ARTICLES

THE *BAKER* DOCTRINE AND THE NEW FEDERALISM: DEVELOPING INDEPENDENT CONSTITUTIONAL PRINCIPLES UNDER THE ALASKA CONSTITUTION

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> *"One of the strengths of our system of parallel federal and state sovereignties is that the states are, in some areas, free to do things differently than the federal government. Sometimes a state method is better."*[1]

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1. Anchorage Police Dep't Employees Ass'n v. Feichtinger, 994 P.2d 376, 389 (Alaska 1999) (Matthews, J., dissenting). Sometimes a state method could be worse, but it is nevertheless the state's prerogative to legislate, as in a marriage, for better or for worse. There are excellent examples of states leading the way for positive change:

> Long before the national government acted, a number of states abolished slavery, extended the right to vote to women, African-Americans, and 18-year-olds, and provided for the direct election of U.S. senators, among other reforms. These state actions expanded the promise of democracy at a time when none of these measures commanded a national consensus. In this sense, states serve as both political reformers and mediators, testing new ideas and helping to hammer out acceptable compromises among state and national majorities.

D. Bodenhamer, *Federalism and Democracy* (Nov. 2001) (U.S. Dep't of State Bureau of Int'l Info. Programs), *available at* http://usinfo.state.gov/products/pubs/democracy/dmpaper4.htm (last visited Oct. 2, 2004).

I. INTRODUCTION

Under the dual sovereignty established by our federalist framework,[2] state courts have a vital constitutional role to fill. The "axiom" has long been recognized that "under our federal system, the states possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause."[3] Maintaining and promoting state sovereignty by developing a body of state constitutional law that gives independent application and purpose to the Alaska Constitution has been a challenge for the Alaska courts. Nevertheless, Alaska has made substantial inroads in this regard. At times, the Alaska courts have clearly—if not boldly—departed from federal constitutional standards, developing a truly independent state constitutional doctrine. Other times, however, the Alaska courts have missed opportunities for developing Alaska constitutional law in favor of unnecessary deference to federal constitutional standards.

This Article posits that state courts are obligated to advance and develop the state constitution as a primary source for interpreting state law, and should therefore defer to federal constitutional standards only when required to do so by the Supremacy Clause. Absent Supremacy Clause concerns, state courts need not interpret or apply federal constitutional provisions unless they are both textually and historically consistent with state constitutional law and policy and provide worthy guidance. The position of this Article mirrors an early court doctrine first enunciated in *Baker v. City of Fairbanks*[4] and will be referred to as the *Baker* Doctrine.

This Article reviews the current status of the nascent doctrine of independent state constitutional law and explores areas in which the Alaska courts have succeeded in giving life to the state constitution. The Article evaluates selected cases in which the *Baker* Doctrine was appropriately applied and touches upon other cases in which it was needlessly overlooked in favor of federal supremacy.[5]

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2. "Federalism is a system of shared power between two or more governments with authority over the same people and geographical area." Bodenhamer, *supra* note 1.

3. Tafflin v. Levitt, 493 U.S. 455, 458 (1990).

4. 471 P.2d 386, 401–02 (Alaska 1970).

5. Evaluating the implementation of the *Baker* Doctrine presents some challenges, because the doctrine applies only to cases that can be resolved solely on state constitutional issues. *Id.* Some of these cases present both state and federal constitutional issues, while others present issues that implicate only the Alaska Constitution. For example, Article VIII of the Alaska Constitution addresses natural resources and is unique to the constitution. *See, e.g.*, Native Village of Elim v. State, 990 P.2d 1, 5 (Alaska 1999) (discussing the "sustained yield clause of the Alaska [C]onstitution" within article VIII, § 4). In the area of natural resources, the state has developed a body of constitutional law that has no parallel to the federal constitution, including applying a form of equal

This Article also takes note of the heightened form of federalism recently promulgated by the United States Supreme Court. Known as the "New Federalism," this doctrine expands both the Tenth and Eleventh Amendments of the United States Constitution, and does so in a manner that reduces federal supremacy and elevates, or at least equalizes, state law. Finally, this Article juxtaposes Alaska's efforts in establishing its own constitutional doctrines within this new form of heightened federalism and contends that this combination provides the state with a significant opportunity to advance its independent state constitutional doctrines and continue with the development of state constitutional standards.

II. A REVIEW OF THE NEW FEDERALISM

Although it is beyond the scope of this Article to analyze the New Federalism doctrine comprehensively, a brief overview is necessary to provide context for the *Baker* Doctrine and to understand more thoroughly the opportunity presented to state courts to expand upon state constitutional principles. The starting points for a discussion of the New Federalism doctrine are the Tenth Amendment and the Supremacy Clause of the Federal Constitution.

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[6] The Supremacy Clause provides:

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protection analysis relative to the utilization of natural resources. *See* Gilbert v. State, 803 P.2d 391, 398 (Alaska 1990) (creating an equal protection test under the "uniform application clause" of the state constitution); Baxley v. State, 958 P.2d 422, 429 (Alaska 1998) (applying equal protection analysis under the uniform application clause and stating that the court will "interpret the Uniform Application Clause to require legislation dealing with natural resources to satisfy a heightened level of equal protection scrutiny"). However, not every case that discusses federal, as well as state, constitutional provisions overlooks the *Baker* Doctrine, since some cases refer to federal law simply for comparison and rest the holding solely on state grounds. Further, some cases do not involve any aspect of state constitutional law, but address state statutory law vis-à-vis federal statutory law, with the Supremacy Clause being the only constitutional consideration. *See, e.g.*, Cline v. Cline, 90 P.3d 147, 153–54 (Alaska 2004) (discussing federal preemption of state court jurisdiction to treat military retirement benefits in excess of fifty percent of the benefit as marital property, stating that the "supremacy clause of the federal constitution requires that state courts defer to federal law. Because allowing the superior court's decision to stand would violate the supremacy clause of the federal constitution, we must require the property division to be retroactively modified to the extent that the division exceeds the fifty percent federal limit on state jurisdiction.").

6. U.S. CONST. amend. X. This is not to suggest, however, that the Tenth Amendment is the only limitation on excessive federal power. The majority in *Printz v. United States*, 521 U.S. 898 (1997) noted:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.[7]

The Tenth Amendment both counter-balances the Article IV Supremacy Clause, which otherwise would eviscerate any true state autonomy, and provides express textual support for the primacy of state law, where not otherwise countermanded by the Federal Constitution.

State constitutional principles must therefore always observe any federal constitutional provision or federal law, and state court judges are mandated to "be bound thereby."[8] However, three areas exist in which the states can develop and assert state-based principles independent of, and potentially superior to, federal law. First, states can use any federal law as a floor; the states are free to create standards that exceed federal minimums.[9] Second, the Federal Constitution and federal laws do not speak to every issue,[10] and states are thus free to address the many areas in which federal law is silent.[11] Third, and most complex, state law may trump any federal law that exceeds federal constitutional parameters.[12]

> Our system of dual sovereignty is reflected in numerous constitutional provisions, and not only those, like the Tenth Amendment, that speak to the point explicitly. It is not at all unusual for our resolution of a significant constitutional question to rest upon reasonable implications. *See, e.g.*, Myers v. United States, 272 U.S. 52 (1926) (finding that the President has the sole authority to remove executive officers under the Federal Constitution by an implication arising from Art. II, 1, 2); Plaut v. Spendthrift Farms, Inc., 514 U.S. 211 (1995) (finding that Article III implies a lack of congressional power to set aside final judgments).

Printz, 521 U.S. at 923 n.13.

7. U.S. CONST. art. IV.

8. *Id.*

9. Federalism mandates that the states may develop their own laws and public policies with different standards as long as these laws satisfy federal constitutional minimums. Addington v. Texas, 441 U.S. 418, 431 (1979).

10. *See* Miree v. DeKalb County, 433 U.S. 25, 33 (1977) (finding no preemption under the Supremacy Clause because Congress had not legislated in the area).

11. *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (stating that "[t]he assumption [is] that the historic powers of the States [are] not superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress").

12. *See, e.g.*, Printz v. United States, 521 U.S. 898, 911 (1997) (emphasizing that there are some powers that belong to the states exclusively, in the absence of a constitutional delegation of power to the federal government, and in such areas Congress cannot "impose . . . responsibilities without the consent of the States").

