open for a commission rather than an individual to head a department with the phrase "unless otherwise provided by law." A board of education had run the territorial schools since 1917, and the Alaska territorial fisheries board had been in place since 1949, so the delegates to the constitutional convention recognized a certain political inevitability about the continuation of at least these two

boards after statehood. Rather than sort through the contentious issues of which departments should be run by boards with what membership and formal powers, and fix these matters in constitutional concrete, the delegates left them to the legislature.

Immediately after statehood, the legislature created a board of education (now the board of education and early development) within the department of education, and a board of fish and game (now two separate boards) within the department of fish and game. These boards had certain policy oversight and rule-making authority, but they were explicitly denied "administrative, budgeting, or fiscal" powers, which were assigned to the respective commissioners (ch 64 SLA 1959). In 1967, the powers of the board of education were expanded, and it was formally elevated to head of the department of education (ch 96 SLA 1967; see AS 14.07.075). It is the only board that currently serves as the head of a principal department.

A proposal made unsuccessfully at the convention, and one that surfaces from time to time as a possible constitutional amendment, is to require that the attorney general be popularly elected. (The attorney general is appointed by the governor in only a few other states.) Because the attorney general advises the governor on legal matters, it is thought by some that political independence from the governor would result in a more objective legal perspective. The rejection of this idea by successive legislatures continues to reaffirm the constitutional ideal of an appointed, hierarchical, accountable executive organization.

The governor's department heads must be confirmed by a majority of votes in a joint session of the legislature. Confirmation of executive appointees is a key legislative check on the executive branch. Typically, state constitutions assign the task to the senate only, as does the U.S. Constitution. In Alaska, there was a territorial tradition of confirming executive appointments in joint session (see, for example, ch 68 SLA 1949), and this was carried over in the state constitution.

The legislature may not require that other appointees also be confirmed. It attempted to do so in 1975 by a law asserting authority to confirm appointments to positions of deputy commissioner and division director. The governor did not submit these appointments to the legislature and the legislature sued. The supreme court ruled against the legislature (*Bradner v. Hammond*, 553 P.2d 1, 1976). It said that the power to confirm did not extend beyond the express limits of the constitution and that the legislature's action violated the principle of separation of powers. Thus rebuffed, the legislature in 1980 placed a proposed constitutional amendment before the voters that would give the legislature explicit authority to determine which executive appointees would be subject to confirmation. The amendment failed to be ratified by the voters.

Section 24 specifies that each department is supervised by the governor, and, by making the tenure of department heads dependent upon "the pleasure of the governor," the present section gives the governor the means to make that supervision effective. In removing a department head, the governor does not, for example, have to show cause (such as incompetence, neglect of duty, or moral turpitude)

or provide a public hearing, nor may the legislature impose conditions on the removal of department heads. (However, it may do so on the removal of certain commission members, as authorized in Section 26.)

Department heads (and commission members covered by Section 26) must be citizens of the United States, but they do not have to be residents of Alaska. After acrimonious debate, the delegates removed a durational residency requirement from the qualifications for department head on the grounds that a governor should be allowed to search for administrative talent outside Alaska if necessary. This section and Section 26 are patterned on the New Jersey constitution (Article V, Section 4 (2) and (4)). Provisions in the Hawaii constitution are also similar (Article V, Section 6).

The appearance of "secretary of state" in this section rather than lieutenant governor has no significance: it is the result of an oversight at the time a constitutional amendment changed the title of the position.

Section 26. Boards and Commissions

> **When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.**

This section governs the appointment and removal of members of two classes of boards and commissions: those that are head of a principal department, of which there is only one—the board of education and early development—and those that are head of a "regulatory or quasi-judicial agency." Among the latter are regulatory boards such as the Regulatory Commission of Alaska and the numerous occupational licensing boards, such as the Alaska State Medical Board. Excluded are the many advisory boards (such as the Recreation Rivers Advisory Board) and the public corporations of the state (such as the Alaska Permanent Fund Corporation, the Alaska Housing Finance Corporation, the Alaska Railroad Corporation, and the Alaska Industrial Development and Export Authority).

With regard to the members of boards within the purview of this section (so-called "Section 26 boards"), the governor has the power to appoint and the legislature the power to confirm. However, these members may or may not serve at the pleasure of the governor, for the legislature is given the power to establish conditions for the removal of board members. Thus, in the case of the state board of education and early development, for example, the law provides that the members serve at the

pleasure of the governor. But in the case of the boards of fish and game, for example, the law restricts the governor's power of removal to cases of "inefficiency, neglect of duty, or misconduct in office."

This section is silent about the boards of public corporations and advisory boards. The governor appoints the members of these boards; their names are not submitted to the legislature for confirmation; and they serve at the pleasure of the governor. A constitutional amendment appeared on the 2000 general election ballot that would have required legislative confirmation of appointees to all public corporations of the state "that manage significant state assets" (except the Permanent Fund Corporation), but it was defeated.

The governor must approve the choice of a principal executive officer made by a Section 26 board—that is, the commissioner of education and early development, and the executive directors of various regulatory and quasi-judicial boards. (Because members of the board of education and early development serve at the pleasure of the governor, their choice of commissioner may simply be the person the governor wants in the position.)

Although it is part of the executive branch, the University of Alaska is neither a principal department nor a regulatory or quasi-judicial agency, and therefore these provisions pertaining to the removal of board members (regents) and selection of the principal executive officer (the president of the university) do not apply to it. However, similar appointment and confirmation provisions apply to the regents in a separate provision of the constitution (Article VII, Section 3).

In addition to the board of regents, the constitution creates four other boards and commissions: the judicial council (Article IV, Section 8), the commission on judicial conduct (Article IV, Section 10), the redistricting board (Article VI, Section 8), and the local boundary commission (Article X**,** Section 12).

Section 27. Recess Appointments

> **The governor may make appointments to fill vacancies occurring during a recess of the legislature, in offices requiring confirmation by the legislature. The duration of such appointments shall be prescribed by law.**

Underlying the attention to "recess appointments" in this section and in other state constitutions is a suspicion that the governor will attempt to circumvent the confirmation power of the legislature by making appointments when the legislature is not in session and cannot reject them. AS 39.05.070, first adopted by the territorial legislature of Alaska in 1955, states: "It is the purpose of [these statutes] to provide procedural uniformity in the exercise of appointive powers conferred by the legislature to eliminate, insofar as possible, recess or interim appointments except in the event of

death, resignation, inability to act or other removal from office and the exercise, insofar as possible, of appointive powers only when the legislature is in session."

This section permits recess appointments, but the legislature may limit their duration. Prior to 1996, Alaska Statute 39.05.080 did not limit the term of office of a recess appointee, but it required the governor to submit to the legislature the names of all appointments requiring confirmations within 30 days after the convening of the session. In 1994, outgoing Governor Hickel made an appointment to a seat on the Alaska Public Utilities Commission (now the Regulatory Commission of Alaska), but did not send the name to the legislature for confirmation because the legislature was not in session. The person assumed office. Incoming Governor Knowles preferred another person in the position. He told the appointed person to resign, and made another appointment. He declared that because he did not send the name of Hickel's appointee to the legislature for confirmation, the appointment was invalid. But the legislature confirmed him and other last minute appointees by Governor Hickel on its own initiative. Hickel's appointee refused to vacate his seat, and the attorney general sued. The Alaska Supreme Court ruled in favor the appointee, saying that once a person has been appointed to an office and assumes the powers of that office, the governor's role in the appointment process is complete. The validity of an appointment does not hinge on submission of the name to the legislature, and the legislature's power of confirmation is not contingent upon the governor submitting names to it (*Cook v. Botelho*, 921 P.2d 1126, 1996).

In the aftermath of this dispute, the legislature extensively revised AS 39.05.080 to limit the terms of recess appointees, to deal with the problem of unconfirmed recess appointees carrying over from the end of one governor's term to the beginning of another's, and to clarify the procedures for presenting names to the legislature for confirmation. It also prohibits the governor from appointing during the recess a person rejected for confirmation by the legislature.

ARTICLE IV

THE JUDICIARY

Alaska's judiciary article, like the legislative and executive articles, is short, flexible and incorporates modern constitutional concepts. It creates a unified court system with centralized administration; it provides for merit selection of judges; it balances the need for judicial independence with the need for judicial accountability to the people; and it allows the legislature to expand the court system to keep pace with a growing state.

Alaska's court system is efficient when compared to many others because it is unified. This means that all of the courts are part of a single state system. They are administered from one place, they all operate under the same rules, and they are all financed by the state legislature. We recognize this type of organization in the federal courts. Indeed, Alaska's judicial experience until statehood in 1959 was with the federal court system. In many states, the court system is fragmented into municipal courts, courts of special jurisdictions, county courts and state appellate courts, each with its own peculiar jurisdiction, its own rules and procedures, its own administration and its own source of funding. Also, in many states, legislative power to create new courts or modify the jurisdiction of constitutional courts is restricted or ambiguous. Judicial reforms long sought in these older states are embodied in Alaska's constitution.

Alaska's system of merit selection for judges seeks to produce a competent and independent judiciary. Article IV requires that judges be appointed by the governor from a list of nominees recommended by an independent body, the judicial council, described in Section 8 below. Thus, judgeships are not spoils of office. Also, judges are not elected. The convention delegates had no confidence in the electoral process to produce qualified judges. Appointed judges do not need to worry about how their decisions will affect their immediate chances of re-election, nor do they need to finance expensive campaigns from donations by private interests (including attorneys who appear before them).

Accountability of appointed judges to the people is provided by periodic "retention elections" in which judges stand before the electorate on their own records, without party labels. The question before the voters is simply whether a particular judge should remain in office. Retention elections for a judge occur at the first general election three years after the judge is appointed (except in the case of district court judges, where it is the first general election one year after appointment) and at four, six, eight, and ten-year intervals thereafter, depending on the court level. A judge can be impeached by

the legislature for "malfeasance or misfeasance" in the performance of duties. A judge can be removed from the bench by the supreme court, after a review by the council on judicial conduct, for mental or physical incapacitation or breach of ethics. However, a judge may not be recalled by the voters (see Article XI, Section 8).

Article IV is flexible because it specifies only the rudimentary structure of the court system and gives the legislature wide latitude to expand and shape the system to meet the needs of the state. The delegates created only two constitutional courts—the superior court (a trial court of general jurisdiction) and the supreme court (an appellate court). Unlike the supreme court, which is a single body with all of the justices sitting together to hear cases, the superior court has many judges in each of the four judicial districts of the state who hear cases sitting alone. At the time, a more elaborate (and more costly) structure was unnecessary. Yet the delegates anticipated the future by authorizing the legislature to expand the court system by adding judges and creating new courts.

These progressive features of Article IV, notably the unified court system and merit selection of judges, did not debut with the Alaska constitution. New Jersey pioneered the unified court system in its 1947 constitution, and Missouri initiated the merit selection of judges in its 1946 constitution. Yet Alaska's judiciary article is notable because it incorporated so many of the innovations hailed by constitutional reformers of the day. Many states have embraced these judiciary reforms in the years since Alaska's constitution was written.

Article IV has been amended five times, but only for fine-tuning. The basic features of the article have proven workable and remain unaltered. Today, Alaska's judiciary system is recognized nationally as one of the best in the United States.

Section 1. Judicial Power and Jurisdiction

> **The judicial power of the State is vested in a supreme court, a superior court and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.**

This section vests the judicial power of the state in the court system and creates the basic structure of that system. It consists of the superior court, which is a trial court, and the supreme court, which hears appeals from the trial court. This section also authorizes the legislature to create additional courts. The legislature has created the district court, which is another trial court that relieves the superior court of hearing lesser criminal and civil matters. It has also created the court of appeals for criminal cases, an intermediate appellate court that helps reduce the number of criminal appeals reaching the supreme court. Alaska's constitution gives to the legislature the task of prescribing the jurisdiction of the various courts, and in this respect it is not unusual, except perhaps in the clarity of its directive.

Importantly, this section also specifies that Alaska's court system is to be unified. Thus, any courts the legislature may create must be administered by the supreme court as part of a centralized state judicial system.

Judicial districts are commonly established in constitutions, but the delegates preferred to leave this matter to the legislature so districts could be easily modified from time to time with changing administrative needs of the judicial system. During territorial days, the federal courts were organized in four judicial districts—District One, southeast Alaska; District Two, northwest Alaska; District Three, southcentral Alaska; and District Four, interior Alaska. The legislature has adopted these four districts for the organization of the state judicial system (see AS 22.10.010 for the boundaries of each district).

The Alaska Supreme Court has declared that this section confers upon it certain inherent rule-making authority distinct from the rule-making authority granted in Section 15. It has said, for example, that it has exclusive power to regulate the practice of law in the state, and statutes dealing with this subject are an unconstitutional invasion of the judicial branch of government (see for example, *Citizens Coalition for Tort Reform v. McAlpine*, 810 P.2d 162, 1991.)

Section 2. Supreme Court

> **(a) The supreme court shall be the highest court of the State, with final appellate jurisdiction. It shall consist of three justices, one of whom is chief justice. The number of justices may be increased by law upon the request of the supreme court.**
>
> **(b) The chief justice shall be selected from among the justices of the supreme court by a majority vote of the justices. His term of office as chief justice is three years. A justice may serve more than one term as chief justice but he may not serve consecutive terms in that office**

Paragraph (a) of this section creates the "court of last resort" in the state judicial system. It sets the number of supreme court justices at three, but allows the legislature to increase that number "upon the request of the supreme court." This proviso (modeled on a similar proviso in Puerto Rico's constitution) was included to prevent the legislature from "packing" the supreme court with new justices as a means of changing a prevailing interpretation of the law. At the request of the court, the legislature expanded the number of justices to five in 1967 (16 other state supreme courts have five justices, 26 have seven justices, and seven have nine justices).

Paragraph (b) was added by amendment in 1970. Notice that paragraph (a) is silent on how the chief justice is to be selected. Prior to the 1970 amendment, the governor designated the chief justice. The

change followed a bitter conflict during the late 1960s between the court and the state bar association over the chief justice's exercise of his administrative prerogatives. The amendment was designed to prevent the accumulation of excessive power by one justice and to make the chief justice accountable to the other members of the court.

This section is, comparatively speaking, simple and terse. Absent are a number of provisions found in other constitutions pertaining to the supreme court, such as authorization to render advisory opinions at the request of the governor or legislature; a requirement for a supermajority vote to declare a legislative act unconstitutional; formal authorization to exercise the power of judicial review (i.e., to scrutinize the constitutionality of acts of the other branches of government); permission for "divisions" of the court (panels of fewer justices than the full bench) to hear and render decisions on cases; assignment of original jurisdiction to the court in certain cases (legislative redistricting cases, for example); or a requirement for broad geographical representation on the court.

Section 3. Superior Court

> **The superior court shall be the trial court of general jurisdiction and shall consist of five judges. The number of judges may be changed by law.**

The superior court is the trial court with original jurisdiction over all civil and criminal matters. To facilitate the work of the court, particularly in small communities without a superior court judge, the legislature immediately after statehood established a set of lower trial courts called district magistrate courts. Deputy magistrates were authorized to assist district magistrates by serving primarily in outlying areas. In 1966, the magistrate courts became the district courts of the present day, and deputy district magistrates became today's magistrates. (The history of the district court and the role of magistrates are discussed in *Buckalew v. Holloway*, 604 P.2d 240, 1979.) Thus, there are now two trial courts, the superior court and the district court.

The superior court deals with serious criminal offenses (felonies) and civil cases involving claims for recovery of money or damages in excess of $100,000. It hears cases on appeal from the district court, and it handles family and juvenile matters. The district court hears minor criminal cases (misdemeanors), violations of municipal ordinances, and civil cases involving sums less than $100,000. Magistrates are appointed by and serve at the pleasure of the presiding superior court judge in each district. They assist primarily, but not exclusively, in outlying areas with routine district court matters such as issuing marriage licenses, summons, and search and arrest warrants; setting bail; and solemnizing marriages.

Each superior and district court judge, and each magistrate, is assigned to one of the four judicial districts. One superior court judge in each district is designated presiding judge to coordinate

administrative matters. There are 40 superior court judgeships throughout Alaska, and 21 district court judgeships (2012).

Section 4. Qualifications of Justices and Judges

> **Supreme court justices and superior court judges shall be citizens of the United States and of the State, licensed to practice law in the State, and possessing any additional qualifications prescribed by law. Judges of other courts shall be selected in a manner, for terms, and with qualifications prescribed by law.**

The legislature has required that, in addition to meeting these minimum qualifications, supreme court justices and superior court judges must have been residents of the state for three years immediately preceding their appointment and engaged in the active practice of law for eight and five years respectively prior to their appointment (AS 22.05.070 and AS 22.10.090). Court of appeals and district court judges must meet the same minimum qualifications and must have been in the active practice of law for eight and three years, respectively (AS 22.07.040 and AS 22.15.160(a)). Magistrates, however, do not have to be licensed lawyers, and they need to be residents of the state only six months prior to being appointed (AS 22.15.160(b)).

Section 5. Nomination and Appointment

> **The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council.**

A variety of methods are used to select judges in the states. Indeed, a variety of methods may be used to select judges of the different courts within the same state. Some judges are elected by the voters on either a partisan or nonpartisan basis; others are appointed, either by the legislature, the judiciary or, more commonly, the governor. The trend is toward appointment as a method of selection, coupled with the use of an impartial body that screens applicants on the basis of their qualifications. In Alaska, this screening body is titled the judicial council. The judicial council evaluates candidates for judgeships and submits several nominees to the governor who makes the final appointment. In other states, the legislature may confirm the governor's appointments. (In Connecticut, the legislature does the appointing from the list of nominees, and in California appellate court judges are appointed by the governor and confirmed by the commission on judicial appointment.)

Alaska was one of the early states to adopt this merit selection method of appointment by the governor from a list of nominees submitted by an independent body which evaluates the qualification of applicants. When a judicial vacancy occurs, the Alaska Judicial Council receives applications from

those interested in filling the position. It then evaluates the candidates on the basis of information derived from a poll of the bar association, letters of reference, background investigations, public hearings and interviews. The council must forward at least two names to the governor; frequently it sends more than two (on one occasion it sent nine names to the governor for a single vacancy).

The legislature has provided for judgeships in the two statutory courts (the district court and court of appeals) to be filled by this method too, although the constitution does not require it (AS 22.07.070 and AS 22.15.170). The legislature has also directed the judicial council to evaluate candidates for the state public defender's office (AS 18.85.050). Composition of the judicial council is specified in Section 8 of this article, and other duties are assigned to it in Section 9.

Section 6. Approval or Rejection

> **Each supreme court justice and superior court judge shall, in the manner provided by law, be subject to approval or rejection on a nonpartisan ballot at the first general election held more than three years after his appointment. Thereafter, each supreme court justice shall be subject to approval or rejection in a like manner every tenth year, and each superior court judge, every sixth year.**

The merit selection method of filling judgeships is usually coupled with the retention election procedure outlined here. Under this procedure, the voters may remove a judge they believe is unfit for office, but, because the judge's name appears on the ballot only at certain intervals, it does not allow them to sweep away a judge on a sudden whim or impulse, and it gives a new judge time to establish a record which can be fairly evaluated. Thus, the retention election is designed to balance the need for judicial independence with the need for public accountability.

Only rarely are judges rejected at the polls (five as of 2010), and the vote in favor of retention is usually between 60 and 75 percent of the total. This is evidence of the generally high caliber of Alaska's judges. It must be noted, however, that the form of the retention elections tends to encourage a yes vote: there is no opposing candidate to the judge standing for election; the judge is nonpartisan; and he or she has the advantage of already being in office.

Recognizing that the public may have difficulty assessing a judge's performance, and mindful of the vulnerability of judges to last-minute smear campaigns, the legislature in 1975 directed the judicial council to evaluate judges standing for retention election and publish the results prior to the election. Several judges have been retained by the voters despite being deemed unqualified by the judicial council, but those rejected by the voters after 1975 had all been deemed unqualified by the council. Prior to the judicial council making recommendations on retention, one judge was rejected by the

voters—a supreme court justice in 1964. The process used by the council since 1975 to evaluate judges is described in the commentary on Section 9.

By statute, judges of the district court and court of appeals are also evaluated by the judicial council prior to their retention election. Only supreme court justices and judges of the court of appeals stand for retention on a statewide basis. Superior and district court judges stand in the judicial district they serve.

The date of a judge's "appointment" is the day the governor makes the appointment rather than the day the judge is installed in office. (See *State, Division of Elections v. Johnstone,* 669 P.2d 537, 1983.)

Section 7. Vacancy

> **The office of any supreme court justice or superior court judge becomes vacant ninety days after the election at which he is rejected by a majority of those voting on the question, or for which he fails to file his declaration of candidacy to succeed himself.**

This section is intended to give a judge leaving office sufficient time to wind up judicial business in an orderly manner and to minimize transition time by allowing the process for appointing a successor to commence in advance of the vacancy.

Section 8. Judicial Council

> **The judicial council shall consist of seven members. Three attorney members shall be appointed for six-year terms by the governing body of the organized state bar. Three non-attorney members shall be appointed for six-year terms by the governor subject to confirmation by a majority of the members of the legislature in joint session. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration to area representation and without regard to political affiliation. The chief of the supreme court shall be ex-officio the seventh member and chairman of the judicial council. No member of the judicial council, except the chief justice, may hold any other office or position of profit under the United States or the State. The judicial council shall act by concurrence of four or more members and according to rules which it adopts.**

Among the states with an independent commission for nominating candidates for judgeships, Alaska is unusual because it has only one such body with responsibility for all appellate and trial courts in the state. In other states, each judicial district is likely to have its own nominating commission for judges who serve that district, and a separate statewide commission that nominates candidates exclusively for statewide appellate court vacancies. While Alaska has only one judicial council for all courts and all districts, its members are to be appointed "with due consideration to area representation."

The composition of the Alaska judicial council—seven members, three of whom are attorneys and three of whom are not attorneys, with the chief justice an ex-officio member and chairman—is similar to that of the statewide commissions in other states. However, in other states the balance is likely to be in favor of lay members rather than lawyers (in Hawaii and Arizona, for example, no more than four of the nine members may be attorneys). Also in other states, all appointees require legislative confirmation; in Alaska, only the lay members appointed by the governor must be confirmed. The privileged role of the state bar association in selecting members of the council, and therefore members of the judiciary, was challenged unsuccessfully in 2009 in federal court as a violation of the U.S. Constitution.

To emphasize the nonpartisan character of the judicial council, this section requires that appointments be made "without regard to political affiliation," although this seems to be a standard that would be difficult to enforce.

The prohibition against "dual office holding" is to avoid conflicts of interest on the part of members (see the commentary under Article II, Section 5).

Section 9. Additional Duties

> **The judicial council shall conduct studies for improvement of the administration of justice, and make reports and recommendations to the supreme court and to the legislature at intervals of not more than two years. The judicial council shall perform other duties assigned by law.**

The primary constitutional duty of the judicial council is to screen applicants for supreme court and superior court vacancies and nominate qualified candidates for appointment by the governor (Section 5). This section gives it the additional duty of studying the judicial system and recommending improvements. Thus, for example, the judicial council has studied such matters as plea-bargaining, bail, sentencing, and use of the grand jury. These studies and recommendations are described in the biennial reports to the legislature and supreme court required by this section.

In addition, this section authorizes the legislature to assign other tasks to the judicial council. The legislature has charged the council with the task of screening applicants for vacancies in the district

court and court of appeals, as well as applicants for the state public defender's office. The main duty assigned to the council by the legislature, however, is that of publicly evaluating the performance of judges prior to their retention elections. (Retention elections are required by Section 6, above.)

To evaluate the fitness of judges for retention, the council surveys attorneys, police officers, probation officers, jurors, social workers, and court employees; it studies decisions of the judge and pertinent court records; and it solicits citizens' opinions through public hearings and other means. The council must publicize the results of its evaluations at least 60 days before the retention election. It does so by publishing them in newspapers around the state and in the official election pamphlet distributed to voters by the division of elections.

At the request of the supreme court, the judicial council also evaluates the performance of *pro tempore* judges (retired judges working under special assignments from the supreme court).

Section 10. Commission on Judicial Conduct

> **The Commission on Judicial Conduct shall consist of nine members, as follows: three persons who are justices or judges of state courts, elected by the justices and judges of state courts; three members who have practiced law in this state for ten years, appointed by the governor from nominations made by the governing body of the organized bar and subject to confirmation by a majority of the members of the legislature in joint session; and three persons who are not judges, retired judges, or members of the state bar, appointed by the governor and subject to confirmation by a majority of the members of the legislature in joint session. In addition to being subject to impeachment under Section 12 of this article, a justice or judge may be disqualified from acting as such and may be suspended, removed from office, retired, or censured by the supreme court upon the recommendation of the commission. The powers and duties of the commission and the bases for judicial disqualification shall be established by law.**

The purpose of this section is to provide an alternative to impeachment for removing a judge from the bench. Impeachment is a cumbersome process; furthermore, it is available only in the case of "malfeasance or misfeasance," which must be proved. It has taken two amendments to this section, however, to develop a satisfactory mechanism for removing or disciplining a judge.

Originally, this section set out a procedure for removing a judge for being incapacitated but not for misconduct. According to the original procedure, the judicial council could certify to the governor that a supreme court justice was incapacitated, whereupon the governor would appoint a three-member board to review the matter and decide whether to recommend to the governor that the justice

should be removed from office. With regard to judges of other courts, the judicial council could recommend early retirement to the supreme court, which was authorized to force a judge into retirement. This provision was similar to one in the 1950 Hawaii constitution.

On one occasion (in 1962), the judicial council used the original procedure to remove a judge. It became apparent, however, that the issues of judicial ethics and propriety were a greater threat to the integrity and public esteem of the judiciary than the infrequent problem of a mentally or physically impaired judge who refused to resign. Thus, the judicial council recommended that the legislature establish a separate commission with broad authority to investigate allegations of judicial misconduct, as well as incapacity, and to recommend disciplinary action. Council members had studied the California commission on judicial performance as a model for such a body. The council's recommendation led to a constitutional amendment in 1968 that created a nine-member commission on judicial qualifications.

In 1982, a second amendment changed the name of the body to the commission on judicial conduct to lessen public confusion about the respective roles of this commission and the judicial council. It also modified the composition of the body by reducing the number of judges from five to three, and increasing the number of lawyers from two to three and lay members from two to three.

The Alaska Commission on Judicial Conduct may investigate charges of disability as well as charges of unethical or improper behavior (such as showing bias or personal favoritism from the bench); it may not evaluate the quality or correctness of judicial decisions, or the general skill and competence of judges. The commission's authority is limited to making recommendations to the supreme court, which independently decides if suspension, censure or removal from office is appropriate (see *In re Robson*, 500 P.2d 657, 1972). Statutory provisions giving the commission authority to reprimand a judge were declared unconstitutional (*In re Inquiry Concerning a Judge*, 762 P.2d 1292, 1988).

As is the case with other boards overseeing professional licensing and standards, relatively few complaints filed with the commission eventually result in a public recommendation for disciplinary action. Nonetheless, the existence of the commission doubtless makes for a more circumspect judiciary.

Section 11. Retirement

> **Justices and judges shall be retired at the age of seventy except as provided in this article. The basis and amount of retirement pay shall be prescribed by law. Retired judges shall render no further service on the bench except for special assignments as provided by court rule.**

Unlike federal judges who are appointed for life (and who do not face periodic retention elections), state judges must retire at age 70. Mandatory retirement of state judges at 70 is common (two-thirds of the states provide for it, either by constitution or statute). It is considered necessary to prevent the possibility of a person of failing powers remaining on the bench, and it creates the opportunity for the infusion of new talent in the judiciary. On the other hand, it deprives the state of the services of experienced judges who remain intellectually vigorous after their seventieth birthday. Thus, after debating the matter, the framers of Alaska's constitution adopted mandatory retirement but left the door open for the supreme court to call on retired judges for ad hoc assignments (so-called *pro tempore* service).

Section 12. Impeachment

> **Impeachment of any justice or judge for malfeasance or misfeasance in the performance of his official duties shall be according to procedure prescribed for civil officers.**

Most constitutions provide for the removal of justices and judges by impeachment. However, it is a cumbersome and archaic procedure that is seldom used. It has not yet been used in Alaska. Therefore, alternative procedures for removal of judges for incapacity or misconduct, such as those found in Section 10, are common (and becoming more so). Judges are not subject to recall in Alaska (Article XI, Section 8). Alaska's impeachment procedure is described in Article II, Section 20.

Section 13. Compensation

> **Justices, judges, and members of the judicial council and the Commission on Judicial Qualifications shall receive compensation as prescribed by law. Compensation of justices and judges shall not be diminished during their terms of office, unless by general law applying to all salaried officers of the State.**

The first sentence in this section was amended in 1968 by adding the words "and the Commission on Judicial Qualifications." The amendment in 1982 that changed the name of the commission on judicial qualifications to the commission on judicial conduct inadvertently omitted express mention of this section, therefore the old name still appears here. Judges and justices receive salaries set by statute. However, the legislature has decided not to compensate members of the judicial council and the commission on judicial conduct for their service on these bodies. They receive only travel expenses and an allowance for living expenses while attending meetings. The prohibition in the second sentence of this section against reducing the salaries of judges in office is a means of safeguarding the independence of the judiciary. This and identical protection for the governor and

lieutenant governor in Article III, Section 15 help protect the integrity of the three branches of government.

