

# UNDERSTANDING THE UNORIGINAL: INDETERMINANT ORIGINALISM AND INDEPENDENT INTERPRETATION OF THE ALASKA CONSTITUTION

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*In this article, I argue that the historical context of the Alaska Constitutional Convention should open up the Alaska Constitution to independent interpretation. Alaska courts sometimes avoid independent interpretation of the Alaska Constitution because it seems to be based on borrowed federal constitutional law. This apparent borrowing may be discounted by understanding the historical situation of the Alaska statehood movement and the power of Congress to mold state constitutions. Because of the inherent ambiguity of state constitutional provisions that have federal analogues, Alaska courts should abandon lockstep interpretation of these provisions and instead independently interpret them in line with the Alaska constitutional heritage. This would further protect the rights of Alaskans and make important contributions to the nation's shared constitutional discourse.*

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## I. INTRODUCTION

Originalism<sup>1</sup> has today become so dominant a strategy for understanding law that it sometimes seems we are all originalists.<sup>2</sup> Originalists claim that reference to historical sources provides an objective method of making legal decisions, based on either enduring values<sup>3</sup> or the meaning of words in context.<sup>4</sup> According to originalists, original meaning is determinant of constitutional law.<sup>5</sup> In seeking to interpret the United States Constitution, legal scholars use originalism to understand a truly original work—the first written national constitution.<sup>6</sup>

Despite its attractiveness as a method for interpreting the United States Constitution, originalism is much more intellectually frustrating when used to interpret decidedly *unoriginal* constitutions—constitutions whose provisions are largely derived from other documents and framed by polities reliant on the U.S. Congress for sovereignty. Originalism’s main strength—recovering the historical context of constitutional provisions to determine constitutional law—is substantially weakened when it is used to examine an unoriginal constitution because state constitutional history, as opposed to national constitutional history, is inherently indeterminate of constitutional meaning. This inherent “indeterminacy” arises from the unoriginal nature of state constitutions.

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1. Defined as “the theory that the Federal Constitution should be interpreted according to the intent of those who drafted and adopted it.” BLACK’S LAW DICTIONARY 1133 (8th ed. 1999).

2. Lawrence H. Tribe, *Comment, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 67 (1997). Alaska courts often use originalist methodology. See, e.g., *Duncan v. Retired Pub. Employees of Alaska, Inc.*, 71 P.3d 882, 887 (Alaska 2003); *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 800 (Alaska 1975); *State v. Gonzalez*, 825 P.2d 920, 928 (Alaska Ct. App. 1992). *But see* *Warwick v. Chance*, 548 P.2d 384, 391 (Alaska 1976) (“[W]e do not construe [our constitution] to be a static document. Like its federal counterpart, it must be considered as a living document adaptable to changing conditions and circumstances unanticipated at the time it was written.”).

3. Tribe, *supra* note 2, at 81.

4. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION*, *supra* note 2, at 3, 16.

5. See, e.g., JACK N. RAKOVE, *ORIGINAL MEANINGS* 3–22 (1996) (discussing the various uses of “original intent,” “original meaning,” and “original understanding”).

6. *Id.*

Yet, a corollary strength—describing the nature of ambiguity in local constitutional history—is augmented. Understanding this ambiguity enables a court to discount plausible “determinant originalist” arguments that would ask a court to interpret a state constitution in accordance with the documents on which it may have been modeled. Understanding the indeterminant nature of state constitutional history also encourages courts to interpret state constitutions according to local constitutional heritage. This is the strength and virtue of “indeterminant originalism.” Perhaps nowhere is the opportunity for indeterminant originalism greater than in Alaska, the last state to adopt its founding constitution.

Recently, the University of Alaska has begun to make historical material easily available on the Internet in celebration of the fiftieth anniversary of the Alaska Constitution.<sup>7</sup> Thus, Alaska courts considering constitutional questions will undoubtedly be inundated with historical evidence marshaled in a determinant originalist modality. This evidence must be viewed in the larger context of the statehood movement to see how the Alaska constitution protects Alaskans’ rights more broadly than does the Federal Constitution.<sup>8</sup> This is not just good sense, it is good law: the Alaska Supreme Court decides the meaning of the Alaska Constitution without having to look to federal interpretation of the Federal Constitution. This is “independent interpretation.”<sup>9</sup>

Because the Federal Constitution provides a sturdy floor for civil rights, the Alaska Supreme Court’s independent interpretation of the Alaska Constitution based on Alaska’s local constitutional heritage can serve to safeguard rights beyond federal consti-

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7. “Creating Alaska—The Origins of the 49th State” will collect historic materials regarding the statehood movement and the Alaska Constitutional Convention and archive statehood materials currently in Alaska museums and libraries. See UNIVERSITY OF ALASKA, CREATING ALASKA—THE ORIGINS OF THE 49TH STATE, <http://www.alaska.edu/creatingalaska/> (last visited Oct. 10, 2005).

8. *Baker v. City of Fairbanks*, 471 P.2d 386, 401–02 (Alaska 1970) (extending the right to a jury trial under the Alaska Constitution to violations of city ordinances even though no such right had been recognized under the Fourteenth Amendment to the United States Constitution).

9. *Id.* For a critique of “independent interpretation,” see Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985). The Alaska constitution provides many “rights” that go beyond those found in the Federal Constitution. *E.g.*, *Valley Hosp. Ass’n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 968 (Alaska 1997) (right to reproductive privacy); *Ravin v. State*, 537 P.2d 494, 511 (Alaska 1975) (right to privacy in the home); *McCracken v. State*, 518 P.2d 85, 91 (Alaska 1974) (right of self-representation in a post-conviction hearing); *Breese v. Smith*, 501 P.2d 159, 168 (Alaska 1972) (right to wear hairstyles reflecting personal choice in public schools).

tutional protections.<sup>10</sup> In this article, I argue that Alaska state courts can find new state constitutional rights even in state constitutional provisions that are superficially or even substantially analogous to the provisions of constitutions on which the Alaska constitution is modeled. This is due to the drive for statehood in Alaska, which created such intense pressure to conform the Alaska constitution to “outside” models, such that its text might not always be the best indicator of its heritage. Specific, recoverable historical context can serve to discount analogies between Alaska and federal constitutional law, opening the door for the Alaska Supreme Court to recognize new and expanded civil rights as part of Alaska’s constitutional heritage.

In Part II of this article, I discuss the role of independent interpretation and originalism at the state level generally and in Alaska particularly. In Part III(A), I briefly discuss the history of the Alaska constitutional convention before arguing in Part III(B) that substantial pressures from both the Alaska citizenry and the United States Congress might have masked portions of the Alaska constitutional heritage in the framing of the Alaska Constitution. In Part IV, I conclude that Alaska’s ambiguous constitutional history should not be ignored by Alaska courts, but should rather be embraced in order to recognize additional constitutional rights, following the guide of *Baker v. City of Fairbanks*.

## II. INDEPENDENT INTERPRETATION AND CONSTITUTIONAL FOUNDATIONS

Since Justice Brennan’s call to state judges to interpret their state constitutions before considering the Federal Constitution,<sup>11</sup> judicial recognitions of rights under many states’ constitutions have bloomed. Even in the first decade after Brennan’s invitation, scholars noted the development of new rights in several states through this process of independent interpretation, including Ore-

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10. See *Doe v. Dep’t of Pub. Safety*, 92 P.3d 398, 404 (Alaska 2004) (“We may not undermine the minimum protections established by the United States Supreme Court’s interpretations of the Federal Constitution.”); see also GERALD A. McBEATH, *THE ALASKA STATE CONSTITUTION: A REFERENCE GUIDE* 25 (1997) (suggesting that the United States Constitution “establishes a floor of protection for individual rights”).

11. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490-91, 495-98, 501-04 (1977).

gon,<sup>12</sup> California,<sup>13</sup> Texas,<sup>14</sup> and Maine.<sup>15</sup> Each of these states has developed a jurisprudence identifying additional constitutional protections beyond those in the federal document. For example, indigent defendants in Maine accused of certain misdemeanors gained the right to court-appointed counsel even though the Federal Constitution extends that right only to accused felons.<sup>16</sup> Two recent articles have discussed the phenomenon of independent interpretation in Alaska.<sup>17</sup>

Independent interpretation of state constitutions has become an important part of the recognition of new constitutional rights and has helped transform state supreme courts into the keepers of the nation's conscience.<sup>18</sup> Judges in states with robust individual-rights jurisprudences are particularly concerned that their decisions will be overturned if based on the Federal Constitution, and so as a

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12. See generally John H. Buttler, *Oregon's Constitutional Renaissance: Federalism Revisited*, 13 VT. L. REV. 107 (1988) (surveying Oregon's expanded freedoms of religion and expression, rights of criminal defendants, and privileges and immunities); see also David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 276 (1992) ("A state—even an out-of-the-way and relatively new one like Oregon—can develop a strikingly independent universe of constitutional references and a constitutional culture completely distinct from the one used by the U.S. Supreme Court.").