A. The Supremacy Clause and Its Limits

The drafters of the Federal Constitution envisioned that federal power would be circumscribed to limited subject matters only.[13] State law-making power was viewed not just as a default to federal law, but rather a central tenet to the implementation of dual federalism:

> The powers delegated by the proposed Constitution to the Federal Government, *are few and defined. Those which are to remain in the State Governments are numerous and indefinite.* The former will be exercised principally on external objects, such as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.[14]

The intended structure expressly provides states with law-making powers that "are numerous and indefinite," whereas federal law-making powers are to remain "few and defined."[15] It is established that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."[16]

Balancing this constriction of federal power, however, is the need to have a large centralized government that enacts supreme law to create a unified government in areas expressly delegated to the federal government by the Constitution. As explained by one court:

> In *The Federalist*, Alexander Hamilton sets forth how political power is to be divided in a Republic. He states that the laws of the larger political entity—into which smaller political societies agree to join—are to be the *supreme law* of the land. Were it otherwise, Hamilton continues, the agreement would be merely a treaty dependent on the good faith of the parties, and not a government. As a corollary, the acts of the larger society or the government must be pursuant to its constitutional powers, because if not, he concludes, such acts, which would invade the residuary authority of the smaller societies, would consti-

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13. *See* Koog v. United States, 79 F.3d 452, 455 (5th Cir. 1996) (reasoning that the Tenth Amendment establishes that the federal government possesses only the powers expressly conveyed to it by the Constitution, but also concluding that the Tenth Amendment is not a substantive limitation on the federal government) (citing New York v. United States, 505 U.S. 144, 157 (1992)).

14. THE FEDERALIST NO. 45, at 313 (James Madison) (J. Cooke ed., 1961) (emphasis added). Other contemporaneous writings indicate that federal "powers extend only to matters respecting the common interests of the union, and are specially defined, so that the particular states retain their sovereignty in all other matters." Letter from Roger Sherman & Oliver Ellsworth to the Governor of Connecticut (Sept. 26, 1787), THE RECORDS OF THE FEDERAL CONVENTION OF 1789, at 99 (Max Farrand ed., 1966).

15. *Id.*; *see also* Marbury v. Madison, 5 U.S. 137, 176 (1803) (finding that "[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written").

16. United States v. Morrison, 529 U.S. 598, 607 (2000).

> tute a usurpation of power. Beginning with *McCulloch v. Maryland*, federal courts have attempted to comply with the spirit of Hamilton's view.[17]

Obviously both state and federal courts have construed the Supremacy Clause more broadly than Alexander Hamilton envisioned.[18] Specifically, the past decades have lacked any definition of the limitation on the Federal Supremacy Clause. However, a series of recent decisions together hint that federal constitutional limits to the Supremacy Clause do exist.[19]

The Supreme Court's decision in *Gregory v. Ashcroft*[20] offers one of the better modern explanations of dual sovereignty and the way in

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17. Vango Media, Inc. v. City of New York, 34 F.3d 68, 71 (2d Cir. 1994) (citations omitted).

18. For instance, the Alaska Supreme Court, in *State v. Andrade*, 23 P.3d 58 (Alaska 2001), declared unconstitutional a regulation that denied to non-citizen legal aliens eligibility to receive permanent fund dividends from the state. *Id.* at 74. The court found that the regulation violated the Supremacy Clause by "improperly exclud[ing] some legal aliens who were not precluded under federal law from forming the intent to remain required for PFD eligibility." *Id.* at 78. In light of the fact that the dividends are purely a matter of state law and constitute a distribution of a portion of the state's wealth to its citizens, as citizenship is defined by the state, *id.* at 69, the court's reliance on federal law and the Supremacy Clause demonstrates an unduly broad application of federal supremacy by a state court. The court in *Andrade* reasoned that "if Congress has not precluded all aliens not admitted for permanent residence from forming the intention to remain indefinitely, Alaska law must recognize that possibility in establishing the requirements for permanent fund dividend eligibility." *Id.* at 73. The court failed to cite to any provision, statute, constitutional mandate or precedent to support its holding. That the Constitution rests immigration issues solely with the federal government is indisputable. Toll v. Moreno, 458 U.S. 1, 10 (1982). But the issue in *Andrade* was determining who would be entitled to receive a state distribution. *Andrade*, 23 P.3d at 69. This is not a question of federal immigration law, and it cannot be said that federal supremacy compelled this result, even though the result reached in *Andrade* itself is fair.

19. The decision in *Printz v. United States*, 521 U.S. 898 (1997), is one such example. In *Printz*, Justice Scalia, writing for the majority, struck down provisions of the Brady Handgun Violence Prevention Act that imposed requirements on the state executive branch. *Id.* at 910–11. The majority reasoned in part that there was "no evidence" by the first Congress of any "assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization" and the majority found "some indication of precisely the opposite assumption." *Id.* at 909. *Printz* emphasized that there are some powers that belong to the states exclusively, in the absence of a constitutional delegation of power to the federal government, and in such areas Congress cannot "impose . . . responsibilities without the consent of the States." *Id.* at 911. The decision in *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), is another example of the courts limiting the scope of previously unchallenged federal government power.

20. 501 U.S. 452 (1991).

which the constitutional design was intended to function. In *Gregory*, the Missouri State Constitution, article V, section 26, provided that "[a]ll judges other than municipal judges shall retire at the age of seventy years."[21] Some state court judges challenged the state constitutional provision as violative of both the Federal Age Discrimination in Employment Act of 1967 and Federal Equal Protection principles.[22] Their challenge was denied, and in the process, the Court reiterated its explanation of dual sovereignty, as set forth in an 1869 decision:

> Over 120 years ago, the Court described the constitutional scheme of dual sovereigns: "'[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,'. . . '[W]ithout the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[23]

According to the Court, dual sovereignty is structured to provide co-equal sovereignty between states and the federal government, with defined exceptions granted to the federal government for supremacy, and with the states retaining superior sovereignty in the remaining vast and largely undefined categories.[24] This view was codified with the enactment of the Tenth Amendment. The Court recognized that "[t]he States thus retain substantial sovereign authority under our constitutional system."[25] Although the states ceded power to the federal government, the states retained "a residuary and inviolable sovereignty."[26] Today, we operate under a system in which the "Framers rejected the concept of a central government that would act upon and through the States, and in-

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21. *Id.* at 455.

22. *Id.*

23. *Id.* at 457 (quoting Texas v. White, 74 U.S. 700, 725 (1869) (quoting Lane County v. Oregon, 74 U.S. 71, 76 (1869))).

24. As reasoned by the Court in *Printz*, "[r]esidual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'" *Printz*, 521 U.S. at 919.

25. *Gregory*, 501 U.S. at 457.

26. THE FEDERALIST NO. 39, at 245 (James Madison) (J. Cooke ed., 1961).

stead designed a system in which the State and Federal Governments would exercise concurrent authority over the people."[27]

Of importance to the states, and state courts, is the purpose undergirding the structure of dual federalism. The Court in *Gregory* stated:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.
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> Perhaps the principal benefit of the federalist system is a check on abuses of government power. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.[28]

The purposes identified by the *Gregory* Court should be considered whenever a state court faces an issue of state law that may differ from, exceed, or duplicate federal law. State courts should accordingly recognize the presence of these concerns as factors warranting a holding based on state law. The Supremacy Clause has given the federal government "a decided advantage in this delicate balance,"[29] as "Congress may impose its will on the States" so long as it is legislating "within the powers granted it under the Constitution."[30] State courts should therefore focus their analyses on the determination of whether Congress is, in fact, acting "within" its constitutional strictures. When Congress legislates "in areas traditionally regulated by the States," state courts should closely scrutinize the federal legislation to determine express congressional intent and the appropriate constitutional textual basis supporting such congressional intent.[31] The preservation of dual sovereignty requires no less than an exacting scrutiny by state courts. Undue deferential rationalization to the potential supremacy of the federal government undermines the structure and feasibility of dual sovereignty and the federalist system overall.

Under the decision in *Gregory*, federal legislation seeking to regulate the structure and operation of state government should be considered

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27. *Printz*, 521 U.S. at 919–20.
28. *Gregory*, 501 U.S. at 458 (citations omitted).
29. *Id.* at 460.
30. *Id.* at 458.
31. *Id.* at 460.

constitutionally infirm and violative of the notion of dual sovereignty.[32] The *Gregory* Court stressed that congressional intent to preempt state law should not be lightly inferred, explaining that "it is incumbent upon the federal courts[33] to be certain of Congress' intent before finding that federal law overrides this balance [of dual sovereignty]."[34] The Court further explained that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"[35] Accordingly, courts need to determine congressional intent and should not assume, infer, or imply intent where none is expressed, particularly when legislation affects state powers and autonomy.[36] Con-

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32. *See id.* The *Gregory* Court stated:

> The present case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as their judges. This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."

Id. (citations omitted).

33. Nor is this obligation limited to the federal courts. State courts have the duty to examine this issue in the same manner and to the same extent as any federal court. Dual sovereignty requires as much.

34. *Id.* (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985)).

35. *Id.* (quoting *Atascadero State Hosp.*, 473 U.S. at 242 (quotations omitted)).