Section 14. Restrictions

> **Supreme court justices and superior court judges while holding office may not practice law, hold office in a political party, or hold any other office or position of profit under the United States, the State, or its political subdivisions. Any supreme court justice or superior court judge filing for another elective public office forfeits his judicial position.**

This prohibition on dual office holding serves the same purposes as similar prohibitions that apply to legislators and the governor: it prevents conflicts of interest, concentrations of power and violations of the separation of powers (see Article II, Section 5). The additional prohibition here against holding office in a political party is intended to reinforce the nonpartisan character of the judiciary. Article II, Section 5, which prohibits dual office holding on the part of legislators, exempts employment by or election to a constitutional convention. No such exemptions appear in this section. This provision required a state judge to resign his position as a regent of the University of Alaska (1976 Informal Opinion Attorney General, December 27).

Section 15. Rule-making Power

> **The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.**

By granting the supreme court authority to make administrative and procedural rules, this section promotes the unity and operational efficiency of the entire court system. At the time of Alaska's constitutional convention, the American Bar Association strongly recommended a provision of this kind; and vesting the supreme court with the power to issue rules for all state courts continues to be urged as a desirable constitutional reform in states with balkanized court systems.

While other state constitutions also grant rule-making power to the supreme court, this provision is noteworthy because it allows the legislature to *amend* the rules governing practice and procedure by a two-thirds vote of each house. Florida has a similar provision, but there the legislature may only *repeal* a court rule by a two-thirds vote of each house. This provision is one of the important "checks and balances" of our governmental system, in this case a legislative check on the judicial branch. The

legislature cannot adopt court rules on its own initiative, but only change rules made by the court (the substance of this distinction might be difficult to find in practical circumstances, however). The court has said that adopting a law containing a provision that inadvertently changes a court rule is not a proper exercise of the authority granted to the legislature in this section *(Leege v. Martin*, 379 P.2d 447, 1963).

With the aim of discouraging public interest law suits against the state, the legislature in 2003 adopted a law that exposed public interest litigants to an assessment of the defendant's legal costs in cases when the defendant prevailed in court. This law affected the "public interest exception" to a rule of civil procedure that normally allowed partial costs to be awarded to the prevailing party. Litigation ensued, in which a Native village, several environmental organizations, and some labor unions argued that the legislature did not adopt the measure by a two-thirds majority vote and it was therefore invalid because the constitution requires a supermajority vote to change court rules. Reversing a lower court decision, the Alaska Supreme Court said that the measure changed a matter of substantive law, not procedure, and the legislature needed only a majority vote to do so (*State v. Native Village of Nunapitchuk*, 156 P.3d 389, 2007).

While this section says that court rules governing practice and procedure in both civil and criminal cases may be amended by the legislature by two-thirds vote, there are some basic rules governing the internal working of the courts that are an exercise of the inherent powers of the judicial system as a separate branch of government, and they are therefore presumably not subject to review by the legislature. The court has said that Section 1 of this article confers some exclusive rule-making authority (see, for example, *Application of Park*, 484 P.2d 690, 1971; and *Citizens Coalition for Tort Reform v. McAlpine*, 810 P.2d 162, 1991).

Section 16. Court Administration

> **The chief justice of the supreme court shall be the administrative head of all courts. He may assign judges from one court or division thereof to another for temporary service. The chief justice shall, with the approval of the supreme court, appoint an administrative director to serve at the pleasure of the supreme court and to supervise the administrative operations of the judicial system.**

The first sentence of this section further unifies the court system by centralizing its administration in the chief justice of the supreme court. It follows the 1947 New Jersey Constitution and the recommendation of the *Model State Constitution*. Many states now have comparable provisions. The second sentence allows the chief justice to cope with backlogs, equalize workloads and otherwise expedite the operation of the court system by temporarily assigning judges from one court to another and from one location to another.

Article IV

Responsibility for day-to-day administration of the court system falls to a professional court administrator who answers to the entire supreme court. Indeed, this was the subject of a 1970 amendment. Originally, the court administrator was hired with the approval of the entire court but served at the pleasure of the chief justice. The 1970 amendment made the administrator responsible to the entire court. The change sought to dilute the power of the chief justice; like the amendment of Section 2, it was an outgrowth of conflicts over the exercise of power by the first chief justice under the original constitutional provisions.

ARTICLE V

SUFFRAGE AND ELECTIONS

Article V deals with voting and elections. Suffrage means the right to vote or the exercise of the right to vote. The most important functions of Article V are to establish the qualifications for voting, to guarantee the right to vote by all who meet those qualifications (including the right to vote an absentee ballot), and to safeguard the sanctity of secret elections.

Elections are largely governed by state law. This is true even of federal elections (indeed, there are no federal elections as such, only state elections to fill federal offices). The U.S. Constitution does not directly address the matter of qualifications for voting or the conduct of state elections. Nonetheless, amendments to the U.S. Constitution over the years and federal voting rights legislation have now established strict guidelines for the states to follow in these matters.

The first section of Article V of Alaska's constitution, which establishes the qualifications to vote in Alaska, has been amended four times. These amendments have liberalized the qualifications for voting by authorizing the legislature to relax residency requirements for participants in presidential elections, lowering the voting age from 19 to 18, eliminating the literacy test and reducing residency requirements from one year to 30 days. These changes parallel efforts nationally to remove impediments to voting in order to reverse the steady decline in voter turnout and to enfranchise members of minority groups who have been systematically excluded from voting.

The two suffrage issues which generated the most controversy at the constitutional convention are now moot: the minimum voting age and a literacy requirement for voting. With regard to the minimum voting age, the committee proposal was 20 years (although the standard elsewhere in the United States was 21), but in floor session it was lowered to 19. There was some, but insufficient, support for 18. It is interesting to note that Alaskans have long been partial to a voting age lower than 21 years. Not only did they set the voting age at 19 in the constitution, but in 1945 the territorial legislature extended the vote to 18-year-olds, with the provision that Congress formally concur (ch 1 SLA 1945). As it happened, Congress never considered the matter and the change was not made. In 1970, the Alaska Constitution was amended to lower the voting age to 18.

With regard to command of the language, delegates opted for the requirement to "read or speak" English, rejecting the more restrictive proposals to require voters to "read" and "read and write" English. At the time, approximately 17 states had "read and write" literacy requirements. The constitution has since been amended to eliminate altogether the literacy test.

Article V

Suffrage articles are typically short, and Alaska's is shorter and less complicated than most. The delegates left to the legislature the task of fashioning a detailed election code. General provisions for the conduct of elections are found in Title 15 of the Alaska Statutes; additional provisions regarding the conduct of municipal elections are found in Title 29.

Section 1. Qualified Voters

> **Every citizen of the United States who is at least eighteen years of age, who meets registration residency requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local election. A voter shall have been, immediately preceding the election, a thirty day resident of the election district in which he seeks to vote, except that for purposes of voting for President and Vice President of the United States other residency requirements may be prescribed by law. Additional voting qualifications may be prescribed by law for bond issue elections of political subdivisions.**

As it originally appeared in the constitution, Section 1 read:

> Every citizen of the United States who is at least nineteen years of age, who meets registration requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local election. He shall have been, immediately preceding the election, for one year a resident of Alaska and for thirty days a resident of the election district in which he seeks to vote. He shall be able to read or speak the English language as prescribed by law, unless prevented by physical disability. Additional voting qualifications may be prescribed by law for bond issue elections of political subdivisions.

This language was first amended in 1966, when the clause "except that for purposes of voting for President and Vice President of the United States other residency requirements may be prescribed by law" was added. This change was made to allow the legislature to relax the residency requirement for voting for U.S. president and vice-president. By the mid-1960s, about 19 states had taken steps to make it easier for recent residents to vote in presidential elections. In 1960, the National Conference of Commissioners on Uniform State Laws recommended the "Uniform Act for Voting by New Residents." Alaska's constitution required an amendment to conform to these trends. Ratification occurred in the 1966 primary election, and the following year the legislature eliminated residency requirements for voting in presidential elections. Congressional amendments to the U.S. Voting Rights Act have eliminated all residency requirements for presidential elections.

An amendment in 1970 lowered the minimum voting age to 18 years. This change reflected renewed sentiment in Alaska and elsewhere in the United States for a lower voting age because of the number of 18-year-olds drafted for duty in the Vietnam War. Congress lowered the minimum voting age to 18 in the 1970 amendments to the U.S. Voting Rights Act., but the U.S. Supreme Court said the measure could not legally apply to state elections. Congress responded with the Twenty-sixth Amendment to the U.S. Constitution, extending the franchise to 18-year-olds in all federal, state and local elections (it was ratified in 1971). Thus, Alaska's amendment preceded Congressional action by only a short time.

A third amendment to Section 1, also made in 1970, eliminated the requirement to read or speak English as a prerequisite to voting. This change, too, was precipitated by federal election law. The U.S. Voting Rights Act of 1965 curtailed the use of literacy tests (it later banned them entirely) in the United States, and Alaska had to prove to a federal court that its "read or speak" English requirement had not been used in the previous five years to prevent anyone from voting because of race. Although the state successfully proved it in 1966 and again in 1972, Alaska's literacy test lingered under a cloud of suspicion. For this reason, and because it was offensive to the Native population, the legislature proposed, and the voters approved, its deletion from the constitution.

The fourth amendment to this section, ratified in 1972, changed the durational residency requirement as a qualification for voting from one year to 30 days. This change was necessary to align Alaska's constitution with the U.S. Supreme Court decision in *Dunn v. Blumstein* (405 U.S. 330, 1972) which overturned Tennessee's one-year residency requirement and questioned the need for a residency requirement in excess of 30 days.

Although the last sentence in this section has not been removed by formal amendment, it is obsolete. Municipalities in Alaska traditionally permitted only property owners to vote on local general obligation bond issues because the bonds are repaid by assessments on property. In the early years of statehood, state law permitted municipalities to continue the practice. However, an Alaska attorney general's opinion declared the practice illegal (May 26, 1963), and the U.S. Supreme Court declared against it in 1970 *(City of Phoenix v. Kolodziejski*, 26 L. Ed. 2d 523, 1970).

Section 2. Disqualifications

> **No person may vote who has been convicted of a felony involving moral turpitude unless his civil rights have been restored. No person may vote who has been judicially determined to be of unsound mind unless the disability has been removed.**

Convicted felons and the mentally incompetent ("idiots" in some older constitutions) are denied the vote in virtually all states. The reason for doing so is to preserve the purity of the ballot, not to invoke

punishment—the presumption being that these people are unfit to vote. Felonies involving moral turpitude are defined in law (AS 15.80.010 (9)) and include virtually all felony crimes. The Alaska election code provides that the right of a convicted felon to register to vote is restored at the time the person is unconditionally discharged (AS 15.05.030; see *Singleton v. State*, 921 P.2d 636, Alaska Ct. App., 1996).

Section 3. Methods of Voting; Election Contests

> **Methods of voting, including absentee voting, shall be prescribed by law. Secrecy of voting shall be preserved. The procedure for determining election contests, with right of appeal to the courts, shall be prescribed by law.**

Three important guarantees are expressed here: absentee voting must be allowed; voting must be by secret ballot; and judicial review must be provided in contested elections. Absentee voting allows qualified voters to cast a ballot despite a temporary absence from their voting precinct on election day, or despite a physical disability which prevents them from going to the polls. An absentee ballot may be cast by a qualified voter for any reason (AS 15.20.010). At the time of the Alaska constitutional convention, a guarantee of this kind was commonplace among the state constitutions, several of which had been amended in the aftermath of World War II to ensure that servicemen would not be denied participation in elections in their home state.

Elections are the foundation of representative democracy, and all state constitutions contain some provision to guarantee their integrity. Alaska's constitution is one of the few that refers to "secrecy" of voting. Others specify that elections shall be "open," or "free." Many require elections to be "by ballot." Many constitutions give symbolic recognition to the fundamental importance of voting in a democracy by placing the suffrage and elections article second in the document, behind only the declaration of rights.

Less common in other state constitutions are provisions for the judicial resolution of election contests. An election "contest" here refers to a challenge to the outcome of an election on the grounds of irregular election procedures, failure of the winner to meet the legal qualifications for candidacy or corrupt practices sufficient to change the results of the election. The delegates modeled this provision on language in the Hawaii Constitution ("contested elections shall be determined by a court of law of competent jurisdiction in such manner as shall be provided by law"). The third sentence of this section directs the legislature to establish a procedure by which the courts may review the legality of an election result. The procedure is found in AS 15.20.540-560. Also, the legislature has provided a procedure whereby the results of recounts may be appealed to the court (AS 15.20.510-530; see *Cissna v. Stout*, 931 P.2d 363, 1996). In the adjudication of election contests involving questioned ballots, Alaska's supreme court has consistently emphasized the necessity of determining the intent of the voter (see *Miller v. Treadwell*, 245 P.3d, 2010).

Article II, Section 12 of the Alaska Constitution says that the members of each house of the legislature shall be "the judge of the election and qualification of its members, and may expel a member with the concurrence of two-thirds of its members." Thus, in the case of a contested legislative election, the legislature would not have to seat a winner declared by the court. (A conflict of this kind has never occurred in Alaska.) The same is true of elections for U.S. senator and representative, as these bodies are also the final judge of their own members. However, the courts have the last word in contested elections for governor or for municipal office.

Section 4. Voting Precincts; Registration

> **The legislature may provide a system of permanent registration of voters, and may establish voting precincts within election districts.**

Registration of voters (also called pre-registration of voters) prior to an election is used by almost all states to safeguard the integrity of elections by ensuring that those who go to the polls possess the legal qualifications for voting. Precincts were part of the territorial election machinery and continued after statehood. Not until 1968, however, did the Alaska legislature adopt a voter registration law. Prior to that time, voters merely gave their name, residence and mailing address to the election judge at their polling place, and verbally affirmed their qualification to vote before casting a ballot. The registration law was to become effective at the 1970 primary election, provided the voters approved it in a referendum on the question in the 1968 general election. They approved it by a vote of 37,152 to 35,278.

Delegates at the constitutional convention wrestled with the matter of voter registration, thinking it was unnecessary in the small towns and villages across Alaska. The committee proposal required registration in all cities with over 2,500 residents and left the matter up to the legislature in other areas. A few other constitutions (Texas and Washington, for example) distinguish between cities greater and smaller than a certain size for purposes of voter registration. However, the delegates ultimately decided to leave the matter of voter registration entirely to the legislature.

Section 5. General Elections

> **General elections shall be held on the second Tuesday in October of every even-numbered year, but the month and day may be changed by law.**

The territorial legislature in 1945 had, with congressional dispensation, established the date of general elections as the second Tuesday in October. However, longstanding federal law called for presidential and congressional elections on "the Tuesday next after the first Monday in November," and that date had become the national standard for state general elections. Nonetheless, the delegates resisted

adopting the more common date; they defeated an amendment that would have made the change. But the expense and complication of holding a general election for state offices in October and another general election for federal offices a month later seemed too burdensome to the first state legislature, which forthwith exercised its prerogative to set the date for general elections by changing to the Tuesday after the first Monday in November (ch 83 SLA 1960).

ARTICLE VI

LEGISLATIVE APPORTIONMENT

Legislative apportionment refers to the distribution of legislative seats among election districts of the state. In 1998, an amendment changed or repealed most of the original constitutional language of this article, some of which was obsolete as a result U.S. Supreme Court rulings. The amendment created a new mechanism for redrawing legislative election districts every ten years: an appointed, public, five-member redistricting board.

This article uses the term redistricting interchangeably with reapportionment, although the latter more precisely refers to the reallocation of the number of seats in a legislative body to districts with fixed boundaries. For example, after each census the U.S. House of Representatives reapportions seats to the states, which then must redistrict, that is, draw new congressional districts internally.

In the United States today, all state legislative chambers are apportioned on the basis of population. All senators in a legislature represent approximately the same number of people, and all house members also represent an equal number of people (although house members, because more numerous, represent fewer people than do senators). This has not always been the case. Until the mid-1960s, many state senates were apportioned on the basis of geographical area. For example, each county might have one senator, regardless of its population.

When Congress created the Alaska territorial legislature in 1912, it gave each of the four large judicial districts two senators and four representatives. The judicial districts were not equally populated at the time, and they became even more disparate as the territory's population increased and as people gravitated toward a few larger towns. As a result, residents of the less populous districts had far more representation in the legislature than did residents from districts with more people. In response to this situation, Congress in 1942 reapportioned the house on the basis of population; that is, the number of house seats of each of the four judicial districts in the territory was to be proportional to its population. Apportionment of the senate was not changed. The 1942 act also enlarged the territorial senate from 8 to 16 members, and the house from 16 to 24 members. These changes took effect in 1944.

A consequence of allocating legislative seats to only four election districts was that legislators tended to be elected from the largest town in each district. It was difficult for residents of small, outlying communities to win an election. The people who planned the constitutional convention recognized

this problem. They wanted broader representation at the convention than could be obtained by simply electing delegates at-large from the four judicial districts. They included 15 single-member districts in the apportionment plan, along with seven delegates elected at-large from the entire territory and 33 delegates elected from the four judicial districts, for a total of 55.

The convention delegates abandoned the use of the four large judicial districts as house election districts in the constitution. Initially, house members were to be elected from 24 districts, 17 of which were single-member and seven were multi-member. These districts would be modified as necessary after each decennial census to maintain approximate equality of population. For the senate, the delegates settled on an apportionment scheme that was based partly on geography and partly on population. Each of the four judicial districts was to get two senators, plus additional senators based on the relative population of the district. This initial allocation of two senate seats to each district was to remain fixed. Therefore, apportionment of the Alaska senate resulted in comparatively more representation for less populated areas of the state. This situation was typical of state senates throughout the country, but it was not to last.

In a series of historic reapportionment cases in the early 1960s (notably *Baker v. Carr,* 369 U.S. 267, 1962, and *Reynolds v. Sims,* 377 U.S 567, 1964), the U.S. Supreme Court established the apportionment rule of "one person, one vote," based on the equal protection clause of the federal constitution. According to this rule, seats in both houses of bicameral state legislatures must be apportioned exclusively on the basis of population, and the seats in each chamber must represent roughly the same number of people. The court's rulings forbade the pervasive over-representation of rural districts resulting from area-based apportionment of state senates and from the failure of lower houses to periodically adopt new redistricting plans.

The effect of these court decisions was to nullify much of the original language of this article of Alaska's constitution. Under the existing apportionment of the senate, 31 percent of the voters resided in districts which could elect a majority of the senate, and it was clearly unconstitutional under the "one person, one vote" standard. In 1964, Governor William Egan reapportioned the senate using mechanisms which were originally intended only for the house of representatives. The Alaska Supreme Court upheld the validity of the reapportionment in *Wade v. Nolan,* 414 P.2d 689, 1966.

The task of redistricting the Alaska legislature after each decennial U.S. census was originally assigned to the governor. Nationwide, reapportionment is traditionally a legislative function, but convention delegates were mindful of the notorious reluctance of legislatures to reapportion themselves in a fair and timely manner. In the mid-1950s, at the time of the convention, many legislatures had not been reapportioned for decades. Therefore, they made reapportionment an automatic process within the executive branch. In this regard, they modeled the process on the Hawaii constitution. (The Hawaii constitution was amended in 1968 to create an independent redistricting commission similar to the one adopted in Alaska with the 1998 amendment.)

Redistricting plans proclaimed by the governor following the 1970, 1980 and 1990 censuses were attacked by partisan opponents, and aspects of all three were found to be unconstitutional by the Alaska Supreme Court. The saga of the post-1970 redistricting litigation is found in *Egan v. Hammond*, 502 P.2d 856, 1972, and *Groh v. Egan*, 526 P.2d 863, 1974. Post-1980 redistricting litigation is *Carpenter v. Hammond*, 667 P.2d 1204, 1983, and *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1987. Post-1990 redistricting litigation is *Hickel v. Southeast Conference*, 846 P.2d 38, 1992.

In 1998, the legislature proposed, and the voters narrowly ratified, a constitutional amendment that fundamentally changed the redistricting process. The 1998 amendment transferred authority for redistricting from the governor to an appointed, five-member public board. It directs the board to produce a draft redistricting plan (or plans) within 30 days of the date it receives block-level census data from the U.S. Census Bureau, and a final plan within 90 days. It authorizes lawsuits against a final board plan, and directs the court to deal with litigation on an expedited basis.

The Alaska Redistricting Board drew new legislative election districts following the 2000 census in accordance with the new provisions of Article VI. As in the past, the process was contentious and the board's final plan sparked numerous lawsuits. The courts declared several parts of the plan unconstitutional, and directed the board to reconsider certain other parts (*In re 2001 Redistricting Cases*, 47 P.3d 1089, 2002). The board adopted a revised final plan that was upheld by the Alaska Supreme Court on May 24, 2002, in time for the new districts to be used in the 2002 legislative elections.

A decade later, the task of the redistricting board was complicated by demographic changes in rural Alaska that made compliance with the federal Voting Rights Act difficult. Alaska is covered by Section 5 of the act, which prohibits a reduction in the number of districts with a predominantly minority voting-age population. Several districts drawn by the board with a view to avoiding "retrogression" in the number of minority seats violated the state constitutional standards of compactness and socioeconomic integration. Litigation over the board's plan was unresolved in the spring of 2012 as the beginning of the election cycle approached (*In re 2011 Redistricting Cases*, 274 P.3d 466, 2012). The Alaska Supreme Court approved an interim plan of the board on May 22, 2012, for use in the 2012 elections.

In most states, redistricting is done by the legislature. However, several states in addition to Alaska delegate the task of redistricting to a board or commission. Some states have "backup" commissions in case the legislature fails to produce a legal plan, and others use commissions that are advisory to the legislature.

Article VI

Section 1. House Districts

> **Members of the house of representatives shall be elected by the qualified voters of the respective election districts. The boundaries of the house district shall be set under this article following the official reporting of the each decennial census of the United States.**

A representative is to be elected by the voters only of his or her district. Qualifications for a representative are specified in Article II, and for a voter in Article V. House district boundaries must be redrawn every ten years after each federal census in order to keep them roughly equal in population.

Section 2. Senate Districts

> **Members of the senate shall be elected by the qualified voters of the respective senate districts. The boundaries of the senate districts shall be set under this article following the official reporting of each decennial census of the United States.**

Senators are also elected only by voters of their district, and senate districts must also be redrawn every ten years.

Section 3. Reapportionment of House and Senate

> **The Redistricting Board shall reapportion the house of representatives and senate immediately following the official reporting of each decennial census of the United States. Reapportionment shall be based upon the population within each house and senate district as reported by the official decennial census of the United States.**

This section assigns authority for redistricting to a redistricting board, and it directs the board to use federal census figures for its work. Federal law generally prohibits states from using any other population data, such as the results of a state census or the number of registered voters. Prior to 1990 it was the practice in Alaska to adjust the federal census figure by removing the estimated number of non-resident military personnel in the state. The original constitutional provisions specified that redistricting was to be based on the "civilian" population. No such adjustment to the population base was made for the purposes of redistricting after the 1990 or 2000 census. The language of this section may now prevent any such adjustment.

The U.S. Census Bureau usually releases two census numbers: the results of the actual enumeration (which is the number Congress uses to reapportion), and a statistically adjusted number that attempts to correct for the inevitable over-count and under-count in the field enumeration. The different numbers have partisan implications, so the question in the states of which to use is politically contentious.

Section 4. Method of Redistricting

> **The Redistricting Board shall establish forty house districts, with each house district to elect one member of the house of representatives. The board shall establish twenty senate districts, each composed of two house districts, with each senate district to elect one senator.**

This section mandates single-member districts: there are to be 40 house districts and 20 senate districts, and each is to have one representative and one senator, respectively. Prior to 1992, the use of multi-member districts was common in Alaska. House districts are the building blocks for senate districts, which are formed by combining two house districts. Section 6 specifies that the two house districts making a senate district must be contiguous "as near as practicable."

Section 5. Combining Districts (Repealed)

Section 6. District Boundaries

> **The Redistricting Board shall establish the size and area of house districts, subject to the limitations of this article. Each house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty. Each senate district shall be composed as near as practicable of two contiguous house districts. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.**

House districts must be contiguous, compact, and contain as nearly as practicable a relatively integrated socio-economic area. Also, they must contain a population that is as near as practicable to one-fortieth of the state's total population. Contiguous means that the all areas of a house district must be reachable without crossing the district boundary. Compact means that districts should approximate circles rather than long, sinuous shapes. Socio-economic integration means that the population of a

district should have social and commercial ties. These requirements of house districts are typical in state constitutions. They are intended to reduce the opportunity for redistricting authorities to "gerrymander"—that is, to draw district lines strictly for partisan advantage. While the contiguity standard is absolute, compactness and socio-economic integration are clearly matters of degree, especially in Alaska, and in the end it is up to the courts to decide whether a reasonable and good-faith effort has been made to honor them.

How close must districts be to the ideal population of one-fortieth of the state's total population? In state redistricting cases the U.S. Supreme Court has held that deviations from the ideal population of plus or minus five percent, for an overall deviation of ten percent in a statewide plan, are acceptable without justification. With its eye on the phrase "as near as practicable" (practicable means capable of being done, or feasible), the Alaska Supreme Court enunciated a stricter standard. Reviewing the Alaska Redistricting Board's final plan in 2002, it ordered the board to further reduce deviations in Anchorage, although all were within the federal guideline of plus or minus five percent. It said: "Newly available technological advances will often make it practicable to achieve deviations substantially below the ten percent federal threshold, particularly in urban areas" (*In re 2001 Redistricting Cases*, 44 P.3d 141, 2002).

The meaning and import of the last two sentences of this section are unclear. The mention of local government boundaries means that the board should give some preference to them for election district boundaries. Presumably, the same is true of natural geographic features. These sentences were in the original constitutional provisions.

Section 7. Modification of Senate Districts (Repealed)

Section 8. Redistricting Board

(a) There shall be a redistricting board. It shall consist of five members, all of whom shall be residents of the state for at least one year and none whom may be public employees or officials at the time of or during the tenure of appointment. Appointments shall be made without regard to political affiliation. Board members shall be compensated.

(b) Members of the Redistricting Board shall be appointed in the year in which an official decennial census of the United States is taken and by September 1 of that year. The governor shall appoint two members of the board. The presiding officer of the senate, the presiding officer of the house of representatives, and the chief justice of the supreme court shall each appoint one member of the board. The appointments to the board shall be made in

the order listed in this sub-section. At least one board member shall be a resident of each judicial district that existed on January 1, 1999. Board members serve until a final plan for redistricting and proclamation of redistricting has been adopted and all challenges to it brought under Section 11 of this article have been resolved after final remand or affirmation.

(c) A person who was a member of the Redistricting Board at any time during the process leading to final adoption of a redistricting plan under Section 10 of this article may not be a candidate for the legislature in the general election following the adoption of the final redistricting plan.

This section provides details about the appointment and qualifications of the five-member redistricting board. Two members are appointed by the governor, and one each by the president of the senate, the speaker of the house, and the chief justice. The sentence "appointments are to be made without regard to political affiliation" suggests the board is intended to be non-partisan. However, redistricting is always a highly partisan business because the political parties have a large stake in the outcome of the process. The number of board members (five) and the method of appointment are not likely to produce a non-partisan body or a balanced bi-partisan body. If one legislative chamber is the same party as the governor, for example, that party will have three members on the board.

Compensation of board members is not set in statute. In 2000, the Legislative Council set it at $200 per meeting day, and in 2010, the board set its own rate of compensation at $400 per meeting day. The board ceases to exist when all litigation concerning the plan is finished. Subsection (c) prohibits a recurrence of a situation following the 1990 redistricting cycle in which the chairman of the governor's advisory board ran successfully in a newly created house district that had no incumbent.

Section 9. Board Actions

The board shall elect one of its members chairman and may employ temporary assistants. Concurrence of three members of the Redistricting Board is required for actions of the Board, but a lesser number may conduct hearings. The board shall employ or contract for services of independent legal counsel.

Here the board is authorized to employ staff. Three votes are required to pass a measure (Section 10 specifies that three votes are required to adopt a draft and final plan). The board is required to hire its own private counsel. The drafters of this section did not want the board to rely on legal advice of the attorney general's office, which might have a partisan bent.

Section 10. Redistricting Plan and Proclamation

(a) Within thirty days after the official reporting of the decennial census of the United States or thirty days after being duly appointed, whichever occurs last, the board shall adopt one or more proposed redistricting plans. The board shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, on all plans proposed by the board. No later than ninety days after the board has been appointed and the official reporting of the decennial census of the United States, the board shall adopt a final redistricting plan and issue a proclamation of redistricting. The final plan shall set out boundaries of house and senate districts and shall be effective for the election of members of the legislature until after the official reporting of the next decennial census of the United States.

(b) Adoption of a final redistricting plan shall require the affirmative votes of three members of the Redistricting Board.

The redistricting board must adopt a draft plan or plans 30 days after it receives block-level census data (this data is released in the Spring of the year following the census; in 2001, it was March 19). Then the board has an additional 60 days to hold hearings (the number and location are not specified) and adopt a final plan. The intent of this compressed 90-day schedule is to have a court-approved, board-created plan in place in time for the June 1 filing deadline for the first round of legislative elections that follow the decennial census. For the elections in 1972 and 1992, the superior court had to impose interim redistricting plans of its own creation because the governor's plans were still being adjudicated.

