

KEYNOTE ADDRESS

THE ALASKA CONSTITUTION AND THE FUTURE OF INDIVIDUAL RIGHTS

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I have been a law professor for a long time—over 39 years. I have never seen my law students as despondent as during the last couple of weeks as they followed the Senate Judiciary Committee hearings dealing with the confirmation of Judge Brett Kavanaugh. So I decided to convene a faculty panel to allow some of my colleagues to share their thoughts about the situation. I wanted to schedule the panel in our largest room which was only available on Friday at noon. That is usually not the best time to get students to attend. To my surprise, not only was every seat taken, but every space on the floor was filled with sitting students and the back of the room was filled with people standing. I asked each of the faculty to say whatever they wanted to share about the situation and then I offered my thoughts. I said to the students that the Supreme Court is likely going to be very conservative and very inhospitable to individual rights for years and maybe decades to come. In light of that, we have only two choices: either give up or fight harder. Of course, that means there is only one choice: we are going to have to fight harder and better than ever before.

Then I talked with them about one key way that they can fight harder: they can turn to state constitutions and state courts as an alternative forum for success. This is not a new insight. In 1977, Justice William Brennan wrote a famous article in the *Harvard Law Review* encouraging the increased use of state constitutional law.¹ I am sure part

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of why he said this was that he himself had been a justice on the New Jersey Supreme Court before going to the nation's highest court. But it is clear that he was feeling despondent at that moment in time. He saw a Supreme Court that had become decidedly more conservative in 1969 with the first two Nixon appointees, and then even more conservative in 1971 with two additional Nixon appointees. So Justice Brennan was pointing a way for the future to have greater expansion of rights and equality.

It seems especially appropriate to be talking about reliance on state constitutions today, when just yesterday the Washington State Supreme Court found that the death penalty in that state was unconstitutional as a violation of the Washington Constitution.² So I decided that what I want to talk about this morning is the use of state constitutions and state courts to protect personal rights and liberties.

I have a special relationship to Alaska. It is an important part of my professional life. It came about, as do many things in life, in an unplanned way. In 1990, then Chief Justice Jay Rabinowitz invited me and another law professor to come to Alaska to speak at a conference of state supreme court justices from five states, to be held in Glacier Bay, one of the prettiest places I have ever seen. Chief Justice Rabinowitz apparently liked what he heard, and he invited us to return the next year to speak to the state bar convention. I have returned every year since.

A few years later, I was asked in addition to reviewing the recent decisions of the United States Supreme Court to also discuss recent Alaska Supreme Court and Alaska Court of Appeals decisions about constitutional law and criminal procedure. I agreed. I will tell you in all candor that of all talks that I have had the good fortune to do, this task is one of the hardest. I am reading the Alaska cases as an outsider and I am speaking to the very judges who decided the cases and the lawyers who argued them. No matter how carefully I read them, I do not know about aspects of the case that are not in the published opinions.

It is also challenging because I learned that the judges and lawyers do not want me to simply come up and summarize their cases for them. They know what they argued and what they decided. What they want is my analysis of the cases. There is something inevitably uncomfortable about criticizing decisions when the judges who decided them and the lawyers who argued them are present in the room. That has become even more uncomfortable over the years as I have come to realize that judges actually worry about what I am going to say. Why should they care what

1. William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

2. *State v. Gregory*, 427 P.3d 621 (Wash. 2018).

this law professor says? But the result of this is that I have come to know Alaska constitutional law far better than any other state's constitutional law, including California, where I have spent most of my professional career.

I want to address three questions this morning. First, why is it that Alaska has developed such a robust body of constitutional law? Second, what is this most likely to mean for the future as we look ahead to what is going to happen in the United States Supreme Court? Where will Alaska constitutional law make the most difference? And third, what are the limits of state constitutional law? While there is great potential for utilizing state constitutional law to protect and even expand civil liberties,³ it is also important to recognize its limitations.

So, why did Alaska develop such a robust body of state constitutional law? It is easy to give simple answers. There is something very independent about the spirit of Alaska that has been there since before it became a state. Developing Alaska constitutional law, apart from United States constitutional law, started early in its history. For example, just to pick a small illustration, the Supreme Court in *Gilbert v California*⁴ held that it does not violate the Fifth Amendment privilege against self-incrimination for the police to require an unrepresented person to provide a handwriting sample because the handwriting sample is not testimonial. But in *Roberts v. State*,⁵ the Alaska Supreme Court came to the opposite conclusion and held that under the Alaska Constitution requiring a handwriting sample is impermissible.