36. This can be seen in the newer application of the preemption doctrine. The Court has emphasized its reluctance to extend the preemption doctrine to contexts other than the Labor Relations Management Act of 1947 (LRMA) and the Employment Retirment Income Security Act of 1974 (ERISA), emphasizing the few circumstances where complete preemption should exist. *See* Metropolitan Life v. Taylor, 481 U.S. 58, 65 (1987) (Brennan, J. concurring) (emphasizing that "our decision should not be interpreted as adopting a broad rule that any defense premised on congressional intent to pre-empt state law is sufficient to establish removal jurisdiction and that the Court holds only that removal jurisdiction exists when, as here, Congress has *clearly* manifested an intent to make causes of action . . . *removable to federal court*") (emphasis in the original) (citations and quotations omitted)); BLAB v. T.V., 182 F.3d 851, 856 (11th Cir. 1999) (holding that, unlike the LRMA and ERISA's very "unique preemptive force," the terms of the Cable Act specifically anticipated state court jurisdiction, and that the text of the statute itself "counsels against a conclusion that the purpose behind the Cable Act was to replicate the 'unique preemptive force' of the LRMA and ERISA"); Whitt v. Sherman Int'l Corp., 147 F.3d 1325, 1333 (11th Cir. 1998) (discussing that the Court has restrained the lower courts' expansion of the complete-preemption doctrine).

gress is obligated to "make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States.'"[37]

B. The Tenth Amendment: More Than a Restraint of Federal Power

While the Supremacy Clause has garnered the most judicial attention and application, the Tenth Amendment provides an additional check on federal power, as well as an express textual delegation of powers to the states that equals or exceeds federal power in certain circumstances.[38] The powers reserved by the Tenth Amendment to the states formed the basis of Justice Brandeis' dissenting view in *New State Ice Co. v. Liebmann*[39] that the states are "laboratories" with sufficient autonomy and sovereignty to create a body of law independent of federal law.[40] That view[41] has been given life by the Court in numerous decisions.[42]

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37. *Gregory*, 501 U.S. at 461 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); s*ee also* United States v. Bass, 404 U.S. 336, 349 (1971) (finding that "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision").

38. "The text of the Tenth Amendment unambiguously confirms this principle." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 801 (1995). It has been noted that the Tenth Amendment made a distinction between the powers of the then newly created federal government and

> the powers retained by the pre-existing sovereign States. As Chief Justice Marshall explained, "it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument."

Id. at 801 (quoting Sturges v. Crowninshield, 17 U.S. 122, 193 (1819)). Further, as discussed by the Court, "Hamilton's reasoning in The Federalist No. 32" established that "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States." *Id.* (quoting THE FEDERALIST NO. 32, at 198 (Alexander Hamilton) (J. Cooke ed., 1961)) (emphasis in original).

39. 285 U.S. 262 (1932).

40. *Id.* at 311 (Brandeis, J., dissenting). Justice Matthews cited to Justice Brandeis' reasoning in his opinion in *Anchorage Police Dept. Employees Ass'n v. Feichtinger,* 994 P.2d 376, 389 (Alaska 1999).

41. One commentator contends that Justice Brandeis' dissent and theoretical position did not promote federalism as it is now touted, but represented a reflection of his personal political view favoring government regulation in general to engineer social change. *See* M. Greve, *Laboratories of Democracy: Analysis of a Metaphor*, 6 Federalist Outlook (May 2001) (American Enterprise Institute For Public Policy Research), *available at* http://www.federalismproject.org/outlook/5-2001.html (last visited Sept. 15, 2004). Greve noted:

The Tenth Amendment also establishes a textual limitation on federal law-making power to ensure a dual system of federalism.[43] As well recognized by the Court, even when Congress must act under "extraordinary conditions," it must still act within the confines of the express constitutional grants of power; the ends do not justify the means:

> Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. *Extraordinary conditions do not create or enlarge constitutional power.* The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. *Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment.*[44]

The principles contained in the Tenth Amendment were implicitly assumed by the original drafters of the Constitution and codified later to eliminate any doubt that "the relationship between the national and state governments" would be preserved "as it had been established by the Constitution before the amendment."[45] As explained by the Court in *United States v. Sprague*,[46] "[t]he Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to

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> The *New State Ice* dissent assumed the rank of a canonical statement of federalism's innovative, experimental virtues. That interpretation, however—testimony to the lasting dominance of Brandeis's progressivist ideology—is unsustainable. The *New State Ice* majority employed judicial review as a coarse screen to filter permissible, public-regarding experimentation from naked interest group dealing. What the dissent stands for is judicial abdication in the face of that spectacle.

Id.

42. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 581 (1995) (holding that "[i]n this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear") (citing San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49–50 (1973); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932)). Brandeis' state laboratory theory as part of the Tenth Amendment limitations on federal power was noted both in *FERC v. Mississippi*, 456 U.S. 742, 789 n.20 (1982) (O'Connor, J. concurring and dissenting in part) and in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 567 n.13 (1985) (Powell, J., dissenting).

43. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 528–29 (1935).

44. *Id.* (citations omitted) (emphasis added).

45. United States v. Darby, 312 U.S. 100, 124 (1941).

46. 282 U.S. 716 (1931).

the States or to the people. It added nothing to the instrument as originally ratified . . . ."[47]

Under this understanding of the Tenth Amendment, the proper questions for courts confronted with the issue of whether a federal law applies in a given case are the following: (1) whether the law makes an express representation of congressional intent to usurp state powers and state law, and (2) if so, whether a textual basis exists in the Constitution for this exercise of congressional power. If either question is resolved negatively, both the Tenth Amendment and the principles of dual federalism require a rejection of the federal law. Moreover, it becomes apparent that the Supremacy Clause cannot be used to bootstrap an otherwise constitutionally infirm provision into constitutional supremacy vis-à-vis the states, as the Supremacy Clause itself requires that Congress must have acted within its constitutional powers before it "may impose its will on the States."[48] Viewed in this light, the Supremacy Clause is a conditional guarantee of supremacy, not an absolute one. The clause ensures supremacy only as long as the congressional enactment is made pursuant to an express delegation of power within the Constitution.[49]

In practice, the powers reserved to the states under the Tenth Amendment have not established a truly co-equal or dual sovereignty system. Although many examples exist of Congress and the federal courts checking potential abuses of state governments,[50] it is impossible to find one state court decision or one state legislative enactment that attempts, much less succeeds, in checking the alleged abuse or usurpation of power by the federal government.[51] This arrangement is not a surprising one, as it embodies a comfortable status quo intellectually and judicially; it is questionable, however, whether this should in fact be the status quo, particularly in light of the Court's recent decisions.

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47. *Id.* at 733; *see also* THE FEDERALIST NO. 84, at 578–79 (Alexander Hamilton) (J. Cooke ed., 1961).

48. Gregory v. Ashcroft. 501 U.S. 452, 460 (1991).

49. United States v. Morrison, 529 U.S. 598, 607 (2000); Marbury v. Madison, 5 U.S. 137, 176 (1803) (stating that "[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written").

50. *E.g.*, Brown v. Bd. of Ed., 347 U.S. 483 (1954).

51. A notable recent example echoes the effort to try, however. Political subdivisions of a number of states have enacted resolutions condemning portions of the USA Patriot Act, 8 U.S.C. § 1365. As of the time of this writing, 270 towns, 43 counties, and 4 states had enacted resolutions condemning this Act. *See* American Civil Liberties Union, *Main Street America Fights Back*, *at* http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11256&c=206 (last visited Oct. 2, 2004). These efforts, meager though they may be, reflect the potential of the states to check the perceived excesses of the federal government.

It is certainly unlikely that this development was intended by the framers of the Constitution. Alexander Hamilton expected the states to retain the ability to prevent federal usurpation of individual liberties, just as the federal government has the power to prevent state abuse of individual liberties: "If their rights are invaded by either, they can make use of the other as the instrument of redress."[52] James Madison also imagined the power of either government to rectify, stop, or prevent the abuse of power by the other: "Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."[53] As further explained by Justice O'Connor in *Gregory*, "[i]f this 'double security' is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty."[54]

History, however, has demonstrated that there has been little, if any, "mutual restraint."[55] Instead, the overwhelming majority, if not the exclusive source, of restraint of power has emanated from federal to state,[56] thus rendering illusory the principle of "mutual restraint." This failure of mutuality can, in all probability, be credited to the fallout from the Civil War.[57] But now, over 140 years later, perhaps the time has come for the federal courts to relax their grip over the states and to allow the states to exercise mutual sovereignty as originally intended.[58]

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52. THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (J. Cooke ed., 1961).

53. *Id.* NO. 51, at 350 (James Madison).