Section 11. Enforcement

Any qualified voter may apply to the superior court to compel the Redistricting Board, by mandamus or otherwise, to perform its duties under this article or to correct any error in redistricting. Application to compel the board to perform must be filed not later than thirty days following the expiration of the ninety-day period specified in this article. Application to compel correction of any error in redistricting must be filed within thirty days following the adoption of the final redistricting plan and proclamation by the board. Original jurisdiction in these matters is vested in the superior court. On appeal from the superior court, the cause shall be reviewed by the supreme court on the law and the facts. Notwithstanding Section 15 of Article IV, all dispositions by the superior court and the supreme court under this section shall be expedited and shall have priority over all other matters pending before the respective court. Upon a final

> **judicial decision that a plan is invalid, the matter shall be returned to the board for correction and development of a new plan. If that new plan is declared invalid, the matter may be referred again to the board.**

This section authorizes "any qualified voter" to bring a suit to compel the board to do its work or to challenge the final plan adopted by the board. In litigation over the board's plan following the 2000 census, the courts also allowed municipal governments to have standing to sue. This section requires suits to be filed no later than 30 days after the 90-day period in which the board has to act. Also, it specifies that the superior court is to be the trial court, and that appeals to the supreme court shall be heard on an expedited basis. These provisions reinforce those of Section 10 that aim to produce a legal redistricting plan for the first round of legislative elections two years after the year of the census. If the supreme court invalidates part of the board's plan, it "shall" remand the plan to the board for further work. But if the supreme court finds fault with the plan a second or subsequent time, it "may" remand the plan to the board. The alternatives to another remand are unspecified and unclear.

ARTICLE VII

HEALTH, EDUCATION AND WELFARE

This article is the shortest in the constitution, and at the time it was written, it was the least controversial. It directs the legislature to establish a unified school system open to all children of the state; it establishes the University of Alaska; and it affirms the power of the legislature to provide for public health and welfare.

Few other constitutions have an article corresponding to this one. Most devote an article just to education. Providing for the public health, safety, welfare and morals is the essence of the state's police powers, which are an inherent attribute of state sovereignty. If reference is made to these matters in a state constitution, it is usually in the context of an enumeration of the powers of the legislature.

Section 1. Public Education

> **The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.**

Virtually all state constitutions summon the legislature to provide free public education. Many contain the following provision, or a close variation of it: "The legislature shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education." Constitutions have long prohibited public money from being used to support religious or sectarian schools. In Alaska, the Territorial Organic Act of 1912 stated: "Nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the government."

This section acknowledges state responsibility for education, but it is silent on how schools are to be organized and operated. From deliberations at the constitutional convention, and from Article X, it is

clear that traditional local school districts were to have control of these matters under the fiscal supervision of a city or borough.

At the time of statehood, a dual system of public education existed in Alaska. Municipal and territorial schools served the urban population, and federal Bureau of Indian Affairs (BIA) schools served the Native population in rural communities. Although the territorial legislature sought to unify this dual system, the lack of money slowed progress. By adopting this section in the state constitution, the people of Alaska affirmed the goal of having a single, statewide school system. Three decades later, this goal was accomplished, thanks largely to public revenues from North Slope oil fields. However, supplanting BIA schools with state-funded schools in a state-run system did not result in uniformity of educational quality and educational opportunity for all Alaska students. Representatives of rural schools repeatedly sued the state to bring their schools closer to parity with urban schools. The first of three notable cases in this regard was Molly Hootch.

The Molly Hootch case (*Hootch v. Alaska State-Operated School System*, 536 P.2d 793, 1975) was brought in 1972 on behalf of a group of Alaska Native schoolchildren to compel the state to build and operate secondary schools in the villages. Lawyers for these students argued that a school system which forced children to leave family and home for boarding schools in a distant, strange and frequently hostile environment was not one really "open to all children of the state" as contemplated by Section 1 of this article. The suit also claimed that the lack of local secondary schools in the villages amounted to racial discrimination and denial of equal protection of the laws under Article I of the Alaska Constitution and the Fourteenth Amendment of the U.S. Constitution. After lengthy litigation (the state supreme court rejected the claims based on Section 1 of this article, and the other claims were never fully adjudicated), an out-of-court settlement was reached in 1976 which obligated the state to build and operate primary and secondary schools in many rural villages. The settlement (consent decree) is discussed in *Tobeluk v. Lind*, 589 P.2d 873, 1979.

A second suit against the state on behalf of rural schools alleged that the different methods of capital funding for urban and rural schools discriminated against the latter. School districts within a city or borough with a sufficient property tax base can, at their discretion, sell bonds for school construction and, under a state reimbursement program, recapture 70 percent of their bond debt payments from the state. Rural school districts without much local property to tax cannot participate in this school debt retirement program. They must obtain their school facilities by direct appropriations from the legislature. In 1997, a coalition of parents, rural school districts, and an advocacy group sued the state on the grounds that this method of financing schools was arbitrary and unfair, and resulted in many substandard rural school facilities. They alleged violations of Section 1 of this article, the equal protection clause of Article I, Section 1, and the federal civil rights law. A superior court agreed with the plaintiffs that the history and practice of capital funding for schools fell short of the state's constitutional obligations in Section 1 *(Kasayulie v. State*, Superior Court Case no. 3AN-97-3782 Civil*)*. After a delay of a decade caused by a secondary issue, the state settled the case by agreeing to

fund several specific rural school projects and to adopt a more equitable method for funding schools in the rural districts.

The *Kasayulie* plaintiffs sued because they were excluded from the state school debt retirement program and had to depend on the uncertain and seemingly arbitrary process of obtaining direct appropriations from the legislature. The Matanuska-Susitna Borough also sued the state over the method of school funding, but here the municipality complained that it had to pay 30 percent of the cost of a new school under the debt retirement program, in contrast to rural districts that did not have to pay anything for their schools (when they got them). They said that this amounted to a constitutional violation of the equal protection clause of the state constitution. The Alaska Supreme Court disagreed *(Matanuska-Susitna Borough v. State,* 931 P.2d 391, 1997).

In 2004, a third suit alleging state neglect of rural schools was brought on behalf of several rural districts where students were faring poorly. The plaintiffs argued that the failure of the state to intervene effectively to improve these academically underperforming schools amounted to an abrogation of its constitutional duty under this section. A superior court agreed *(Moore v. State,* Case No. 3AN-04- 9756 CI), and in 2012 the state settled the case by pledging corrective action.

On several occasions the courts have been called on to decide whether state funds are being used in violation of the last sentence of this section, which prohibits the state from spending public money for the "direct benefit" of religious and other private schools. Indeed, a dispute over this issue was an early constitutional question to come before the new state supreme court. It involved the provision of free public transportation for pupils attending private schools, authorized by a territorial law adopted in 1955. On the basis of this section, the court in 1961 declared the practice unconstitutional *(Matthews v. Quinton,* 362 P.2d 932, 1961).

The *Quinton* decision notwithstanding, the legislature later adopted AS 14.09.020, a law that reimbursed school districts for providing free public transportation to nonpublic school pupils who live along routes generally served by the public school transportation system. In 1993, the Department of Education cut off state funds for this service on the grounds that it was unconstitutional under the *Quinton* decision. Parents of students in the Fairbanks area sued, and the superior court upheld AS 14.09.020 stating that, under the legal analysis in *Sheldon Jackson College* (see below), pupil transportation constituted indirect aid to nonpublic schools and therefore did not violate the direct-benefit provision of this section (*Ten Eyck v. State,* Superior Court Case no. 4FA-93-2135 Civil).

Another "direct benefit" case involved a state grant program that gave Alaska residents attending private colleges in Alaska the difference between the tuition charged at their college and that charged by the state university. Opponents of the program claimed that it benefited the private schools directly, although technically the grant was made to the student. To quiet the controversy, which was then in the courts, the legislature placed a constitutional amendment on the general election ballot in

1976 that would have expressly permitted the tuition grants. The voters rejected the proposal by a large margin. Lawsuits resumed, and the court declared that the grants violated the "direct benefit" clause of Section 1 because "the student is merely a conduit for the transmission of state funds to private colleges . . . ." *(Sheldon Jackson College v. State,* 599 P.2d 127, 1979).

Further interpretation of the last sentence in this section was provided by the superior court in a suit challenging two appropriations. One of these was to the Alaska Black Leadership Caucus for "community-based educational enrichment." The superior court upheld the appropriation on the grounds that the caucus was not an educational institution as the constitution uses the phrase, because education was only one aspect of its several activities. The second appropriation was to a nonprofit organization of daycare providers. Again, the superior court upheld the appropriation, in this case because preschool children were the beneficiaries.

Section 2. State University

> **The University of Alaska is hereby established as the state university and constituted 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.**

Section 3. Board of Regents of University

> **The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The board shall, in accordance with law, formulate policy and appoint the president of the university. He shall be the executive officer of the board.**

These sections create the University of Alaska as a public corporation and establish certain principles of its management and governance. The board of regents is authorized to appoint the president of the university without the approval of the governor or legislature, unlike appointment of department heads (see Article III, Sections 25 and 26).

These sections confer a measure of autonomy on the university, and the Alaska Supreme Court has acknowledged that the university is "an instrumentality of the sovereign which enjoys in some limited respects a status which is coequal rather than subordinate to that of the executive or the legislative arms of the government." Nonetheless, the court has consistently treated the university as a public agency of the state like any other. (See *University of Alaska v. National Aircraft Leasing,* 536 P.2d 121, 1975, in which state statutes regarding the waiver of sovereign immunity were applied to the

university; *Carter v. Alaska Public Employees Association*, 663 P.2d 916, 1983, in which the university was ruled to be subject to state laws regarding the disclosure of public information; and *Southeast Alaska Conservation Council v. State*, 202 P.3d 1162, 2009, in which proceeds from university lands were considered state revenues for purposes of Article IX, Section 7 of the state constitution.)

A dispute over the fiscal autonomy of the university erupted in 1977 when the legislature included the university under the state's fiscal procedures act and executive budget act, measures which apply to other departments and agencies of the executive branch. This and other measures caused the university to sue the state, alleging that they constituted illegal infringement on the board of regents' constitutional authority to govern. The university eventually withdrew these claims. An opinion of the attorney general said: "The University of Alaska is similar in all or most respects to other state executive agencies for purposes of budgeting and accounting; it does not have any peculiar status by virtue of being constitutionally established" (February 28, 1977).

A dispute over the control of the university's land occurred in the late 1970s when the legislature authorized the sale of a parcel of land held in trust for the university, without providing compensation to the university. The university sued the state, arguing that it held title to the land under Section 2. The Alaska Supreme Court ruled that the legislature could dispose of university land without the consent of the Board of Regents (Section 2 says that the university's property shall be administered and disposed of according to law), but it must compensate the university for the taking *(State v. University of Alaska,* 624 P.2d 807, 1981). In a later settlement negotiated between the university and the state regarding other university trust lands sold by the state without compensation to the university, the state agreed to reconstitute a land trust for the university.

Section 4. Public Health

The legislature shall provide for the promotion and protection of public health.

Section 5. Public Welfare

The legislature shall provide for public welfare.

While it is within the powers of a state legislature to provide for public health and welfare, Sections 4 and 5 remove from the Alaska legislature discretion in the matter, as they state that the legislature "shall" provide for public health and welfare. However, an explanation for the inclusion of these sections does not reside in this distinction, as it is inevitable that the state legislature would exercise its inherent powers in this area. Rather, these sections are included in the constitution as a statement of public policy that the Alaska state legislature has a firm responsibility to act in behalf of public

health and welfare. Delegate Rolland Armstrong said that these sections express "a philosophy we need within the constitution."

The draft text of these sections was taken from the Hawaii Constitution. Section 4 was not changed during floor debate. However, the draft language of Section 5 was shortened significantly. As proposed, it read: "The state may provide for public welfare for persons unable to maintain a standard of living compatible with health and human dignity." This clearly referred to welfare in the sense of public assistance to the indigent, and the delegates feared that a narrow use of the term "welfare" might inhibit the legislature from implementing the section more expansively, and they adopted the present version as a result.

Neither section has spawned controversy or required judicial interpretation.

ARTICLE VIII

NATURAL RESOURCES

At the time of the constitutional convention, Alaska had a slender economic base. Mining and fishing were the economic mainstays, and neither industry was robust. Proponents of statehood believed that the future of the state of Alaska depended upon the successful development of all its natural resources. Statehood bills pending in Congress indicated that the new state government would acquire an enormous amount of land from federal holdings, and it would assume responsibility for managing all fish and wildlife. Alaska's delegate to Congress, Bob Bartlett, devoted his keynote speech at the constitutional convention to the role of resource development in Alaska's future and to the ease with which the benefits of this development could be lost by careless management: ". . . fifty years from now, the people of Alaska may very well judge the product of this Convention not by the decisions taken upon issues like local government, apportionment, and the structure and powers of the three branches of government, but rather by the decision taken upon the vital issue of resources policy."

Delegate Bartlett and others urged constitutional defenses against freewheeling disposals of public resources and colonial-style exploitation that would contribute nothing to the growth and betterment of Alaska. Such abuses were common in the early history of resource management in the western states, and manifestations of them were visible in contemporary Alaska under the complacent management of federal bureaus. Thus, the convention delegates sought to enshrine in the state constitution the principle that the resources of Alaska must be managed for the long-run benefit of the people as a whole—that is, the resources of the state must be managed as a public trust. They did not attempt to write a resource code; rather, they sought to fix the general concept of the public interest firmly in the resource law and resource administration of the state, as well as in the consciousness of Alaskans, so it would not be subverted through the indifference or avarice of future generations.

In drafting this article, delegates were unable to refer to other state constitutions or the *Model State Constitution* for ideas and guidance, as none of them dealt with natural resource policy as broadly as the Alaskans thought necessary. At the time of Alaska's constitutional convention, only the Hawaii Constitution addressed natural resource policy in a separate article, and that article was brief. Other state constitutions, if they contained reference to resources at all, focused on specific matters of local relevance, such as irrigation and water rights in the western states, tidelands in Washington, reforestation in Oregon, and so on. These state constitutions were, for the most part, written before modern principles of conservation and resource policy—sustained yield and multiple use, for

example—were articulated. Thus, Alaska's natural resource article was a unique product of the 1956 convention, and it remains unique among the states, even though constitutional treatment of natural resource and environmental issues in other states has grown through amendment and revision in recent years.

Article VIII of Alaska's constitution clearly establishes that the natural resources of Alaska should be developed. Indeed, to the convention delegates, the very success of statehood hung in the balance. But while this article creates a strong presumption in favor of resource development, it will not abide that which is wasteful, biologically exhaustive, rooted in special privilege, narrowly selfish or contrary to the rights of others and to the larger public interest. With certain exceptions, this article allows the government to sell, lease or give away public land and resources, but it may do so only in accordance with constitutional and statutory guidelines, and all transactions must be in full public view.

Despite their philosophical aversion to the "giveaway" of public resources, the delegates were enamored with the long-established federal method of disposing of public mineral lands, which allows a person to obtain the right to receive fee title to a legitimate mineral deposit by filing a claim to it and performing certain tasks thereafter. Meanwhile, a draft article on natural resources prepared by consultants to the convention called for the state to retain in public ownership the subsurface title to all mineral lands and to lease the right to produce minerals from these lands. Congress was predisposed to the same idea, and in all likelihood was going to prohibit the state from transferring out of state ownership the mineral rights to land acquired from the federal government. Nonetheless, in the constitution the delegates opted for the existing federal system of obtaining full title to mineral lands "if not prohibited by Congress." As it happened, Congress forced on the state the leasing alternative and required the state to retain ownership of the minerals on its land.

Delegates debated at some length the organization of the executive agency to be charged with managing natural resources. There was vocal public support for a commission of fish and game to oversee the management of those resources (as there was support for the creation of a constitutional board of education to head the state department of education). In the end, however, the delegates left the way open for a board to head a principal department but willed to the legislature the task of deciding when and where (see discussion of Article III, Section 25).

It is not surprising that controversies over resource management have been among the most bitter in Alaska's political history and that the courts have been called on frequently to decide the meaning of constitutional language in the context of these disputes. This is because natural resources loom so large in the lives of so many Alaskans, if not as a source of livelihood then as source of cherished recreation. It is also because the language of this article is general and often opaque. A major challenge of the resource agencies has been to manage in the interest of conservation and to satisfy the needs of various user groups without creating special privileges and exclusive rights, which the constitution abhors. The courts have had to determine when management schemes reasonably limit

access and reasonably allocate among user groups, and when they cross a constitutional threshold and violate guarantees of equal and open access to the public.

Section 1. Statement of Policy

> **It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.**

This is an emphatic statement that the policy of the state is to encourage the development of its land and resources, but in a manner that recognizes the collective interests of the people as the owners of these lands and resources. The meaning of the phrase "consistent with the public interest" is found elsewhere in this article. For example, it means that the principles of conservation must govern resource management (Sections 2 and 4); that everyone should be treated equally by management rules, particularly rules adopted in the interests of conservation that limit the access of some groups to certain resources (Sections 3, 15, 16 and 17); and that the public must be notified of all disposals of public land and resources, which may occur only according to the terms of general laws (Sections 8, 9 and 10). The delegates wanted the state's resources developed, not plundered. At the time of the convention, a current of opinion in Alaska was that corporate developments such as the Kennecott copper mine made insufficient lasting social and economic contributions to the territory, and that absentee owners of fish traps had unfair, exclusive rights of access to Alaska's salmon and were depleting the resource in their single-minded quest for profits.

Section 2. General Authority

> **The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.**

This section is a broad grant of legislative authority to implement the policy enunciated in Section 1. The original resource article of the Hawaii constitution written in 1950 began with a similar provision: "The legislature shall promote the conservation, development and utilization of agricultural resources, and fish, mineral, forest, water, land, game and other natural resources" (Article X, Section 1 of the 1950 constitution). In addition to utilization and development, conservation appears as an objective of resource management. The delegates understood the term in its traditional sense of "wise use." The Alaska Supreme Court has said: "The terms 'conserving' and 'developing' both embody concepts of utilization of resources. 'Conserving' implies controlled utilization of a resource to prevent its exploitation, destruction or neglect. 'Developing' connotes management of a resource to

make it available for use" *(Kenai Peninsula Fisherman's Co-op Association v. State,* 628 P.2d 897, 1981).

Section 3. Common Use

> **Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.**

This section enshrines in the Alaska Constitution the common law doctrine that natural resources must be managed by the state as a public trust for the benefit of the people as a whole, rather than for the benefit of the government, corporations, or private persons. Sections 15 and 17 of this article reinforce the public trust doctrine of natural resource management in Alaska, and they work in harmony with this section to prohibit the state from granting to any person or group privileged or monopolistic access to the wild fish, game, waters, or lands of Alaska. Sections 3, 15, and 17 are known as the "equal access clauses" of the natural resources article. The Alaska Supreme Court has said that "although the ramifications of these clauses are varied, they share at least one meaning: exclusive or special privileges to take fish and wildlife are prohibited" (*McDowell v. State*, 785 P.2d 1, 1989). Allegations of a violation of this section typically involve an allegation of a violation of the other two as well.

Tension exists between the equal access clauses and other provisions of this article that require natural resource management to honor principles of conservation (Sections 2 and 4) and that expect "preferences among beneficial uses" (Section 4). Regulating the harvest of fish, game, and other resources in the interest of conservation involves limiting access to them in some manner, as for example with bag limits and closed seasons. Where is the line that separates legitimate regulatory measures from unconstitutional denial of access guaranteed by Sections 3, 5 and 17? This is a question that is often before the courts.

The Alaska Supreme Court has upheld traditional regulatory tools of fish and game management such as registration requirements and limitations on the means and methods of taking. For example, the court upheld designation by the Board of Fisheries of "superexclusive" fishing districts in which people who register to fish are barred from other districts *(State v. Herbert*, 803 P.2d 863, 1990). It upheld designation by the Board of Game of urban areas as "nonsubsistence areas" in which no priority may be given to subsistence hunting (*State v. Kenaitze Indian Tribe*, 894 P.2d 632, 1995). It has also upheld regulations that selectively ban certain equipment in the taking of fish and game. For example, it upheld a ban on spotter airplanes in the Bristol Bay salmon fishery (*Alaska Fish Spotters Assn v. State*, 838 P.2d 798, 1992), and it upheld a ban on airplanes and airboats as a means of access to certain areas for hunting (*Interior Alaska Airboat Association v. State*, 18 P.3d 686, 2001).

The courts have also upheld regulations of the Alaska Board of Fisheries that allocate resources among user groups. For example, the supreme court upheld an allocation of salmon among commercial and recreational fishermen *(Kenai Peninsula Fisherman's Co-op Association v. State*, 628 P.2d 897, 1981). The court of appeals upheld an allocation among commercial fishermen using different types of fishing gear *(Meier v. State Board of Fisheries*, 739 P.2d 172, Alaska Ct. App., 1987). The supreme court upheld a fixed quota of king salmon to commercial trollers that was challenged by sportsmen who claimed the quota amounted to a special privilege and limited the ability of the vast majority of the public to fish for king salmon *(Tongass Sport Fishing Assn v. State*, 866 P.2d 1314, 1987).

To be free of constitutional problems, resource laws and regulations must have adequate justification; they must have a reasonable basis for distinctions they make among various users; they must put everyone on an equal footing within a group of users; and they may not prevent anyone from belonging to a particular user group. A regulation may make access to a resource more convenient for some people and less so for others, but convenience of access is not protected by the constitution.

However, a law or regulation in the name of conservation may treat groups unfairly or convey a special privilege in violation of the common use and anti-monopolistic safeguards of Sections 3, 15, and 17. One such law was a subsistence measure adopted by the legislature in 1986 that made access to subsistence uses of fish and game dependent upon place of residency. According to the law, people who lived in areas determined to be urban were denied access to subsistence activities, and those who lived in areas determined to be rural were permitted access. In a decision with far-reaching political impact, the Alaska Supreme Court said the state could legally allocate subsistence resources among different groups if necessary to protect the resource, but it could not use place of residency as criterion for making that allocation (*McDowell v. State*, 785 P.2d 1, 1989). As a consequence of this decision, the federal government found that state management of fish and game on federal land failed to conform to provisions of the federal Alaska National Interest Lands Conservation Act of 1980, which requires that rural residents have a subsistence preference, and took from the state control of fish and game management on federal land in Alaska.

Another regulatory scheme found to violate the equal access sections of Article VIII was one that authorized exclusive areas for big-game guides. Permits for these areas, in which only the permit holder could guide hunters, were not available for competitive bidding. Rather, they were assigned on the basis of past use, occupancy and investment by guides. The permits were of unlimited duration and required no lease or rental payment to the state. The rules regarding the transfer of permits allowed the holder to sell a permit as if it were private property. The court said that although there was nothing unconstitutional about leases and exclusive concessions on state lands, this particular scheme for allocating hunting areas among competing guides was constitutionally offensive because it resembled "the types of royal grants the common use clause expressly intended to prevent. Leases and concession contracts do not share these characteristics" (*Owsichek v. State*, 763 P.2d 488, 1988).

As a result of the *Owsichek* decision, the attorney general advised the commissioner of the Alaska Department of Natural Resources that the department's proposal to limit the number of commercial fishing guides on the Kenai River by issuing permits according to criteria similar to those used by the guide board for exclusive hunting areas violated the common use and equal access clauses of the constitution (Memorandum of September 27, 1991).

Permits issued under the state's limited entry fisheries program share several of the characteristics that the court found objectionable in *Owsichek* (allocation of the permit on the basis of past use, sale of the permit as private property), but that program enjoys its own constitutional authorization (see the commentary below under Section 15).

Section 4. Sustained Yield

> **Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.**

This section bolsters the commitment to conservation found in Section 2. The principle of sustained yield management is a basic tenet of conservation: the annual harvest of a biological resource should not exceed the annual regeneration of that resource. Maximum sustained yield is the largest harvest that can be maintained year after year. State law defines maximum sustained yield as "the achievement and maintenance in perpetuity of a high level annual or regular periodic output of the various renewable resources of the state land consistent with multiple use" (AS 38.04.910). At the time of the constitutional convention, stocks of Alaska's salmon had been reduced to a sad remnant of their past bounty by neglect of the sustained yield maxim. The qualifying phrase "subject to preferences among beneficial uses" signals recognition by the delegates that not all the demands made upon resources can be satisfied, and that prudent resource management based on modern conservation principles necessarily involves prioritizing competing uses.

In a challenge to the legality of the state's predator control program, which sought to reduce the number of wolves and bears in certain areas so that more moose and caribou would be available to hunters, the Alaska Supreme Court determined that the constitutional mandate to manage wildlife on a sustained yield basis applied to predators as well as game animals, and that the phrase "subject to preferences among beneficial uses" allowed the board of game to give priority to prey over predators *(West v. State, Board of Game,* 248 P.3d 689, 2010). In this case, the court ruled that the plaintiffs failed to show that the department of fish and game had ignored considerations of sustained yield.

Section 5. Facilities and Improvements

> **The legislature may provide for facilities, improvements, and services to assure greater utilization, development, reclamation, and settlement of lands, and to assure fuller utilization and development of the fisheries, wildlife, and waters.**

This section is, strictly speaking, unnecessary because the legislature possesses the inherent power to provide for all facilities, improvements, and services it deems necessary to promote a public purpose. Its presence in the constitution is hortatory—that is, it *exhorts* the legislature to do these things in order to further the constitutional mandate to use and develop the state's resources. Commentary on this section submitted by the drafting committee at the convention noted that it was "not intended as an authorization for the state's entering business in competition with private industry."

Section 6. State Public Domain

> **Lands and interests therein, including submerged and tidal lands, possessed or acquired by the State, and not used or intended exclusively for governmental purposes, constitute the state public domain. The legislature shall provide for the selection of lands granted to the State by the United States, and for the administration of the state public domain.**

The public domain is government-owned land that has not been set aside for special use and remains open for private settlement and development in accordance with public land laws. Thus, all state lands, including tidelands and submerged land beneath navigable rivers and inland bays, are in the public domain except for parcels explicitly withdrawn for a specific governmental purpose. The second sentence of this section is a general authorization for the legislature to select land in accordance with the Statehood Act (it was evident at the time that Congress would make a large grant of federal land to the new state) and to provide for the administration of state lands. It is technically unnecessary, as managing state lands is an inherent power of all state legislatures.

Section 7. Special Purpose Sites

> **The legislature may provide for the acquisition of sites, objects, and areas of natural beauty or of historic, cultural, recreational, or scientific value. It may reserve them from the public domain and provide for their administration and preservation for the use, enjoyment, and welfare of the people.**

This language, like that of Section 5 and Section 6, is not necessary to authorize action which the legislature would otherwise be prevented from taking. However, it makes clear that special-purpose withdrawals are within the constitutional scheme even though development objectives are stressed in

other sections. That is, this section prevents constitutional objections to such withdrawals on the grounds that they are incompatible with commercial development.

Alaska Statute 38.04.070 authorizes land to be classified for forest and wildlife reserves, state parks (to protect areas with special recreational, scenic, cultural, historical, wilderness and similar values), state trails and wild and scenic rivers. However, these classifications may not impair public access for traditional recreational use unless they are less than 640 acres or the legislature approves (AS 38.05.200).

Section 8. Leases

> **The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses. Leases and permits shall provide, among other conditions, for payment by the party at fault for damage or injury arising from noncompliance with terms governing concurrent use, and for forfeiture in the event of breach of conditions.**

This and the following section deal with public access to resources on state lands. This section authorizes the legislature to lease the public domain and issue permits for mineral exploration on it. Commentary on this section prepared by the drafting committee said:

> The legislature is authorized to lease state lands or interests therein. In granting leases, the potential uses of the land are to be considered so that maximum benefit can be derived. Each lease shall state the particular use or uses to be made of the lands as well as the conditions of the use and the term or tenure of the lease in order to facilitate reasonable concurrent use by others if occasion arises. “Reasonableness” of concurrent uses implies that possibilities of conflict in use should be kept to a minimum. Provisions of liability, forfeiture and other means of enforcement of the lease are to be provided in the instrument.

The legislature has exercised this authority in the Alaska Land Act, AS 38.05.

Section 9. Sales and Grants

> **Subject to the provisions of this section, the legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures. All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these**

resources. Reservation of access shall not unnecessarily impair the owners' use, prevent the control of trespass, or preclude compensation for damages.

In addition to leasing, the legislature may sell or give away (by means of a grant) state-owned resources. "Interests therein" refers to specific, limited uses of the land, such as agricultural uses, which may be sold without transferring full title. The second sentence of this section anticipated that Congress would prohibit the new state from conveying away the mineral interests in its land, and, in fact, Section 6(i) of the Alaska Statehood Act bars the state from selling or giving away mineral rights. The background of this provision is discussed at length in *State v. Lewis,* 559 P.2d 630, 1977; see also Section 11 below, and Article XII, Section 13. A condition of sale or grant of the surface use of state land is that the state retains ownership of the subsurface mineral resources and may provide third party access to these resources. In the case *Hayes v. A.J. Associates* (960 P.2d 556, 1998), the court ruled that commercial developers who had purchased land from the state had to accommodate a person who staked mining claims on their land. Third-party access may not unduly impair the owner's right to use the land or to control trespass by others, and the owner may be compensated for damages caused by those seeking to exercise their right of access This little-known reservation of mineral rights to the state, and the right of anyone to stake mining claims in pursuit of these minerals, received widespread public attention in 2003 when homeowners in the Matanuska-Susitna valley discovered that the state had issued leases to a company to explore for coal bed methane gas on private, residential lots that had once been state land.

The Alaska Land Act, AS 38.05, implements this section by providing for the sale of land by auction, lottery and other methods.

Section 10. Public Notice

No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.