13. See, e.g., Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081, 1089–90 (1985) (discussing right to free speech in shopping malls).

14. See generally James C. Harrington, *Privacy and the Texas Constitution*, 13 VT. L. REV. 155 (1988) (discussing right to privacy).

15. See, e.g., Marshall J. Tinkle, *State Constitutional Law in Maine: At the Crossroads*, 13 VT. L. REV. 61, 80 (1988) (discussing the right to counsel for defendants accused of misdemeanors in addition to those accused of felonies).

16. *Id.* In another example, the California Supreme Court read California's free-speech provision more expansively than the First Amendment, and the U.S. Supreme Court affirmed. *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1974), *aff'd* 447 U.S. 74 (1980).

17. See Thomas V. Van Flein, *The Baker Doctrine and the New Federalism: Developing Independent Constitutional Principles Under the Alaska Constitution*, 21 ALASKA L. REV. 227 (2004); Ronald L. Nelson, *Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation*, 12 ALASKA L. REV. 1 (1995). Additional authors have discussed particular rights in Alaska in depth. See, e.g., Erwin Chemerinsky, *Privacy and the Alaska Constitution: Failing to Fulfill the Promise*, 20 ALASKA L. REV. 29 (2003); Steven Keith Green, *Freedom of Religion in Alaska: Interpreting the Alaska Constitution*, 5 ALASKA L. REV. 237 (1988); Michael B. Wise, *Northern Lights—Equal Protection Analysis in Alaska*, 3 ALASKA L. REV. 1 (1986).

18. Paul Finkleman & Stephen E. Gottlieb, *Introduction*, in *TOWARDS A USABLE PAST* 1, 13 (Paul Finkleman & Stephen E. Gottlieb eds., 1991).

result sometimes base their decisions solely on the state constitution.<sup>19</sup> It is a controversial question whether state courts are finding new rights that reflect a state constitutional heritage or advancing civil rights the Supreme Court is unwilling to match on a national scale.<sup>20</sup> Regardless of the answer, state courts are recognizing new rights, and these holdings will likely affect constitutional interpretation in other states.<sup>21</sup> Through such decisions, states may regain their stature as the “informers” of the United States Constitution.<sup>22</sup>

In Alaska, courts often apply independent interpretation in deciding cases. Even where the Federal and Alaska Constitutions use identical language, the Alaska Supreme Court has held that the Alaska Constitution affords greater protections than the Federal Constitution.<sup>23</sup> In 1995, Ronald Nelson first argued that Alaska’s independent interpretations are both uniquely local and nationally valuable, and described Alaska’s independent interpretation of clauses regarding equal protection, privacy, freedom of religion, and natural resources.<sup>24</sup> Recently, Thomas Van Flein discussed a series of notable cases exemplifying independent interpretation and argued that such interpretation is obligatory under *Baker*.<sup>25</sup>

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19. See Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1026 (1985).

20. See Peter R. Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13, 34–35 (1988) (referring to these perspectives as the “independent state jurisprudence” and “expansionist” views, respectively). In addition to the ideological background of the Justices, there are institutional reasons why the U.S. Supreme Court may be unwilling to advance civil rights, including general concerns about federalism, trepidation about setting too high of a national standard, and jurisprudential restraints. Utter, *supra* note 19, at 1043–45.

21. Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49, 56 (1988); see also *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, Blackmun, and Powell, JJ., concurring).

22. Kermit Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*, in *TOWARDS A USABLE PAST* 388, 391 (Paul Finkleman & Stephen E. Gottlieb eds., 1991); Utter, *supra* note 19, at 1040.

23. Van Flein, *supra* note 17, at 228; see, e.g., *State v. Anthony* 810 P.2d 155, 157 (Alaska 1991); *State v. Erickson*, 574 P.2d 1, 11–12 (Alaska 1978).

24. Nelson, *supra* note 17, at 11–32.

25. Van Flein, *supra* note 17, at 244–56 (observing that “[w]e are free . . . to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heri-

Both Nelson and Van Flein suggest that Alaska's independent interpretations are robust—not only on textual dissimilarity, but also on Alaska's local constitutional heritage.<sup>26</sup>

Yet in cases advancing independent interpretations of the Alaska Constitution, courts rarely explicitly rely on an originalist interpretation.<sup>27</sup> This is unusual among state courts, which often seem to ease their trepidation at departing from federal interpretations by resorting to determinant originalism.<sup>28</sup> Perhaps Alaska courts believe that originalism will force them into lockstep with the United States Supreme Court's interpretation of the Federal Constitution. After all, the Alaska Court of Appeals already presumes that the Alaska Constitution should be interpreted in lockstep with the Federal Constitution, even as federal constitutional doctrine changes.<sup>29</sup> Whatever the reason, Alaska courts' indifference to originalism is unfortunate. To the extent that Alaska's unique history informs the provisions framed in Fairbanks in 1956, it can serve as a taproot for new or expanded constitutional rights. Additionally, an originalist understanding of the Alaska Constitution actually counsels against interpreting it in step with the Federal Constitution despite the appearance of the wholesale accep-

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tage.”); *see also* State v. Browder, 486 P.2d 925 (Alaska 1971); Roberts v. State, 458 P.2d 340 (Alaska 1969); MCBEATH, *supra* note 10, at 25.

26. *See* Van Flein, *supra* note 17, at 248 (discussing Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280–81 (Alaska 1994)), 254 (discussing Stanek v. Kenai Peninsula Borough, 81 P.3d 268, 272 (Alaska 2003)); *see also* Nelson, *supra* note 17, at 17 (recognizing positive aspects of Alaska's broader interpretation of equal protection and the right to privacy).

27. Among the cases emphasized by Van Flein in his discussion of the *Baker* doctrine, only one case concerning provisions in Alaska's constitution, *Gonzalez*, even touched on historical reasons for Alaska's interpretation. *See* Van Flein, *supra* note 17, at 247–53 (discussing State v. Gonzalez, 825 P.2d 920 (Alaska Ct. App. 1992) (using historical analysis)). Alaska's constitutional history plays a prominent role in *Gonzalez*, serving to link Alaska's independent interpretation to both Oregon and Hawaii's independent interpretations and to distance Alaska's constitutional protections from a narrowing federal view. *See Gonzalez*, 825 P.2d at 933 (citing Frederic E. Brown, *The Sources of the Alaska and Oregon Codes, Pt. I*, 2 UCLA-ALASKA L. REV. 15 (1972) and Frederic E. Brown, *The Sources of the Alaska and Oregon Codes, Pt. II*, 2 UCLA-ALASKA L. REV. 87 (1972)).

28. *See* G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 855 (1991).

29. *See, e.g.,* Mitchell v. State, 818 P.2d 1163, 1165 (Alaska Ct. App. 1991). This is true even when the clause in question has already been interpreted differently from its federal counterpart. *Davis v. Municipality of Anchorage*, 945 P.2d 307, 311 (Alaska Ct. App. 1997).

tance of federal constitutional law at the Alaska Constitutional Convention.<sup>30</sup> Such an appearance of wholesale acceptance may be explained by history and may be discounted by constitutional theory; it does not necessarily solely reflect the Alaska constitutional heritage. An indeterminant originalist understanding of the Alaska Constitution favors independent interpretation.

The Alaska Supreme Court might also eschew originalism because originalism's theoretical difficulties are daunting. Recent state constitutions pose a major challenge to determinant originalism because they are "unoriginal" in two distinct ways: (1) they are in no way pre-political, but are part of an iterative process between politics and law; and (2) they are not crafted solely out of framers' creativity but rather arise from multiple sources—they are derived from earlier versions, created by newly western Americans from pre-existing states, modeled on the consensus of experts, and forged under substantial and systemic congressional pressure to conform.<sup>31</sup> Because state constitutions are iterative, derivative, and assimilative,<sup>32</sup> they seemingly leave little room for the distinct expression of a state's local constitutional heritage.<sup>33</sup> In fact, it is precisely where a state has a strong local constitutional heritage distinct from the nation's that Congress acts to suppress that heritage in the new state constitution.<sup>34</sup>

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30. See, e.g., *State v. Dankworth*, 672 P.2d 148, 150–51 (Alaska Ct. App. 1983).

31. Under Gardner's recently developed framework, state constitutions are neither unique, determinate, or self-constructed; thus, they cannot be understood in the constitutional positivist manner in which judges normally understand the Federal Constitution. See James A. Gardner, *Whose Constitution is it? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1251 (2005).

32. Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 132 (2004).