But why is it that Alaska has among the most robust bodies of separate state constitutional law in the country? I think there are a couple of different explanations. One is the difference in the text of the Alaska Constitution compared to the United States Constitution. Specific textual provisions in the Alaska Constitution have understandably led to greater protections of rights. Any constitution is a function of the time in which it was written. If we were to write a constitution today for the United States, it would not include anything like the Third Amendment which states that the government cannot require that a person quarter soldiers in his or her home. But that was included in 1791 because the King of England had a practice of requiring people to quarter soldiers in their homes.

Likewise there are provisions in the Alaska Constitution that are very much a function of the time in which it was written. For example, in

3. Erwin Chemerinsky, Essay, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1695 (2010).

4. 388 U.S. 263 (1967).

5. 458 P.2d 340 (Alaska 1969).

Article I, Section 7 of the Alaska Constitution, it says the “right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.”⁶ Remember when the Alaska Constitution was written in the mid 1950s, it was just following and not completely after the McCarthy era, when people were subjected to what can only be described as compulsion to waive the privilege against self-incrimination in legislative and executive proceedings. It is notable in the Alaska Constitution that it is Article I that includes the declaration of individual rights. That is an appropriate and symbolic place to put protections of individual liberties. Article I of the United States Constitution is about the legislative power, followed by Article II dealing with executive power, and then Article III about the judicial power. Indeed, there is little in the text of the United States Constitution about individual liberties, which is why so many states insisted upon the addition of the Bill of Rights.

It is not just Article 1 of the Alaska Constitution that protects individual rights: Article 5 has provisions with regard to voting rights;⁷ Article 6 deals with legislative apportionment;⁸ Article 7 talks about the obligations of the state for health, education and welfare;⁹ and Article 8 includes the duty of the state to protect natural resources, including an obligation of the state to protect the public trust.¹⁰

Many of these articles of the Alaska Constitution include provisions that have no analogue in the United States Constitution. Some special aspects of the Alaska Constitution were added later. Article 1, Section 22 of the Alaska Constitution protects a right to privacy.¹¹ There is no express provision in the United States Constitution that protects the right to privacy; the word “privacy” is not included in the United States Constitution. In *Griswold v. Connecticut*,¹² one of the first cases recognizing a right to privacy, Justice Douglas wrote that privacy is protected by the “penumbra” of the Bill of Rights noting that there are elements associated with privacy emanating from numerous places including the First, Third, Fourth, and Fifth Amendments. One commentator said at the time that Justice Douglas was like a cheerleader skipping through the Bill of Rights saying, “Give me a P, give me an R, give me an I” to eventually spell out privacy.¹³ I have always thought that this created a shaky foundation for

6. ALASKA CONST. art. I, § 7.

7. ALASKA CONST. art. V.

8. ALASKA CONST. art. VI.

9. ALASKA CONST. art. VII.

10. ALASKA CONST. art. VIII.

11. ALASKA CONST. art. I, § 22.

12. 381 U.S. 479 (1965).

13. Robert G. Dixon, *The “New” Substantive Due Process and the Democratic*

a constitutional right of privacy. It may well have effects in the longer term as the Supreme Court undermines privacy rights under the United States Constitution.

But privacy is explicitly included in the Alaska Constitution, and this has potentially enormous significance. To pick just one example, in *People v. Ravin*,¹⁴ the Alaska Supreme Court in 1975—40 years before other states began to create a right to possess marijuana for personal use—found that under the Alaska right to privacy, there is a specific right to possess small amounts of marijuana for personal use in one’s home. That did not include a right to buy or sell marijuana. But it did take the right to privacy under the Alaska Constitution and gave it a specific meaning. Alaska did so earlier than any other state because the Alaska Constitution has a specific provision on privacy.

There are other areas where amendments to the Alaska Constitution provide rights that have no analogue in the United States Constitution. Alaska amended its constitution to provide detailed protection for victims’ rights. Article 1, Section 24 of the Alaska Constitution included a long list of rights that are protected for victims of crimes: the right to be protected from the accused; the right to confer with the prosecution; the right in all court proceedings to be treated with “dignity, respect, and fairness”; the right to a timely disposition of criminal proceedings; the right to be present during a court proceeding; the right to be heard at sentencing or post-conviction proceedings; the right to be there for any release proceedings; a right to restitution; and the right to be notified if the convicted criminal has escaped.¹⁵ There is nothing like this in the U.S. Constitution.