This section requires the state, when disposing of state lands and resources as authorized by Sections 8 and 9 above, to observe fixed legal procedures that protect the public's interest in these lands and resources. One such procedure is a formal announcement by the state that it intends to sell, lease or grant a specific parcel before the transaction occurs. This requirement is a protection against fraud and administrative wrongdoing, and against concessions, sales and leases that may inadvertently confer special privileges in violation of Sections 3, 15 and 17. The Alaska Supreme Court underscored the significance of this provision in *Alyeska Ski Corporation v. Holdsworth,* 426 P.2d 1006, 1967. In that case, an unsuccessful bidder for a state lease complained of procedural irregularities in the award of the bid. The Department of Natural Resources rejected the complaint and asserted that the commissioner's decision in the matter was final, not subject to review by the

courts. The court held otherwise, compelled by the "unequivocal constitutional mandate requiring that all leases of state lands are to be entered into in accordance with safeguards imposed by law." If the pertinent statutes and regulations were ambiguous regarding judicial review, the constitution was not, in the view of the court. The justices noted that Article VIII, Section 10 "reflects the framers' recognition of the importance of our land resources and of the concomitant necessity for observance of legal safeguards in the disposal or leasing of state lands."

In 1976, the voters turned down an amendment to this section which would have given the legislature veto power over all disposals of state-owned natural resources. The proposed amendment stemmed from legislative dissatisfaction with certain sales of state royalty oil that had been negotiated by the executive branch.

In a dispute over a contract issued by the Alaska Railroad Corporation to a company to remove gravel from the corporation's land, the Alaska Supreme Court said that the public notice requirement of this section applied to the contract, and that the requirement for public notice was not satisfied merely by the company applying for a conditional use permit from the local government prior to digging (*Laverty v. Alaska R.R.Corp.*,13 P.3d 725, 2000).

Section 11. Mineral Rights

> **Discovery and appropriation shall be the basis for establishing a right in those minerals reserved to the State which, upon the date of ratification of this constitution by the people of Alaska, were subject to location under the federal mining laws. Prior discovery, location, and filing, as prescribed by law, shall establish a prior right to these minerals and also a prior right to permits, leases, and transferable licenses for their extraction. Continuation of these rights shall depend upon the performance of annual labor, or the payment of fees, rents, or royalties, or upon other requirements as may be prescribed by law. Surface uses of land by a mineral claimant shall be limited to those necessary for the extraction or basic processing of the mineral deposits, or for both. Discovery and appropriation shall initiate a right, subject to further requirements of law, to patent of mineral lands if authorized by the State and not prohibited by Congress. The provisions of this section shall apply to all other minerals reserved to the State which by law are declared subject to appropriation.**

This and the following section describe the methods by which citizens can acquire the right to explore for and produce minerals on state-owned land. These methods perpetuate the distinction between locatable and leasable minerals established in federal land law. Locatable minerals are gold, silver, lead, and other metallic minerals; the main leasable minerals are coal and oil.

Locatable minerals on federal land are managed under the U.S. Mining Law of 1872. According to this law, a person can prospect freely on the public domain, and, upon discovering a mineral deposit, file a claim that gives the right to produce and sell the mineral. Indeed, the prospector can patent a legitimate claim, that is, he may acquire from the government full ownership (fee title) to the land as well as to the minerals it contains. The alternative to locating mineral claims on public land is leasing the land from the government for a fee and sharing with the government the income from the sale of minerals produced from the lease (i.e., paying royalties).

Mining interests in the territory sought to perpetuate the location system for metallic minerals on state lands that would be acquired from the federal government at the time of statehood. However, Congress was mindful of the importance of resource income to the new state government and troubled by the "giveaway" of public resources inherent in a location system. Accordingly, it was inclined to require the state to adopt a leasing system for these minerals. Indeed, statehood bills pending in Congress at the time of the constitutional convention called for the leasing of minerals in all lands transferred to the state. A draft resources article prepared by the Public Administration Service (a private, nonprofit group serving as technical consultants to the convention) proposed that the delegates adopt a leasing system for metallic minerals rather than the existing location system. But the delegates nonetheless made clear in this section their preference for the location system, including the right to patent a claim, if Congress would not stand in the way. Thus, the next-to-last sentence allows a mining claim to be patented ". . . if authorized by the State and not prohibited by Congress."

As it happened, Congress in Section 6(i) of the Statehood Act prohibited the state from parting with the title to its minerals. This section says, in part:

> The grants of mineral lands to the State of Alaska . . . are made upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented . . . . Mineral deposits in such lands shall be subject to lease by the State as the legislature may direct . . . .

The state government subsequently adopted a mining law that was nominally a leasing system, but which had the main attributes of the traditional location system (claims could not be patented, but they were otherwise similar to claims filed under the federal law). This system was challenged by a coalition of environmental, Native, and fishing groups on the grounds that it was not a true leasing system as contemplated in Section 6(i) of the Statehood Act because it required no rent or royalty payments to the state *(Trustees for Alaska v. State,* 736 P.2d 324, 1987). The Alaska Supreme Court upheld the challenge, and the U.S. Supreme Court refused to hear an appeal by the state. A new metallic mining law was adopted in 1989 that incorporates rental fees and royalties (AS 38.05.212).

Section 12. Mineral Leases and Permits

> **The legislature shall provide for the issuance, types and terms of leases for coal, oil, gas, oil shale, sodium, phosphate, potash, sulfur, pumice, and other minerals as may be prescribed by law. Leases and permits giving the exclusive right of exploration for these minerals for specific periods and areas, subject to reasonable concurrent exploration as to different classes of minerals, may be authorized by law. Like leases and permits giving the exclusive right of prospecting by geophysical, geochemical, and similar methods for all minerals may also be authorized by law.**

This section provides for a leasing system similar to that of the federal Mineral Leasing Act of 1920, whereby the rights to explore for and extract oil and gas and other nonmetallic minerals are leased by the state according to terms and conditions it may impose. Thus, for example, an oil company may not freely drill for oil on public land as a miner might prospect for gold; it must first obtain from the state a lease to a specific tract, which is normally issued at a competitive auction to the highest bidder (the state usually specifies that bids in excess of minimum required lease payments be in the form of a cash payment, but it may specify that the bid terms be royalty payments or share of net profits; see *Baxley v. State*, 958 P.2d 422, 1998, under Article II, Section 19). The company holding the lease must share the value of the product of the lease with the state by payment of a royalty. Royalties are payments to the landowner, who is typically a private person in other states. Royalties are not taxes, which the state government may collect from mineral production on its own land as well as private land.

This section is implemented by AS 38.05.135-180. Petroleum revenue from competitive oil and gas lease bonus bids, royalties, and taxes have been the financial lifeblood of the state of Alaska.

Section 13. Water Rights

> **All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.**

This section continues the traditional right in the western United States to use water on a “first-come-first-served” basis. This method differs from an early method of acquiring water rights used historically on the East Coast. Known as the “riparian method,” it allocated water rights to owners of

the stream bank. In Alaska and the other western states, however, water rights were traditionally acquired by actual use of the water. Under this constitutional provision, which is further developed in state statute and regulation, a prior user of water has preference to it, but these rights may be withdrawn or limited in order to reallocate the water to a use that has a higher public priority (a hydroelectric development might displace placer mines, for example). The "reservation of fish and wildlife" clause in the last sentence means that those who appropriate water do not also acquire a property right to the fish or wildlife that use the water.

Section 14. Access to Navigable Waters

> **Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.**

This section adopts the public trust doctrine regarding navigable rivers and other public waterways, whereby citizens of the state have the right to travel on and otherwise use these bodies of water. The government may not deny this use except by a general law that protects a public interest. For example, a state law may keep people away from a lake that supplies drinking water to a town, or impair navigation on a river by building a dam; but it may not protect the interests of a private fishing lodge by blocking public access to a stream. When the state sells or leases public land next to a navigable waterway or other public body of water, it must, because of this section, reserve a public access easement (AS 38.05.127; see also *CWC Fisheries, Incorporated v. Bunker*, 755 P.2d 1115, 1988, in which the court said that a sale of tidelands contained an implicit public access easement, by virtue of the public trust doctrine, even though such an easement was not mentioned in the patent). This section does not authorize trespass across private land to reach a navigable body of water.

Section 15. No Exclusive Right of Fishery

> **No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.**

This is one of three "equal access" clauses of Article VIII; it applies specifically to fishing. It works with Sections 3 and 17 to guarantee that no one should have monopolistic access to any of Alaska's natural resources (see discussion under Section 1). The second sentence was added by amendment in

1972 to authorize an exception to the prohibition in the first sentence so that the state could institute a limited entry program for distressed fisheries.

The prohibition in the first sentence of this section derives from a federal law governing Alaska's fisheries during the territorial period. Section 1 of the White Act prohibited the U.S. secretary of commerce from granting an "exclusive or several right of fishery" or denying to any citizen "the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted."

The exception in the second sentence was the result of efforts to revitalize the depressed salmon fisheries in the mid-1960s. Restricting the number of boats in various state-managed fisheries had primarily economic objectives but also served long-term management and conservation goals. The legislature passed a limited entry law in 1968 (ch 186 SLA 1968), but a federal court found the law unconstitutional. The U.S. Supreme Court vacated that decision, but the issue was later litigated in state superior court, which found the law to violate Sections 3 and 15 of Article VIII and Section 1 of Article I.

Recognizing that a limited entry system would require constitutional authorization, the legislature placed such an amendment before the voters in 1972. The measure was ratified, and soon thereafter the legislature adopted a limited entry law (AS 16.43). The Commercial Fisheries Entry Commission administers the program. Constitutionality of the law has been upheld by the state supreme court *(State v. Ostrosky*, 667 P.2d 1184, 1983), and an initiative to repeal the law was rejected by a wide margin of the voters in 1976.

In 2005, in response to regulatory changes by the Board of Fisheries in certain salmon fisheries in Cook Inlet that reduced the number of salmon that fishermen in these fisheries could catch, the fishermen sued the state for compensation for the decline in the market value of their limited entry permits. The Alaska Supreme Court ruled that these permits did not have private property status that would require compensation in cases of a government "taking." To hold otherwise would effectively give permit holders an exclusive right to fish not enjoyed by other people in violation of sections 3 and 15 of this article *(Vanek v. State, Board of Fisheries*, 193 P.3d, 283, 2008).

A dispute over the meaning of this section which predates the limited entry issue centered on the question of whether leasing of tidelands for the purpose of set net fishing created an exclusive right of fishery. Attorney general opinions on the matter have said no. "While Section 15 of Article VIII prohibits the state from granting exclusive fishing rights through legislation or regulation, it does not preclude the state from granting property interests which, by their nature, lead to exclusivity of use for fishing. The fact that the motivating force behind the creation of the property interest is a desire to promote fishing is of no consequence . . . ." (1963 Informal Opinion Attorney General, March 13; see also 1983 Informal Opinion Attorney General, April 21).

Section 16. Protection of Rights

> **No person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law.**

This section further reinforces the right of public access to state-owned resources by circumscribing the conditions under which this right may be infringed or revoked. Only a superior public purpose established in law may intervene, and a fair payment must be made if a specific existing right is extinguished.

A prime intent of the drafters of this section was to assure those who had built improvements on pilings over the tidelands could acquire property rights. At the time, many docks, warehouses, businesses, public buildings, and homes in coastal communities of Alaska were built over tidelands owned by the federal government, which considered these facilities, as a legal matter, in trespass. "Properly understood, section 16 establishes that substantial improvements on tidelands that existed at the time of statehood would give rise to protected property rights while tidelands that were unimproved at the time of statehood would be state property that could be disposed of only in accordance with other provisions of Article VIII*" (State, Dept. of Natural Resources v. Alaska Riverways, Inc.,* 232 P3.d 1203, 2010). In this case, the state supreme court rejected a claim that this section gave a riverbank property owner the right to build a dock over a state-owned riverbed without first obtaining a lease from the state.

In 1973, the state supreme court ruled that a person whose property access was impaired by the construction of a new state road was entitled to just compensation under this section. In that case, construction in Anchorage of the Minnesota Bypass across Chester Creek obstructed the flow of high water up the creek, which had been used by the plaintiff for many years as access from his property to Cook Inlet for commercial fishing. Also, the new road made access to his driveway difficult *(Wernberg v. State,* 516 P.2d 1191, 1973).

However, the court denied another claim for compensation under this section because the state's construction of a bridge downstream from the residence of the claimant did not keep him from using the river as a base for his floatplane, it merely made the use less convenient *(Classen v. State,* 621 P.2d 15, 1980).

Section 17. Uniform Application

> **Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.**

This section is an "equal protection of the laws" provision (see Article I, Section 1) that pertains specifically to natural resource management. It is one of three "equal access" clauses of Article VIII (see discussion of Section 3). Resource laws and regulations must apply equally to all people who are "similarly situated." Fishermen who claimed unequal treatment by a fishing regulation that granted a smaller allocation of fish to their district than to neighboring districts were told by the court that the districts were not "similarly situated" with respect to fish spawning patterns and historical catch levels and participation in the fishery. As a result, the court said the fishermen did not have a valid complaint under this section *(Gilbert v. Department of Fish and Game,* 803 P.2d 391, 1991).

Section 18. Private Ways of Necessity

> **Proceedings in eminent domain may be undertaken for private ways of necessity to permit essential access for extraction or utilization of resources. Just compensation shall be made for property taken or for resultant damages to other property rights.**

The state may use its power of eminent domain (forcing people to sell their property for the benefit of a larger public purpose) for a project that is privately owned, such as an oil pipeline or a road to a significant mining development. However, the owner must receive fair compensation for the property that is taken. (See also Article I, Section 18.)

The commentary that accompanied the draft of this section explained the intent of the constitutional convention's resources committee.

> This provision was borrowed from the Wyoming Constitution and modified to meet Alaskan conditions. The Wyoming provision states, "Private property shall not be taken for private use unless by consent of the owner, *except for private ways of necessity*, and for reservoirs, drains, flumes, or ditches on or across the lands of others for agricultural, mining, domestic or sanitary purposes, nor in any case without due compensation." In that arid state this provision was developed to assure access to water supply even though it might be necessary for a private person to secure easement across adjoining private lands. Since the adoption of the Wyoming Constitution, a number of western states have included a similar provision in their constitutions. Since the problem of essential access in Alaska is not limited to water

supply as in Wyoming, this article makes a general provision for the use of eminent domain proceedings to provide essential access for extraction and utilization of natural resources.

ARTICLE IX

FINANCE AND TAXATION

In drafting Article IX of Alaska's constitution, the committee on finance and taxation generally heeded the advice of experts and consultants who urged that the legislature be given broad discretion in managing the state's fiscal affairs. Historically, state constitutions were restrictive in the area of public finance, which tended to result in evasive budgetary measures that complicated and distorted state financial management. Alaska's constitution contains conventional safeguards to protect the public treasury—for example, appropriations must be for a public purpose; expenditures must be authorized by an appropriation; general obligation debt may be incurred only for capital projects, and requires approval of the voters—but it omits antiquarian constraints and restrictions that bedeviled many older documents. It was after the state's purse swelled from oil revenues from North Slope production that amendments were made to curtail legislative discretion in fiscal matters by setting a limit on appropriations and mandating savings.

The delegates forbade the practice, common among other states, of "earmarking" revenues (Section 7). This prohibition was intended to enhance the fiscal prerogatives of the legislature, not hobble them. When specific revenues are dedicated to specific purposes (gasoline taxes to highway construction, and lottery income to education, for examples) the legislature loses its ability to match expenditures with public needs as these change from year to year. Convention delegates believed that all public goods and services should openly compete for funding on a regular basis.

As originally written, the prohibition against dedicated funds in Section 7 prevented the creation of the Alaska Permanent Fund, which is a mandatory public savings account that receives automatic contributions from royalties and other non-tax petroleum revenues. Voters ratified an amendment in 1976 to authorize this popular and unique state fund (Section 15).

State budgets soared after the trans-Alaska pipeline began operation in 1977. There was the widespread concern, however, that oil revenue could not sustain this new level of state spending in the long run, and it was likely to be volatile in the short-run. In the summer of 1981, Governor Hammond called a special session of the legislature to consider a constitutional amendment to limit annual appropriations. A proposal was adopted, and it was ratified by the voters at the general election in the fall of 1982 as Section 16 of this article. The measure called for the voters to reconsider the section four years later, and it was upheld by a large margin at the general election of

1986. However, Section 16 has never effectively limited appropriations because the fiscal base was set comparatively high, there are significant exceptions to the limit, and revenues available for appropriation have fallen short of what was foreseen at the time the amendment was adopted.

Despite the failure of the appropriation limit, or perhaps because of it, interest continued in establishing a mandatory device that would curtail spending and reserve money for the uncertainties of the future. In 1986, the legislature created in statute a budget reserve fund (AS 37.05.540). In 1990, the legislature adopted a constitutional budget reserve fund that was ratified by the voters at the general election the same year. The measure, Section 17 of this article, requires all income derived from the termination (by settlement or litigation) of disputes with oil companies over back taxes and royalties to be deposited to the fund.

Convention delegates surely gave little thought to the notion of spending limits in the winter of 1956, in view of the lugubrious fiscal prospects for the new state, their determination to draft a concise constitution, and their bedrock confidence that a fairly-apportioned, citizen legislature would act responsibly.

Section 1. Taxing Power

> **The power of taxation shall never be surrendered. This power shall not be suspended or contracted away, except as provided in this article.**

Legislatures frequently grant tax exemptions and other tax-related inducements to corporations to locate within the state or engage in certain business activities. Courts have found that in some circumstances this special tax treatment amounts to a contractual relationship with the corporation that future legislatures may not abrogate. Consequently, the constitutions of many states provide that "the power to tax shall not be surrendered, suspended, or contracted away," to clarify that tax exemptions granted by the general laws of the legislature do not create contractual obligations. The *Model State Constitution* recommended such a provision (it was dropped in later editions). Presumably, the delegates adopted this version of the prohibition to emphasize that the state could legally grant tax exemptions under general law for public purposes, such as inducement for industrial development (see Section 4). The committee commentary that accompanied the draft of this section said the following: "The power to tax is never to be surrendered, but under terms that may be established by the legislature, it may be suspended or temporarily contracted away. This could include industrial incentives, for example."

According to Article X**,** Section 2, the state can delegate its power to tax only to local government.

Section 2. Nondiscrimination

> **The lands and other property belonging to citizens of the United States residing without the State shall never be taxed at a higher rate than the lands and other property belonging to the residents of the State.**

The "equal protection" clauses of the Alaska Constitution (Article I, Section 1) and the U.S. Constitution (Fourteenth Amendment) both stand in the way of the state or a local government taxing property at different rates strictly on the basis of where the owner lives. Technically, therefore, this section is unnecessary. Symbolically, however, its inclusion was important to reassure nonresident commercial interests (who tended to oppose statehood) that their property would not be singled out for tax purposes. A similar provision was included for the same reason in the Territorial Organic Act of 1912: ". . . nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents." Provisions of this kind are found in other constitutions of western states (see, for example, Article XXII of the South Dakota Constitution; a similar provision was deleted from the Hawaii Constitution by the convention in 1968).

Section 3. Assessment Standards

> **Standards for appraisal of all property assessed by the State or its political subdivisions shall be prescribed by law.**

Many state constitutions require taxes to be "uniform and equal." Section 9 of the Territorial Organic Act of 1912 contained a uniformity clause: ". . . all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof." However, these provisions at times complicated the fiscal life of states when courts interpreted them to prohibit graduated income taxes, tax exemptions and other reasonable differences in the treatment of various tax resources. Because of the potential for these problems, Alaska's constitutional convention delegates decided against a uniform and equal clause. However, they included this language to accomplish a measure of statewide uniformity in local property taxation by requiring the legislature to establish a common set of standards for appraising property.

The legislature has not written appraisal standards into law. In anticipation of doing so, and otherwise implementing this section, the legislature adopted House Concurrent Resolution 14 in 1962, which called for the Local Affairs Agency—a predecessor of the Department of Community and Economic Development—to study assessment problems and procedures in Alaska, prepare a manual for assessors and recommend legislation "necessary to establish uniform, equalized and realistic assessment throughout Alaska." A manual was prepared, but it was not widely adopted and has not been kept current. The only statutory guideline for the assessment of property by the state and local

governments is that it be done on the basis of "full and true value." (AS 29.45.110 defines the full and true value as "the estimated price that the property would bring in an open market and under the then prevailing market conditions in a sale between a willing seller and a willing buyer both conversant with the property and with prevailing general price levels.") The Alaska Supreme Court has given local governments leeway in their choice of appraisal methodologies to determine fair market value (see, for example, *North Star Borough Assessor's Office v. Golden Heart Utilities, Inc.*, 13 P.3d 263, 2000).

In 1985, the Kenai Peninsula Borough Assembly established a levy of 1.75 mills on each dollar of assessed value for real property and a rate of 2.5 mills for personal property. Personal property was defined to include certain oil and gas transportation property. The state objected to the differential tax rate, arguing that the statutory requirement that property be assessed at its full and true value meant that real and personal property had to be assessed at the same rate (the lower rate for real property was the equivalent to assessing it at less than full market value). The matter went to court, and the Alaska Supreme Court agreed with the state that both types of property had to be taxed at the same rate *(Kenai Peninsula Borough v. Department of Community and Regional Affairs,* 751 P.2d 14, 1988).

Section 4. Exemptions

> **The real and personal property of the State or its political subdivisions shall be exempt from taxation under conditions and exceptions which may be provided by law. All, or any portion of, property used exclusively for nonprofit religious, charitable, cemetery, or educational purposes, as defined by law, shall be exempt from taxation. Other exemptions of like or different kind may be granted by general law. All valid existing exemptions shall be retained until otherwise provided by law.**

If it is used for governmental purposes, property of state and local governments is immune from taxation as a general principle of law. The first sentence of this section allows the legislature to provide for the taxation of state-owned or municipally-owned property in appropriate circumstances, such as when the property is being used for commercial purposes either by the government itself or by a private lessee or concessionaire (see Section 5). In the absence of such legislation, however, a tax-exempt government agency retains its exemption even if engaged in money-making activity. In a case involving a hotel-restaurant-bar business obtained through foreclosure and run for a year by a tax-exempt state development corporation, the Alaska Supreme Court ruled that the corporation was not liable for local property taxes during the period it operated the business because it was furthering the general public purpose of its charter as a development agency *(City of Nome v. Block No. H, Lots 5, 6, & 7,* 502 P.2d 124, 1972).

The second sentence of this section grants a tax exemption to "property used exclusively for nonprofit religious, charitable, cemetery or education purposes, as defined by law." The large majority of state constitutions exempt (or require the legislature to do so by general law) religious, charitable and educational property from property taxes; cemetery property is often included in the list of automatic exemptions, and some state constitutions favor other types of property with an automatic exemption as well, such as hospitals and property of horticultural and agricultural societies, for examples. The Alaska legislature has extended tax-exempt status to hospitals under its authority to grant additional exemptions by general law, as discussed below.

Property of a religious organization that is utilized in a commercial enterprise does not enjoy tax-exempt status, even if the profits of the enterprise are used for a benevolent or charitable purpose *(Evangelical Covenant Church of America v. City of Nome,* 394 P.2d 882, 1964). Only that portion of property owned by an exempt organization that is used exclusively for the purposes of the organization qualifies for tax exemption; the remainder is taxable. Thus, offices rented to private physicians in a tax-exempt hospital could not benefit from tax-exempt status *(Greater Anchorage Area Borough v. Sisters of Charity of the House of Providence,* 553 P.2d 467, 1976). However, the mere fact that property belonging to a charitable organization generates income does not disqualify it from the exemption, if the income is reasonably necessary for the operation and maintenance of the property and does not represent a form of profit to the organization *(Matanuska-Susitna Borough v. King's Lake Camp,* 439 P.2d 441, 1968). In the absence of legislation narrowly defining educational purposes, the court saw no reason why a vocational training facility operated by a union should not qualify for the exemption *(McKee v. Evans,* 490 P.2d 1226, 1971). The court ruled that buildings owned by the Tanana Chiefs Conference, a non-profit social service Native regional corporation, qualified for a municipal property tax exemption because the organization was pursuing charitable purposes even though its services were fully remunerated by the federal government. However, those portions of the buildings used for fundraising, lobbying, political activities, and economic development programs did not qualify for the exemption *(Fairbanks North Star Borough v. Dena Nena Henash*, 88 P.3d 124, 2004).

The exemption for charitable, religious, educational and cemetery property extends only to general taxes, not to special assessments such as those levied as a result of a local improvement district for water and sewer installation, road paving and similar purposes (1966 Opinion Attorney General No. 10).

The third sentence authorizes optional exemptions by the legislature. Some state constitutions prohibit any exemptions other than those specified in the constitution. The Alaska Legislature has exercised this authority by extending tax-exempt status to hospitals and to a portion of the value of residential property owned by the elderly. In 2006, it extended tax-exempt status to housing for teachers of tax-exempt schools (see AS 29.45.030). The legislature has also authorized municipal governments to grant a number of additional tax exemptions within their local jurisdiction. These optional exemptions

at the local level may extend to personal property, business inventories, property of nonprofit organizations, historical sites, conservation easements and other classifications of property (AS 29.45.050).

Section 5. Interests in Government Property

> **Private leaseholds, contracts, or interests in land or property owned or held by the United States, the State, or its political subdivisions, shall be taxable to the extent of the interests.**

This section states the general principle of tax law that private interests in publicly-owned property are taxable. Thus, if a private person leases government land and improves it for commercial purposes, the value of the lease and improvements are taxable even though the land is not taxable because it remains in government ownership. (See *North Star Borough Assessor's Office v. Golden Heart Utilities, Inc*., 13 P.3d 263, 2000.)

Section 6. Public Purpose

> **No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose.**

This is a traditional constitutional safeguard that is, on its face, reasonable and understandable. No one would advocate the use of public money or public credit for a private purpose. However, the line separating a public and private purpose is often difficult to discern and changes over time. Judge James Wickersham included a prohibition against using public money "for any but a public purpose" in a draft of Alaska's territorial act. At a hearing on the measure, Wickersham was asked what the words meant. He replied: "Some legislatures and city councils have big Fourth of July celebrations out of public funds. It is to prevent spending money for matters of that kind." A senator observed: "A celebration of the Fourth of July might be regarded as a public matter." Indeed, they are today.

The contemporary notion of public purpose in Alaska—which encompasses subsidized loans for students, private businesses and purchasers of residential property; subsidies for personal utility bills; and permanent fund "dividends" (cash payments to all residents)—is certainly an expansive one. The courts have deferred to legislative judgment about the bounds of public purpose. For example, in a 1962 decision, the Alaska Supreme Court said:

> . . . the phrase "public purpose" represents a concept which is not capable of precise definition. We believe that it would be a disservice to future generations for this court to attempt to define it. It is a concept which will change as changing conditions create

> changing public needs . . . . Where the legislature has found that a public purpose will be served by the expenditure or transfer of public funds or the use of public credit, the court will not set aside the finding of the legislature unless it clearly appears that such finding is arbitrary and without any reasonable basis in fact *(DeArmond v. Alaska State Development Corporation,* 376 P.2d 717, 1962).

The Alaska Supreme Court has yet to find a legislative determination of public purpose arbitrary and without any basis in fact. It has upheld the use of revenue bonds by a public corporation and general obligation bonds of a municipality for industrial development purposes *(DeArmond;* and *Wright v. City of Palmer,* 468 P.2d 326, 1970). It has upheld the use of revenue bonds by a public corporation to purchase home mortgages *(Walker v. Alaska State Mortgage Association,* 416 P.2d 245, 1966). It has upheld state grants to homeowners to pay off the mortgages of property lost in the 1964 earthquake *(Suber v. Alaska State Bond Committee,* 414 P.2d 546, 1966). In *Suber* the court said: "It is not essential that the entire community or any particular number of persons should benefit from remedial legislation in order that a public purpose be served. The purpose of the program is no less public because its benefits may be limited by circumstances to a comparatively small part of the public." The court found no violation of this section by the Anchorage municipal telephone utility competing with private vendors of telephone equipment *(Comtec, Incorporated v. Municipality of Anchorage,* 710 P.2d 1004, 1985). The court found a legitimate public purpose in a privately-owned gas line that the Kenai Peninsula Borough supported by means of a special assessment district *(Weber v. Kenai Peninsula Borough,* 990 P.2d 611, 1999*).*

Section 7. Dedicated Funds

> **The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in Section 15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.**

Convention delegates prohibited the dedication, or "earmarking," of funds for specific purposes so that the legislature would not tie its own hands in providing for the public needs of the day. The commentary on this section by the constitutional convention committee that drafted it included this observation:

> Even those persons or interests who seek the dedication of revenues for their own projects will admit that the earmarking of taxes or fees for other interests is a fiscal evil. But if allocation is permitted for one interest the denial of it to another is difficult, and the more special funds are set up the more difficult it becomes to deny

> other requests until the point is reached where neither the governor nor the legislature has any real control over the finances of the state.

The phrase "as provided in Section 15 of this article" in the second sentence was added by an amendment in 1976 to allow creation of the Alaska Permanent Fund (see Section 15). Two exceptions to the prohibition against earmarking were allowed by the convention delegates. One exception is a dedicated fund that was already in existence, such as the school fund of AS 43.50.140, which receives proceeds from the tobacco tax for use of school repair and construction. The other exception allows new earmarking when it is required by federal law to participate in a federal program. This is the case with the Fish and Game Fund of AS 16.05.100, to which sport hunting and fishing license fees are dedicated.

A statutory dedication of revenue may not seem too serious because future legislatures are not bound by it. But a statutory dedication is likely to be self-perpetuating. A governor's veto might block a future legislature's effort to repeal the dedication. The flow of money into and out of the fund may be "off-budget" and shielded from annual review by the finance committees and the public. And the dedication fosters the development of a constituency that benefits from the dedication and resists changes to it.