54. Gregory v. Ashcroft, 501 U.S. 452, 459 (1991).

55. *Id.*

56. The U.S. Supreme Court has been the sole source of restraint against federal usurpation of power. *See* Bodenhamer, *supra* note 1 ("Although the Supreme Court, which by now was recognized as the final arbiter of constitutional interpretation, accepted and promoted this aim, it still attempted to keep federal power in check. Nonetheless, the general trend was clear: Federal authority grew in concert with national needs, and state power diminished correspondingly.").

57. *Id.* ("The Civil War, fought over the question of slavery, settled the dispute about the nature of the union and the supremacy of the national government in it. It did not answer all the questions about the proper division of responsibility between central and state governments, even though the 14th Amendment, ratified in 1868, contained language that permitted the legitimate expansion of national power.").

58. The fear for some in doing this could be the resurrection of state-sponsored provincialism, discrimination, and other ill-motivated actions. It would seem plain, however, particularly in light of both the post-Civil War amendments and present day sensibilities and notions of fairness, that the expansion of state sovereignty would not result in the states' return to 18th-Century prejudices. There are many legitimate areas of state sovereignty that do not touch upon issues of discrimination that could provide a testing

The Supreme Court's recent resurrection of the principle that states are co-equal sovereigns[59] and its renewed recognition that the federal government is not an unrestrained oracle of truth, power, and autonomy[60] indicates that the time has now come to test the waters of this New Federalism. The Court has restrained congressional legislative powers[61] and, at the same time, reinvigorated the states' historical authority to establish their own regulatory or other legislative powers.[62] In a series of decisions, the Court constricted the breadth of the Commerce Clause,[63] as well as Congress' powers under Section 5 of the Fourteenth Amendment.[64] Additionally, the Court elevated the Tenth Amendment and interpreted it in a manner that constrains Congress' ability to use the states to implement congressional legislative enactments simply by

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ground for the responsible assertion of state power, and, as suggested in Bodenhamer *supra* note 1, many states lead the way in progressive and enlightened changes.

59. *United States v. Lopez*, 514 U.S. 549 (1995), which breathed new life into the doctrine established under both *United States v. Harris*, 106 U.S. 629 (1883), and the *In re Civil Rights Cases*, 109 U.S. 3 (1883).

60. For instance, the Court in United States v. Morrison reigned in congressional power under the Commerce Clause by striking down the Violence Against Women Act, 42 U.S.C. § 13981. 529 U.S. 598, 627 (2000). The Court based its holding on an "economic/noneconomic" distinction. *Id.* Many commentators have addressed this theory. *See, e.g.*, Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2231 (1998) (criticizing the Court's enclave theory); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEXAS L. REV. 795, 812 (1996) (stating that "the constitutional status of the principle of federalism does not necessarily depend on the existence of areas of exclusive state powers").

61. Not all of the Court's justices agree with this practice. A sizable minority find the New Federalism to be both practically and theoretically in error. *See Morrison*, 529 U.S. at 663 (Breyer, J., dissenting).

62. *See id.* at 617–18; *see also Lopez*, 514 U.S. at 567–68.

63. *See Morrison*, 529 U.S. 598 (invalidating the Violence Against Women Act as legislation beyond the Congress' legislative powers and violative of the 11th Amendment); *see also Lopez*, 514 U.S. 549 (voiding portions of the Gun-Free School Zones Act of 1990 as violative of Congress' textual powers). For additional discussion, *see* Scott Arceneaux, *Federalism in the Balance, How the Supreme Court's Recent Federalism Opinions Are Threatening To Upset the Delicate Balance Between the Federal Courts, Congress and the States*, 47 LOY. L. REV. 797 (2001).

64. The Court's recent consistency of holdings and frequency of decisions in this area, compared to the absence of either in the prior fifty years, suggests that a fundamental doctrinal shift has occurred. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act as impermissibly in excess of Section 5 of Congress' 14th Amendment powers); *see also* Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After* City of Boerne v. Flores, 32 IND. L. REV. 163 (1998).

fiat.[65] Finally, the Court has buttressed this invigorated federalism by giving states heightened protection under the Eleventh Amendment's[66] sovereign immunity doctrine.[67]

Despite periods of Court neglect, the Tenth Amendment was clearly intended to provide a substantive barrier to federal authority. For instance, in 1798, Thomas Jefferson explained that any federal act that was not authorized by the express powers delegated under the Constitution would be void.[68] He wrote, "whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no

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65. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997) (invalidating sections of the Brady Act that forced state and local law enforcement agencies to assist the federal government in conducting background checks of prospective buyers); New York v. United States, 505 U.S. 144 (1992) (holding that an interstate compact governing the disposal of hazardous waste violated the Tenth Amendment because "Congress may not commandeer the States' legislative processes by directly compelling them to enact and enforce a federal regulatory program").

66. The Eleventh Amendment, along with the Tenth Amendment and the enumerated powers doctrine, is one of the "three pillars" ensuring state sovereignty. In recent years, the Supreme Court has brought new attention to the Eleventh Amendment by striking down a variety of federal laws that sought to impose liability against the states. *See* Alden v Maine, 527 U.S. 706, 712 (1999); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72 (1996).

67. For example, the following cases demonstrate a pattern of invalidating federal laws that subjected states to potential liability and elevating the Eleventh Amendment immunity to a degree not seen since the 1930s: Bd. of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356, 374 (2001) (voiding certain provisions of the Americans with Disabilities Act the Court found intruded upon state sovereign immunity from suit); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 82–83 (2000) (holding that the Age Discrimination in Employment Act was constitutionally infirm to the extent it attempted to eliminate state sovereign immunity); Alden v. Maine, 527 U.S. 706, 712 (1999) (holding that the Fair Labor Standards Act was an unconstitutional intrusion into the Eleventh Amendment to the extent it attempted to recognize private suits for damages against nonconsenting states in state court); College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 691 (1999) (holding provisions of the Trademark Remedy Clarification Act unconstitutional to the extent these provisions attempted to abrogate state sovereign immunity); Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 US 627, 630 (1999) (using identical reasoning as above to strike portions of the Patent and Plant Variety Protection Remedy Clarification Act to the extent directed at the states); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 47 (1996) (striking a portion of the Indian Gaming Regulatory Act that permitted suit against states); New York v. United States, 505 U.S. 144, 149 (1992) (holding part of the Low-Level Radioactive Waste Policy Act unconstitutional for overreaching).

68. Thomas Jefferson, Kentucky Resolution of 1798 and 1799, *reprinted in* 4 DEBATES ON THE FEDERAL CONSTITUTION 540 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1891).

force."[69] In light of the Court's recent emphasis on the reserved powers of the states, each individual state, including Alaska, should reevaluate its respective state constitution and promote the development of state law independently of federal doctrine, grounded in the text and intent of the state constitution.

III. THE *BAKER* DOCTRINE: THE OBLIGATION OF STATE COURTS TO DEVELOP STATE CONSTITUTIONAL PRINCIPLES FIRST AND USE FEDERAL LAW FOR MINIMUM STANDARDS

In light of the federal Supremacy Clause, Alaska courts interpreting the state constitution are obligated only to ensure that minimum federal standards are met.[70] Alaska courts are free to, and should, exceed these standards in the many instances in which the Alaska Constitution textually exceeds the Federal Constitution.[71] An early decision of the Alaska Supreme Court, *Baker v. City of Fairbanks*,[72] explained:

> While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, 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.[73]

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69. *Id.*

70. Lemon v. State, 514 P.2d 1151, 1154 n.5 (Alaska 1973) (explaining that the court may adopt its own interpretations of the Alaska Constitution if it meets the minimum standards set by the United States Supreme Court under the Federal Constitution). When interpreting the state constitution, Alaska courts will "interpret the constitution and Alaska law according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters." Native Village of Elim v. State, 990 P.2d 1, 5 (Alaska 1999) (citing Alaska Wildlife Alliance v. Rue, 948 P.2d 976, 979 (Alaska 1997)).

71. Baker v. City of Fairbanks, 471 P.2d 386, 401–02; *See also* Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 967 (Alaska 1997) ("[O]ur articulation of the protection of reproductive rights under Alaska's constitution may be broader than the minimum set by the federal constitution."); Shagloak v. State, 597 P.2d 142, 145 n.14 (Alaska 1979) ("A state supreme court is not limited by the decisions of the United States Supreme Court or by the federal constitution when interpreting the provisions of the state constitution, since the latter may have broader safeguards than the minimum federal standards.").

72. 471 P.2d 386 (Alaska 1970).

73. *Id.* at 401–02.