33. See George P. Fletcher, *Constitutional Identity*, 14 CARDOZO L. REV. 737, 737 (1993) ("When constitutional language fails to offer an unequivocal directive for decision, the recourse of the judge is not always to look 'outward' toward overarching principles of political morality. . . . The way to understand this subcategory of decisions is to interpret them as expressions of the decision makers' constitutional identities."); see also ROBERT C. POST, *CONSTITUTIONAL DOMAINS* 42 (1995) (suggesting an appeal to the "national ethos" as an overarching method of interpretation). In this article, I use "constitutional heritage" because that is the term used by the Alaska Supreme Court in *Baker*. *Baker v. City of Fairbanks*, 471 P.2d 386, 401–02 (Alaska 1970).

34. Biber, *supra* note 32, at 132–73 (discussing assimilative congressional requirements for Louisiana, Utah, New Mexico, and Hawaii).

An additional theoretical complication arises from the knowledge of the framers of recent state constitutions that the record of state constitutional conventions would likely be used to interpret the state constitution in the future. Although courts have long used legislative history to understand statutes and constitutional provisions, it was particularly important in the 1940s and 1950s; consequently, as the most recent founding state constitutions were being framed, delegates knew the importance of history when they undertook their tasks.<sup>35</sup> Sometimes, this knowledge was explicit. For example, the use of the “Tennessee Plan”<sup>36</sup> to achieve statehood informs the Alaska Constitution, not simply because the Tennessee Plan was part of the historical context, but because delegates *understood* that it would have an impact.<sup>37</sup> Because of the self-awareness of the delegates, judges cannot know for certain whether interested delegates manipulated the convention’s historical record.<sup>38</sup>

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35. See Tarr, *supra* note 28, at 852.

36. The Tennessee Plan called for election of a congressional delegation before attaining statehood so the delegates could be sent to Washington, D.C. to campaign for statehood. See *infra* pt. III.A.

37. On January 23, 1956, George Lehleitner addressed the Alaska Constitutional Convention: “[S]hould you Alaskans decide to use the Tennessee Plan and obtain statehood . . . [the] ordinance that you enact for that purpose, will bear . . . a significant relationship to the constitution in the sense that the Declaration [of Independence] bears a very definite relationship to the Federal Constitution.” George Lehleitner, Private Citizen of New Orleans, Louisiana, Address at the Alaska Constitutional Convention (Jan. 23, 1956), <http://www.alaska.edu/creatingalaska/convention/speeches/lehleitner.xml> [hereinafter Lehleitner Address]. Lehleitner was a proponent of statehood for Alaska and Hawaii because he believed that an amalgamation of democracies around the world would prevent the rise of fascism and communism. Lehleitner suggested that Alaska use the Tennessee Plan to achieve statehood. See CLAUDE M. NASKE, JOHN S. WHITEHEAD & WILLIAM SCHNEIDER, *ALASKA STATEHOOD: THE MEMORY OF THE BATTLE AND THE EVALUATION OF THE PRESENT BY THOSE WHO LIVED IT 100–02* (1981) [hereinafter *ORAL HISTORY*] (interview with George Lehleitner). While it may be true that the Tennessee Plan had no effect on the terms of the Alaska Constitution, its influence is critical to understanding the Alaska Constitution as an organic document outlining a new political sovereign, and the framers of the Alaska Constitution understood that fact.

38. Cf. Scalia, *supra* note 4, at 29–37.

Alaska's constitution is likewise unoriginal<sup>39</sup>—its origins are not unambiguously Alaskan; thus, determinant originalists encounter theoretical difficulty uncovering the values Alaskans expressed when framing and ratifying their state constitution.<sup>40</sup> Sometimes, the values may seem obvious, such as when the words of the Alaska Constitution mimic the words of its models. But it is precisely where the words are similar that judges might commit a fundamental attribution error by failing to account for the power of the historical situation in framing the state constitution.<sup>41</sup> The historical context of the Alaska Constitutional Convention offers alternative explanations for some provisions, suggests they might not necessarily reflect the Alaska constitutional heritage, and encourages courts to look elsewhere to find it.<sup>42</sup>

### III. A MODEL AND MODELED CONSTITUTION

#### A. The Last First Constitution: A Brief History<sup>43</sup>

Alaska's constitution was drafted in the winter of 1955-56, the last of a string of post-World War II state constitutions including those of Hawaii, Missouri, and New Jersey.<sup>44</sup> The war brought vast

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39. I do not use this term in a pejorative sense—Alaska does have a model constitution—but rather to say that Alaska's constitution did not originate from the Alaskan pre-political heritage and came instead from an academic consensus reflecting the preferences of the Lower 48 states.

40. See Fletcher, *supra* note 33, at 737 (opining that constitutional interpretation in close cases should depend on “constitutional identities”).

41. For a discussion of attribution theory, see Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in 10 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 173 (L. Berkowitz ed., 1977).

42. “[I]f one is to remain faithful to the original understanding of state constitutions, one must look . . . to the broader political and theoretical context from which the state provisions came.” Tarr, *supra* note 28, at 858. Yet, while a contextual understanding of the pressures on delegates calls into doubt the “Alaskan nature” of constitutional provisions superficially similar to those of its models, such an understanding also demonstrates the full resilience of Alaska's local constitutional heritage where the text of Alaska's constitution departs from its models. These departures indicate a strong, independent constitutional heritage for Alaska while not denying the possibility of a strong, independent constitutional heritage where delegates adopted provisions suggested by Outsiders. Unfortunately, this side of the argument is beyond the scope of this article.

43. Alaska's constitutional convention is discussed most fully by delegate Victor Fischer. See generally VICTOR FISCHER, *ALASKA'S CONSTITUTIONAL CONVENTION* (1975).

44. Another useful source on the drafting is the “Creating Alaska” project. See *CREATING ALASKA—THE ORIGINS OF THE 49TH STATE*, *supra* note 7.

military support to Alaska, giving it the population and economy to credibly demand statehood.<sup>45</sup> To help satisfy the burgeoning demand for statehood, Alaska adopted its constitution prior to becoming a state<sup>46</sup> and sent a full slate of elected delegates to convince the U.S. Congress of the merits of Alaska statehood.<sup>47</sup>

In planning the constitutional convention, the Alaska Statehood Committee asked outside experts to analyze the function of state constitutions within the federal system and to recommend provisions desirable for Alaska.<sup>48</sup> Consultants were present at the convention but “managed to stay out of the public eye, avoiding the criticism that ‘outsiders’ were writing the constitution.”<sup>49</sup> Yet, they still had a strong influence.<sup>50</sup>

In addition to seeking consultants’ advice, delegates looked for guidance from the National Municipal League’s model constitution and the constitutions of other states and countries.<sup>51</sup> According to one delegate’s account, the model constitution “provided delegates with a composite view of what was then considered . . . the most advanced thinking with respect to constitutional concepts and provisions.”<sup>52</sup> However, this model was designed for states seeking to tweak their constitutions and not for territories attempting to create them.<sup>53</sup> Alaska, not yet a state and with no prior constitution, had greater freedom for innovation than states with existing constitutions.<sup>54</sup>

## B. Pressures on the Constitutional Convention

Despite the unfettered innovation attributed to the Alaska Constitutional Convention, the Alaska Constitution is remarkable for its *unoriginality*. For the most part, Alaska’s constitution is bor-

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45. JOHN WHITEHEAD, *COMPLETING THE UNION: ALASKA AND HAWAII AND THE BATTLE FOR STATEHOOD* 7 (2004). By 1956, many prominent Alaskans had been pushing hard for statehood for over forty years. CLAUS-M. NASKE & HERMAN E. SLOTNICK, *ALASKA: A HISTORY OF THE 49TH STATE* 141–42 (2d ed. 1987).

46. Lehleitner Address, *supra* note 37.

47. NASKE & SLOTNICK, *supra* note 45, at 155.

48. *Id.* at 19–20.

49. *Id.* at 42.

50. *Id.* at 49.

51. *Id.* at 49, 51, 113.

52. *Id.* at 50.

53. *Id.*

54. *Id.*

rowed law.<sup>55</sup> Its judicial selection provisions were modeled on Missouri's.<sup>56</sup> The finance and taxation article was modeled on the constitutions proposed by Hawaii and the National Municipal League, adjusted for a statehood bill pending in Congress.<sup>57</sup> Despite being framed nearly 170 years after the Federal Constitution, Alaska's constitution includes nearly verbatim versions of some rather dusty federal provisions.<sup>58</sup> According to many experts, Alaska produced a model constitution.<sup>59</sup> Because the Framers of 1956 made deliberate and judicious choices, those assessments are accurate. But, Alaska's constitution is "model" because it itself is based on so many models.

Apart from simply wanting a good framework of government, the major reason for the fidelity of the Alaska Constitution to outside models was the overwhelming desire for statehood. According to Alaska political scientists Gerald McBeath and Thomas Morehouse, "[the delegates'] first objective was to obtain statehood; after that they could turn their attention to the uses of statehood powers."<sup>60</sup> The statehood objective required the adoption of the Tennessee Plan of electing a congressional delegation *before* actually becoming a state. This objective affected both the timing of the constitution's framing and its very terms—to match the confidence evinced by the Tennessee Plan, Alaska needed an ideal constitution to prove it was mature enough for statehood.<sup>61</sup> To create such a model, Alaskans mimicked other states, looked to outside experts, and preemptively capitulated to Congress's probable de-

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55. For a definition of "borrowed law," see generally ALAN WATSON, ANCIENT LAW AND MODERN UNDERSTANDING: AT THE EDGES 4 (1998) ("The life of the law is not logic, nor is it experience. It is borrowing.").