How comprehensive did the convention delegates mean to be with this prohibition against dedicated funds when they adopted the phrase "proceeds of any state tax or license" in the first sentence? Did they mean all state revenue, or did they want to exclude from the prohibition against dedication those state revenues that are not derived from a tax or license? The question became important when Alaska began to receive substantial income from oil lease bonuses and royalties, which are not proceeds from a tax or license. An opinion of the attorney general of an early administration said that oil lease royalty income was outside the prohibition against earmarking in this section. A later opinion reversed this interpretation and held that the historical record of the convention made it clear that the delegates intended to bar the dedication of all state revenues, whether or not they derive strictly from a tax or license (1975 Opinion Attorney General No. 9, May 2). Consequently, a constitutional amendment was required to create the Alaska Permanent Fund (Section 15 of this article).

The Alaska Supreme Court has interpreted the phrase "proceeds of any state tax or license" to mean all sources of state revenue (see *State v. Alex*, 646 P.2d 203, 1982). For example, the court ruled that a state law that granted state land to the University of Alaska and required proceeds from that land to put into a university trust fund was an unconstitutional dedication of funds *(Southeast Alaska Conservation Council v. State*, 202 P.3d 1162, 2009*)*.

In 1998, Alaska participated in a settlement of tobacco-related claims which provided annual payments to the state of millions of dollars per year for 40 years. The legislature sold this stream of future revenue for a lump-sum, which it then appropriated (mainly for rural school construction). This

unusual transaction was challenged as an unlawful dedication of funds, but the court ruled that it was not *(Myers v. Alaska Housing Finance Corporation*, 68 P.3d 386, 2003).

It is generally understood that the authors of the constitution intended certain exceptions to the prohibition against dedicated revenues, such as pension contributions, proceeds from bond issues, revolving fund receipts and sinking fund receipts (1982 Informal Opinion Attorney General, November 30). Indeed, beyond these practical exceptions to the prohibition on the dedication of revenue, it must be noted that some dedications have a legitimate role in state financial management, despite the public policy problems that caused them to be prohibited in the Alaska Constitution. Dedication allows the benefits of a public program to be directly linked to those who pay for them. Some revenues are dedicated in Alaska today in a manner that makes the practice constitutionally acceptable, namely that the pertinent statutes say that the legislature "may" appropriate certain money for a certain purpose. The legislature has a political but not a legal obligation to do so. An example of this practice is the fisheries enhancement tax levied under AS 43.76.010. This is a tax on salmon fishermen intended to support salmon hatcheries. The tax receipts are deposited to the general fund, and "the legislature may make appropriations to the Department of Community and Economic Development for the purpose of providing financing to qualified [regional aquaculture] associations" (AS 43.76.025).

Enterprise funds are also examples of de facto dedication of revenues, such as the Marine Highway System Fund, which directs receipts from the sale of tickets on the ferry system to the support of that system. The constitutionality of this fund was challenged in court and upheld because the language of its authorizing statutes is permissive and does not restrict the authority of the legislature to appropriate money from the fund, although parts of the act creating this fund that restricted the authority of the executive branch to request appropriations from the fund were found to violate the prohibition of this section (*Sonneman v. Hickel*, 836 P.2d 936, 1992).

Section 8. State Debt

> **No state debt shall be contracted unless authorized by law for capital improvements or unless authorized by law for housing loans for veterans, and ratified by a majority of the qualified voters of the State who vote on the question. The State may, as provided by law and without ratification, contract debt for the purpose of repelling invasion, suppressing insurrection, defending the State in war, meeting natural disasters, or redeeming indebtedness outstanding at the time this constitution becomes effective.**

This provision permits the state to borrow money for capital improvements and veterans' housing loans. It prohibits the state from borrowing money to pay for operating expenses of government (except as provided in the last sentence of this section and Section 10 of this article). The state must pay for its annual operating expenses from recurring revenues. This section and Section 10 constitute a "balanced budget" mandate that is found in one form or another in all state constitutions. (Only rarely have states issued long-term general obligation bonds to pay for annual operations, unlike the federal government which does so routinely).

Borrowing for capital improvements must be approved by the voters. The legislature may not incur debt by itself (see the exception for revenue bonds in section 11). This rein on the legislature is intended to protect the fiscal integrity of the treasury. It is a common constitutional restraint among the states (a few constitutions allow the legislature to issue debt by a supermajority vote). It is the result of well-publicized defaults by states on bonds issued for overly ambitious public works projects and of scandals arising from bribery and corrupt financing schemes. The Territorial Organic Act of 1912 originally prohibited the territory of Alaska and its municipalities from acquiring any kind of debt without congressional approval, but this stricture was removed in 1935.

In 1982, a constitutional amendment was ratified that inserted the words "or unless authorized by law for housing loans for veterans." This allowed the state to sell tax-exempt general obligation bonds for veterans' housing loans. The amendment was a response to a 1980 federal law that prevented states or public corporations such as the Alaska Housing Finance Corporation from selling housing bonds in the tax-exempt market, but allowed an exception for bonds to finance veterans' housing (tax-exempt bonds can be sold at a lower rate of interest because interest paid by the bond is exempt from federal income tax).

The term "capital improvements" used in this section and Section 9 has been construed by the Alaska Supreme Court to mean assets in the form of real or personal property with a permanent character, such as streets, sewers, schools, and public buildings. Thus, the municipality of Juneau could not borrow money through the sale of general obligation bonds to acquire land for the expansion of state government offices, as land is not a public works or capital improvement within the traditional meaning of these terms *(City of Juneau v. Hixson,* 373 P.2d 743, 1962). (See also AS 37.07.120(4).)

Revenue bonds issued by an instrumentality of the state are explicitly exempt from the requirement for voter approval of this section (see Section 11, below). The state supreme court has said that lease-purchase agreements are also exempt, because these contractual agreements do not legally commit the legislature to make the lease payments. The contracts say that the lease payments are subject to annual appropriation by the legislature. "Where a lease-purchase agreement does not require a future legislature to appropriate funds, the agreement is not a long-term binding obligation to repay borrowed money pursuant to article IX, section 8, and is not 'debt' as defined by the Alaska Supreme Court" (*Carr-Gottstein Properties v. State,* 899 P.2d 136, 1995). The court defined debt for purposes of this section in *Chefornak v. Hooper Bay Construction Company,* 758 P.2d 1266, 1988, as

"borrowed money, usually evidenced by bonds but possibly created by the issuance of paper bearing a different label." In this case, a village sought unsuccessfully to repudiate an obligation to a construction company which was the result of an out-of-court settlement of a lawsuit, by claiming it was a "debt" incurred in violation of Section 9, below.

The large majority of general obligation bond propositions to go before the voters have been approved.

Section 9. Local Debts

> **No debt shall be contracted by any political subdivision of the State, unless authorized for capital improvements by its governing body and ratified by a majority vote of those qualified to vote and voting on the question.**

This section limits the general borrowing power of local governments just as Section 8 limits the general borrowing power of the state government: debt secured by the general credit of the government may be acquired only for capital improvements, and only after an affirmative vote of the electorate. Its purpose is also the same: to safeguard the fiscal integrity of the government. (See commentary under Section 8 for definitions of "debt" and "capital improvements.")

Alaska's constitution does not impose a ceiling on local debt, but the constitutions of many states do so, for example by restricting local debt to a percentage of the total assessed valuation of the taxing jurisdiction. However, the Alaska legislature has restricted local property tax rates to 30 mills (see AS 29.45.090(b), which has the effect of limiting access of local governments to oil production and pipeline property), but it has not restricted mill rates for revenue used to repay bonded debt.

Section 10. Interim Borrowing

> **The State and its political subdivisions may borrow money to meet appropriations for any fiscal year in anticipation of the collection of the revenues for that year, but all debt so contracted shall be paid before the end of the next fiscal year.**

This provision is an exception to the restriction in Section 8 against borrowing for non-capital expenses. It authorizes the state and local governments to acquire short-term debt to deal with cash-flow problems within the yearly budget cycle by issuing revenue anticipation notes. While it is clear that the debt should not be greater than an amount that can be repaid from revenues raised in one fiscal year, this provision recognizes that, as a practical matter, it may be necessary to delay full retirement of the debt into the next fiscal year.

Section 11. Exceptions

> **The restrictions on contracting debt do not apply to debt incurred through the issuance of revenue bonds by a public enterprise or public corporation of the State or a political subdivision, when the only security is the revenues of the enterprise or corporation. The restrictions do not apply to indebtedness to be paid from special assessments on the benefited property, nor do they apply to refunding indebtedness of the State or its political subdivisions.**

This section makes it clear that the limitations on the issuance of debt in Sections 8 and 9 apply only to general obligation debt. General obligation bonds are backed by the full taxing power of the government that issues them. Revenue bonds, on the other hand, are backed by the money generated by the project they finance, such as user fees and connection charges of a sewer project, gate receipts of a sports arena or mortgage payments of a housing authority. Revenue bonds for a project may be secured by the full financial resources of the public corporation that issues them, but these resources are limited to the revenue-generating assets of the corporation and exclude the taxing power of government.

The state has frequently incurred debt through the sale of revenue bonds, which does not require voter approval. For example, the state has sold revenue bonds for construction and expansion of the Anchorage and Fairbanks airports. Also, quasi-independent public corporations, such as the Alaska Housing Finance Corporation and the Alaska Industrial Development and Export Authority, have marketed a substantial number of revenue bonds. At times, the state has financed public buildings with revenue bonds issued by the former Alaska State Housing Authority, which are secured by long-term lease agreements with the state. Also, in recent years the state has committed itself to long-term lease-purchase agreements to obtain public office space from private developers.

Because revenue bonds and lease-purchase agreements do not require voter approval, they are mechanisms popular with the government for acquiring public facilities. The financial obligations incurred by Alaska public corporations are not a legal liability of the state. Under some circumstances, however, the state may be compelled to come to the defense of revenue bonds or certificates of participation (used to finance lease-purchase agreements) to prevent default in order to protect its own general credit rating. In 1994, the legislature adopted restrictions on the use of lease-purchase agreements, including the requirement that they be approved by law (AS 36.30.085(e)).

Section 12. Budget

> **The governor shall submit to the legislature, at a time fixed by law, a budget for the next fiscal year setting forth all proposed expenditures and anticipated income of all departments, offices, and agencies of the State. The governor, at**

> **the same time, shall submit a general appropriation bill to authorize the proposed expenditures, and a bill or bills covering recommendations in the budget for new or additional revenues.**

Virtually all state constitutions direct the governor to submit a proposed budget to the legislature, although most do so in the article on the executive branch. Traditionally, state governors' budgets were adopted with little or no change, particularly for operating programs. This tendency has become less pronounced in recent years as state legislatures have acquired independent fiscal staff. It is certainly not the case in Alaska, where the legislative finance committees produce their own budgets.

The governor's responsibility for preparing a budget is elaborated in the Executive Budget Act (AS 37.07), which requires a comprehensive, long-range fiscal plan for the state. The governor must submit a budget to the legislature on December 15 each year, approximately one month before the legislature convenes.

Section 13. Expenditures

> **No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.**

The government may not spend money that has not been appropriated for the purpose of the expenditure. This is a customary safeguard against fraud and fiscal mismanagement that appears in one form or another in most constitutions. The version here is taken from the *Model State Constitution.*

An appropriation is an authorization to spend public money. Generally speaking, the full amount of an appropriation does not have to be spent if the purpose of the appropriation is accomplished with a lesser amount. Thus, appropriations authorize a ceiling of expenditures for each specified purpose. This does not mean, however, that the executive branch can restrict expenditures willy-nilly. To do so would constitute informal veto power immune from a legislative override. If a law requires the executive branch to carry out a specific task (make grants to communities, for example) and money is appropriated for that purpose, there is an obligation on the part of the executive branch to spend the money as directed.

The last sentence of this section permits the legislature to determine when the unspent portion of an appropriation lapses back to the fund from which it was appropriated. Typically, appropriations for operating programs are made to lapse at the end of the fiscal year for which they are made, but capital

appropriations generally lapse when the project is completed or at some date set by the legislature beyond the next fiscal year.

Section 14. Legislative Post-Audit

> **The legislature shall appoint an auditor to serve at its pleasure. He shall be a certified public accountant. The auditor shall conduct post-audits as prescribed by law and shall report to the legislature and to the governor.**

A legislative post-audit is a review of the expenditure of public funds by all government agencies (legislative, executive and judicial) to ensure that the agencies spent the money in compliance with applicable laws and regulations. A post-audit contrasts with the pre-audit used in some states where expenditures are reviewed before payment is made. This section makes the auditor responsible to the legislature, as a potential conflict of interest exists if the post-auditor is appointed by and responsible to the governor, as is the case in some states.

State statutes that implement this section (AS 24.20.241) authorize the legislative auditor to undertake "performance" audits, as well as financial audits. A performance audit evaluates a program's management and its effectiveness in meeting its goals.

Section 15. Alaska Permanent Fund

> **At least twenty-five percent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments. All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.**

A constitutional amendment in 1976 added this entire section. It mandates the creation of the Alaska Permanent Fund. An amendment was required because Section 7 prohibits the dedication of revenues. Although the permanent fund dedicates non-tax petroleum revenue (royalties and lease-related revenue received by the state by virtue of its ownership of oil lands), the phrase "tax or license" used in Section 7 has been interpreted to encompass all forms of public revenue.

Dedicated funds normally specify the source of the revenue and the purpose for which it is to be expended (for example, motor fuel taxes are often dedicated to highway construction, lottery income to education, and so on). This provision specifies merely that certain money will be deposited to a special fund and invested, only the earnings of which may be appropriated by the legislature. Nonetheless, the fund represents a type of dedication because the deposits bypass the legislative

appropriation process. The fund's earnings are not earmarked for a particular purpose by the constitution; they are deposited in the general fund "unless otherwise provided by law." The law on the matter provides that approximately half of the annual income of the fund is to be distributed on a per capita basis (the dividend program) and as much of the balance as necessary is to be deposited to the corpus (principal) of the fund to account for losses in the value of the fund due to inflation (so-called inflation-proofing). Any income remaining after these purposes are satisfied is deposited to a reserve account for future dividends and inflation-proofing (see AS 37.13.145).

Section 16. Appropriation Limit

> **Except for appropriations for Alaska permanent fund dividends, appropriations of revenue bond proceeds, appropriations required to pay the principal and interest on general obligation bonds, and appropriations of money received from a non-State source in trust for a specific purpose, including revenues of a public enterprise or public corporation of the State that issues revenue bonds, appropriations from the treasury made for a fiscal year shall not exceed $2,500,000,000 by more than the cumulative change, derived from federal indices as prescribed by law, in population and inflation since July 1, 1981. Within this limit, at least one-third shall be reserved for capital projects and loan appropriations. The legislature may exceed this limit in bills for appropriations to the Alaska permanent fund and in bills for appropriations for capital projects, whether of bond proceeds or otherwise, if each bill is approved by the governor, or passed by affirmative vote of three-fourths of the membership of the legislature over a veto or item veto, or becomes law without signature, and is also approved by the voters as prescribed by law. Each bill for appropriations for capital projects in excess of the limit shall be confined to capital projects of the same type, and the voters shall, as provided by law, be informed of the cost of operations and maintenance of the capital projects. No other appropriation in excess of this limit may be made except to meet a state of disaster declared by the governor as prescribed by law. The governor shall cause any unexpended and unappropriated balance to be invested so as to yield competitive market rates to the treasury.**

This section was added by amendment in 1982. At the time, efforts to slow the growth of government by means of constitutional restraints on government spending were popular nationally, and limits of one sort or another are now found in many state constitutions. Some of these affect revenues, some appropriations. Annual increases may be limited to the annual growth of personal income, wages and salaries, or population and inflation, or to a ratio of revenue or spending to personal income that existed in a base year. This section of Alaska's constitution limits incremental growth of state appropriations to a dollar amount, $2.5 billion, adjusted for changes in population and inflation from

July 1, 1981 (see also Article XV, Section 28). The adjustments for population growth and inflation were intended to allow spending to remain steady on a real per capita basis. It is popularly referred to as the state's "spending limit," although it is technically an appropriation limit. (The distinction between expenditures and appropriations is discussed in the commentary to Section 13.) The fondness for capital spending on the part of legislators and their constituents is revealed in the provision that a third of the amount appropriated when the limit comes into play must be for capital projects, and in the mechanism for exceeding the limit for capital appropriations.

The appropriation limit in this section has never limited appropriations, largely because the base of $2.5 billion was high, from a historical perspective in Alaska, and because revenues available for appropriation did not continue to increase as dramatically as foreseen at the time. Meanwhile, inflation and population growth continued apace. As adopted in 1982, this amendment had an "escape clause" that called for a referendum in 1986 on its repeal (see Article XV, Section 27). Despite its problematic effectiveness, the voters expressed their strong support for continuation of the measure.

Section 17. Budget Reserve Fund

(a) There is established as a separate fund in the State treasury the budget reserve fund. Except for money deposited into the permanent fund under Section 15 of this article, all money received by the State after July 1, 1990, as a result of the termination, through settlement or otherwise, of an administrative proceeding or of litigation in a State or federal court involving mineral lease bonuses, rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments or bonuses, or involving taxes imposed on mineral income, production, or property, shall be deposited in the budget reserve fund. Money in the budget reserve fund shall be invested so as to yield competitive market rates to the fund. Income of the fund shall be retained in the fund. Section 7 of this article does not apply to deposits made to the fund under this subsection. Money may be appropriated from the fund only as authorized under (b) or (c) of this section.

(b) If the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year, an appropriation may be made from the budget reserve fund. However, the amount appropriated from the fund under this subsection may not exceed the amount necessary, when added to other funds available for appropriation, to provide for total appropriations equal to the amount of appropriations made in the previous calendar year for the previous fiscal year.

(c) An appropriation from the budget reserve fund may be made for any public purpose upon affirmative vote of three-fourths of the members of each house of the legislature.

(d) If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law.

This section was added by amendment in 1990. It represents another attempt to constrain state government spending, one which would have been unnecessary if the robust fiscal conditions of the early 1980s had continued and the appropriation limit in Section 16 had worked the way it was envisioned. Here, the focus is on a source of potential revenue to the state in the form of one-time payments from the resolution of disputes—either negotiated or adjudicated—with oil companies over back royalty and tax payments. In a number of lawsuits and administrative proceedings, the state government claimed that oil companies underpaid royalties and taxes due to the state from the production of North Slope oil fields. By the end of the 1980s, several billion dollars were at stake in these claims. Even if the state prevailed in only a portion of its claims, or negotiated settlements for only a portion of the amounts in dispute, the state stood to receive a lot of money. Many people preferred to see this "windfall" revenue set aside in a budget stabilization fund rather than contribute to what they considered distended annual budgets which were not sustainable in the long-run.

Central to the budget stabilization concept is that money may be appropriated from the reserve fund when revenues are below the level of the previous fiscal year, but this money must be repaid to the fund when revenues rebound.

Litigation was necessary to interpret two key phrases in this section, namely the phrase "administrative proceeding" in subsection (a), and the phase "amount available for appropriation" used in subsection (b). The questions were not academic. If informal conferences between the Department of Revenue and the oil companies over disputed taxes were considered to be administrative proceedings, a great deal more money would flow into the fund than if they were not. If the phrase "amount available for appropriation" were interpreted broadly to include such assets of the state as the permanent fund earning reserve account, as a practical matter all appropriations from the fund would have to be made under subsection (c), requiring a three-fourths supermajority vote. In *Hickel v. Halford* (872 P.2d 171, 1994), the court said that an informal conference was an administrative proceeding, and it ordered the Department of Revenue to transfer approximately $1 billion into the budget reserve from the general fund. In *Hickel v. Cowper* (874 P.2d 922, 1994), the court upheld a broad interpretation of "amount available for appropriation," making access to the money in the fund more difficult without resorting to section c, which allows appropriations from the fund with a three-fourths majority vote. The legislature has used this method to appropriate money

from the fund, but when doing so the members of the partisan minority caucus in the house and/or senate must be included in the political negotiations over the budget bill because their votes are needed to pass it. (There is also a statutory budget reserve fund (AS 37.05.540), which has been used by the legislature as a temporary savings account. It gets its money from direct appropriations, has more lenient rules for access, no requirement for supermajority votes, and no repayment provisions.)

ARTICLE X

LOCAL GOVERNMENT

Like Article VIII on natural resources, Article X on local government reflects considerable constitutional innovation. In drafting this article, the delegates tried to steer a middle course between too little and too much detail about local government structure. Existing constitutional provisions varied between New Jersey's silence on the subject and New York's long, discursive local government article.

Looking at metropolitan government elsewhere in the United States, members of the local government committee saw a hodgepodge of counties and cities crisscrossed with single-purpose, special service districts, all pursuing their duties narrowly without regard for economies that could be realized from consolidation and cooperation. County and city governments were inflexible, physically and functionally. This rigidity, financial handicaps, the absence of centralized control over the activities of the various jurisdictions, the distance of these governmental units from the average voter, and the lack of an integrated budget for their operations made local government despairingly inefficient and irrational in many parts of the country.

Furthermore, the courts tended to construe the powers of local governments very narrowly (unlike state governments with inherent power, local governments derive their authority solely from the state via express constitutional and statutory grants of power). Thus, municipal governments were often barred from dealing with pressing problems because they could not find some explicit provision that authorized them to act in the area.

At the time of the convention, local government institutions were quite undeveloped in Alaska. Scattered around the territory were small cities and a few independent school and public utility districts. There were no counties; Congress had prohibited their creation in the Territorial Act of 1912. It was evident that a majority of Alaskans would live in or near cities. Unincorporated areas on the periphery of cities, such as Spenard and Fairview near Anchorage, were growing rapidly (and resisting mightily efforts to annex them). Conflicts between special purpose districts and cities were already occurring. The delegates wanted to prevent problems by limiting the number of permissible local government units and giving flexibility and rationality to the system of local government.

There was general agreement on the long-term need for a unit of general purpose government between the state and the city, something that did not exist in Alaska at the time. The delegates feared that in the absence of this intermediate level of areawide government, fiscally autonomous service

districts would proliferate, resulting in the jurisdictional chaos that made local government so inefficient and reform so difficult elsewhere. Some delegates even wanted to do away with the cities altogether and provide for a single areawide unit of local government. This idea had appeal in concept, but as a practical matter it was considered unrealistic, as cities were already well established. Therefore, the convention authorized two units of local government in the constitution, the city and the borough.

The borough in Alaska was something new under the sun. It was intended as a progressive, flexible variation of the traditional county. Pains were taken to emphasize the legal and political distinctness of this new super-county form of government, including use of the term "borough" instead of county. However, the delegates were reluctant to specify anything more than the broadest constitutional framework for it. They realized that the vast differences across Alaska—differences in population distribution, concentration of taxable wealth, tradition and experience with local self-government—would require local variations of borough government.

Article X speaks of two types of boroughs, organized and unorganized. The sparsely populated rural areas were to be provided with local government services by the legislature through unorganized boroughs (Section 6). It is not clear how many unorganized boroughs were contemplated by the convention delegates, but the intention was that several would be created, as candidates for full borough status in the future, and eventually the state would be covered by a seamless network of large, regional boroughs, with a powerful, elevated local boundary commission arranging the pieces to suit statewide as well as local criteria. But early on, in 1961, the legislature simply designated the entire area outside organized boroughs as *the* unorganized borough.

The first borough created—the tiny Bristol Bay Borough in 1962—was at odds with the constitutional vision of boroughs as expansive regional units destined to merge or mesh with comparable, contiguous regional boroughs. This borough, like the several others subsequently created through local initiative, was designed to exploit a local tax resource to provide a narrow range of services to a small community of people. In these cases of voluntary incorporation there is usually also a defensive motivation to forestall a neighboring jurisdiction from annexing the local tax resource and exploiting it for a broader community.

In struggling to implement the borough concept, the legislature had to cope with popular reluctance to take on a new and unknown form of government and to shoulder new taxes to pay for it. Local populations resisted another layer of government to provide services that were being provided by the state or a local service area. The legislature had to force, directly and indirectly, the formation of boroughs in the most populated parts of the state (Ketchikan, Juneau, Sitka, Kodiak, Anchorage, Kenai, Matanuska Valley, and Fairbanks). As events unfolded in some areas, it became evident that local government could be provided most efficiently with a only one unit, and today Anchorage, Juneau, and Sitka are unified, city-borough governments. Elsewhere, city and borough governments have generally accommodated each other, and relationships among boroughs, cities, and school

districts have stabilized. Large areas of the state do not have organized borough government today because they do not have a tax base to support it, or because it serves no useful purpose.

The contemporary system of local government in Alaska that has emerged from this article is something different from and perhaps less grand than that foreseen by its authors. With difficulty, haltingly, and over time, the legislature and the local boundary commission have crafted a workable system of local government from the minimal guidelines offered in the 15 short sections of Article X.

Section 1. Purpose and Construction

> **The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.**

This section expresses the constitutional policy of encouraging the spread of local government in Alaska with "a minimum of local government units," namely cities and boroughs, as provided in subsequent sections. It establishes a strong presumption in favor of local government. When oil companies sued on numerous grounds to block formation of the North Slope Borough, the Alaska Supreme Court was bound by the constitution to uphold the formation of new boroughs whenever the requirements for incorporation have been minimally met *(Mobil Oil Corporation v. Local Boundary Commission*, 518 P.2d 92, 1974). In that decision, the court said: "Aside from the standards for incorporation [in statute], there are no limitations in Alaska law on the organization of borough governments. Our constitution encourages their creation."

The second sentence of this section is included to thwart the restrictive and narrow interpretation of this article that the courts and the legislature might be tempted to give it by the weight of tradition, most notably the longstanding judicial doctrine that local governments are powerless to act in the absence of delegated authority. Known as Dillon's Rule, it asserts:

> [A] municipal corporation possesses and can exercise the following powers and not others. First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable *Merriam v. Moody's Executors,* 25 Iowa 163, 170, 1868**Error! Bookmark not defined.Error! Bookmark not defined.**.

The convention delegates wanted local governments to get the benefit of the doubt in disputes over their power to act. In fact, the Alaska Supreme Court has referred to this section in several decisions favoring municipalities in disputes over their taxing powers. (See, for example, *Liberati v. Bristol Bay*

Borough, 584 P.2d 1115, 1978, in which the power of the borough to levy a sales tax on fish was unsuccessfully challenged as an unauthorized tax.)

Section 2. Local Government Powers

> **All local government powers shall be vested in boroughs and cities. The State may delegate taxing powers to organized boroughs and cities only.**

By authorizing only two units of local government, the city and borough, this section implements the constitutional objective in Section 1 of maximizing local self-government "with a minimum of local governmental units." By delegating the power to tax to only cities and boroughs, this section implements the constitutional objective in Section 1 of preventing the "duplication of tax-levying jurisdictions." Commentary on these provisions written by the local government committee notes that they are designed to prevent "numerous types of local units which can become not only complicated but unworkable," and "overlapping taxing authorities" that "often do not realize needs other than their own." Thus, for example, school districts in Alaska do not have independent taxing power, unlike the situation in many other parts of the United States.

The Alaska Supreme Court declared unconstitutional a state law that authorized private aquaculture associations to collect mandatory assessments on the sale of salmon by commercial fishermen, saying the scheme amounted to a delegation of taxing powers to an entity other than a city or borough *(State v. Alex*, 646 P.2d 203, 1982). The legislature then imposed a state "salmon enhancement" tax on salmon permit holders paid to the general fund (see AS 43.76.010; see commentary on Article IX, Section 7). On the basis of the *Alex* decision, the attorney general advised the Commercial Fisheries Entry Commission that the state buy-back program for excess permits violated this section of the constitution, as the buy-back fund was to be derived from assessments by the Commission on permit holders in each fishery (1985 Informal Opinion Attorney General, May 23).

Section 3. Boroughs

> **The entire State shall be divided into boroughs, organized or unorganized. They shall be established in a manner and according to standards provided by law. The standards shall include population, geography, economy, transportation, and other factors. Each borough shall embrace an area and population with common interests to the maximum degree possible. The legislature shall classify boroughs and prescribe their powers and functions. Methods by which boroughs may be organized, incorporated, merged, consolidated, reclassified, or dissolved shall be prescribed by law.**

This section mandates the creation of boroughs, which were thought of by the delegates as areawide units of government geographically larger than a city, comparable in some ways but superior to the traditional county. Adoption of the term "borough" was debated at length by the delegates. It was selected to emphasize the unique aspects of this governmental jurisdiction, and to avoid legal and political connotations of the traditional county. Alaska's boroughs were intended to be more versatile and powerful than counties.

The legislature is given wide latitude to define and shape this new creature. The constitution provides only that standards for creating boroughs must include population, geography, economy, and transportation, with the area and population of boroughs sharing common interests. More specific guidelines were avoided by the delegates (some constitutions establish the boundaries of every county) because they recognized that the borough concept would have to be adapted to a wide variety of local circumstances. The directive to "classify" boroughs reflects the expectation that the basic concept would need some customizing to suit diverse socioeconomic and geographic conditions across the vast state.

Also, the expectation was that areas with insufficient population, wealth, and other prerequisites for local self-government would nonetheless be designated as boroughs but remain "unorganized" until such time as conditions warranted incorporation. These might be boroughs of the third class, with the legislature acting as their assembly. However, multiple unorganized boroughs have not been created. The entire area of the state outside of organized boroughs is designated a single unorganized borough.