The *Baker* court thus laid the cornerstone on which independent Alaska constitutional law can be built.[74]

The *Baker* Doctrine establishes a preference, if not an obligation, for Alaska courts to examine and expound upon Alaska constitutional law in lieu of, or certainly in addition to, federal constitutional law.[75] As explained by the court:

> [W]e have recognized that we are at liberty to make constitutional progress in Alaska by our own interpretations, as long as we measure up to the national standards which are required by the United States Supreme Court. It is our duty to move forward in those areas of constitutional progress which we view as necessary to the development of a civilized way of life in Alaska.[76]

The court further reasoned that, although federal constitutional minimums must of course be observed, it is incumbent upon Alaska courts to decide cases based on the Alaska Constitution: "[doing otherwise] would be an abdication of our constitutional responsibilities to look only to the [U.S.] Supreme Court for guidance."[77]

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74. Although *Baker* was the first to explain the justification and need for creating an independent body of state constitutional law, a prior decision touched upon the issue and laid the foundation for future decisions. Roberts v. State, 458 P.2d 340, 342–43 (Alaska 1969) (holding "[w]e are not limited by decisions of the United States Supreme Court or the United States Constitution when we expound our state constitution; the Alaska Constitution may have broader safeguards than the minimum federal standards"); *see also* Breese v. Smith, 501 P.2d 159, 167 (Alaska 1972) ("[T]his court is not obligated to interpret our constitution in the same manner as the Supreme Court of the United States has construed parallel provisions of the Federal Constitution"); State v. Glass, 583 P.2d 872, 876 (Alaska 1978) ("We may construe Alaska's constitutional provisions as affording additional rights.").

75. Notably, state courts have equal standing with lower federal courts when construing federal constitutional law. *See, e.g.*, Freeman v. Lane**,** 962 F.2d 1252, 1258 (7th Cir. 1992) (citations omitted) (stating that "[w]e agree with the state that the Supremacy Clause did not require the Illinois courts to follow Seventh Circuit precedent interpreting the Fifth Amendment. 'In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is a parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the Supreme Court'").

76. *Baker*, 471 P.2d at 401 (citation omitted).

77. State v. Browder, 486 P.2d 925, 936 (Alaska 1971). Justice Burke repeatedly stressed this reasoning during his tenure on the bench. *See, e.g.*, Robison v. Francis, 713 P.2d 259, 271 (Alaska 1986) (Burke, J., concurring) ("When called upon to determine the constitutionality of an Alaska statute under both the state and federal constitutions, it is my belief that this court should consider first the requirements of the Alaska Constitution."); Adams v. Pipeliners Union, 699 P.2d 343, 352 (Alaska 1985) (Burke, J., concurring) ("Thus, our opinion should not be read as holding such quotas constitutional; their constitutionality, at least under the Alaska Constitution, remains an open question."); Schafer v. Vest, 680 P.2d 1169, 1172 (Alaska 1984) (Burke, J., concurring) ("Our duty,

A review of the *Baker* Doctrine's application demonstrates the Supreme Court's notable success in progressing well beyond federal constitutional minimums.

IV. THE *BAKER* DOCTRINE APPLIED: NOTABLE CASES IN WHICH INDEPENDENT ALASKA STATE CONSTITUTIONAL STANDARDS WERE CREATED

Although only thirty-four years old, the *Baker* Doctrine has gained a strong foothold in the Alaska courts. Several reasons may explain the relatively rapid growth of independent state constitutional law in Alaska: (1) the state is both geographically and culturally dissociated with the Lower 48, and its people demonstrate, in most areas, a strong penchant for individual autonomy;[78] and (2) the federal government had an overwhelming influence in pre-statehood days, including ownership of almost all land, which strongly compelled most Alaskans to seek "independence" by becoming a state, and the state courts now guard that independence.

In addition, the potential for independent state-based law is high in Alaska because the scope of the state courts' constitutional review in Alaska is broad.

> The courts of the state of Alaska have the constitutional duty to review actions by agencies of the state in order to ensure compliance with all provisions of the Alaska Constitution. This function applies not only to coordinate branches of government such as the legislature and the executive branch but to component parts of the judiciary such as lower courts, and the grand jury.[79]

In short, virtually any government action, by law, regulation, rule, or court order, is subject to constitutional review if questioned. Accordingly, there is no shortage of opportunity to develop state law independently of federal law.

State courts gain distinct advantages by resting their decisions on independent state grounds. In addition to fulfilling the expectations of dual federalism, when a state court rests its decision on state law, any

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as I see it, is to look first to the requirements of the Alaska Constitution. If the protection sought is afforded by that document, it becomes irrelevant whether or not the same protection is provided by the Constitution of the United States.").

78. Since the 1970s, the Alaska Independence Party, originally devoted to the secession of Alaska from the federal government, has regularly fielded candidates for office, and on one occasion won the gubernatorial office. *See* Alaska Independence Party Platform, *available at* http://www.akip.org/platform.html (last visited Oct. 3, 2004) (describing one goal to "support and defend States' Rights, Individual Rights, and the Equal Footing Doctrine as guaranteed by the constitutions of the United States of America and the state of Alaska").

79. O'Leary v. Superior Court, 816 P.2d 163, 173 (Alaska 1991) (citations omitted).

federal review is thereafter more limited.[80] To an extent, the federal courts lack jurisdiction to review a decision that rests solely on state law.[81] It is recognized that "where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, [federal court] jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment."[82] This rule was first established to preclude federal authority to modify state-court judgments resting on an alternative state substantive ground.[83] The doctrine grew and was extended to bar federal review of state judgments that rest on adequate and independent state procedural grounds.[84]

The converse is also true; when a state court relies on both federal and state law, the federal courts may find jurisdiction to review the state court's decision.[85] In *Michigan v. Long*,[86] for instance, the U.S. Supreme Court considered its jurisdiction to review a judgment of the Michigan Supreme Court that had ruled a search unlawful.[87] Because the Michigan court had relied almost exclusively on federal decisions construing the Fourth Amendment, federal review was not precluded; the federal courts expressly adopted a presumption in favor of federal review "when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear

80. Federal review is limited, if not eliminated, if the state court's reasoning "rest[ed] on a state law ground that is independent of the federal question and adequate to support the judgment . . . [regardless of] whether the state law ground is substantive or procedural." Coleman v. Thompson, 501 U.S. 722, 729 (1991). The federal courts follow a general principle that they will not disturb state court judgments based on adequate and independent state law grounds. Wainwright v. Sykes, 433 U.S. 72, 81 (1977).

81. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977) ("If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted.").

82. Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).

83. Murdock v. Memphis, 87 U.S. 590, 636 (1874).

84. Henry v. Mississippi, 379 U.S. 443, 446–47 (1965).

85. Michigan v. Long, 463 U.S. 1032, 1040–41 (1983). *See* Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103, 106 (2003) ("We have previously held that, in such circumstances, we shall consider a state-court decision as resting upon federal grounds sufficient to support this Court's jurisdiction."); Pennsylvania v. Muniz, 496 U.S. 582, 588 n.4 (1990) (finding no adequate and independent state ground precluding federal review when the state court says that state and federal constitutional protections are identical).

86. 463 U.S. 1032 (1983).

87. *Id.* at 1035.

from the face of the opinion."[88] Accordingly, state courts can ensure the better development of state law and protect the integrity of their judgments by relying on state constitutional law when rendering decisions.

Other reasons exist to independently expand Alaska constitutional law. The Alaska Constitution, being relatively new in origin, contains textual provisions that could not have been, or were not, envisioned when the Federal Constitution was drafted.[89] For example, Alaska's "constitutional right to privacy finds no express counterpart in the federal constitution and has thus served as the basis for extending protections to Alaska citizens that are not extended under the United States Constitution."[90] The right to privacy is but one example. The state constitution also contains an entire article, article VIII, devoted to natural resources, a subject not mentioned in the Federal Constitution.[91] As discussed below, Alaska courts have often given truly independent analysis and meaning to the Alaska Constitution, particularly in the areas of criminal law, individual rights, and civil liberties.[92]

A. Alaska Has Created Greater State Constitutional Protections for Civil Liberties

Civil liberty protections have experienced the best developments in truly independent Alaska constitutional law. This trend is not coincidental since "[t]he 'constitutionally mandated balance of power' between

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88. *Id.* at 1040–41. The Court in *Michigan v. Long* determined that the federal court had jurisdiction to review the state court decision since the state court's citation to federal law and precedent was not "being used only for the purpose of guidance" but instead was "compel[ling] the result." *Id.*

89. An obvious example is that the Federal Constitution makes no mention of an air force for the plain reason that controlled flight had not yet been invented. Though never modified to add the raising of an "air force" as a congressional power, the fact that the federal government has an air force has never been questioned.