56. FISCHER, *supra* note 43, at 113. Compare ALASKA CONST. art. IV with MO. CONST. art. V.

57. FISCHER, *supra* note 43, at 142.

58. *Id.* at 70. Compare ALASKA CONST, art. I, § 20 ("No member of the armed forces shall in time of peace be quartered in any house without the consent of the owner . . .") with U.S. CONST. amend. III. ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner . . .").

59. NASKE & SLOTNICK, *supra* note 45, at 155.

60. GERALD A. MCBEATH & THOMAS A. MOREHOUSE, ALASKA POLITICS AND GOVERNMENT 120 (1994); see also GERALD E. BOWKETT, REACHING FOR A STAR: THE FINAL CAMPAIGN FOR ALASKA STATEHOOD xi, 8 (1989).

61. According to George Rogers, a consultant to the convention, "delegates did not attempt to be too innovative in their constitution writing for fear that the U.S. Congress might not accept too innovative a document." MCBEATH & MOREHOUSE, *supra* note 60, at 126 (interview with George Rogers). But see WHITEHEAD, *supra* note 45, at 255 (characterizing the Tennessee Plan as "clever or unseemly or not quite cricket," but not excessively audacious).

mands. This historical context suggests that the Alaska Constitution might not be fully representative of Alaska's local constitutional heritage.<sup>62</sup> That is, the "constitutional identity"<sup>63</sup> of Alaskans is not infused into the state constitution in the same way that the framers of Pennsylvania's radical constitution were seized by the "spirit of '76" or the United States Constitution was infused with the "originality of '87."

1. *The Popular Drive for Statehood.* Alaskans in the 1950s wanted statehood. The issue had been hotly debated since 1924.<sup>64</sup> By 1946, most Alaskans favored statehood to accelerate economic development and shake off federal control over fish traps,<sup>65</sup> which was viewed as responsible for the precipitous decline in fish stocks.<sup>66</sup> By 1958, when Alaskans formally accepted statehood in a plebiscite vote, more than 80% of voters chose statehood.<sup>67</sup>

The drive for statehood was not merely about correcting federal mismanagement of natural resources. A moral argument for self-determination and the global rebuking of colonial power dur-

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62. Certainly, delegates had a great deal of choice in framing the constitution. The reasons behind the deliberate choices of delegates between adopting provisions of the Hawaii, Missouri, or New Jersey Constitutions, or the academic insights of the National Municipal League, the Kestenbaum Commission, or other consultants, are important for determining original meaning. But the choice between several possible models, although grist for the originalist mill, does not alter the goals of the convention—to prove to Congress Alaska's merit for statehood, not simply to crystallize the constitutional heritage of Alaska.

63. Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 389–92 (1998).

64. NASKE & SLOTNICK, *supra* note 45, at 141–43. The idea of petitioning the territory was still alive in the 1950s. According to one authority, business leaders in Nome "suggested that Alaska be divided along the 153 meridian into a state and district, and that the latter be allowed to join the former when it had developed economically and no longer would be a liability to the new state." *Id.* at 184. In 1954, Territorial Governor B. Frank Heintzleman suggested petitioning Alaska to make southeast, south-central, and interior Alaska into a state. BOWKETT, *supra* note 60, at 17.

65. STEPHEN HAYCOX, ALASKA: AN AMERICAN COLONY 268–69 (2002); *see also* William A. Egan, Remarks to the Alaska Constitutional Convention (Feb. 5, 1956), <http://www.alaska.edu/creatingalaska/convention/speeches/egan.xml> [hereinafter Egan Remarks].

66. *See* FISCHER, *supra* note 43, at 8; Egan Remarks, *supra* note 65; ORAL HISTORY, *supra* note 37, at 2; *see also* WHITEHEAD, *supra* note 45, at 35, 46, 210–16. The federal government asserted control over fishing and mining at the behest of Outside interests. MCBEATH & MOREHOUSE, *supra* note 60, at 42, 78.

67. ORAL HISTORY, *supra* note 37, at 367.

ing and after World War II also contributed.<sup>68</sup> To attain their goal, Alaskans stretched the rhetoric of self-determination, anti-colonialism, and anti-communism; Ernst Gruening's keynote address at the constitutional convention provides such an example: "Inherent in colonialism is an inferior political status. Inherent in colonialism is an inferior economic status. . . . The economic disadvantages of Alaskans . . . are the hallmarks of colonialism."<sup>69</sup> Gruening evinced anti-Soviet sentiment as well: "It is an inspiring challenge to us to establish on this side of the Bering Strait . . . a shining example of our way of life, of government by consent of the governed."<sup>70</sup> In short, the desire for statehood was influenced by both the circumstances and the times.

2. *Congressional Reluctance and Requirements for Alaska Statehood.* To acquire statehood, Alaska needed to secure Congress's consent.<sup>71</sup> Generally, a congressional enabling act authorizes a territory to hold a constitutional convention, and a congressional admission act formally admits a new state.<sup>72</sup> Before admission, Congress reviews the proposed state constitution and may require changes.<sup>73</sup> Congress set a high bar for Alaska's entry into the Union—lawmakers were worried about diluting their individual power and were concerned that the Alaska congressional delegation would not make easy allies. Congress's reluctance to grant statehood to Alaska pressured Alaska statehood proponents to anticipate the will of Congress and frame constitutional provisions accordingly.

Members of Congress are generally reluctant to admit new states because it costs each current lawmaker power.<sup>74</sup> New states

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68. See, e.g., Elizabeth A. Tower, *Anthony J. Dimond: Statehood Pioneer*, 13 ALASKA HIST. 29, 45–47 (1998).

69. Ernst Gruening, Address to the Alaska Constitutional Convention: Let Us Now End American Colonialism (Nov. 9, 1955), <http://www.alaska.edu/creatingalaska/convention/speeches/gruening.xml> [hereinafter Gruening Address]. Gruening's speech at the convention is littered with dramatic rhetoric comparing the federal government to King George III and compiling grievances against the federal government in much the same manner as Jefferson did against King George III in the Declaration of Independence. *Id.*

70. *Id.*

71. See U.S. CONST. art. IV, § 3, cl. 1.

72. Biber, *supra* note 32, at 127–28.

73. *Id.* at 128.

74. Lehlitner Address, *supra* note 37; NASKE & SLOTNICK, *supra* note 45, at 212. This threat was apparently so great that opponents of Alaska statehood suggested amending the U.S. Constitution to reduce the amount of representation in any new state. *Id.*

will bring new delegates to Congress, forcing reapportionment in the House of Representatives.<sup>75</sup> This concern may seem small given the three-member size of Alaska's delegation, but lawmakers in the 1950s assumed that Hawaii would enter the Union simultaneously.<sup>76</sup> With the addition of four new Senators, the two-thirds supermajority needed to invoke cloture, override a veto, or consent to a treaty would increase from 65 to 67 votes.<sup>77</sup>

The dilution of power may be worthwhile to Representatives or Senators if new congressional delegates can be counted on as allies; however, despite Alaska's apparent similarity to other western states, its geographic remoteness and special environmental concerns presented obstacles to alliance-building.<sup>78</sup> Some lawmakers opposed statehood because of political pressure from large companies whose Alaska investments would be at risk under a new state tax system.<sup>79</sup> For others, cloture was of particular importance.<sup>80</sup> These lawmakers opposed statehood out of fear that Alaska would support controversial equal rights legislation.<sup>81</sup>

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75. BOWKETT, *supra* note 60, at 19. No matter how small the population, every state in the union must have at least one representative. U.S. CONST. art. I, § 2. Even seats in the Senate, where representation is not based on population, are diluted by the addition of states, because the Senate can consent to treaties, override a veto, or invoke cloture on debate only if a certain portion of Senators agree. *See* Lehleitner Address, *supra* note 37.

76. FISCHER, *supra* note 43, at 9; Lehleitner Address, *supra* note 37.

77. *See* NASKE & SLOTNICK, *supra* note 45, at 165. The Senate did not adopt the three-fifths rule until 1975. *See* United States Senate Art and History, [http://www.senate.gov/artandhistory/history/common/briefing/Filibuster\\_Cloture.htm](http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.htm) (last visited Sept. 4, 2005).

78. *See* GOING UP IN FLAMES: THE PROMISES AND PLEDGES OF ALASKA STATEHOOD UNDER ATTACK 13 (Malcolm B. Roberts ed., 1990).