The legislature may mandate the creation of boroughs, and citizens may voluntarily petition to create boroughs. Statutory standards for borough incorporation are similar to, and little more specific than, the constitutional standards set out here (see AS 29.05.031). This flexibility has allowed boroughs to vary widely in size and population. Local petitions to create a borough are made to the local boundary commission created in Section 12 below. (The commission may not create boroughs on its own initiative.) Initially, the legislature provided for three classes of boroughs, but now only first-class and second-class boroughs are authorized.

The legislature has also adopted procedures for boroughs to be merged, consolidated, reclassified, and dissolved (see AS 29.05 and 29.06).

Section 4. Assembly

> **The governing body of the organized borough shall be the assembly, and its composition shall be established by law or charter.**

An amendment in 1972 to this section deleted a requirement that cities within a borough have formal representation on the borough assembly. The original provision was intended to promote cooperation

between cities and boroughs and the integration of their activities. But because of competition and conflict between cities and boroughs for territory and functions, it more often resulted in stalemate. Furthermore, it violated principles of legislative apportionment enunciated in a series of federal reapportionment cases of the early 1960s (see commentary under Article VI) which required local government legislative bodies to be apportioned on the basis of population.

Section 5. Service Areas

> **Service areas to provide special services within an organized borough may be established, altered, or abolished by the assembly, subject to the provisions of law or charter. A new service area shall not be established if, consistent with the purposes of this article, the new service can be provided by an existing service area, by incorporation as a city, or by annexation to a city. The assembly may authorize the levying of taxes, charges, or assessments within a service area to finance the special services.**

This provision authorizes service areas to be created within boroughs, and seeks to keep their number to a minimum. A service area may be created within a borough, but only if the service cannot be provided by an existing service area or by a city. Property receiving such services as road improvement, water supply, and fire protection from a special district may be taxed differentially to pay for them. Sections 2 and 15 prevent the existence of autonomous service areas.

The local government committee saw a special need for service areas in sparsely settled areas. Commentary by the committee said:

> One of the local government problems in Alaska today is the inability of small communities to organize for provision of just one or a few local services. By authorizing the establishment of service areas within boroughs, the proposed article makes it possible for a small unincorporated community or a relatively isolated area to meet a specific local need. Through establishment of service areas and assumptions of administrative or advisory responsibility, the citizens of small communities or rural areas will be preparing themselves for full self-government.

Although authorizing the creation of service areas, this section, read together with Section 1, favors the formation of cities over service areas. (See *Keane v. Local Boundary Commission,* 893 P.2d 1239, 1995, in which opponents of incorporation of a second class city unsuccessfully argued that the services to be provided by the new city could be better provided by a service area created by the borough in which the city was located.)

Section 6. Unorganized Boroughs

> **The legislature shall provide for the performance of services it deems necessary or advisable in unorganized boroughs, allowing for maximum local participation and responsibility. It may exercise any power or function in an unorganized borough which the assembly may exercise in an organized borough.**

This section refers to unorganized boroughs, indicating the intention of the drafters of this article that the entire state would be divided into boroughs, some of which would be organized and some of which would remain unincorporated until ready for self-government. (Commentary by the local government committee on the draft article said: "Under terms of the proposed article, all of Alaska would be subdivided into boroughs. In meeting the needs of the unincorporated areas, the legislature is to allow for "maximum local participation and responsibility.") Here the delegates had in mind local committees which would advise the legislature and perhaps assume administrative responsibilities.

Multiple unorganized boroughs have not been created. Instead, the legislature treats the entire area outside organized boroughs as one large unorganized borough (AS 29.03.010). To provide local services in the unorganized borough and meet the goal of local participation and responsibility, the legislature has used special service areas as authorized by Section 5 (AS 29.03.020). Service areas in the unorganized borough include school districts (called regional education attendance areas) and salmon enhancement districts. These entities have their own governing board.

Section 7. Cities

> **Cities shall be incorporated in a manner prescribed by law, and shall be a part of the borough in which they are located. Cities shall have the powers and functions conferred by law or charter. They may be merged, consolidated, classified, reclassified, or dissolved in the manner provided by law.**

This section gives broad power to the legislature to build a statutory framework for the creation and operation of cities, the second of the two local government units authorized in Section 2. It requires that cities be part of a surrounding borough if one exists (but they retain their independence of borough government with regard to their internal affairs). The constitution suggests by reference to "classification" of cities and boroughs in this and other sections that flexibility should be provided by authorizing the creation of cities with different sets of duties and responsibilities. Two classes of cities are recognized by statute—first- and second-class cities (see AS 29.04.030 and AS 29.35.250-350)—in addition to home-rule cities (see Section 9 below and AS 29.04.010).

This section also gives the legislature broad power to specify how the separate existence of cities may be terminated (i.e., through merger, consolidation, unification, or dissolution). Statutory procedures for unification of a city and borough need not give voters of the dissolved city the right to ratify the dissolution, even if the city is a home-rule city *(City of Douglas v. City of Juneau,* 484 P.2d 1040, 1971; see also Section 12 below).

Section 8. Council

> **The governing body of a city shall be the council.**

This section provides that the governing body of a city be referred to as the "council" and Section 4 provides that the governing body of a borough be referred to as the "assembly."

Section 9. Charters

> **The qualified voters of any borough of the first class or city of the first class may adopt, amend, or repeal a home rule charter in a manner provided by law. In the absence of such legislation, the governing body of a borough or city of the first class shall provide the procedure for the preparation and adoption or rejection of the charter. All charters, or parts or amendments of charters, shall be submitted to the qualified voters of the borough or city, and shall become effective if approved by a majority of those who vote on the specific question.**

This section furthers the constitutional objective expressed in Section 1 of providing maximum local self-government by providing a mechanism for first-class cities and boroughs to acquire home rule status. A charter is a locally drafted "organic law" for a home-rule community; it provides the largest measure of local self-government allowable under the constitution. Cities and boroughs that have not acquired home-rule powers by adopting a charter must operate within the limits of the powers delegated to them by the state in the Municipal Code (Title 29 of the Alaska statutes). These are known as general law municipalities. Home-rule municipalities, in contrast, may exercise all legislative powers not prohibited by state law or by their own charter (see Section 11). The major municipal governments in the state today are home rule municipalities.

The second sentence of this section is a self-executing provision that allows first class cities and boroughs to adopt home-rule charters if the legislature fails for whatever reason to implement the section (the constitution does not define classes of municipalities; it presumes that the legislature will adopt a classification scheme that involves at least first-and second-class categories).

Section 10. Extended Home Rule

The legislature may extend home rule to other boroughs and cities.

Cities and boroughs other than those of the first-class may adopt home-rule charters only under procedures specified by the legislature. They may not take advantage of the self-executing provision in Section 9.

Statutes provide that a borough or first-class city may adopt a home-rule charter, as may a second-class city that exceeds 35 square miles in area if the Department of Community and Economic Development determines that the population of the city is at least 3,500 permanent residents (AS 29.10.010).

Section 11. Home Rule Powers

A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.

This broad grant of home-rule power is unusual among state constitutions. It implements the policy of "maximum local self-government" set out in Section 1. Typically, other state constitutions enumerate the powers that may be exercised by home-rule municipalities, and courts have tended to interpret these enumerated powers narrowly. By extending legislative powers not otherwise prohibited to home-rule municipalities, the authors of Alaska's local government article sought to make home-rule powers as expansive as possible.

Home rule municipalities may not exercise legislative powers explicitly denied to them (see AS 29.10.200), nor may they exercise legislative powers that are implicitly denied them in cases where a state law preempts local action. The courts have been called on repeatedly to determine whether municipal ordinances are valid in the face of seemingly contrary state law. Thus, the judicial task has been to ascertain whether state laws were meant to further a specific statewide policy and have uniform statewide application. If so, then the local enactment must yield. For example, the City of Anchorage could not impede an electric utility from extending power lines to certain portions of the service area awarded to it by the Alaska Public Utilities Commission (now the Regulatory Commission of Alaska). The court said that the authority of the commission derived from state law and it prevails over an ordinance of a home-rule municipality *(Chugach Electric Association v. City of Anchorage,* 476 P.2d 115, 1970). Similarly, the court found that a local ordinance which required a person with a tort claim against the home-rule city to give written notice to the city within 120 days after the incident giving rise to the claim thwarted state law which established a two-year period within which such claims could be filed *(Johnson v. City of Fairbanks,* 583 P.2d 181, 1978). In *Macauley v. Hildebrand* (491 P.2d 120, 1971), the court prevented a home-rule city from requiring

the local school district to participate in a centralized accounting system without the school board's consent, as such consent was required by state law. (See also *Simpson v. Municipality of Anchorage*, 635 P.2d 1197, Alaska Ct. App., 1981; and *City of Valdez v. State*, 793 P.2d 532, 1990.)

Conflict or inconsistency of an ordinance with a state law is not necessarily fatal, provided the ordinance deals with a matter of purely local concern rather than statewide concern. Thus, for example, the court upheld the leasing ordinance of a home-rule city against its alleged inconsistency with state law *(Lien v. City of Ketchikan*, 383 P.2d 721, 1963; contrast *Foreman v. Anchorage Equal Rights Commission*, 779 P.2d 1199, 1989; see also *Acevedo v. City of North Pole*, 672 P.2d 130, 1983).

Article II, Section 19, which prohibits "local and special legislation," protects home-rule and other municipalities from selective intervention in their affairs by the legislature and serves the constitutional objective of providing "maximum self-government."

Section 12. Boundaries

> **A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.**

Through the local boundary commission created in this section, the convention delegates sought a mechanism to bring flexibility, adaptability, and rationality to local government boundaries in Alaska. In their view, a major failing of municipal government in the older states was the rigidity of boundaries: city, county, and other jurisdictional lines could not, as a practical matter, be modified to respond to changing governmental needs and opportunities. They wanted a mechanism to facilitate boundary change, and one with Olympian perspective. In the words of the local government committee, this commission allows boundary decisions to be made "at a level where areawide or statewide needs can be taken into account. By placing authority in this third party, arguments for and against boundary change can be analyzed objectively."

The local boundary commission is a five-member body appointed by the governor. It operates within the Division of Community and Regional Affairs, Department of Commerce, Community and Economic Development. The division serves as staff to the commission. Recommendations by the

commission on boundary changes under this section are subject to a legislative veto. (See AS 44.33.812.)

The term "boundary change" used in this section refers to changes in established boundaries such as through annexation and detachment, not to the creation of new cities and boroughs through incorporation. Although the local boundary commission plays a key role in new incorporations and unifications, it does so through authority conferred on it by the legislature under Sections 3 and 7 of this article (which say that cities and boroughs may be incorporated, merged, consolidated, classified, or dissolved in the manner provided by law). The legislature has said that the local boundary commission may not consider the creation of a new borough under this section (AS 29. 05.115).

The commission may reject petitions for incorporation if it finds that statutory conditions are not met, and it may amend petitions or attach conditions to them prior to approval.

Boundary changes that result from annexation may involve the dissolution of an existing unit of government. In such cases, approval of the annexation by the local boundary commission, if it survives legislative scrutiny as provided here, is decisive, even if statutory procedures regarding dissolution required ratification by the voters of the dissolved governmental unit. (See *Fairview Public Utility District No. 1 v. City of Anchorage*, 368 P.2d 540, 1962, which involved the dissolution through annexation of a public utility district without ratification, and *Oesau v. City of Dillingham*, 439 P.2d 180, 1968, which involved the dissolution through annexation of a city without ratification by voters of the city.)

Although this section says that the local boundary commission may consider any proposed boundary change, the legislature has stipulated that it may consider only proposals from the legislature, the commissioner of the Department of Commerce, Community and Economic Development, or a political subdivision of the state. Under this authority, for example, the local boundary commission considered and approved a request by the commissioner of the department for detachment from the North Slope Borough of the mineralized zone around the Red Dog mining property. This detachment was critical to the success of the proposed Northwest Arctic Borough, incorporation of which the commission also approved.

The power of legislative veto over proposals of the local boundary commission made under this section is one of two explicit authorizations of the legislative veto in the Alaska Constitution. (See Article III, Section 23; also see Article IV, Section 15.) To reject a proposal under this section, the legislature must muster a majority of both houses acting separately rather than a majority voting in joint session. Decisions by the local boundary commission have occasionally been rejected by the legislature. For example, in 1989 the legislature rejected the proposed annexation by the Fairbanks North Star Borough of Pump Station 7 on the trans-Alaska pipeline (Legislative Resolve No. 6). Decisions of the commission made under statutory authority not derived from this section are not subject to the legislative veto. For example, the Alaska Supreme Court ruled that the local boundary

commission's approval of the incorporation petition of the North Slope Borough was not subject to legislative approval because the statutes governing incorporation did not require it *(Mobil Oil Corporation v. Local Boundary Commission,* 518 P.2d 92, 1974). Statutory provisions governing incorporation and alteration of municipalities are AS 29.05 and AS 29.06.

Section 13. Agreements; Transfer of Powers

> **Agreements, including those for cooperative or joint administration of any functions or powers, may be made by any local government with any other local government, with the State, or with the United States, unless otherwise provided by law or charter. A city may transfer to the borough in which it is located any of its powers or functions unless prohibited by law or charter, and may in like manner revoke the transfer.**

Members of the local government committee saw intergovernmental conflict and jurisdictional rivalry as an underlying cause of the inefficiency and rigidity of municipal government in many parts of the country. Because of them, services were needlessly duplicated and efforts were hindered to solve problems that cut across governmental lines of authority (pollution abatement, river basin management, regional economic development and many others). In this article, the delegates sought to emphasize the constitutional goal of intergovernmental cooperation and integration at the local government level. If city functions overlap with borough functions, the city should cede these to the borough. By this and the original language in Section 4 (since removed by amendment) which gave cities representation on borough assemblies, the constitution seeks intergovernmental cooperation and the fullest reasonable integration of activities between cities and boroughs.

Ironically, in some areas the creation of boroughs around established cities led to the duplication of local government structures that the convention delegates strived to avoid in crafting this article. The solution has not been cooperative agreements between the city and borough, as contemplated here, but unification into a single city-borough government. Juneau, Sitka, and Anchorage have unified city-borough governments.

Section 14. Local Government Agency

> **An agency shall be established by law in the executive branch of the state government to advise and assist local governments. It shall review their activities, collect and publish local government information, and perform other duties prescribed by law.**

The agency established by this section is the Division of Community and Regional Affairs within the Department of Commerce, Community, and Economic Development. (It was formerly the Local Affairs Agency within the governor's office, and the Department of Community and Regional Affairs). It is the only executive agency mandated by the constitution. (The local boundary commission created in Section 12 is one of five boards and commissions created by the constitution.) Its presence in the constitution symbolizes the importance placed on local government matters by the constitution's authors.

Section 15. Special Service Districts

> **Special service districts existing at the time a borough is organized shall be integrated with the government of the borough as provided by law.**

At the time of the convention, school districts were the primary special service districts in existence. In keeping with the general constitutional objectives of minimizing local jurisdictions and favoring general purpose over special purpose government, the delegates voted to require school districts to be absorbed by boroughs where they are formed. Under this scheme, the borough levies taxes to support education and approves the budget of the school district, which otherwise continues under the management of a local school board and separate school administration. Within general tax and budget restraints, borough school districts have substantial autonomy. A number of the delegates wanted independent school districts to remain autonomous after statehood, but the contrary view reflected in this section prevailed. The requirement here that school districts be merged with borough governments was a major complicating factor in the implementation of the new borough concept. The constitution does not specify a timetable for the creation of boroughs, and in the meantime existing cities, school districts and public utility districts would continue to operate (Article XV, Section 3).

ARTICLE XI

THE INITIATIVE, REFERENDUM, AND RECALL

The initiative and referendum are devices that permit the electorate to participate directly in the law-making process. Through the initiative the voters may enact legislation, and through the referendum they may veto laws passed by a recent legislature. Through the recall, the voters may remove an elected official from office. The initiative and referendum are known as "direct democracy" provisions. They first appeared in this country during the populist reform movement of the early twentieth century, and they are found in one form or another in about half of the state constitutions.

Basic procedures for using the initiative and referendum are specified in this article to ensure that these avenues of popular access to the legislative process are not dependent upon or constrained by supplemental legislation adopted by the legislature. However, the procedures and grounds for recalling elected officials are left entirely to the legislature.

Generally speaking, Alaska's convention delegates were ambivalent about direct democracy, for while they authorized it on the one hand, they circumscribed its use on the other. For example, certain subjects are off-limits (Section 7); the legislature is given an opportunity to pass its own version of an initiative proposal (Section 4); and the legislature may amend an initiated law after it is adopted by the voters (Section 6). These constitutional hedges on the exercise of the initiative and referendum reflect an underlying faith in the efficacy of legislative deliberation, fear on the part of some delegates that the initiative and referendum would be exploited by special interests for their own narrow purpose, and perhaps outright suspicion by others of the sudden passions and impulses of the voters.

A variation of the initiative not foreseen in the language of Article XI was an "advisory" vote regarding a constitutional amendment to create a unicameral (one house) legislature. Because Article XIII, Section 1 precludes the use of the initiative to amend the constitution, and because the legislature refused to place a unicameral amendment before the voters, backers of a unicameral legislature did what they could to bring pressure on the legislature by initiating an advisory ballot proposition. Although technically an initiative, this measure was loosely referred to as a "referendum" on the question of unicameralism.

Use of an advisory ballot took another turn in 1978 when the legislature itself placed a ballot proposition before the voters seeking guidance on the constitutional question of limiting the length of legislative sessions. The legislature has sought an advisory vote several times since. In 1986, it

sought the opinion of voters on the issue of adopting an annuity plan for the elderly in place of the longevity bonus; in 1999, on the question of whether a portion of permanent fund investment earnings should be used to help balance the state budget; and in 2007, on the issue of adopting a constitutional amendment prohibiting state and local governments from providing employment benefits to same-sex couples. These measures are not referendums as described in Article XI.

On other occasions, the legislature has asked voters to pass judgment on laws it has adopted. A 1968 act providing for pre-registration of voters and a 1980 act creating the Alaska Statehood Commission both contained requirements that the electorate give its approval before the laws became effective. Each of these ballot propositions was called a "referendum," although neither was a citizens' referendum under the terms of Article XI. Another instance of the legislature submitting a public policy decision directly to the voters occurred in 1982 and involved the proposed relocation of the state capital from Juneau to a new site at Willow. In that case, the expenditure of money for purposes of the relocation could occur only if so authorized by the electorate. It is arguable whether delegation of the inherent legislative function of law-making and appropriating money which occurred in these cases was constitutional, but they were not challenged.

Initiatives are invariably contentious, and disputes are common over the wording used by the lieutenant governor on the petition and the ballot, his certification or rejection of an application, and his determination regarding the similarity of an alternative measure adopted by the legislature.

Section 1. Initiative and Referendum

> **The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum.**

Voters in Alaska may bypass the legislature and enact a law by means of the initiative. The people can accomplish by the initiative what the legislature can accomplish by enacting laws, except for the explicit limitations in Section 7 of this article. Thus, enactments by initiative are similar to enactments by the legislature, and they are bound by the rules of legislation that bind the legislature. For example, initiatives must conform to the single-subject rule in Article II, Section 13. (See *Yute Air Alaska, Incorporated v. McAlpine,* 698 P.2d 1173, 1985.) Further, initiated laws must be constitutional. The attorney general instructed executive branch officials to ignore the so-called "Tundra Rebellion" initiative adopted in 1982 because it violated Article XII, Sections 12 and 13 of the constitution (see commentary under Article XII, Section 12). Also, the lieutenant governor has rejected initiative applications on the grounds that their subject matter was clearly unconstitutional (see Section 2 below).

The initiative may not be used to amend the constitution. Thus, various efforts to adopt term limits by the initiative came to nothing because they sought to change the qualifications for office set in the constitution (see Article II, Section 2; see also *Alaskans for Legislative Reform v. State*, 887 P.2d 960, 1994). Voters adopted term limit initiatives in 1994, 1996, and 1998 pertaining to legislative and congressional offices. The 1994 initiative was scheduled to take effect when 24 other states adopted similar legislation; the 1996 and 1998 initiatives were not implemented on the advice of the attorney general. A U.S. Supreme Court decision nullified state efforts to impose term limits on congressional office (*Cook v. Gralike*, 531 U.S. 570, 2001). The 1996 and 1998 initiated laws were repealed by the legislature in 2001.

Initiated laws may not exceed the general powers of a legislative body. In the case *Municipality of Anchorage v. Frohne* (568 P.2d 3, 1977) regarding use of the initiative at the municipal level, the Alaska Supreme Court said: "The Borough Assembly . . . had no power, through a prior legislative act, to bind a municipal government not yet in existence. Similarly, the people through the initiative process cannot accomplish that result." (See also *Griswold v. City of Homer*, 186 P.3d 558, 2008, in which the court said that the initiative could not be used to amend the city zoning code because that was not a power possessed by the city council.)

The referendum gives to the voters veto power similar to that of the governor. By following the referendum procedures, they may reject a measure recently passed by the legislature and signed into law. Like the governor's veto power, the referendum applies to entire bills, not portions of them. The referendum may not be used to repeal appropriations or other certain types of legislation (see Section 7 below).

The referendum has seldom been used. It was used in the primary election of August 24, 1976, to repeal a law raising the salaries of judges, legislators, and department heads. It was used in the 2000 general election to reject a law that authorized "land and shoot" methods of taking wolves. The "land and shoot" law adopted by the legislature repealed a prohibition against such airborne hunting that had been adopted by initiative in 1996.

Section 5 of this article requires a referendum petition to be filed within 90 days after adjournment of the legislature that passed the bill which is the subject of the petition. How do the voters go about repealing a law after the 90-day deadline? How do the voters repeal a law enacted through the initiative, should they change their mind about it? (This section says that only "acts of the legislature" are subject to veto by the referendum.) The answer in both cases is the initiative. The initiative can be used to overturn a law if the 90-day period of Section 5 has expired or if rejection of an initiative is sought (1975 Informal Opinion Attorney General, April 14). The initiative has been used several times to attempt to repeal a standing law. An initiative on the 1976 general election ballot sought to repeal the state's limited entry law enacted several years earlier. (It was defeated.) An initiative to

repeal the state's subsistence law appeared on the 1982 general election ballot. (It, too, was defeated.) An initiative in 1998 successfully repealed a road sign law adopted by the legislature in 1997.

The initiative and referendum, subject to the limitations of Section 7, have been extended to municipalities (AS 29.26.100).

Section 2. Application

> **An initiative or referendum is proposed by an application containing the bill to be initiated or the act to be referred. The application shall be signed by not less than one hundred qualified voters as sponsors, and shall be filed with the lieutenant governor. If he finds it in proper form, he shall so certify. Denial of certification shall be subject to judicial review.**

This is the first step of a two-step process of placing an initiative or referendum on the ballot. It requires an application signed by 100 qualified voters. Only then may a petition be circulated to acquire the signatures required in Section 3 below. The first step assures that the measure has some popular support before the state goes to the expense of printing petitions, and it creates a threshold level of effort to discourage frivolous petitions.

Alaska Statute 15.45.030 defines the proper form of an initiative petition. It must be confined to one subject; the subject must be expressed in the title; the enacting clause shall read "Be it enacted by the People of the State of Alaska"; and the bill may not include subjects prohibited by Section 7 of this article. Alaska Statute 15.45.270 defines the proper form of a referendum application.

The substance of a proposed initiative may not be unconstitutional. The state supreme court has said that as a general rule the constitutionality of an initiative should wait to be adjudicated until after the measure has been adopted by the electorate. However, it recognizes an exception for initiative applications that are "clearly unconstitutional or unlawful." On advice of the attorney general, the lieutenant governor has, on occasion, rejected initiative applications as being unconstitutional. Opponents have brought suit to keep an initiative off the ballot on the grounds that it is unconstitutional, and sponsors have sued to challenge a ruling by the lieutenant government that their measure is unconstitutional. In the case *Alaskans for Efficient Government v. State*, 153 P.3d 296, 2007, the Alaska Supreme Court said that the lieutenant governor properly declined to certify an initiative that required a supermajority vote in the legislature to pass tax-related bills, because Article II, Section 14 of the constitution requires only a majority of the legislature to adopt bills, and an initiative may not be used to amend the constitution. In the case *Kohlhaas v. Office of Lt. Governor*, 223 P.3d 105, 2010, the court also upheld the denial of certification by the lieutenant governor. In the case of *State v. Trust the People*, 113 P.3d 613, 2005, on the other hand, the sponsors of an initiative successfully challenged the lieutenant governor's ruling that their measure was unconstitutional.

Sponsors of an initiative also prevailed in court against the denial of certification of their measure by the lieutenant governor in *Pebble Ltd. Partnership v. Parnell*, 215 P.3d 1064, 2009.

Section 3. Petition

> **After certification of the application, a petition containing a summary of the subject matter shall be prepared by the lieutenant governor for circulation by the sponsors. If signed by qualified voters who are equal in number to at least ten percent of those who voted in the preceding general election, who are resident in at least three-fourths of the house districts of the State, and who, in each of those house districts, are equal in number to at least seven percent of those who voted in the preceding general election in the house district, it may be filed with the lieutenant governor.**

This is the second and more difficult step in securing a place on the ballot for an initiative or referendum. The requirement for signatures on a petition is to assure widespread support for an initiative or referendum before it reaches the ballot. The sponsors of a measure must collect signatures of registered voters equal in number to 10 percent of the votes cast in the preceding general election, and these signatures must come from a minimum of 30 house districts where the total in each must be a minimum of 7 percent of the votes cast in the preceding general election in that district. This is a more burdensome signature requirement than appeared in the original constitution. It was added by an amendment ratified in 2004. Prior to the amendment, those seeking to place a measure on the ballot had only to collect signatures equal to "ten percent of those who voted in the preceding general election and resident in at least two-thirds of the house districts of the state." The convention delegates chose the ten percent figure as a compromise between eight percent urged by some and fifteen percent urged by others. The constitutional amendment in 2004 was intended to assure statewide support for a proposed measure. Under the original provisions, virtually all of the required signatures could be obtained from a few urban districts.

The lieutenant governor must write an objective summary of the proposed initiative for the petitions that are circulated for signatures. The courts often have to decide if the summary is objective. For example, opponents of an initiative that would require parental notification prior to an abortion by a minor sued to prevent the measure from appearing on the ballot because the summary on the signature petitions omitted pertinent provisions of the measure. The court agreed that the summary was incomplete, but allowed the measure to go forward to the ballot with a revised summary *(Planned Parenthood of Alaska v. Campbell*, 232 P.3d 725, 2010).

Section 4. Initiative Election

> **An initiative petition may be filed at any time. The lieutenant governor shall prepare a ballot title and proposition summarizing the proposed law, and shall place them on the ballot for the first statewide election held more than one hundred twenty days after adjournment of the legislative session following the filing. If, before the election, substantially the same measure has been enacted, the petition is void.**

By the terms of this section, an initiative may not go before the voters until the legislature has had an opportunity to contemplate the subject matter of the initiative over a full session and decide whether to adopt a similar law. If it adopts "substantially the same measure," the initiative dies. Statutes assign to the lieutenant governor, with a formal concurrence of the attorney general, the task of determining substantial similarity (AS 15.45.210). If the legislature does not act, the initiative appears on the ballot at the first statewide election occurring 120 days after adjournment of the legislative session. This could be a primary, general, or special election, depending on when the legislature adjourned, and the difference could be significant for the fate of the measure because the number and characteristics of voters vary with different types of elections.

These provisions give the legislature considerable power over initiatives, as do the provisions of Section 6 which permit the legislature to amend an initiated law at any time and repeal it after two years. Allowing the legislature time to consider an initiative over the course of a session resembles the "indirect initiative" used in some states whereby voters can introduce bills in the legislature.

Some initiative petitions in Alaska have died by the legislature enacting a substitute measure. For example, in 1974 an act by the legislature regulating election campaign financing displaced a proposed initiative, as did an act repealing the state's personal income tax in 1979. Not surprisingly, the sponsors of initiatives that are set aside tend not to think that the substitute measures are substantially the same as their own (see, for example, *Warren v. Boucher*, 543 P.2d 731, 1975). In the *Warren* decision, the court said: "If in the main the legislative act achieves the same general purpose as the initiative, if the legislative act accomplishes that purpose by means or systems which are fairly comparable, then substantial similarity exists." The court noted that because the legislature possesses broad power to amend an initiative (Section 6), it therefore "has broad power to change an initiative by an enactment covering the same subject as the initiated measure."

In 2004, a group upset by Governor Frank Murkowski's appointment of his daughter to the U.S. Senate seat he vacated to become governor, sponsored an initiative to change the manner in which a vacancy for U.S. senator is filled in Alaska (from appointment by the governor to an election). The lieutenant governor refused to certify the petition because he asserted it was unconstitutional. The sponsors successfully sued to have the petition certified for the ballot. Then the lieutenant governor determined that a measure passed by the legislature was substantially the same as the initiative, and

withdrew it from the ballot. The sponsors successfully challenged this ruling, and the measure appeared on the ballot *(State v. Trust the People,* 113 P.3d 613, 2005), but not before the sponsors sued again to have the ballot wording rewritten to eliminate bias. It was adopted by the voters.

The legislature may not repeal an initiated law for two years. May it repeal within two years a law that has been determined to be substantially the same as a proposed initiative? This circumstance has not yet occurred and therefore not yet litigated, but an argument could be made that repeal would violate the intent of this section.