In addition, it is established under Alaska law that even when the two constitutions contain identical provisions, it is not mandated that there should be identical results since the Alaska Constitution is generally deemed far more protective of individual rights and liberties than the Federal Constitution. *See* Doe v. Dep't of Pub. Safety, 92 P.3d 398, 404 (Alaska 2004); Blue v. State, 558 P.2d 636, 641 (Alaska 1977) ("[T]he Alaska Supreme Court is not limited by decisions of the United States Supreme Court or by the United States Constitution when interpreting its state constitution.").

90. State v. Gonzalez, 825 P.2d 920, 932 (Alaska Ct. App. 1992).

91. *See* ALASKA CONST. art. VIII.

92. Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 967 (Alaska 1997) (establishing much broader "protection of reproductive rights under Alaska's constitution" than the "minimum set by the federal constitution"); *Doe*, 92 P.3d at 404 (due process and privacy rights under the state constitution found to far exceed standards set in federal constitution); Matter of A.B., 791 P.2d 615, 621 (Alaska 1990) (comparing federal privacy standards to state constitutional standards).

the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'"[93]

The court in *Doe v. Dep't of Public Safety*[94] explained the heightened recognition of personal liberty under the state constitution and squarely rejected federal constitutional standards that proved too insufficient to satisfy Alaska's greater protections of fundamental liberties:

> We have often recognized the importance of personal liberty under our constitution. "[A]t the core of this concept is the notion of total personal immunity from governmental control." The right is not absolute; its limits depend on a balance of interests that varies with the importance of the right infringed. When the state encroaches on fundamental aspects of the right to liberty, it must demonstrate a compelling government interest and the absence of a less restrictive means to advance that interest.[95]

Applying these standards, the court found that the Alaska Sex Offender Registration Act unconstitutionally required the convicted sex offender to register when his conviction had been set aside prior to enactment of the law.[96] The court reasoned that the "set-aside conferred on Doe a fundamental right to be let alone with respect to the conviction that was being set aside," and the state could not, consistent with notions of due process, require him to register.[97]

Critical to our analysis here, the *Doe* court flatly rejected federal constitutional law standards that found no due process violation under the same circumstances.[98] Instead, the court, relying on the *Baker* Doctrine, detailed the greater protection of personal liberty offered by the state constitution:

> State courts are not necessarily bound by the United States Supreme Court's decisions when they consider issues of state constitutional law. Only the Supreme Court's decisions on issues of federal law, including issues arising under the Federal Constitution, bind the state courts' consideration of those issues. *The Alaska Supreme Court is the final authority on whether an Alaska statute violates the Alaska Constitution.* Doe's appeal involves Alaska's constitutional guarantee of due process. The Federal Constitution protects the due process rights of all Americans. But federal law does not preclude the Alaska Constitution from providing more rigorous protections for the due process

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93. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

94. 92 P.3d 398, 405 (Alaska 2004).

95. *Id.* at 405 (citations omitted) (quoting Breese v. Smith, 501 P.2d 159, 168 (Alaska 1972)).

96. *Id.* at 408.

97. *Id.* The court held that because of the act's "burden on Doe's liberty interests and its interference with his settled expectations . . . the Alaska Constitution's guarantee of due process prevents the state from contradicting the judgment of the superior court and requiring Doe to" register. *Id.* at 412.

98. *Id.* at 403.

> rights of Alaskans. When we interpret a provision in the Alaska Constitution, we are not bound by the United States Supreme Court's interpretation of the corresponding provision in the Federal Constitution. We may not undermine the minimum protections established by the United States Supreme Court's interpretations of the Federal Constitution. But "we have repeatedly explained that we are free, and we are under a duty, 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."[99]

The *Doe* decision, by invoking the elevated protections under the Alaska Constitution and expressing the duty to turn to it before the Federal Constitution, represents an excellent application of the *Baker* Doctrine.

Another example of greater personal freedom being afforded under Alaska's state constitution is the decision in *Swanner v. Anchorage Equal Rights Comm'n.*[100] In *Swanner*, the court recognized that the wording of the free exercise of religion clauses in both the state and federal constitutions were identical.[101] However, the court announced that it would apply and interpret the Alaska Constitution without being constrained by federal precedent, stating that it could reach a finding that would "provide greater protection to the free exercise of religion under the state constitution than is now provided under the United States Constitution."[102] This decision is notable since it provides guidance to the Alaska courts to analyze constitutional issues independently without being constrained by federal precedent, even if the constitutional language is similar or identical.

One of the preeminent areas in which state constitutional law exceeds federal constitutional law pertains to the individual right of privacy. Unlike the Federal Constitution, the Alaska Constitution contains an express textual protection for privacy rights.[103] As the Alaska Supreme Court noted in *Anchorage Police Dep't Employees Ass'n v. Mun. of Anchorage*:[104]

> Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Consti-

99. *Id.* at 404 (citations omitted) (emphasis added).
100. 874 P.2d 274, 280–81 (Alaska 1994).
101. *Id.* at 280.
102. *Id.* at 281.
103. ALASKA CONST. art. I, § 22.
104. 24 P.3d 547 (Alaska 2001).

> tution, it can only be concluded that the right is broader in scope than that of the Federal Constitution.[105]

Accordingly, because the Alaska Constitution expressly mandates the protection of individual privacy rights, the state legislature is often circumscribed, if not prohibited altogether, from enacting legislation that intrudes into this right, even though such legislation may not be violative of federal constitutional standards.[106] Thus, Alaska courts have invalidated, on state constitutional grounds, legislative attempts to restrict abortions,[107] laws attempting to criminalize drug use in the privacy of one's home,[108] voting right restrictions,[109] and attempted restrictions on the right to a jury trial.[110]

In *Valley Hospital Ass'n, Inc. v. Mat-Su Coalition for Choice*,[111] the Alaska Supreme Court held that the Alaska constitution provides a heightened right to reproductive choice:

> [O]ur articulation of the protection of reproductive rights under Alaska's constitution may be broader than the minimum set by the federal constitution . . . .Our prior decisions support the further conclusion that the right to an abortion is the kind of fundamental right and privilege encompassed within the intention and spirit of Alaska's constitutional language.[112]

Thus, to some degree, the national debate over the validity and continuing viability of the United States Supreme Court's decision in *Roe v. Wade*[113] is of minimal importance in Alaska, as the Alaska Supreme Court has rested its holdings on independent state constitutional grounds. By doing so, the state court has kept the promise of dual sovereignty and federalism.

Another example of Alaska's assertion of independent state constitutional doctrine is the right to privacy as it relates to access to records. The reasoning in *Matter of A.B.*[114] is illustrative. In *Matter of A.B.*, the court compared both federal and state constitutional privacy standards,

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105. *Id.* at 550 (Alaska 2001) (citing Ravin v. State, 537 P.2d 494, 514–15 (Alaska 1975)).

106. Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice, 948 P.2d 963, 968 (Alaska 1997) ("[The Alaska Constitution] provides more protection of individual privacy rights than the United States Constitution.").

107. *Id.* at 968.

108. Ravin v. State, 537 P.2d 494, 514–15 (Alaska 1975).

109. Vogler v. Miller, 651 P.2d 1, 6 (Alaska 1982) (finding a voting law violative of the state constitution but not violative of the Federal Constitution, and striking down voting law requiring three percent of voter signatures for candidates).

110. Loomis Elect. Prot., Inc. v. Schaefer, 549 P.2d 1341, 1344 (Alaska 1976).

111. 948 P.2d 963 (Alaska 1997).

112. *Id*. at 967–68.

113. 410 U.S. 113 (1973).

114. 791 P.2d 615 (Alaska 1990).

applied both standards to the facts then pending, and grounded its holding in both constitutions.[115] The court explained:

> In analyzing asserted constitutional rights of privacy, the applicable legal principles are as follows. The federal right of privacy derives from a broad reading of the due process clause of the fourteenth amendment, or from "emanations" from other constitutional provisions. The right to privacy in Alaska is expressly guaranteed by article I, section 22 of the Alaska Constitution, which states in relevant part: "The right of the people to privacy is recognized and shall not be infringed."
>
> Although neither federal nor state rights of privacy are absolute, it is part of the judicial function to ensure that governmental infringements of privacy are supported by sufficient justification. Under federal precedent it must be found that the privacy invasion is necessary to a compelling state interest, and that the governmental regulation does not sweep too broadly. Under the Alaska Constitution, the required level of justification turns on the precise nature of the privacy interest involved. In absence of a suspect classification or impairment of a fundamental right, we have required that there be a "fair and substantial relation" between the means chosen and a legitimate governmental purpose. Where fundamental rights are at stake, the State's interest in invading privacy must be compelling. Thus, to determine the validity of the release order, we must consider both the nature and the extent of the privacy invasion, and the strength of the state interest in requiring disclosure. The release order at issue here survives constitutional attack under either standard.[116]

The result in *Matter of A.B.* was correct; the analysis, however, unnecessarily considered both federal and state constitutional standards. Since the state constitutional standard protecting the right to privacy is broader than the federal standard, any discussion of the federal standard is pure dicta. It is not necessary for the state courts to address the federal standard in a right to privacy case other than to note that the Alaska constitutional standard is more protective of individual rights than federal law. A risk exists that the courts may be co-opted by federal precedent, even when simply using that precedent as a model.[117] Accordingly, state

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115. *Id.* at 621.