79. The Seattle Chamber of Commerce never endorsed Alaska statehood, even after every other Pacific Coast Chamber had. *See* ERNST GRUENING, BATTLE FOR ALASKA STATEHOOD 99 (1967). Gruening believed that the Chamber's reluctance was due to the fact that its Alaska Committee was "dominated by a handful of men who view Alaska as King George III and his ministers viewed the thirteen colonies—as something to be exploited and kept down but never to be given equality." *Id.*

80. McBEATH, *supra* note 10, at 5; McBEATH & MOREHOUSE, *supra* note 60, at 47. At the 1949 Governors Conference, Georgia Gov. Herman Talmadge vocally opposed a resolution calling for the admission of Alaska: "The people I represent are opposed to the admission of any states whose Senators are not likely to take our position on cloture." *See* GRUENING, *supra* note 79, at 7.

81. *See* BOWKETT, *supra* note 60, at 19; HAYCOX, *supra* note 65, at 271; NASKE & SLOTNICK, *supra* note 45, at 162. These regionalist views are apparent in the admission debates. During the three-day debate in the 81st Congress, Senators from Minnesota, Montana, New York, North Dakota, Oregon, Vermont, and

To ensure political integration, Congress had previously required several provisions in new state constitutions,<sup>82</sup> such as the “Blaine Amendments,” which prevent states from using public funds to support sectarian schools.<sup>83</sup> By consistently requiring specific provisions, Congress often compelled new states to conform to a consensus on constitutional text,<sup>84</sup> creating “an extraordinary degree of mimesis by state constitution makers.”<sup>85</sup> This forced homogeneity suggests that western states whose cultural heritage was at odds with established eastern practices were prevented from fully expressing that heritage in the new state constitution.<sup>86</sup>

Alaska was little different.<sup>87</sup> Although Alaska was finally admitted by an admission act, several enabling acts had been proposed in previous years. These bills contained similar require-

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Wyoming spoke in favor of statehood; Senators from Arkansas, Georgia, Mississippi, Nebraska, North Carolina, and Tennessee spoke in opposition to statehood. GRUENING, *supra* note 79, at 55–56.

82. Hall, *supra* note 22, at 392; Biber, *supra* note 32, at 132. This power is purportedly derived from the Guarantee Clause. See U.S. CONST. art. IV, § 4. See also H.R. REP. No. 2079, at 4–5 (1909) (on statehood for Arizona and New Mexico) (“[T]he Constitution nowhere defines the qualification of Territories for statehood. Congress therefore has discretion as to what conditions shall be required of Territories seeking admission as States.”). In fact, the constitutionality of these additional requirements hinges on congressional power to legislate in the area without recourse to the Guarantee Clause. See also Biber, *supra* note 32, at 175 (citing *Coyle v. Smith*, 221 U.S. 559 (1911)).

83. Luke Lantta, *Note, The Post-Zelman Voucher Battleground: Where to Turn After Federal Challenges To Blaine Amendments Fail*, 68 LAW & CONTEMP. PROBS. (forthcoming). For entry of many western states, Congress required strong anti-polygamy provisions and the teaching of English in public schools. See, e.g., H.R. REP. No. 2079, at 2 (1909) (relating to statehood for Arizona and New Mexico).

84. Biber, *supra* note 32, at 132; Hall, *supra* note 22, at 392.

85. See Hall, *supra* note 22, at 392.

86. Biber, *supra* note 32, at 132–73 (discussing assimilative congressional requirements for Hawaii, Louisiana, New Mexico, and Utah).

87. *Contra* Biber, *supra* note 32, at 129, 207. I disagree with Biber on this point chiefly because he fails to consider the path dependence of requirements of constitutional provisions. Alaska entered the Union without passage of an enabling act, and hence its constitution was framed with an eye to presumed congressional requirements, not actual requirements. There was thus no reason to require constitutional provisions in an admission act when those provisions are already in the proposed state constitution. Biber’s contention that Congress had few requirements of Alaska and Hawaii is merely an artifact of the prudent judgments of delegates to Alaska and Hawaii’s constitutional conventions.

ments to the enabling acts passed for other western states.<sup>88</sup> For example, a 1955 House bill would have required Alaska to adopt constitutional provisions prohibiting publicly funded sectarian schools.<sup>89</sup> The delegates to the Alaska Constitutional Convention knew they would likely have to capitulate preemptively to similar demands.<sup>90</sup> In the Alaska Constitution, several sections are responsive to particular requirements outlined by the House of Representatives in proposed bills addressing Alaska statehood.<sup>91</sup>

3. *Showing Capacity for Self-Government.* To win over Congress, Alaska also needed to demonstrate a capacity for self-government.<sup>92</sup> “Knowing that a nationwide audience would judge their performance, the delegates’ goal was to produce a document that would be viewed inside *and outside* Alaska as prudent and responsible.”<sup>93</sup> In some ways, the holding of the constitutional convention was itself a carefully considered maneuver to show the willingness and ability to self-govern.<sup>94</sup> But this maneuver required a modern, model constitution, not one purely responsive to the constitutional preferences of Alaskans. To frame the ideal constitution believed to be necessary for statehood, the delegates copied recent state constitutions and incorporated advice from academic and governmental organizations with an eye to demonstrating political maturity.

For both Alaska and Hawaii, the National Municipal League’s Model State Constitution was a primary influence.<sup>95</sup> The Model

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88. Compare Biber, *supra* note 32, at 130–31 and Lantta, *supra* note 83, at 218 with H.R. REP. NO. 84–88, at 47 (1955).

89. H.R. REP. NO. 84–88, at 47.

90. Instead of an enabling act, which authorizes the state to hold a constitutional convention to prepare for statehood, and a subsequent admission act to formally accept the state, states that use the Tennessee Plan only require an admission act to be accepted into the Union.

91. Compare ALASKA CONST. art. VII, § 1 and art. IX § 2 with H.R. REP. NO. 84–88, at 47.

92. McBEATH, *supra* note 10, at xix; McBEATH & MOREHOUSE, *supra* note 60, at 117.

93. McBEATH & MOREHOUSE, *supra* note 60, at 117 (emphasis added); see also generally GORDON S. HARRISON, ALASKA’S CONSTITUTION: A CITIZEN’S GUIDE (3d ed. 1992).

94. NASKE & SLOTNICK, *supra* note 45, at 209. The maneuver worked—such initiative was noted by other states’ Senators. See 103 CONG. REC. 466–69 (1957) (statement of Sen. Murray).

95. Specifically, the fifth edition, published in 1948, was the most influential for Alaska. See COMMITTEE ON STATE GOVERNMENT OF THE NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION WITH EXPLANATORY

was a distillation of the best provisions in state constitutions, informed by prominent thinkers and federal constitutional protections. The Alaska Constitution's judiciary article was also heavily influenced by ideas found in the New Jersey and Missouri Constitutions.<sup>96</sup> While it is all too clear that delegates to the Alaska Constitutional Convention often adopted provisions from other constitutions because they were either generally accepted ideas<sup>97</sup> or reasonable reactions to territorial history, Congress's demand that Alaskans exhibit the ability to govern themselves created an underlying motivation to adopt the consensus position.

Occasionally, the delegates of the Alaska Constitutional Convention specifically rejected the consensus position. Knowing Congress had in the past reviewed the entire proposed state constitution<sup>98</sup> and assuming Congress would prefer certain uncontroversial constitutional provisions to others, delegates adopted these uncontroversial provisions rather than the academic consensus provisions. For example, the Model State Constitution of the era suggested a unicameral legislature,<sup>99</sup> but one reason the delegates chose a bicameral system was that they believed Congress would be leery of any boldness in the structure of the legislature.<sup>100</sup>

Another example of the delegates rejecting the academic consensus position concerned Article X, which appears to be one of the more uniquely Alaskan parts of the state constitution, since it discusses "boroughs"<sup>101</sup> and not "counties," as other modern state constitutions do.<sup>102</sup> The committee that framed its provisions explicitly rejected the National Municipal League's model provisions,<sup>103</sup> despite the fact that these provisions were the most up-to-

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ARTICLES (Alaska Legislative Research Agency, 5th ed. 1948) [hereinafter MODEL STATE CONST.].

96. Other states were also influential. For instance, the free speech section of Alaska's Constitution is taken directly from Idaho. MCBEATH, *supra* note 10, at 35.

97. See, e.g., MCBEATH & MOREHOUSE, *supra* note 60, at 197 (discussing adoption of the Missouri Plan for judicial nominations and retention elections).

98. S. REP. No. 454, at 2-3 (1910) (discussing admission of Alabama, Louisiana, and Texas).

99. MODEL STATE CONST. art. III, § 301.

100. MCBEATH & MOREHOUSE, *supra* note 60, at 121 ("Concerned about how the nation as a whole and Congress in particular would assess their political maturity, the majority of delegates shied away from the boldness of a unicameral legislature."); see also BOWKETT, *supra* note 60, at 32.