Meaning of "filed" in this section was the subject of litigation over an initiative in 1984 to abolish the state transportation commission. Although the initiative petition was filed before the 1984 legislative session convened, the lieutenant governor did not begin to verify the signatures until after it began. Those opposed to the measure argued that the filing was not valid until after the verification process (in which case the initiative would have to wait until after another legislative session before it could be put on the ballot), but the supreme court disagreed and upheld the decision of the lieutenant governor to put it on the 1984 ballot: "While the court in no way disagrees with the importance of the safeguard afforded by requiring the initiative to lie before a complete session of the legislature, it concludes . . . that actual filing of a facially valid initiative suffices to invoke that safeguard" *(Yute Air Alaska, Incorporated v. McAlpine,* 698 P.2d 1173, 1985).

The accuracy of ballot summaries prepared by the lieutenant governor is periodically disputed. For example, in 1982 opponents of an initiative alleged that the lieutenant governor had failed to summarize in a truthful and impartial manner the subject of the initiative on both the petition and the ballot. The initiative sought to repeal the state's subsistence law, which gave preference to rural residents in the taking of fish and game resources when there were not enough to meet the demands of all the resource users. The petition summary said that passing the initiative would prevent classification of subsistence users on the basis of whether they lived in an urban or rural area. The complaint was that the summary was misleading and biased in favor of adoption of the initiative because the initiative would not prevent such classification under federal law. The court ruled that the summary accurately described the effect of the initiative on state law, and that it did not have to address the effect of passage on the working of federal law *(Burgess v. Miller,* 654 P.2d 273, 1982).

In 2002, the sponsors of an initiative to move the site of legislative sessions from Juneau challenged the ballot summary of their measure prepared by the lieutenant governor. The Alaska Supreme Court ordered changes, saying that the "past-tense phrasing—'as determined by a commission'—can easily be read to mean that an existing commission already has determined the costs and that the initiative seeks to keep them secret" *(Alaskans for Efficient Government v. State,* Supreme Court Order No. 41, August 7, 2002; No. S-10633). See Article XIII, Sections 1 and 3 about biased wording of summaries of proposed constitutional amendments.

Section 5. Referendum Election

> **A referendum petition may be filed only within ninety days after adjournment of the legislative session at which the act was passed. The lieutenant governor shall prepare a ballot title and proposition summarizing the act and shall place them on the ballot for the first statewide election held more than one hundred eighty days after adjournment of that session.**

An aggrieved voter has 90 days from the end of the session to collect all the signatures necessary to refer a bill to the electorate (a referendum campaign could begin as soon as the bill is passed, thus allowing more than 90 days in some cases). Some state constitutions provide for the suspension of the legislative act when a referendum application has been filed against it, pending the outcome of the election. However, Alaska's constitution allows the law to take effect and, by the terms of Section 6, stay in effect for 30 days after the defeat of the legislative measure at the polls. (This is the interpretation by the Alaska Supreme Court in *Walters v. Cease*, 388 P.2d 263, 1964.)

To repeal an act after the 90-day deadline has passed, voters would have to utilize an initiative petition (see commentary on Section 1).

Section 6. Enactment

> **If a majority of the votes cast on the proposition favor its adoption, the initiated measure is enacted. If a majority of the votes cast on the proposition favor the rejection of an act referred, it is rejected. The lieutenant governor shall certify the election returns. An initiated law becomes effective ninety days after certification, is not subject to veto, and may not be repealed by the legislature within two years of its effective date. It may be amended at any time. An act rejected by referendum is void thirty days after certification. Additional procedures for the initiative and referendum may be prescribed by law.**

Included in this section are procedural details as well as important substantive provisions. Procedurally, the section establishes that a majority of the votes cast is necessary to adopt an initiative or referendum, and it establishes the effective date of an initiative measure approved by the voters—90 days after the lieutenant governor certifies the outcome of the election—and the date an act becomes void after rejection at the polls—30 days after certification of the referendum results.

Substantively, this section prohibits the legislature from repealing an initiated law for two years but permits the legislature to amend it at any time. It is silent on the question of whether and when the legislature may readopt a law rejected by a referendum. The convention delegates placed a great deal of trust in the deliberative processes of a fairly apportioned and broadly representative legislature, and

they were reluctant to supplant this process entirely with "direct democracy" mechanisms. They prohibited the legislature from making an immediate and outright repeal of an initiated law, for such authority might totally vitiate the initiative process. On the other hand, they allowed the legislature to repeal an initiated law two years after its effective date; they reasoned that by then circumstances giving rise to the law might well have changed, and the effectiveness of the law could be fairly evaluated. They allowed the legislature to amend an initiated law at any time, knowing that to do so would mean putting initiated laws at the mercy of the legislature. An opinion of the attorney general noted: ". . . mindful of the potential need to protect the State from mistakes, the Convention prohibited repeal but allowed amendment, even though it was also aware that the power to amend was virtually the power to destroy" (1975 Informal Opinion Attorney General, August 19).

The rationale for the legislature's power of amendment was stated by the Alaska Supreme Court in *Warren v. Boucher* (543 P.2d 731, 1975):

> The constitution thus vests broad authority in the legislature to vary the terms of an initiated law, after its adoption, by the process of amendment. This power amounts to a check or balance against the initiative process. No doubt the legislature was given this power to assure that initiatives that were ill-advised, which might seriously cripple or frustrate the sound workings of government, or which might be impracticable, could be altered or corrected rapidly by the legislature. It was obviously intended by the framers that the initiative process should not be permitted to disrupt vital governmental functions or to impose intolerable burdens upon established administrative systems. To this end the legislature was given the ability to substitute its judgment for that of the proponents of the initiative.

The legislature's amendments in 1975 to an initiated conflict-of-interest law were challenged in court on the grounds that they repealed the initiated law. The court found that the amendments were not so severe as to effectively repeal the law *(Warren v. Thomas,* 568 P.2d 400, 1977). However, the court indicated that amendments to an initiated law that are tantamount to repeal would be unconstitutional.

This section does not prevent the legislature from passing again a law which has been rejected by referendum (or from adopting a new one which achieves much the same purpose under a new guise). In 1996, an initiative was adopted by the voters that prohibited airborne "land and shoot" hunting of wolves by the public. The legislature re-authorized public "land and shoot" hunting methods in 2000 if it was done within an area designated for predator control by the department of fish and game. Supporters of the 1996 initiative mounted a successful referendum and overturned the legislature's action in the general election of 2000. In 2003, however, the legislature again authorized private airborne hunting by private persons in predator control areas. In 2008, opponents of private airborne hunting put an initiative on the ballot that reinstated the prohibitions of the 1996 initiative (it also included grizzly bears), but the measure failed.

Unlike a governor's veto, the referendum is an arduous and expensive process, as is the initiative. When an initiated law or a veto by referendum is offensive to a majority of legislators, only their fear of reprisal at the polls rather than constitutional safeguards works to keep the measure intact.

Section 7. Restrictions

> **The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation. The referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety.**

The initiative and referendum may not be used to enact or repeal certain types of legislation, as provided in this section and also Article XII, Section 11. Several measures have run afoul of these prohibitions, either in litigation after their enactment or in litigation over certification for the ballot by the lieutenant governor.

An expansive definition of "appropriation" has undone several initiatives. The first of these was the Alaska Homestead Act, an initiative adopted by the voters that provided for the free transfer of 30 million acres of state-owned land to Alaska residents. The court ruled that the term "appropriation" in this section refers to the setting aside of state-owned assets generally, rather than to just the cash assets of the state. In the case *Thomas v. Bailey* (595 P.2d 1, 1979), the Alaska Supreme Court said: "Thus, the Alaska Homestead Act would substantially deplete the state government of valuable assets just as surely as an initiative allotting to residents of specified years large sums of money. In the same manner, it constitutes an appropriation and hence may not be enacted by initiative."

The reasoning in *Thomas* blocked a municipal initiative that forced the sale of the city-owned electric utility (valued at about $35 million) to the regional cooperative utility for one dollar (*Alaska Conservative Political Action Committee v. Municipality of Anchorage*, 745 P.2d 936, 1987). It was applied in the case *McAlpine v. University of Alaska* (762 P.2d 81, 1988), which concerned a proposed initiative that would separate the community college system from the University of Alaska, and in so doing require the university to transfer to the new system real and personal property used by the community colleges. The court said that the mandatory transfer of property was a form of appropriation, and it ordered the property transfer section of the initiative removed from the measure that appeared on the ballot. In 1996, the *Thomas* rationale stopped the F.I.S.H. initiative, which proposed to reserve five percent of the statewide harvest of salmon for subsistence, personal use, and sport fishing. The lieutenant governor refused certification of the petition. The court ruled that salmon are a state asset and the proposed initiative would, in effect, appropriate them (*Pullen v. Ulmer*, 932 P.2d 54, 1996).

The court has said that in other sections of the constitution, mainly Sections 15 and 16 of Article II, the term appropriation refers strictly to money. In this section, however, it has said that a broader definition is necessary to accomplish the intent of the framers "to prevent popular give-away programs and maintain legislative control over the allocation of state assets" *(Alaska Legislative Council ex rel. State Legislature v. Knowles*, 86 P.3d 891, 2004).

Both a referendum and an initiative have been challenged as illegally treating local or special legislation. In *Walters v. Cease* (394 P.2d 670, 1964), the Alaska Supreme Court stopped a referendum on the Mandatory Borough Act of 1963 because the act was special and local legislation that is off limits to the referendum. In *Boucher v. Engstrom* (528 P.2d 456, 1974), the court upheld a capital move initiative, saying that legislation establishing the location of the state capital was not special and local because the subject was of statewide interest and importance.

The Alaska Supreme Court upheld the refusal of the lieutenant governor to certify a proposed initiative on the grounds that it attempted to prescribe a rule of court in violation of this section. In the case *Citizens Coalition for Tort Reform v. McAlpine* (810 P.2d 162, 1991), the lieutenant governor denied certification of an initiative that sought to limit the contingent fees of attorneys. The court said contingent fees fell within the purview of the court's rule-making power regarding the regulation of the practice of law and the conduct of attorneys, and therefore initiatives on the subject were forbidden by this section.

In 2000, the legislature placed a proposed amendment to this section on the general election ballot. The amendment would have added wildlife management to the subjects out of reach by initiative by inserting the language "permit, regulate, or prohibit the taking or transportation of wildlife, prescribe seasons or methods of taking wildlife." The proposed amendment was sparked by two initiatives that sought to regulate the taking of wolves. The first of these, which was adopted in 1996, restricted airborne "land and shoot" hunting; the second, which failed in 1998, sought to restrict the use of snares. (See Article XII, Section 11 for a discussion of the attempt to keep this initiative off the ballot.) The proposed amendment was not ratified.

Use of the initiative to place constitutional amendments before the voters is precluded by Article XIII, which authorizes only two methods to amend the constitution, and by Section 1 of this article which limits the use of the initiative to enacting laws. (See the discussion of term-limit initiatives under Section 1 above; see also *Starr v. Hagglund*, 374 P.2d 316, 1962.) However, an initiative may be used to call a constitutional convention. (See Article XIII, Section 2.)

Section 8. Recall

> **All elected public officials in the State, except judicial officers, are subject to recall by the voters of the State or political subdivision from which elected. Procedures and grounds for recall shall be prescribed by the legislature.**

This section makes the governor, lieutenant governor, and legislators subject to popular recall—that is, subject to removal from office by a vote of the electorate. Legislators can be recalled only by the voters of the district that elected them. Procedures for use of the recall are specified in AS 15.45.470-720. These include the grounds for recall, which are lack of fitness, incompetence, neglect of duties, or corruption. The legislature has also authorized the recall of elected municipal officials in the state municipal code (AS 29.26.240-350). Recall campaigns at the local level take place from time to time, some successfully.

In 1993, a recall campaign was mounted against Governor Hickel and Lieutenant Governor Coghill, and petitions were circulated for signatures. Eventually, the director of the division of elections decertified the petitions and the effort died. Several attempts have been made to recall legislators, but none have reached the voters. Two legislators resigned their positions prior to a recall vote, and twice the lieutenant governor has rejected recall petitions against legislators because the alleged grounds for recall did not meet the criteria for recall.

ARTICLE XII

GENERAL PROVISIONS

This article contains a number of constitutional odds and ends. During the convention the delegates referred to it as the "miscellaneous article." Items were included that did not fit logically in any other article. Several of the provisions of the article were included in anticipation of the requirements Congress would place on Alaska as a condition of admission to the United States. The delegates wanted a document fully acceptable to Congress that would take effect immediately upon the formal declaration of statehood. They consulted other state constitutions and drafts of pending statehood legislation for guidance in drafting these provisions. Sections 1, 4, 5 and 12 are the result of this effort. Section 13 constituted agreement in advance to any terms and conditions Congress might impose on the new state of Alaska.

Other provisions of the article define words and phrases used elsewhere in the document, clarify intent, mandate a merit system for state employment, and protect retirement benefits of state workers.

Section 1. State Boundaries

> **The State of Alaska shall consist of all the territory, together with the territorial waters appurtenant thereto, included in the Territory of Alaska upon the date of ratification of this constitution by the people of Alaska.**

This boundary article was based on language in pending statehood legislation (H.R. 2535). The origin of it is discussed in the study on natural resources prepared for the convention by the consultants Public Administration Service, which says, in part:

> The statehood bills for Alaska and Hawaii in 1954 and 1955 included language designed to apply the Submerged Lands Act of 1953 to those two prospective states. The description of Alaskan boundaries set out in these acts is pertinent to the drafting of a boundary article for the Alaskan Constitution, for the assumption can be made with a fair degree of safety that similar language will be incorporated into any future Congressional Act of admission. The language was rather carefully worked out in 1954 and 1955 in the Committees of the House of Representatives and the Senate and can be considered as settled.

Section 2. Intergovernmental Relations

> **The State and its political subdivisions may cooperate with the United States and its territories, and with other states and their political subdivisions on matters of common interest. The respective legislative bodies may make appropriations for this purpose.**

The *Model State Constitution* recommended a provision on intergovernmental relations to foreclose any doubt about the authority of the state to participate in interstate compacts and about the authority of local governments to enter directly into revenue-sharing agreements with the federal government. The following commentary on this provision was prepared by the committee of convention delegates that proposed the draft article.

> This provision is recommended mainly in order to make it clear that the state can participate in cooperative programs such as the Western Interstate Compact on Higher Education even though such programs may involve the expenditure of public funds outside the state. Some states have had to amend their constitutions in order to participate in such programs.
>
> This provision would also authorize local government units in Alaska to cooperate with Federal agencies on grant-in-aid programs such as housing and airport construction. Local government units could maintain direct relations with Federal agencies, but the Governor would serve as agent for the state in developing the intergovernmental relations of state agencies. In view of the close relationships which Alaska will have with the neighboring Canadian provinces, explicit authority is granted to the state to cooperate with foreign nations to the extent consistent with the laws of the United States.

Section 3. Office of Profit

> **Service in the armed forces of the United States or of the State is not an office or position of profit as the term is used in this constitution.**

Serving in the U.S. military or National Guard does not disqualify a person from becoming a legislator under Article II, Section 5, or governor or lieutenant governor under Article III, Section 6. The meaning of "position of profit" is discussed by the Alaska Supreme Court in *Begich v. Jefferson*, 441 P.2d 27, 1968. Article II, Section 5 exempts from the definition of a position of profit for legislators employed by or elected to a constitutional convention.

Section 4. Disqualification for Disloyalty

> **No person who advocates, or who aids or belongs to any party or organization or association which advocates, the overthrow by force or violence of the government of the United States or of the State shall be qualified to hold any public office of trust or profit under this constitution.**

This section is derived from statehood bills pending at the time of the convention.

Section 5. Oath of Office

> **All public officers, before entering upon the duties of their offices shall take and subscribe to the following oath or affirmation: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Alaska, and that I will faithfully discharge my duties as . . . to the best of my ability." The legislature may prescribe further oaths or affirmations.**

This, too, is a provision that derived from pending statehood legislation. Commenting on the inclusion of such a provision recommended in the *Model State Constitution*, authors of the publication said it is "more in deference to common usage than because of any deep conviction that the observance of such a formality will, in and of itself, transform the venal or incompetent into devoted public servants."

Section 6. Merit System

> **The legislature shall establish a system under which the merit principle will govern the employment of persons by the State.**

Here the constitution mandates a state civil service system based on merit. The alternative, Delegate Sundborg pointed out to the constitutional convention, is the "spoils system." A state civil service system keeps state jobs from being distributed as political favors. It also encourages the development of a competent, permanent work force. "Generally defined, the merit principle requires the recruitment, selection, and advancement of public employees 'under conditions of political neutrality, equal opportunity, and competition on the basis of merit and competence'" (*Alaska Public Employees Assn v. State*, 831 P.2d 1245, 1992).

This section is implemented by the State Personnel Act (AS 39.25), which includes a detailed definition of the merit principle. Approximately 90 percent of state employees are covered by the provisions of the personnel act. Exempt from its coverage are policy-level positions (mainly

commissioners, deputy commissioners, and division directors) in each executive department, and employees of the governor's office and the legislature.

The Alaska Supreme Court rejected the claim that privatizing state jobs violates the requirement in this section for the merit principle to govern state employment. The claim was brought by a state employee laid off as a result of an agency decision to contract with a private firm for maintenance of a rural airport. He argued that privatization subverts state policies relating to worker qualifications and conditions of employment, and allows the state to avoid costs of employment that it should properly bear. The Court said: "Establishing qualifications and conditions of employment to ensure a stable and experienced body of civil service workers is unquestionably among the varied goals of the merit principle. But in terms of the principle's constitutional purpose, this goal is secondary to the principle's primary objective of securing state workers against the evils of the spoils system" (*Moore v. State*, 875 P.2d 765, 1994).

Section 7. Retirement System

> **Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.**

This section protects state employees from a reduction of retirement benefits to which they were entitled when they entered the retirement system. The legislature may change retirement benefits, but the changes will only affect people entering the retirement system after the change is made. That is, a person is entitled to the benefits of the retirement system which existed at the time the person entered public employment, even if retirement benefits are subsequently reduced (see *Hammond v. Hoffbeck*, 627 P.2d 1052, 1981).

A retirement system for elected public officials, the Elected Public Officers' Retirement System (EPORS), was created by a general legislative pay bill enacted in 1975. When the bill became effective, the governor, lieutenant governor, and all legislators were required to participate in EPORS. The legislative pay bill creating EPORS was subsequently repealed by a referendum. Although the system ceased to exist, those public officials who participated in the system for the few months of its operation were entitled to its schedule of benefits upon their retirement by virtue of this constitutional provision *(State ex rel. Hammond v. Allen,* 625 P.2d 844, 1981).

According to the commentary on this provision by the convention committee that drafted it, a purpose of the section was to "assure state and municipal employees who are now tied into various retirement plans that their benefits under these plans will not be diminished or impaired when the Territory becomes a state."

Section 8. Residual Power

> **The enumeration of specified powers in this constitution shall not be construed as limiting the powers of the State.**

This provision extends to the powers of the state the same protection extended to the rights of individuals by Article I, Section 21. It blocks application of the doctrine of *expressio unius est exclusio alterius* (the mention of one thing implies the exclusion of another). The provision is probably not necessary, as it is established legal doctrine in the United States that a state may exercise all the powers not denied it in the U.S. Constitution or its own state constitution. Nonetheless, inclusion of it here reinforces the principle that this constitution is to be construed by the courts expansively rather than narrowly.

Section 9. Provisions Self-executing

> **The provisions of this constitution shall be construed to be self-executing whenever possible.**

A "self-executing" provision is one that takes effect without implementation by legislative action. By instructing the courts to interpret provisions of the constitution as self-executing to the greatest reasonable extent, this section seeks to lessen the opportunity for the legislature to vitiate a constitutional provision by failing to adopt the required ancillary legislation. Examples of provisions that the convention took special care to make self-executing are found in Article VI, which contains sufficient procedural detail for legislative redistricting to occur without further direction in statute; in Article X, where there is direction for municipalities to achieve home-rule status in the absence of statutory procedures; in Article XI, where the steps for initiatives and referendums are spelled out; and in Article XIII, where all steps necessary for calling a constitutional convention are specified, including the wording of the ballot.

Section 10. Interpretation

> **Titles and subtitles shall not be used in construing this constitution. Personal pronouns used in this constitution shall be construed as including either sex.**

Titles such as "Article XII, General Provisions," and subtitles such as "Section 10 Interpretation" have no legal meaning in the constitution. The second sentence of this provision means that the words *he* and *his* also mean *she* and *her*.

Section 11. Law-Making Power

> **As used in this constitution, the terms "by law" and "by the legislature," or variations of these terms, are used interchangeably when related to law-making powers. Unless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of Article XI.**

The aim of this section is to avoid confusion that might be created by different expressions for the concept of law, such as confusion that might arise over the scope of the initiative in Article XI stemming from the various terms "law," and "by the legislature." However, it creates some confusion about the scope of the initiative in the second sentence with the phrase "Unless clearly inapplicable." What, in addition to the explicit limitations in Article XI, Section 7, is beyond the reach of the initiative? This question was posed in a lawsuit seeking to keep an initiative off the ballot that prohibited the use of snares in trapping wolves. The plaintiffs argued that wildlife management was the exclusive domain of the legislature by virtue of it being the trustee of the state's natural resources, and therefore the regulation of wolf trapping was "clearly inapplicable" to the initiative process. The court rejected this argument. It said: "The convention debates suggest the framers added 'clearly inapplicable' to Article XII so that the initiative would not replace the legislature where the legislature's power serves as a check on other branches of government, such as legislative power to define courts' jurisdiction or override judicial rules." No separation of powers issues are raised by wildlife management and it is therefore a legitimate subject for the initiative (*Brooks v. Wright,* 971 P.2d 1025, 1999). Voters rejected the initiative in the general election of 1998.

Section 12. Disclaimer and Agreement

> **The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States. They further agree that no taxes will be imposed upon any such property, until otherwise provided by the Congress. This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation.**

With the exception of the second sentence, this provision is the conventional *clause irrevocable* which is found in virtually all statehood acts since Ohio's. Its purpose is to avoid land disputes between new states and the federal government. Section 8 of the Alaska Statehood Act contains similar language, and these two statements constitute a form of contract between the federal government and the people of the State of Alaska. This section is discussed at length in *Metlakatla Indian Community, Annette Island Reservation v. Egan,* 362 P.2d 901, 1961.

The novel feature of this provision and its counterpart in Section 8 of the statehood act is the reference to Native rights. The purpose of this reference was to leave open the possibility of Alaska Natives' receiving compensation from the federal government for their claims to land in Alaska. It took a special act of Congress, the Alaska Native Claims Settlement Act of 1971, to settle the matter of Native land claims. For a number of years, the federal government suspended the right of the State of Alaska to select its land entitlement under the statehood act because the claims of the Natives conflicted with the state's land selections.

In 1982, an initiative was approved by the voters that challenged federal ownership of unappropriated federal land in Alaska. This "Tundra Rebellion" initiative was patterned after similar "sagebrush rebellion" campaigns in other western states (where federal land holdings tend to be large). It asserts state ownership of all federal land, except specified federal withdrawals, and directs the Alaska Department of Natural Resources to begin to manage the land. The Alaska attorney general ruled that this initiative is unconstitutional under the Alaska Constitution because it violates Sections 12 and 13 of Article XII (1983 Opinion Attorney General, No. 2).

Section 13. Consent to Act of Admission

> **All provisions of the act admitting Alaska to the Union which reserve 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.**

By this section the people of Alaska gave advance consent to the terms of the future statehood act, whatever they might be. Advance consent to terms of the statehood act regarding mineral rights is found in Article VIII, Sections 9 and 11. The history and intent of this section are discussed at length in *State v. Lewis* (559 P.2d 630, 1977).

Giving blanket consent to a future statehood act was controversial at the constitutional convention, but it was finally agreed to because the delegates knew that Congress would require consent by Alaskans to the statehood bill and because the likely terms of admission had already become apparent in pending statehood legislation. The delegates hoped that this provision would substitute for a special referendum to ratify the future statehood act, but, in fact, the statehood act did require Alaskans to go

to the polls and vote to approve the act. This vote occurred on August 26, 1958, and 85 percent of the ballots cast favored admission under the terms of the act.

Section 14. Approval of Federal Amendment to Statehood Act Affecting an Interest of the State under that Act

> **A federal statute or proposed federal statute that affects an interest of this State under the Act admitting Alaska to the Union is ineffective as against the State interest unless approved by a two-thirds vote of each house of the legislature or approved by the people of the State. The legislature may, by a resolution passed by a majority vote of each house, place the question of approval of the federal statute on the ballot for the next general election unless in the resolution placing the question of approval, the legislature requires the question to be placed before the voters at a special election. The approval of the federal statute by the people of the State is not effective unless the federal statute described in the resolution is ratified by a majority of the qualified voters of the State who vote on the question. Unless a summary of the question is provided in a resolution passed by the legislature, the lieutenant governor shall prepare an impartial summary of the question. The lieutenant governor shall present the question to the voters so that a "yes" vote on the question is a vote to approve the federal statute.**

This section was added by amendment in 1996. In effect, it makes a political statement that the federal government may not unilaterally change the terms of the Statehood Act. The Statehood Act is a compact between the federal government and the state of Alaska. It is not implicitly incorporated into the constitution of the state of Alaska, and therefore it is not necessary to amend the constitution to ratify changes to the Statehood Act. According to this provision, a supermajority of the legislature or a majority of the voters may bind the state to a change in the Act. Without such approval, this provision declares that a change made by Congress is "ineffective."

Behind this amendment is the concern that Congress would authorize oil and gas leasing in the Arctic Wildlife Refuge and share petroleum revenues with the state on less generous terms than are set in the Statehood Act. Under the terms of the Statehood Act, the federal government is to give ninety percent of mineral revenues to Alaska. Draft legislation in Congress would have set Alaska's share at fifty percent.

This wordy amendment is a departure from the terse style generally favored by the drafters of the Alaska Constitution in 1955-56.

ARTICLE XIII

AMENDMENT AND REVISION

This article provides for the formal amendment of the constitution. The authors of Alaska's constitution sought to reduce the need for amendments by leaving to the legislature many matters that are typically included in the constitutions of other states, such as specifying the powers of local government and organizing the executive branch. They also provided automatic mechanisms to deal with anticipated changes, such as legislative redistricting. Thus, the authors tried to write a constitution that would not invite or require the frequent tampering that has made monsters of many state constitutions.

The convention delegates sought to make amendment procedures difficult enough to prevent rash, cluttering changes, but easy enough to allow the constitution to accommodate the important needs of a changing society. Because constitutional matters are of a fundamental importance, the delegates believed that all changes should be ratified by the voters. Thus, the delegates rejected the committee suggestion that the legislature could amend the constitution without a vote of the people, if two successive legislatures approved a proposal by two-thirds majority vote (this approach is used in Delaware, which is the only state constitution that can be amended without a popular vote).

To ensure that changes are well-conceived and properly drafted, the convention required a two-step process that allows for adequate deliberation, attention to detail and opportunity for reflection. Thus, proposals for change must emerge from a deliberative body (step one) before they reach the electorate for ratification (step two). The deliberative body may be either the legislature or a constitutional convention convened expressly for the purpose of studying changes in the state's basic law. Thus, the delegates did not allow the constitution to be amended by initiative because that process bypasses a deliberative body.

As the governmental body broadly representative of the people, the legislature is the logical and traditional point of origin for proposed amendments. To ensure that proposed amendments command substantial support, the constitution requires a two-thirds majority vote of each house for them to be presented to the voters.

The legislature should not be the only source of proposals for change, however, because legislatures are reluctant to reform themselves and curtail their own power. Furthermore, the legislature is not the ideal body to give the constitution a major overhaul if one is needed. Revision, in contrast to piecemeal amendment, is properly the job of an assembly dedicated specifically to that task and equipped for it. For these reasons, the delegates made explicit provision for constitutional

conventions. According to Article XIII, the legislature may convene a convention at any time, and the voters of the state may decide for themselves every ten years whether a convention should be called. Also, the voters may call a convention at any time through the initiative process (see the commentary under Section 2 below).

No mention is made of the governor in this article, which has been taken to mean he has no role in adopting amendments. The legislature proposes amendments in the form of resolutions, which are not subject to the governor's veto. As a consequence of his isolation from the amending process, the governor is disadvantaged in periodic struggles with the legislature over the respective powers of the two branches of government. For example, proposed constitutional amendments that would have authorized the legislature to nullify administrative regulations enhanced legislative powers at the expense of executive power (these failed to be ratified, however).

The constitution has been amended 28 times between its ratification in 1956 and the general election of 2012 (see Appendix table "Constitutional Amendments Appearing on the Ballot"). Thirteen proposed amendments have been rejected by voters. Four times the question "Shall there be a constitutional convention?" has gone before the voters, and four times they have answered no. (The question will appear on the 2012 general election ballot.)

Prior to the 1998 general election, the Alaska Supreme Court ordered a proposed amendment off the ballot because it was so broad that it amounted to a revision of, not an amendment to, the constitution. Only a constitutional convention can propose revisions. The court defined a revision as "a change which alters the substance and integrity of our constitution in a manner measured both qualitatively and quantitatively" (*Bess v. Ulmer*, 985 P.2d 979, 1999). The proposed amendment would have withdrawn from prisoners all rights granted under the Alaska Constitution, so that they would have only those rights afforded by the U.S. Constitution. The court said the measure would alter the substance and integrity of the constitution and affect as many as eleven sections of it. In the same decision, the court upheld as an amendment the proposed re-write of Article VI, which was ratified in 1998. The decision also struck from the ballot the second sentence of the proposed amendment dealing with same-sex marriage that became Article I, Section 25.