116. *Id.* (citations omitted).

117. In *Whalen v. Hanley*, 63 P.3d 254 (Alaska 2003), the Alaska Supreme Court addressed "[l]egislative immunity under Alaska's constitution" but noted that Alaska's provision is "patterned after the federal speech or debate clause," and therefore, the court "looked to the United States Supreme Court's interpretation of the scope of federal immunity as a model for determining the scope of legislative immunity under Alaska's constitution." *Id.* at 258. The court then essentially parroted the federal precedent and ascribed its meaning as the intended meaning of the state constitution. *Id.* However, in *Kerttula v. Abood*, 686 P.2d 1197 (Alaska 1984), the court carefully evaluated the two comparable provisions, including a textual difference, and explained that the "only difference which was specifically identified by the framers between the Alaska and Federal

courts should vigilantly scrutinize the basis of federal precedent before applying that interpretation to a state constitutional provision. To the extent that Alaska "[s]tate courts are not necessarily bound by the United States Supreme Court's decisions when they consider issues of state constitutional law,"[118] it is superfluous to analyze federal law when the decision can be grounded in state law alone. Further, by grounding a decision, even in part, upon federal law, the state courts risk review and reversal by a federal court.

The right to a jury trial has also received emphasis under the Alaska Constitution. Justice Jay Rabinowitz explained that the "Alaska Constitution is the source of the right to a jury trial."[119] Attempts to modify or restrict this right by the legislature traditionally have been closely scrutinized and typically found invalid—that is until recently. The right to a jury trial had been considered the cornerstone of Alaska's civil and criminal justice systems, and the protection of this right exceeds federal constitutional minimums: "The Alaska Supreme Court has held that the right to jury trial guaranteed by Article I, Section 11 of the Alaska Constitution is broader than the corresponding right to jury trial guaranteed by the Federal Constitution."[120] It is well established that "the trial jury's role as finder of fact is one of the fundamental aspects of American jurisprudence."[121] Accordingly, any action that infringes upon this right will be closely examined.

A decision that represents an anomaly, however, is the plurality decision in *Evans v. State*.[122] In *Evans*, the plurality upheld legislative restrictions on the right to a jury in the civil context by affirming damages caps.[123] Whereas prior case law established the primacy of jury verdicts and respect for jury decisions, by affirming limitations on jury awards, the plurality undermined the traditional respect the constitution had enshrined for jury verdicts. *Evans* may best be viewed as a nod to political expediency as opposed to any doctrinal change in the constitutional standing of the right to a jury trial and in the jury's previously unfettered domain to render a verdict consistent with the law and its judgment.

Constitutions pertains to the in-session limitation in our document. This limitation is not relevant to this case." *Id.* at 1201–02. The courts have therefore established that even when using federal precedence on a similar provision, they will be careful to distinguish any textual differences that could mandate a different result.

118. Doe v. State, 92 P.3d 398, 404 (Alaska 2004).

119. Vinson v. Hamilton, 854 P.2d 733, 740 (Alaska 1993) (Rabinowitz, J. dissenting).

120. Malloy v. State, 1 P.3d 1266, 1287 (Alaska Ct. App. 2000).

121. *Id*.

122. 56 P.3d 1046 (Alaska 2002).

123. *Id.* at 1070.

B. The Alaska Constitution Provides Greater Protections for Criminal Procedural and Substantive Rights

In the area of criminal law, a number of Alaska cases provide similarly notable examples of holdings based on state constitutional law. For example, the Alaska Supreme Court has construed the due process rights afforded prisoners in disciplinary proceedings under the Alaska Constitution in excess of the federal constitutional standards.[124] As the court in *Brandon v. Department of Corrections*[125] explained:

> A comparison of the relevant holdings of this court and the United States Supreme Court in the area of prison disciplinary proceedings shows that we have interpreted the due process guarantee under the Alaska Constitution more broadly than the United States Supreme Court has interpreted the identical provision of the United States Constitution.[126]

Other decisions likewise have turned to the Alaska Constitution and given it independent application. In *Beavers v. State*,[127] the court held that Alaska's state constitutional right against self-incrimination, which bars the use of confessions obtained by police threats, was "more demanding than federal constitutional law."[128] The *Beavers* court noted that federal constitutional law employs a "totality of circumstances" standard in determining whether a confession was obtained in violation of a suspect's right against self-incrimination, and this standard may permit confessions obtained in the presence of police threats.[129] Rejecting this approach, the *Beavers* court expressly rested its ruling on article I, section 9 of the Alaska Constitution.[130]

Individual rights have been enhanced under state constitutional law in other areas of criminal law. The Alaska Court of Appeals in *State v. Gonzalez*[131] explained that the "Alaska Constitution's unique concern with the rights to liberty and privacy, and the Alaska Supreme Court's vigilant enforcement of these rights" result in stronger individual protections under the Alaska Constitution.[132] As a result, criminal defendants have broader search and seizure protections[133] than those available solely

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124. *See* Brandon v. Dep't of Corrs., 73 P.3d 1230 (Alaska 2003); McGinnis v. Stevens, 543 P.2d 1221 (Alaska 1975).

125. 73 P.3d 1230 (Alaska 2003).

126. *Id.* at 1234.

127. 998 P.2d 1040 (Alaska 2000).

128. *Id.* at 1046.

129. *Id.* at 1045.

130. *Id.* at 1046.

131. 825 P.2d 920 (Alaska Ct. App. 1992).

132. *Id.* at 933.

133. ALASKA CONST. art. I, § 14 (providing that that "[t]he right of the people to be secure in their persons, houses and other property, papers, and effects, against unreason-

under the Federal Constitution.[134] In addition, Alaska defendants have a constitutional right to counsel at the pre-indictment line-up stage of a criminal prosecution, unlike under federal law.[135]

C. Alaska's Equal Protection Standard Is More Favorable to Individual Protection than the Federal Standard

Alaska courts have also developed a more demanding level of scrutiny for purposes of minimal constitutionality under the State's equal protection clause. The Alaska Court of Appeals in *Maeckle v. State*[136] recognized the irrelevance of federal standards when determining equal protection under Alaska law and reasoned that for "purposes of deciding Maeckle's claim, [the court] need consider *only* the Alaska Constitution, since our supreme court has interpreted Alaska's equal protection and due process clauses more broadly than the federal courts have construed parallel provisions of the United States Constitution."[137] When reviewing state legislative enactments for compliance with the minimal requirements of equal protection, the state court has heightened its application of "minimal scrutiny" under its sliding scale analysis beyond the mere "rational basis test" applied under federal constitutional standards. As the Alaska Supreme Court explained:

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able 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 persons or things to be seized.").

In at least one circumstance, where the state court has followed federal precedent in construing a similar state constitutional provision, even if the federal courts subsequently reduce the constitutional protections previously established, the state courts have remained steadfast in keeping the prior, broader standard, but then shifting the basis of the decision to the state constitution. An example of this occurred in *State v. Jones*. 706 P.2d 317 (Alaska 1985). In *Jones*, the court refused to abandon the *Aguilar-Spinelli* test it had previously adopted. *Id.* at 322. Originally set forth by the United States Supreme Court, the test requires that a warrant for search and seizure must establish both an informant's basis of knowledge and his veracity. *Id.* Despite the fact that the United States Supreme Court had since abandoned the heightened protections of the *Aguilar-Spinelli* test, the Alaska Supreme Court upheld the test and its incorporation into the state constitution under the article I, section 14 search and seizure provision. *Id.* This again emphasizes both the state courts' vigilance in protecting individual rights notwithstanding fluctuations from the federal courts and the necessity of grounding decisions in state law in the event the federal courts alter their standards.

134. *See* Zehrung v. State, 569 P.2d 189 (Alaska 1977); Woods & Rohde, Inc. v. State, 565 P.2d 138 (Alaska 1977).

135. Blue v. State, 558 P.2d 636, 643 (Alaska 1977).

136. 792 P.2d 686 (Alaska Ct. App. 1990).

137. *Id.* at 688 (citing Stiegele v. State, 685 P.2d 1255, 1257 (Alaska 1984)) (emphasis added).