101. ALASKA CONST. art. X, § 2.

102. See, e.g., WIS. CONST. art. IV, § 23. In fact, a "borough" was considered effectively a modernized "county." See FISCHER, *supra* note 43, at 118-19.

103. FISCHER, *supra* note 43, at 125.

date of any in the Model.<sup>104</sup> The Alaska delegates were specifically concerned that a county system would be a poor choice given the requirements of the new state and purposefully chose to use “borough” instead of “county” to ensure that courts would consider local government in light of Alaska’s constitutional structure and needs.<sup>105</sup> The adopted provisions reflect the delegates’ desire to create a local government system that would work for Alaska’s unique geography.

Yet, these provisions were also responsive to the opinions of national experts concerned with the form of local government, especially those of the Kestenbaum Commission, who reported to Congress and the President on the relationships among different governmental levels. Less controversial today, in 1956 the relationship between state and local government was of paramount importance because of the 1954 *Brown v. Board of Education*<sup>106</sup> decision. *Brown* focused Congress on the interaction between local and state governments.<sup>107</sup> To examine this interaction, Congress authorized the Kestenbaum Commission to study state-local intergovernmental relations.<sup>108</sup> One of the Commission’s main findings was that state constitutions were too restrictive of local governmental powers.<sup>109</sup> The Commission’s report was quoted at length at the Alaska Constitutional Convention<sup>110</sup> and Article X broadly answers its concerns<sup>111</sup> and flatly rejects the National Municipal League

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104. MODEL STATE CONST. v, introductory cmt.

105. FISCHER, *supra* note 43, at 118–19.

106. 347 U.S. 483 (1954).

107. See KESTENBAUM COMM’N, FINAL REPORT 5 (1955) (“In light of recent Supreme Court decisions, and in our present highly interdependent society, there are few activities of government indeed in where there is not some degree of national interest, and in which the National Government is without constitutional authority to participate in some manner. . . . In all of its actions the National Government should be concerned with their effects on State and local governments.”).

108. *Id.* at iii.

109. *Id.* at 37 (“[M]any State constitutions restrict the scope, effectiveness, and adaptability of State and local action. These self-imposed constitutional limitations make it difficult for many States to perform all of the services their citizens require, and consequently have frequently been the underlying cause of State and municipal pleas for Federal assistance.”).

110. ALASKA LEGISLATIVE COUNCIL, CONSTITUTIONAL CONVENTION: MINUTES OF THE DAILY PROCEEDINGS (1965), available at [http://www.law.state.ak.us/doclibrary/cc\\_minutes.html](http://www.law.state.ak.us/doclibrary/cc_minutes.html) (last visited Oct. 4, 2005) [hereinafter CONSTITUTIONAL CONVENTION MINUTES].

111. Compare ALASKA CONST. art. X, § 1 (stating “[t]he purpose of this article is to provide for maximum local self-government with a minimum of local government units”) with CONSTITUTIONAL CONVENTION MINUTES, *supra* note 110

model.<sup>112</sup> In keeping with the report's recommendations, Article X also instructs judges to interpret the article liberally, with a mind toward granting expansive powers to local governments.<sup>113</sup> It does so through a clause delegates passed in part to preserve sufficient flexibility in whatever local governmental system would be ultimately authorized by the state legislature.<sup>114</sup> While these historical facts are not enough to prove that the delegates of the Alaska Constitutional Convention framed Article X to meet the perceived expected requirements of Congress for local governmental powers, they are consistent with that theory.<sup>115</sup>

The key to achieving statehood was showing Congress that Alaskans could govern themselves. Thus the delegates at the constitutional convention undertook to adopt a model document, and where Congress's needs seemed likely to depart from constitutional models, the delegates abandoned the models to respond to those concerns. By modeling the constitution on generally accepted ideas and anticipating federal requirements, the delegates responded to tremendous dual pressures from their constituents and the United States Congress. In so doing, the delegates may have masked the Alaska constitutional heritage. This masking hinders efforts to uncover the meaning of constitutional text from the historical record because the historical record is filled with inherent ambiguity.

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(noting how “[m]ore or less hidden in this picture is a paradox that consistently plagues the state, . . . too many local governments and not enough local government.’ That is one of the points that we have tried to meet here, not to establish too many local governments but those that would be established would be effective.”) *and* KESTENBAUM COMM’N, *supra* note 107, at 48–49.

112. FISCHER, *supra* note 43, at 125. The National Municipal League had just updated its provisions regarding local government (art. VIII) in the fifth edition. *See* MODEL STATE CONST. v, introductory cmt. In the next edition, it incorporated the need for adaptable local government.

113. ALASKA CONST. art. X, § 1. This provision was included to nullify “Dillon’s Rule,” which operates to narrowly construe local government powers. *See* MCBEATH, *supra* note 10, at 182.

114. *See* FISCHER, *supra* note 43, at 127.

115. It is of course also possible that both the delegates and the Kestenbaum Commission reacted to the same recent governmental issues regarding local government in the same manner, or that consultants advised the delegates regarding these issues between editions of the model constitution. Given that the Kestenbaum Commission report was discussed at the convention, however, it at least must have been in their minds and its divergence from the Model State Constitution is apparent.

## IV. FROM AMBIGUITY TO LIBERTY

## A. Interpreting Ambiguous Origins

In determining how courts should interpret legitimate but unoriginal constitutional text, there are two main problems that need to be resolved. First, as Professor Gardner argues, it seems impossible to interpret state constitutions independently of the Federal Constitution because state constitutions do not seem to arise from distinct ways of life.<sup>116</sup> State constitutions borrow heavily from each other, frustrating attempts to find a unique state constitutional heritage within the text of a particular state constitution. Moreover, constitutional provisions are often era-dependent rather than state-dependent.<sup>117</sup> For instance, “[i]f Illinois has an environmental clause in its constitution and Oregon does not, this does not say that the people of Illinois place environmental values higher than do Oregonians. It says something about adopting a constitution in 1972 as compared with 1859.”<sup>118</sup>

Second, some scholars have challenged the precision of determinant originalist interpretation given the paucity of historical data in so many state histories.<sup>119</sup> The complementary criticism, rarely voiced, is that courts are under pressure to use historical justifications to achieve contemporary ideological ends, and so they occasionally fill in the blanks of the historical record.<sup>120</sup> If judges have difficulty discovering historical evidence of a political community’s values,<sup>121</sup> they will understandably continue to interpret their state

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116. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 793–94, 818–19 (1992); see also Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington’s Experience*, 65 TEMP. L. REV. 1153, 1156 (1992). This is a remarkable argument especially given that uniform state constitutionalism was specifically rejected at the first Constitutional Congress. Roderick L. Ireland, *How We Do It in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted Its State Constitution to Address Contemporary Legal Issues*, 38 VAL. U. L. REV. 405, 417–18 (2004).

117. See Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 195 (1984). An example from the Alaska constitution would be the anti-McCarthy provision. See ALASKA CONST. art. I, § 7.

118. Linde, *supra* note 117, at 195.

119. See Gardner, *supra* note 116, at 811; see also Utter, *supra* note 116, at 1156.

120. Teachout, *supra* note 20, at 34.

121. See RAKOVE, *supra* note 5, at 3–22; see also Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 525 (1995) (listing examples of mistakes in interpreting constitutional history).

constitutions in light of federal constitutional doctrine, with its surfeit of historical information regarding apparently related values.<sup>122</sup>

Professor Gardner is correct in noting the difficulties in parsing-out distinct constitutional heritages among states.<sup>123</sup> This is especially true in light of the intentionally assimilative effects of congressional approval of state constitutions.<sup>124</sup> Yet, Gardner fails to consider that state constitutional heritages are masked in systemic ways by pressures to conform to the will of Congress.<sup>125</sup> Where the state's distinct constitutional heritage is especially robust or meets only limited congressional resistance, these pressures to conform will fail to shape the state constitution. Any modality of constitutional interpretation will pick up this robust heritage. But, where these pressures succeed in shaping the new state constitution, state courts should reasonably abandon determinant originalism in order to interpret state constitutions in light of the constitutional heritage. There simply is not enough historical or theoretical contingency to make originalist accounts determinant of constitutional meaning.

Because of the twin demands from constituents and Congress, delegates to Alaska's constitutional convention frequently referred to other state constitutions, model constitutions, independent evaluators, and Congress's likely demands. Whole branches of government, such as the judiciary, were empowered with language borrowed from other constitutions.<sup>126</sup> The delegates preemptively responded to Congress's demands when framing specific provisions such as the finance and taxation article.<sup>127</sup> Even when archaic constitutional provisions had little bearing on the modern world, delegates erred on the side of tradition in making the Alaska Constitu-

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122. See Schapiro, *supra* note 63, at 419–28.