In response to the *Bess* decision, the legislature proposed an amendment that appeared on the 2000 general election ballot that would have added a sentence to section 1 of this article reading: "An amendment is a change that is limited to one subject and may affect more than one constitutional provision." It would also have added a fifth section that prohibited the courts from altering or changing the language of a proposed amendment or revision to the constitution. The amendment failed to be ratified.

Section 1. Amendments

> **Amendments to this constitution may be proposed by a two-thirds vote of each house of the legislature. The lieutenant governor shall prepare a ballot title and proposition summarizing each proposed amendment, and shall place them on the ballot for the next general election. If a majority of the votes cast on the proposition favor the amendment, it shall be adopted. Unless otherwise provided in the amendment, it becomes effective thirty days after the certification of the election returns by the lieutenant governor.**

Alaska's constitution may be amended by two methods. This section authorizes the legislature to propose amendments to the electorate by two-thirds majority in each house. The remaining sections of this article deal with the second method of amendment, the constitutional convention.

This section was amended in 1974 by substituting the word "general" for "statewide" near the end of the second sentence. As a result of this change, proposed constitutional amendments appear on the general election ballot rather than the primary election ballot (the primary is the first statewide election to occur after the end of a regular legislative session). There is a substantially higher turnout for general elections than for primary elections.

Some state constitutions limit the number of amendments the legislature may submit to the voters at one time, and limit the frequency with which individual articles may be amended. This section has no such limitations. However, an amendment may not be so sweeping as to be a revision of the constitution *(Bess v. Ulmer*, 985 P.2d 979, 1999). The constitution may not be amended by the initiative (see Article XI, Section 1).

In 1976, a dispute occurred between the legislature and the executive over the objectivity of the summary of a proposed amendment that was written for the ballot by the lieutenant governor. The legislature charged that the wording of the summary biased voters against the proposal because it suggested that the proposal sought improper objectives. The proposal failed at the polls. If ratified, the amendment would have required legislative approval of sales and leases of state-owned resources made by the Department of Natural Resources. The executive branch opposed this legislative veto power as a violation of the separation of powers doctrine. The ballot summary stated, in part: "The amendment would, with respect to state land disposals, exempt the legislature from the constitutional prohibition against local and special legislation, vest the legislature with the veto power and vest the legislature with the executive power of administration and the judicial power of review." To prevent recurrence of charges of biased ballot summaries, the legislature established a mechanism for the review of ballot wording, including the opportunity for judicial review (AS 15.50.025). (See commentary under Article XIII, Section 4, and Article XI, Section 3 for other disputes about biased wording of ballot measures.)

Section 2. Convention

The legislature may call constitutional conventions at any time.

This and the following section authorize the second method of amending the constitution—by constitutional convention. By implication, the voters as well as the legislature may call a constitutional convention at any time. This is because the voters can do by initiative what the legislature can do, unless they are explicitly barred by the constitution, and calling a convention by initiative is not prohibited in Article XI, Section 7 (see Article XII, Section 11 and *Proceedings of the Constitutional Convention*, pp. 3439-3440).

Presumably the call would be by resolution and not subject to the governor's veto.

Section 3. Call by Referendum

If during any ten-year period a constitutional convention has not been held, the lieutenant governor shall place on the ballot for the next general election the question: "Shall there be a Constitutional Convention?" If a majority of the votes cast on the question are in the negative, the question need not be placed on the ballot until the end of the next ten-year period. If a majority of the votes cast on the question are in the affirmative, delegates to the convention shall be chosen at the next regular statewide election, unless the legislature provides for the election of the delegates at a special election. The lieutenant governor shall issue the call for the convention. Unless other provisions have been made by law, the call shall conform as nearly as possible to the act calling the Alaska Constitutional Convention of 1955, including, but not limited to, number of members, districts, election and certification of delegates, and submission and ratification of revisions and ordinances. The appropriation provisions of the call shall be self-executing and shall constitute a first claim on the state treasury.

This provision guarantees to the voters a chance to decide at least once every decade if there should be a constitutional convention. Many state constitutions provide for a periodic referendum on a convention, but the interval is typically twenty years. Delegates to the convention chose ten years on the grounds that change would be occurring fast in Alaska. This section specifies the essential procedures for holding a convention in order to prevent the legislature from thwarting the will of the voters by refusing to issue a call.

The first referendum on the question of holding a constitutional convention was held in 1970. The ballot read: "As required by the constitution of the State of Alaska Article XIII, Section 3, shall there be a constitutional convention?" The outcome was a very narrow affirmative vote, 34,911 to 34,472.

Opponents of the convention sued, claiming that the wording of the ballot proposition biased the vote in favor of the measure by implying that the convention, rather than the vote, was required by the constitution. The courts agreed and threw out the election results *(Boucher v. Bomhoff*, 495 P.2d 77, 1972). The direct question was put before the voters at the next general election (1972), "Shall there be a constitutional convention?" This time it was decisively defeated, 29,192 to 55,389. A convention was rejected by the voters again in 1982 (63,816 to 108,319); in 1992 (84,929 to 142,735); and in 2002 (60,217 to 152,120).

If a convention were ever called under this section, it would almost certainly require an act of the legislature to implement. Too many features of the act calling the 1955 convention would be unsuitable for a new convention, such as provisions for delegates' districts, ratification of the work of the convention, and other matters. The meaning of the last sentence is unclear. A convention would require an appropriation by the legislature. Does "self-executing" mean that the appropriation would not be subject to the governor's veto?

Section 4. Power

> **Constitutional conventions shall have plenary power to amend or revise the constitution, subject only to ratification by the people. No call for a constitutional convention shall limit these powers of the convention.**

The power of a convention to propose constitutional changes cannot be limited ("plenary" means full). Neither a convention called by voters under Section 3, nor one called by the legislature under Section 2, may be restricted in scope.

ARTICLE XIV

APPORTIONMENT SCHEDULE

Article XIV contained the original legislative apportionment schedule which is obsolete, having been modified after each decennial census since 1960. Description of the current Alaska legislative election districts may be obtained from the Division of Elections.

ARTICLE XV

SCHEDULE OF TRANSITIONAL MEASURES

This article establishes the legal continuity between the territory and the State of Alaska, and sets in motion the new machinery of state government. Because it deals with transitional matters which are now history, this article is no longer a working part of the constitution. Indeed, the courts have ruled that provisions of Article XV may be amended by statute. A future comprehensive revision of the constitution should drop this article from the document.

Section 20 of Article XV declares the capital of the state to be Juneau. Placing this provision in the transitional articles rather than in the body of the constitution was a major compromise by delegates at the constitutional convention. Location of the capital was perhaps the most divisive of all the issues facing the delegates, and they finally agreed to postpone the issue by putting Section 20 in the transitional article. At the time, however, the consequences of doing so were not altogether clear, and it required a court case *(Starr v. Hagglund,* 374 P.2d 316, 1962) to establish that the provisions in Article XV could be changed by statute rather than the constitutional amendment process. (In this case, the question was whether the people could change Section 20 by initiative, and the state Supreme Court said yes.)

Article XV also contains a provision for three ordinances to be ratified by the electorate: the first adopted the constitution itself; the second adopted the Alaska-Tennessee Plan; and the third abolished fish traps in Alaska. These are included in this publication after the list of delegates signing the constitution.

Adoption of the Alaska-Tennessee Plan meant that the voters would elect two “shadow” senators and a representative who would go to Washington, D.C., and lobby for statehood. While they would not have any legal power, they would be a constant reminder to Congress of the aspirations of Alaskans for admission to the Union.

Fish traps in the territory had become a symbol of nonresident exploitation of Alaska. These efficient fishing devices were owned by canneries and allowed to operate by the federal government. Local people opposed them because they excluded individual fishermen from a large portion of the salmon harvest in southeast Alaska, and they were thought to be harmful to the fishery resource as well. (The history of fish traps in Alaska is summarized in the early supreme court case of *Metlakatla Indian*

Community, Annette Island Reservation v. Egan, 362 P.2d 901, 1961). The proposed ordinance prohibited the use of fish traps. It became effective as soon as Alaska achieved statehood.

Voters ratified all three ordinances: they approved the constitution by a vote of 17,447 to 8,180; they endorsed the Alaska-Tennessee Plan 15,011 to 9,556; and they voted to abolish fish traps by 21,285 to 4,004.

Sections 26, 27 and 28 were added to this article by the ratification of the amendment creating the appropriation limit (Article IX, Section 16) in 1982. These sections provided implementing language for the amendment. Section 26 exempted expenditures for a capital move from the limit, if the move was approved by the voters in 1982 (it was not); Section 27 is a "sunset" provision, which requires the voters to take affirmative action to continue the life of the amendment (in 1986 the voters approved the extension of the amendment); and Section 28 specifies that the appropriation limit is to take effect for the fiscal year beginning July 1, 1983. Section 29 was added in 1998.

Section 1. Continuance of Laws

> **All laws in force in the Territory of Alaska on the effective date of this constitution and consistent therewith shall continue in force until they expire by their own limitation, are amended, or repealed.**

Section 2. Saving of Existing Rights and Liabilities

> **Except as otherwise provided in this constitution, all rights, titles, actions, suits, contracts, and liabilities and all civil, criminal, or administrative proceedings shall continue unaffected by the change from territorial to state government, and the State shall be the legal successor to the Territory in these matters.**

Section 3. Local Government

> **Cities, school districts, health districts, public utility districts, and other local subdivisions of government existing on the effective date of this constitution shall continue to exercise their powers and functions under law, pending enactment of legislation to carry out the provisions of this constitution. New local subdivisions of government shall be created only in accordance with this constitution.**

Section 4. Continuance of Office

All Officers of the Territory, or under its laws, on the effective date of this constitution shall continue to perform the duties of their offices in a manner consistent with this constitution until they are superseded by officers of the State.

Section 5. Corresponding Qualifications

Residence, citizenship, or other qualifications under the Territory may be used toward the fulfillment of corresponding qualifications required by this constitution.

Section 6. Governor to Proclaim Election

When the people of the Territory ratify this constitution and it is approved by the duly constituted authority of the United States, the governor of the Territory shall, within thirty days after receipt of the official notification of such approval, issue a proclamation and take necessary measures to hold primary and general elections for all state elective offices provided for by this constitution.

Section 7. First State Elections

The primary election shall take place not less than forty nor more than ninety days after the proclamation by the governor of the Territory. The general election shall take place not less than ninety days after the primary election. The elections shall be governed by this constitution and by applicable territorial laws.

Section 8. United States Senators and Representative

The officers to be elected at the first general election shall include two senators and one representative to serve in the Congress of the United States, unless senators and a representative have been previously elected and seated. One senator shall be elected for the long term and one senator for the short term, each term to expire on the third day of January in an odd-numbered year to be determined by authority of the United States. The term of the representative shall expire on the third day of January in the odd-numbered year immediately

following his assuming office. If the first representative is elected in an even-numbered year to take office in that year, a representative shall be elected at the same time to fill the full term commencing on the third day of January of the following year, and the same person may be elected for both terms.

Section 9. Terms of First Governor and Lieutenant Governor

The first governor and lieutenant governor shall hold office for a term beginning with the day on which they assume office and ending at noon on the first Monday in December of the even-numbered year following the next presidential election. This term shall count as a full term for purposes of determining eligibility for re-election only if it is four years or more in duration. (An amendment to this section was approved by the voters of the state August 25, 1970, and became effective October 10, 1970. The term "secretary of state" was changed to "lieutenant governor.")

Section 10. Election of First Senators

At the first state general election, one senator shall be chosen for a two-year term from each of the following senate districts, described in Section 2 of Article XIV: A, B, D, E, G, I, J, L, N and O. At the same election, one senator shall be chosen for a four-year term from each of the following senate districts, described in Section 2 of Article XIV: A, C, E, F, H, J, K, M, N and P. (These districts are now obsolete.)

Section 11. Terms of First State Legislators

The first state legislators shall hold office for a term beginning with the day on which they assume office and ending at noon on the fourth Monday in January after the next general election, except that senators elected for four-year terms shall serve an additional two years thereafter. If the first general election is held in an even-numbered year, it shall be deemed to be the general election for that year.

Section 12. Election Returns

The returns of the first general election shall be made, canvassed, and certified in the manner prescribed by law. The governor of the Territory shall certify the results to the President of the United States.

Section 13. Assumption of Office

When the President of the United States issues a proclamation announcing the results of the election, and the State has been admitted into the Union, the officers elected and qualified shall assume office.

Section 14. First Session of Legislature

The governor shall call a special session of the first state legislature within 30 days after the presidential proclamation unless a regular session of the legislature falls within that period. The special session shall not be limited as to duration.

Section 15. Office Holding by First Legislators

The provisions of Section 5 of Article II shall not prohibit any member of the first state legislature from holding any office or position created during his first term.

Section 16. First Judicial Council

The first members of the judicial council shall, notwithstanding Section 8 of Article IV, be appointed for terms as follows: three attorney members for one, three and five years respectively, and three nonattorney members for two, four and six years respectively. The six members so appointed shall, in accordance with Section 5 of Article IV, submit to the governor nominations to fill the initial vacancies on the superior court and the supreme court, including the office of chief justice. After the initial vacancies on the superior and supreme courts are filled, the chief justice shall assume his seat on the judicial council.

Section 17. Transfer of Court Jurisdiction

Until the courts provided for in Article IV are organized, the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admission unless otherwise provided by law. When the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law.

Section 18. Territorial Assets and Liabilities

The debts and liabilities of the Territory of Alaska shall be assumed and paid by the State, and debts owed to the Territory shall be collected by the State. Assets and records of the Territory shall become the property of the State.

Section 19. First Reapportionment

The first reapportionment of the house of representatives shall be made immediately following the official reporting of the 1960 decennial census, or after the first regular legislative session if the session occurs thereafter, notwithstanding the provisions as to time contained in Section 3 of Article VI. All other provisions of Article VI shall apply in the first reapportionment.

Section 20. State Capital

The capital of the State of Alaska shall be at Juneau.

Section 21. Seal

The seal of the Territory, substituting the word "State" for "Territory," shall be the seal of the State.

Section 22. Flag

The flag of the Territory shall be the flag of the State.

Section 23. Special Voting Provision

Citizens who legally voted in the general election of November 4, 1924, and who meet the residence requirements for voting, shall be entitled to vote notwithstanding the provisions of Section 1 of Article V.

Section 24. Ordinances

Ordinance No. 1 on ratification of the constitution, Ordinance No. 2 on the Alaska-Tennessee Plan, and Ordinance No. 3 on the abolition of fish traps, adopted by the Alaska Constitutional Convention and appended to this constitution, shall be submitted to the voters and if ratified shall become effective as provided in each ordinance.

Section 25. Effective Date

This constitution shall take effect immediately upon the admission of Alaska into the Union as a state.

Section 26. Appropriations for Relocation of the Capital

If a majority of those voting on the question at the general election in 1982 approve the ballot proposition for the total cost to the State of providing for relocation of the capital, no additional voter approval of appropriations for that purpose within the cost approved by the voters is required under the 1982 amendment limiting increases in appropriations (Article IX, Section 16). (Adopted by voters November 2, 1982; however, the ballot measure referred to in this section was defeated, so this provision is inoperative.)

Section 27. Reconsideration of Amendment Limiting Increases in Appropriations

If the 1982 amendment limiting appropriation increase (Article IX, Section 16) is adopted, the lieutenant governor shall cause the ballot title and proposition for the amendment to be placed on the ballot again at the general election in 1986. If the majority of those voting on the proposition in 1986 reject the amendment, it shall be repealed. (Adopted November 2, 1982.)

Section 28. Application of Amendment

The 1982 amendment limiting appropriation increases (Article IX, Section 16) applies to appropriations made for fiscal year 1984 and thereafter. (Adopted November 2, 1982.)

Section 29. Applicability of Amendments Providing for Redistricting of the Legislature

The 1998 amendments relating to redistricting of the legislature (art. VI and art. XIV) apply only to plans for redistricting and proclamations of redistricting adopted on or after January 1, 2001. (Adopted November 3, 1998.)

Agreed upon by the delegates in Constitutional Convention assembled at the University of Alaska, this fifth day of February, in the year of our Lord one thousand nine hundred and fifty-six, and of the Independence of the United States the one hundred and eightieth.

WM. A. EGAN
President of the Convention

R. ROLLAND ARMSTRONG
DOROTHY J. AWES
FRANK BARR
JOHN C. BOSWELL
SEABORN J. BUCKALEW, JR.
JOHN B. COGHILL
E.B. COLLINS
GEORGE D. COOPER
JOHN M. CROSS
EDWARD V. DAVIS
JAMES P. DOOGAN
TRUMAN C. EMBERG
HELEN FISCHER
VICTOR FISCHER
DOUGLAS GRAY
THOMAS C. HARRIS
JOHN S. HELLENTHAL
MILDRED R. HERMANN
HERB HILSCHER
JACK HINCKEL
JAMES HURLEY
MAURICE T. JOHNSON
YULE F. KILCHER
LEONARD H. KING
WILLIAM W. KNIGHT
W.W. LAWS
ELDOR R. LEE
MAYNARD D. LONDBORG
STEVE McCUTCHEON
GEORGE M. McLAUGHLIN
ROBERT J. McNEALY
JOHN A. McNEES
M.R. MARSTON
IRWIN L. METCALF
LESLIE NERLAND
JAMES NOLAN
KATHERINE D. NORDALE
FRANK PERATROVICH
CHRIS POULSEN
PETER L. READER
BURKE RILEY
RALPH J. RIVERS
VICTOR C. RIVERS
JOHN H. ROSSWOG
B.D. STEWART
W.O. SMITH
GEORGE SUNDBORG
DORA M. SWEENEY
WARREN A. TAYLOR
H.R. VANDERLEEST
M.J. WALSH
BARRIE M. WHITE
ADA B. WIEN

ATTEST:
THOMAS B. STEWART *Secretary of the Convention*

ORDINANCE NO. 1

RATIFICATION OF CONSTITUTION

Section 1. Election

The Constitution for the State of Alaska agreed upon by the delegates to the Alaska Constitutional Convention on February 5, 1956, shall be submitted to the voters of Alaska for ratification or rejection at the territorial primary election to be held on April 24, 1956. The election shall be conducted according to existing laws regulating primary elections so far as applicable.

Section 2. Ballot

Each elector who offers to vote upon this constitution shall be given a ballot by the election judges which will be separate from the ballot on which candidates in the primary election are listed. Each of the propositions offered by the Alaska Constitutional Convention shall be set forth separately, but on the same ballot form. The first proposition shall be as follows:

"Shall the Constitution for the State of Alaska prepared and agreed upon by the Alaska Constitutional Convention be adopted?"

Yes ____ No ____

Section 3. Canvass

The returns of this election shall be made to the governor of the Territory of Alaska, and shall be canvassed in substantially the manner provided by law for territorial elections.

Section 4. Acceptance and Approval

If a majority of the votes cast on the proposition favor the constitution, then the constitution shall be deemed to be ratified by the people of Alaska to become effective as provided in the constitution.

Section 5. Submission of Constitution

Upon ratification of the constitution, the governor of the Territory shall forthwith transmit a certified copy of the constitution to the President of the United States for submission to the Congress, together with a statement of the votes cast for and against ratification.

ORDINANCE NO. 2

ALASKA-TENNESSEE PLAN

Section 1. Statement of Purpose

The election of senators and a representative to serve in the Congress of the United States being necessary and proper to prepare for the admission of Alaska as a state of the Union, the following sections are hereby ordained, pursuant to Chapter 46, SLA 1955.

Section 2. Ballot

Each elector who offers to vote upon the ratification of the constitution may, upon the same ballot vote on a second proposition, which shall be as follows:

"Shall Ordinance Number Two (Alaska-Tennessee Plan) of the Alaska Constitutional Convention, calling for the immediate election of two United States Senators and one United States Representative, be adopted?"

Yes ____ No ____

Section 3. Approval

Upon ratification of the constitution by the people of Alaska and separate approval of this ordinance by a majority of all votes cast for and against it, the remainder of this ordinance shall become effective.

Section 4. Election of Senators and Representative

Two United States senators and one United States representative shall be chosen at the 1956 general election.

Section 5. Terms

One senator shall be chosen for the regular term expiring on January 3, 1963, and the other for an initial short term expiring on January 3, 1961, unless when they are seated the Senate prescribes other expiration dates. The representative shall be chosen for the regular term of two years expiring January 3, 1959.

Section 6. Qualifications

Candidates for senators and representative shall have the qualifications prescribed in the Constitution of the United States and shall be qualified voters of Alaska.

Section 7. Other Office Holding

Until the admission of Alaska as a state, the senators and representative may also hold or be nominated and elected to other offices of the United States or of the Territory of Alaska, provided that no person may receive compensation for more than one office.

Section 8. Election Procedure

Except as provided herein, the laws of the Territory governing elections to the office of Delegate to Congress shall, to the extent applicable, govern the election of the senators and representative. Territorial and other officials shall perform their duties with reference to this election accordingly.

Section 9. Independent Candidates

Persons not representing any political party may become independent candidates for the offices of senator or representative by filing applications in the manner provided in Section 38-5-10, ACLA 1949, insofar as applicable. Applications must be filed in the office of the director of finance of the Territory on or before June 30, 1956.

Section 10. Party Nominations

Party nominations for senators and representative shall, for this election only, be made by party conventions in the manner prescribed in Section 38-4-11, ACLA 1949, for filling a vacancy in a party nomination occurring after a primary election. The names of the candidates nominated shall be certified by the chairman and secretary of the central committee of each political party to the director of finance of the Territory on or before June 30, 1956.

Section 11. Certification

The director of finance shall certify the names of all candidates for senators and representatives to the clerks of court by July 15, 1956. The clerks of court shall cause the names to be printed on the official ballot for the general election. Independent candidates shall be identified as provided in Section 38-5-10, ACLA 1949. Candidates nominated at party conventions shall be identified with appropriate party designations as is provided by law for nominations at primary elections.

Section 12. Ballot Form; Who Elected

The ballot form shall group separately the candidates seeking the regular senate term, those seeking the short senate term, and candidates for representative. The candidate for each office receiving the largest number of votes cast for that office shall be elected.

Section 13. Duties and Emoluments

The duties and emoluments of the offices of senator and representative shall be as prescribed by law.

Section 14. Convention Assistance

The president of the Alaska Constitutional Convention, or a person designated by him, may assist in carrying out the purposes of this ordinance. The unexpended and unobligated funds appropriated to the Alaska Constitutional

Convention by Chapter 46, SLA 1955, may be used to defray expenses attributable to the referendum and the election required by this ordinance.

Section 15. Alternate Effective Dates

If the Congress of the United States seats the senators and representative elected pursuant to this ordinance and approves the constitution before the first election of state officers, then Section 25 of Article XV shall be void and shall be replaced by the following:

"The provisions of the constitution applicable to the first election of state officers shall take effect immediately upon the admission of Alaska into the Union as a State. The remainder of the constitution shall take effect when the elected governor takes office."

ORDINANCE NO. 3

ABOLITION OF FISH TRAPS

Section 1. Ballot

Each elector who offers to vote upon the ratification of the constitution may, upon the same ballot, vote on a third proposition, which shall be as follows:

"Shall Ordinance Number Three of the Alaska constitutional convention, prohibiting the use of fish traps for the taking of salmon for commercial purposes in the coastal waters of the State, be adopted?"

Yes ____ No ____

Section 2. Effect of Referendum

If the constitution shall be adopted by the electors and if a majority of all the votes cast for and against this ordinance favor its adoption, then the following shall become operative upon the effective date of the constitution:

"As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and to make manifest the will of the people of Alaska, the use of fish traps for the taking of salmon for commercial purposes is hereby prohibited in all the coastal waters of the State."

APPENDIX:

CONSTITUTIONAL AMENDMENTS APPEARING ON THE BALLOT

Shading denotes failure to be ratified

Election Date	Subject of Amendment	Provisions Affected	Resolution Number	Votes For	Votes Against
8/23/66	Residency Requirement to Vote for President	Article V, Section 1	SJR 1 (1966)	**36,667**	12,383
8/27/68	Commission on Judicial Qualifications	Article IV, Section 10	HJR 74 (1968)	**32,481**	12,823
8/27/68	Compensation of Judicial Qualification Commission	Article IV, Section 13	HJR 74 (1968)	**27,156**	17,467
8/25/70	Establish Voting Age at 18 Years	Article V, Section 1	HJR 7 (1969)	**36,590**	31,216
8/25/70	Remove English Requirement for Voting	Article V, Section 1	HJR 51 (1970)	**34,079**	32,578
8/25/70	Secretary of State Designated Lieutenant Governor	Article III, Sections7-11, 13-15; Article XI, Sections 2-6; Article XIII, Sections 1,3; Article XV, Section 9	SJR 2 (1970)	**46,102**	18,781
8/25/70	Chief Justice Elected by Supreme Court	Article IV, Section 2	HJR 11 (1970)	**44,055**	19,583
8/25/70	Term of Office for Judicial System Administrator	Article IV, Section 16	HJR 11 (1970)	**43,462**	18,651
8/22/72	Residency Requirement for Voting	Article V, Section 1	HJR 126 (1972)	**31,130**	20,745
8/22/72	Prohibition of Sexual Discrimination	Article I, Section 3	HJR 102 (1972)	**43,281**	10,278
8/22/72	Right of Privacy	Article I, Section 22	SJR 68 (1972)	**45,539**	7,303

Appendix

Election Date	Subject of Amendment	Provisions Affected	Resolution Number	Votes For	Votes Against
8/22/72	Eliminate City Representation on Borough Assemblies	Article X, Section 4	SJR 52 (1972)	**30,132**	19,354
8/22/72	Authorize Limited Entry Fisheries	Article VIII, Section 15	SJR 10 (1971)	**39,837**	10,761
8/22/74	Voting on Constitutional Amendments at General Elections	Article XIII, Section 1	HJR 20 (1973)	**56,017**	20,403
11/02/76	Action on Veto of Bills	Article II, Sections 9 and 16	HJR 11 (1975)	**71,829**	39,980
11/02/76	Authorize Permanent Fund	Article IX, Sections 7 and 15	HJR 39 (1976)	**75,588**	38,518
11/02/76	Administration and Review of State Land Disposals	Article VIII, Section 10	SJR 45 (1976)	46,652	**64,744**
11/02/76	Direct Financial Aid to Students	Article VII, Section 1	HJR 73 (1976)	54,636	**64,211**
11/07/78	Powers of Legislative Interim Committees	Article II, Section 11	SJR 16 (1978)	48,078	**68,403**
11/04/80	Legislative Annulment of Regulations	Article II, New Section	HJR 82 (1980)	58,808	**82,010**
11/04/80	Disqualification of Legislators	Article II, New Section	SJR 2 (1980)	47,054	**99,705**
11/04/80	Interim and Special Legislative Committees	Article II, Section 11	HJR 80 (1980)	41,868	**102,270**
11/04/80	Appointment and Confirmation of Members	Article III, Section 26	HJR 20 (1980)	56,316	**90,506**
11/02/82	Veterans' Housing Bond Authority	Article IX, Section 8	HJR 71 (1982	**111,460**	69,497

Election Date	Subject of Amendment	Provisions Affected	Resolution Number	Votes For	Votes Against
11/02/82	Changes in Commission on Judicial Qualifications	Article IV, Section 10	HJR 32 (1981)	**123,172**	53,424
11/02/82	Limiting Appropriation Increases	Article IX, Section 16; Article XV, Sections 26-28	SJR 4 (1981)	**110,669**	71,531
11/06/84	Legislative Annulment of Administration Regulations	Article II, New Section	HJR 5 (1983)	91,171	**98,855**
11/06/84	Limit Length of Legislative Session	Article II, Section 8	HJR 2 (1984)	**150,999**	94,299
11/04/86	Legislative Annulment of Administrative Regulations	Article II, New Section	SJR 40 (1986)	65,176	**94,299**
11/08/88	Resident Hiring Preference	Article I, Section 23	HJR 18 (1988)	**162,997**	30,650
11/06/90	Budget Reserve Fund	Article IX, Section 17	SJR 5 (1990)	**124,280**	63,307
11/08/94	Right to Bear Arms	Article I, Section 19	SJR 39 (1994)	**153,300**	57,636
11/08/94	Rights of Crime Victims	Article I, Sections 12, 24	HJR 43 (1994)	**178,858**	27,641
11/05/96	Voter Approval of Changes to Statehood Act	Article XII, Section 14	SJR 3 (1996)	**157,936**	71,082
11/3/98	Same Sex Marriage	Article I, Section 25	SJR 42 (1998)	**152,962**	71,631
11/03/98	Redistricting	Article VI, Sections 1-11; Article XI, Section 3; Article XIV, Sections 1-3; Article XV, Section 29	HJR 44 (1998)	**110,768**	101,686
11/07/00	Prohibition on Wildlife Initiative	Article XI, Section 7	HJR 56 (2000)	96,253	**179,552**

Appendix

Election Date	Subject of Amendment	Provisions Affected	Resolution Number	Votes For	Votes Against
11/07/00	Amendment Provision; Prohibit Court Intervention	Article XIII, Section 1; New Section	SJR 27 (2000)	114,310	**151,467**
11/07/00	Confirmation of Board Appointees	Article III, Section 26; Article IX, Section 15	SJR 34 (2000)	72,419	**194,975**
11/02/04	Requirements for Initiative and Referendum	Article XI, Section 3	HJR5 (2004)	**149,236**	139,642
11/02/10	Increase Number of Legislators and Districts	Article II, Section 1; Article VI, Sections 4,6	SJR 21 (20010)	99,490	**147,744**

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