> Minimal scrutiny under our state constitution may be more demanding than under the federal constitution. As under the federal constitution, the challenged exclusion must be designed to achieve a "legitimate" governmental objective; however, the exclusion must bear a "fair and substantial" relationship to the accomplishment of the legitimate objective under state law whereas the relationship under federal law need only be "rational."[138]

What is notable about Alaska's higher level of minimal scrutiny is that nothing in the text of the Alaska Constitution appears to mandate a more exacting standard. Instead, this scrutiny is mandated only by the court's interpretation of the general intent of the state constitution. In holding that, at a minimum, legislation "must bear a 'fair and substantial' relationship to the accomplishment of the legitimate objective," the court implicitly concluded that such an interpretation resonated with the spirit and intent of the Alaska Constitution.[139] In addition, the state court reviewed federal law in this regard and simply found it constitutionally unjustifiable to require that only a "rational" basis be met before the legislature may distinguish among citizens.[140] Thus, the *Stanek* and *Maekcle* decisions represent excellent examples of Alaska courts fulfilling the promise of dual federalism and giving vigor to the state constitution.

D. Takings Requirements under the Alaska Constitution Exceed Federal Standards

An important area in which a material textual difference between the state and federal constitutions exists pertains to takings. Under the Federal Constitution's Fifth Amendment, the government need only pay damages for a taking when property has been taken or impacted to such an extent that it has no useful economic value.[141] The Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation."[142] The Alaska Constitution, on the other hand, contains a provision that requires the government to reimburse a property owner even if the property is simply "damaged" by government actions or regulations.[143] The state Takings Clause provides that "[p]rivate property shall not be taken *or damaged* for pub-

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138. Stanek v. Kenai Peninsula Borough, 81 P.3d 268, 272 (Alaska 2003) (quoting Dep't of Revenue v. Cosio, 858 P.2d 621, 629 (Alaska 1993)).

139. *Id.*

140. *Id*.

141. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

142. U.S. CONST. amend. V.

143. Balough v. Fairbanks North Star Borough, 995 P.2d 245, 265 (Alaska 2000) ("The inclusion of the term 'damage' in the Alaska Constitution affords the property owner broader protection than that conferred by the Fifth Amendment of the Federal Constitution.") (quoting Anchorage v. Sandberg, 861 P.2d 554, 557 (Alaska 1993)).

lic use without just compensation."[144] Alaska courts have appropriately determined that this textual difference is both material and substantial; federal takings jurisprudence therefore provides limited guidance to the state courts.[145]

Unlike federal courts, Alaska courts "liberally interpret Alaska's Takings Clause in favor of property owners, whom it protects more broadly than the federal Takings Clause."[146] Moreover, the Alaska Takings Clause protects not only real property, but it extends to personal property and services or labor as well.[147] In addition, the state constitu-

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144. ALASKA CONST. art. 1, § 18 (emphasis added); *see also Sandberg*, 861 P.2d at 557 (stating that "[t]his clause is interpreted liberally in favor of the property owner"); State v. Doyle, 735 P.2d 733, 736 (Alaska 1987) (finding that the inclusion of "the term 'damage' in the Alaska Constitution affords the property owner broader protection than that conferred by the Fifth Amendment of the Federal Constitution").

145. This is not universally true, however. For example, in *State Dep't of Natural Res. v. Arctic Slope Reg. Corp.*, 834 P.2d 134 (Alaska 1991), the Alaska Supreme Court examined only federal takings jurisprudence when deciding whether the state had taken property pertaining to oil drilling data. *Id.* at 139. The court relied on federal law, and explained that "[i]n deciding this case we follow the approach taken by the United States Supreme Court in Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1000 (1984)." *Id.* at 138. The court was cognizant that it had "previously held that the term 'damages' affords the property owner broader protection than that conferred by the Fifth Amendment." *Id.* The court, however, concluded that "the difference between Alaska's takings clause and the federal clause is irrelevant *to this case*." *Id.* (emphasis added). Unfortunately, the court failed to provide any analysis justifying its conclusion that the difference between the two provisions was immaterial. Further disappointing is the fact that the court potentially could have reached the same conclusion construing only the state constitution.

Another notable example of the court failing to adhere to its separate analysis and unique text under the Alaska Constitution is the decision in *0.958 Acres, More or Less v. State*, 762 P.2d 96 (Alaska 1988). In that case, the court relied on federal standards to conclude that the taking of a section of property that indisputably affected access to the remaining parcel was minimal and thus not compensable, ignoring the fact that the Alaska Constitution requires some compensation for any "damage" to a property interest. *Id.* The court held: "If the remaining access is reasonable, then the mere diminution of prior access does not amount to a taking or damage of a cognizable property interest such as would require compensation under the federal or state constitution." *Id.* at 101. The court further explained: "Government activity in pursuit of social goals often has a detrimental effect upon the value of some real property. Unless this detriment rises to the level of a 'taking' or 'damage' within the meaning of art. I, section 18 of the Alaska Constitution, however, there is no right to compensation." *Id.* (quoting Triangle, Inc. v. State, 632 P.2d 965, 969 (Alaska 1981)). This reasoning borders on equating the federal standard to the state standard and in the process rendering the "or damage" clause immaterial.

146. Waiste v. State, 10 P.3d 1141, 1154 (Alaska 2000) (noting that unlike the federal clause, Alaska's Takings Clause mentions "damage[ ]" as well as "tak[ing]").

147. *Id.*

tion takings section "ensures compensation for temporary as well as permanent takings."[148] Moreover, resting on the text of the Alaska Takings Clause, the courts have rejected federal court decisions, or what they term as "traditional rules," "that do not comport with the primacy of full compensation, measured from a property owner's perspective, and with economic reality."[149] Additionally, under Alaska law, the "objective of just compensation is to place the property owner 'as fully as possible in the same position as he was in prior to the taking of his property.'"[150] This restoration to full economic health, no matter how minor the harm or "damage," finds no counterpart in federal takings law.[151] In light of all the foregoing, the three-factor test used by federal courts to determine whether government action effects a taking, including (1) "the character of the governmental action," (2) "its economic impact," and (3) "its interference with reasonable investment-backed expectations," is not the model generally followed in Alaska.[152]

When viewed as a whole, the Alaska courts have appropriately and substantially created an independent takings doctrine based exclusively on the Alaska Constitution and the textual difference between the Alaska Constitution and the Federal Constitution. In this regard, the courts have assisted in the preservation of the dual federalist structure and strengthened the autonomy of the state.

V. CONCLUSION

Alaska courts have made many notable inroads along the path of establishing an independent body of state constitutional law, and in so doing, have promoted and fulfilled the promise of dual federalism. The Alaska courts have given life to the state constitution, particularly where textual differences exist, and established a truly separate body of state law. This is particularly noteworthy in the areas of individual rights and liberty and takings. The courts' creation of independent state law fulfills the intent of the Framers of the Federal Constitution, who envisioned strong and independent states that worked together on issues of national

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148. *Id.*

149. *Id.* (citing Stewart & Grindle, Inc. v. State, 524 P.2d 1242, 1246–47 (Alaska 1974) (approving and adopting New Jersey's "provocative departure from established precedent" in developing "analysis sensitive to the economic realities of public condemnation" and adopting the court's analysis in State v. Nordstrom, 54 N.J. 50 (1969)).

150. Ehrlander v. Dep't of Transp. and Pub. Facilities, 797 P.2d 629, 633 (Alaska 1990) (quoting Ketchikan Cold Storage Co. v. State, 491 P.2d 143, 150 (Alaska 1971)).

151. Also, the heightened takings analysis under the Alaska Constitution applies "not only to ordinary eminent domain proceedings, but to actions in inverse condemnation." *Ehrlander*, 797 P.2d at 633 (citing State v. Doyle, 735 P.2d 733, 733 (Alaska 1987)).

152. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984).

importance, but maintained their own powers to govern as each state saw best.

Alaska courts have produced some notable failures as well, not addressed here in detail, but best represented by the plurality's decision in *Evans v. State.*[153] The plurality in *Evans* ignored the state constitution's more exacting standard in favor of what appears to be a political compromise, rather than basing the decision on a principled legal analysis.[154] However, it is rare for the Alaska Supreme Court to neglect the well-recognized protections of individual liberty and access to the courts under the state constitution, and the *Evans* decision may not withstand the test of time. If it does, it may well remain as a monument of what to avoid in future cases.

On the whole, the Alaska courts have succeeded in developing a body of independent state constitutional law. It appears likely that the unique features of the state constitution will continue to be given life and meaning, making it a primary document governing Alaskans, not just a symbol. In light of the United States Supreme Court's invigoration of federalism and state sovereignty, the state courts in Alaska are presented with an opportunity to further establish Alaska's role as a sovereign within a federalist system.

153. 56 P.3d 1046 (Alaska 2002).
154. *Id.* at 1070.