123. Gardner, *supra* note 116, at 763–64.

124. See Biber, *supra* note 32, at 132.

125. I assume with Gardner that states are attempting to interpret their constitutions as distinct constitutional enterprises and not merely as expressions of a shared, national constitutional enterprise. According to Lawrence Friedman, Gardner's critique of independent interpretation loses its force when this assumption is attacked. See Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 136 (2000); see also Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1160 (1993) (“State constitutional texts are best thought of as multiple efforts to articulate a common aspiration for constitutional governance.”).

126. FISCHER, *supra* note 43, at 113. Again, compare ALASKA CONST. art. IV with MO. CONST. art. V. The election of judges was hotly debated at the convention, but the Missouri Plan for retention elections eventually won out. See MCBEATH, *supra* note 10, at 15.

127. See FISCHER, *supra* note 43, at 142.

tion like other constitutions. This suggests that delegates were responsive to more than merely Alaskans' constitutional preferences when framing the constitution's text; instead, the Alaska Constitution is in large part derivative.

It is tempting to conclude that the Alaska Constitution, so largely derived, must be interpreted in light of source state constitutions and of the constitutional provisions that the National Municipal League highlighted as models. Such a conclusion would be wrong. Alaska courts can discount constitutional analogies in light of an indeterminant originalist history that suggests ambiguity about many of Alaska's constitutional provisions. This inherent ambiguity in state constitutional history prevents courts from identifying the historical contingencies that could determine original meaning in state constitutions.

Alaska has an easy answer to the major challenge of indeterminant originalist independent interpretation: the acquiescence of constitutional convention delegates belies a distinct constitutional heritage. Provisions like the Blaine Amendment were adopted despite the Supreme Court's holding that such requirements, if they had actually been enacted, would have been unconstitutional.<sup>128</sup> It is unclear whether delegates to the Alaska Constitutional Convention actually knew that Congress could not constitutionally make requirements of state constitutions outside of its Article I and Guarantee Clause powers.<sup>129</sup> Congress, for its part, required them because of the belief, regardless of constitutionality, that these provisions would have some effect on the new state.<sup>130</sup> If Alaska delegates knew these requirements were unconstitutional, they acquiesced out of desire for statehood (as others had before them).<sup>131</sup> Even if Alaska's offer of specific constitutional provisions could bind the state more than a congressional requirement could, the state would merely be bound to constitutional *text*, not constitu-

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128. See Biber, *supra* note 32, at 184.

129. The record suggests that the delegates did not know such requirements were unconstitutional; for instance, there is no mention in the constitutional convention's minutes of *Coyle v. Smith*, 221 U.S. 559 (1911), the leading case holding that many federal requirements for state constitutions are unconstitutional. See CONSTITUTIONAL CONVENTION MINUTES, *supra* note 110; see also FISCHER, *supra* note 43, at 19. However, given the academic attention devoted to the Alaska Constitutional Convention, one would imagine that some delegates, or at least consultants, were aware of this precedent.

130. Biber, *supra* note 32, at 184 (discussing motivations for similar, previous requirements of earlier state constitutions).

131. *Id.* at 195 (discussing the example of New Mexico).

tional *law*.<sup>132</sup> The Alaska Constitution, like the Federal Constitution, does not come with its own cipher<sup>133</sup>—Alaska courts need not interpret constitutional provisions in light of Congress’s intent in making a requirement. This acquiescence by delegates to presumed demands of Congress is not binding.

Because the Alaska constitutional text was created under pressure to acquire statehood, Alaska courts should always read it with an eye to the state’s constitutional heritage,<sup>134</sup> and not just parrot federal interpretations of federal analogues, in order to maintain the Alaska Constitution’s greater protection for civil, political, and social rights for Alaskans.

## B. A Few Opportunities for Expanded Rights

In addition to being able to meet the theoretical challenge of indeterminant originalism, Alaska courts can create a more harmonious and consistent constitutional doctrine by encouraging independent interpretation through indeterminant originalism. For example, the Alaska Court of Appeals has outlined two methods of understanding state constitutional provisions that must be reappraised when embracing indeterminant originalism. These meth

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132. Judging from the historical record, Alaska realistically could not even be bound to a constitutional text to the degree of preventing amendments. Congress has a long history of inserting specific “unamendable” provisions into state constitutions, and no such provisions, even allowing for the possibility that such provisions are constitutional, were adopted in the Alaska Constitution. Biber, *supra* note 32, at 131. Another way of thinking about this dialogue is that Congress had certain required concepts, but had no power to control the conceptions of those concepts that Alaska would adopt in the future. *Cf.* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 134–36 (1977).

133. The fact that Alaska wanted statehood so badly that Congress did not even have to ask for these specific provisions suggests an alternative reason for the framing of some constitutional provisions. If such provisions are, in fact, sops, why should a court use an originalist modality to interpret them according to the models of the Alaska Constitution? The originalist modality actually counsels against interpreting these provisions in line with their federal constitutional analogues.

134. *See Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alaska 1970) (“We are free . . . to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.”).

ods contradict each other and are both dangerous to civil rights. First, in *State v. Gonzalez*,<sup>135</sup> the court used a “lockstep approach”<sup>136</sup> to determine that the Alaska constitutional provision governing self-incrimination means the same thing that the federal constitutional analogue meant *in 1956* when it was incorporated into the Alaska Constitution.<sup>137</sup> While the *Gonzalez* court’s approach actually afforded the criminal defendant more protection than the United States Constitution currently would, such retrospective lock-stepping essentially ossifies state constitutional provisions<sup>138</sup> and could operate even where there are distinct textual differences between the Alaska and federal texts.<sup>139</sup> This process of pegging Alaska constitutional protections to 1956 national minimums would, if applied to other civil rights, wreak havoc on values that have emerged and endured over the past fifty years.

Although *Gonzalez* specifically disavowed tacking the meaning of the Alaska Constitution to changes in federal constitutional doctrine,<sup>140</sup> the court of appeals has also created a rebuttable presumption *in favor* of doing just that. Under this “criteria approach” canon of constitutional construction, a litigant bears the burden of showing something in the “text, context, or history” of the Alaska Constitution that justifies an interpretation independent from that of the Federal Constitution.<sup>141</sup> This presumption was ap-

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135. 825 P.2d 920 (Alaska Ct. App. 1992).

136. *Id.* at 931 (“Departure from the original intent of the drafters of article I, § 9 requires something more than a recent shift in federal constitutional interpretation.”). For an explanation of the “lockstep approach” and its alternatives, the “criteria approach” and the “primacy approach,” see Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudications*, 72 NOTRE DAME L. REV. 1015, 1021–26 (1997) (“Under this methodology, the state supreme court . . . sets forth a list of circumstances (criteria or factors) under which it says it will feel justified in interpreting its state constitution more broadly than the Federal Constitution.”).

137. See *Gonzalez*, 825 P.2d at 931.

138. Linde, *supra* note 117, at 195.

139. *State v. Dankworth*, 672 P.2d 148, 150–51 (Alaska Ct. App. 1983) (“We recognize that the state constitutional provision, while using different language, is essentially the same as its federal counterpart and was intended by the constitutional convention to be so.”) (citing Alaska Constitutional Convention, Committee Proposal 5, Commentary on the Legislative Article, § 6, at 2 (Dec. 14, 1955)).

140. *Gonzalez*, 825 P.2d at 931.

141. *E.g.*, *Davis v. Municipality of Anchorage*, 945 P.2d 307, 311 (Alaska Ct. App. 1997). Several state judges have outlined potential criteria to justify independent interpretation. See, *e.g.*, Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 CONN. L. REV.

plied throughout the 1990s to criminal procedure questions, including double jeopardy,<sup>142</sup> the right to post-conviction bail,<sup>143</sup> and the right to confront witnesses.<sup>144</sup> This presumption, grounded as it is in established precedent, is in tension with the responsibility to interpret independently the Alaska Constitution outlined by the Alaska Supreme Court in *Baker*.<sup>145</sup>

The presumption that the Alaska Constitution should be interpreted in the same way as the Federal Constitution absent some textual, contextual, or historical reason should be rejected for several reasons.<sup>146</sup> First, it prevents Alaska courts from looking to Alaska's local constitutional heritage when deciding important issues of criminal procedure. Moreover, nullifying this presumption would generally expand criminal procedural rights and bring an isolated branch of constitutional jurisprudence in line with the general theory of independent interpretation established by the Alaska Supreme Court.<sup>147</sup> It would make Alaska serve as a policy labora-

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635, 644–45 (1994) (discussing Washington and Connecticut's six-factor criteria approach); see also Ireland, *supra* note 116, at 404; Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 795 (2000) (describing Oregon's originalist "template" primacy approach, among other approaches taken by Oregon courts).

142. See *Davis*, 945 P.2d at 311; *Aaron v. City of Ketchikan*, 927 P.2d 335, 336 (Alaska Ct. App. 1996); *State v. Zerkel*, 900 P.2d 744, 758 n.8 (Alaska Ct. App. 1995); *Mitchell v. State*, 818 P.2d 1163, 1165 (Alaska Ct. App. 1991).

143. *Hosier v. State*, 976 P.2d 869, 870–71 (Alaska Ct. App. 1999).

144. *See Pease v. State*, 54 P.3d 316, 329 (Alaska Ct. App. 2002).

145. *Baker v. City of Fairbanks*, 471 P.2d 386, 401–02 (Alaska 1970).

146. In addition to the rights-based issues discussed above, Robert Williams has identified six, more general problems with prospective lockstepping: (1) it pre-judges future cases; (2) it precludes state courts from easily independently interpreting the state constitution; (3) it snuffs out independent analysis by lawyers, judges, and scholars; (4) it reduces the usefulness of state constitutional law; (5) it relegates state constitutions to legal shadows; and (6) it prevents states from learning from each other. See Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping*, 46 WM. & MARY L. REV. 1499, 1520–27 (2005). In comparison to a lockstep approach (a conclusive presumption of dependent interpretation), these same problems exist under a criteria approach albeit to a lesser degree—as the possible criteria for independent interpretation increase, these dangers decrease.

147. See *Baker*, 471 P.2d at 386. Nullifying the presumption might also honor Alaska's constitutional heritage by bringing the procedural rights of criminal defendants in line with the rights of those states, such as Oregon, whose law heavily influenced Alaska's past. See Organic Act of 1884, ch. 53, § 7, 23 Stat. 25–26 (1884) (cited in Brown, *supra* note 27, at 90). At present, Oregon's due process jurisprudence protects criminal defendants far more than Alaska's does. David C.

tory for other states and the federal government to observe as they continue to balance the interests of society and the rights of criminal defendants.<sup>148</sup> While it is true that establishing two different constitutional standards could be confusing to law enforcement,<sup>149</sup> having prior independent interpretations of relevant provisions would prevent future erosions in federal protections from impacting the rights of Alaskans.<sup>150</sup>

The main alternative to the “criteria approach” and the “lock-step approach” is the “primacy approach.”<sup>151</sup> This approach, implicit in *Baker*, would better honor the distinct constitutional heritage of Alaska while building a reservoir of constitutional holdings on which sister states and federal courts could draw.<sup>152</sup> It is especially important to adopt a primacy approach for state textual provisions that are identical or very similar to federal constitutional provisions; it is only when two courts interpret the same words in

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Brody, *Criminal Procedure Under State Law: An Empirical Examination of Selective New Federalism*, 23 JUST. SYS. J. 75 (2002).

148. See Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1141 (1985) (favoring the use of state courts as laboratories for testing constitutional interpretations). These policy experiments are critical to our nation’s moral progress and constitutional dialogue. See generally Friedman, *supra* note 125; Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 WM. & MARY L. REV. 1385 (2005).

149. Barry Latzer, *The New Judicial Federalism and Criminal Justice*, 22 RUTGERS L.J. 863, 864–65 (1991). Of course, the court need not adopt two standards through independent interpretation, for it can always reflect and still interpret the state provisions to match the federal provisions. *Id.*; see also Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 99 (1988).

150. Cf. Ronald K.L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1138 (1985) (citing the Montana Supreme Court: “Federal rights are considered minimal and a state constitution may be more demanding than the equivalent federal constitutional provision.”); Bruce Ledewitz, *When Federal Law Is Also State Law*, 72 TEMP. L. REV. 561, 571 (1999) (arguing that federal law sets the rights’ floor, but states may raise the level in or under their own constitutions). If state constitutions are interpreted in prospective lock-step with the Federal Constitution, federal interpretations may cause turnarounds in state constitutional law, effectively making the U.S. Supreme Court the last word on state law issues. See Williams, *State Courts Adopting Federal Constitutional Doctrine*, *supra* note 146, at 1512–13.

151. See Williams, *Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudications*, *supra* note 136, at 1015–34.

152. James N.G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 ALB. L. REV. 783, 793 (2003).

two different sources that a true dialogue occurs.<sup>153</sup> There is no reason to assume that two apparently analogous provisions must mean the same thing, or even if they do, that the federal interpretation is correct.<sup>154</sup>

These observations about the history of the Alaska Constitution can bolster the state's already strong line of cases based on independent interpretation under *Baker*<sup>155</sup> and are critically important under the United States Supreme Court's holdings in *Henry v. Mississippi*<sup>156</sup> and *Michigan v. Long*.<sup>157</sup> Under these rulings, the less federal law forms the basis for state court decisions, the lower the likelihood of United States Supreme Court review.<sup>158</sup> In the past, the Alaska Supreme Court has grounded its independent interpretation not so much on the history of the constitutional provisions themselves as on Alaska's unique constitutional heritage. According to the court of appeals:

Constitutional interpretation follows the "rule that the intent underlying . . . constitutional language should first be gathered from the plain meaning of the language itself." . . . [T]his inquiry is not controlled by any one source of authority, such as United States Supreme Court precedent or an appeal to the intent of the framers of the Alaska Constitution. Rather, such authority is considered and, when appropriate, followed when helpful in discerning the "intention and spirit of our local constitutional language and [whether the right invoked is] necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage."<sup>159</sup>

With the creation of an easily accessible, comprehensive historical source for the constitutional convention, the Alaska Supreme Court can expect to see many more historical arguments regarding constitutional provisions. While this eases the burden on lawyers uncovering supportive documentation, it increases the burden on

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153. See Friedman, *supra* note 125, at 99, 133; see also Kahn, *supra* note 125, at 1163 ("The common enterprise of interpretation is held together by a common discourse, not by a single *telos*.").

154. Tarr, *supra* note 28, at 848.

155. *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970).

156. 379 U.S. 443, 446 (1965) ("[T]his Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions.").

157. 436 U.S. 1032, 1042–44 (1983) (holding that the Court may review state court decisions allegedly based on independent state grounds if the decision itself rests primarily on federal law).

158. See Van Flein, *supra* note 17, at 245.

159. *State v. Gonzalez*, 853 P.2d 526, 529 (Alaska Ct. App. 1993) (citing *Baker*, 471 P.2d at 397, 402) (emphasis omitted).

courts to wade through “‘law-office’ history.”<sup>160</sup> Courts must obviously delve into the historical particulars of the provisions at hand, but it is important to note that these provisions were forged under tremendous general pressures from both the Alaska citizenry and the U.S. Congress.

These pressures indicate that the Alaska constitutional heritage is truly robust where the Alaska constitution differs from “model” constitutions that delegates examined; it also shows that parts of the Alaska constitutional heritage may have been masked by the overall effort to obtain statehood. After all, “Alaskans wrote their constitution primarily to use as a tool in their quest for statehood. Wanting to make a good impression on Congress and the nation, the founders strove to produce a model document reflecting the reformists’ standards of the time.”<sup>161</sup> A historical examination of the Alaska Constitution thus suggests that its text and structure may not always be the only indicator of Alaska’s unique constitutional heritage. It is not simply Alaska’s constitutional heritage that is infused into Alaska’s Constitution, but the requirements of the conforming power of Congress and academic consensus. Any presumption in favor of interpreting the Alaska Constitution in line with the Federal Constitution should thus be discarded.

## V. CONCLUSION

In his speech to the Alaska Constitutional Convention, Robert B. Atwood argued that the Alaska Constitution must pass three tests:

First, the test of the people who sent you here who must approve it by vote and ratification. Second, the approval of Congress who must accept it as a sound document upon which to build a state government and third, that everlasting test that comes when the document is placed into operation as the highest law of the land.<sup>162</sup>

Alaska has a unique constitutional heritage that serves as the basis for independent interpretation of its state constitution. Understanding how the delegates forged a document to pass Atwood’s first two tests can help show judges how to interpret the Alaska

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160. Alfred H. Kelley, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 (1965).

161. McBEATH & MOREHOUSE, *supra* note 60, at 133.

162. Robert B. Atwood, Chairman, Alaska Statehood Comm’n, Address at the Alaska Constitutional Convention (Nov. 8, 1955), <http://www.alaska.edu/creatingalaska/convention/speeches/atwood.xml>.

Constitution to pass Atwood's third and ultimately most important test.

Professor Gardner argues that since state constitutions do not reflect distinctive ways of life, and judges still demand that lawyers marshal historical arguments about the origins of state constitutional provisions, each state should "convince the people of the states that they really do constitute unique communities that differ in fundamental ways from the communities defined by neighboring states and by the nation."<sup>163</sup> Alaskans, of course, need no convincing. Alaskans today, like the Alaskans of 1956, identify in meaningful ways with their home state. Although the desire for statehood forced Alaska's constitutional convention delegates to negotiate a model and modeled constitution, masking values in Alaska's constitutional heritage, the ambiguity of the origins of Alaska's constitutional text gives Alaska courts the opportunity to express those fundamental values. By recognizing the indeterminate origins of Alaska constitutional provisions, Alaska courts can better establish a distinct constitutional discourse benefiting Alaskans and contributing to the nation's shared constitutional progress.

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163. Gardner, *supra* note 116, at 832.