Correspondingly, there are also provisions in the Alaska Constitution that have been interpreted to create rights for criminal defendants that do not have any analogue in the U.S. Constitution. Take for example the right to bail. The United States Constitution provides that there cannot be excessive bail. But in the Alaska Constitution, there is a right to bail in all cases except capital cases. Since there are no capital cases, given that Alaska does not have the death penalty, it creates a right to bail that is clearly broader than the United States Constitution. The Alaska Supreme Court has also interpreted language in the Alaska Constitution that creates a right for rehabilitation for prisoners.

Another area of difference that has major consequences is in regard to affirmative duties imposed on the government. It has often been said that the United States Constitution is about negative liberties—

Ethic: A Prolegomenon, 1976 BYU L. REV. 43, 84 (1976).

14. 537 P.2d 494 (Alaska 1975).

15. ALASKA CONST. art. I, § 24.

prohibitions on what the government can do. The United States Supreme Court has famously, on many occasions, refused to find any affirmative constitutional rights. For example, in *San Antonio Independent School District v. Rodriguez*,¹⁶ the Supreme Court held that there is no right to education under the United States Constitution. Similarly, in *Deshaney v. Winnebago County Department of Social Services*,¹⁷ the Supreme Court held that the government has no duty to protect people from privately inflicted harms. In that case, the state, despite repeated warnings, had no duty to protect a child from serious abuse by his father.

But there are provisions in the Alaska Constitution that create affirmative duties on the part of the government. So with regard to education, the Alaska Constitution specifically provides in Article 7, Section 1 that the state has to create a system of public schools that are free from sectarian influences.¹⁸ Article 7, Section 4 creates a duty of the state to protect public health.¹⁹ Section 5 creates a duty of the state to protect the public welfare.²⁰ Article 8 creates specific duties of the state to protect the natural resources of Alaska, and it is obvious, given Alaska's beauty and the resources of this state, why that would be included.²¹

The Alaska Constitution also creates a duty of the state to protect the resources of the state in public trust.²² There is a lawsuit currently pending in Oregon federal court brought on behalf of children arguing that the United State government has the obligation, under the public trust doctrine, to deal with the problem of climate change.²³ The federal district court denied the motion to dismiss and the Ninth Circuit has refused an interlocutory review, so the suit proceeds. It is much harder under federal law and the United States Constitution to establish a right, such as the one being claimed in the Oregon case because there is nothing like the public trust doctrine explicitly stated in the United States Constitution. But it exists under the Alaska Constitution.

My sense is that if there were a constitutional convention held in 2018, the United States Constitution would be more like the Alaska Constitution than the United States Constitution as written in 1787. Alaska had the tremendous benefits of the experience gained under the United States Constitution in deciding to include these provisions. But

16. 411 U.S. 1 (1973).

17. 489 U.S. 189 (1989).

18. ALASKA CONST. art. VII, § 1.

19. ALASKA CONST. art. VII, § 4.

20. ALASKA CONST. art. VII, § 5.

21. See e.g., ALASKA CONST. art. VIII, § 2 ("The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.").

22. *Id.*

23. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016).

there's no doubt that having this specific language in the constitution has made an enormous difference in the development of Alaska constitutional law.

Having words on paper, however, is not enough. I often ask my students, especially undergraduates, to first read the United States Constitution and then read a copy of the Stalin-era Soviet constitution. I would also have them read Solzhenitsyn's "A Life in the Gulags," which described the actual conditions faced by some Soviet citizens.²⁴ I would then ask the students what is the difference between the two constitutions? The students are always surprised that the Stalin-era Soviet constitution has a much more elaborate statement of individual rights than the United States Constitution, despite the reality of great abuses of civil liberties. The difference in systems is that in the United States, unlike the Soviet Union, courts have the power to strike down government actions. Alaska would not have had this wonderful history of robust state constitutional law just because of having words on paper. Alaska has had terrific justices and judges to make those words real.

This raises the question: why does Alaska have this great tradition of excellent justices and judges? I think that if we reflect on what has made Alaska special with regard to constitutional law, great credit should be given to the constitutional provision establishing the Alaska Judicial Council.²⁵ The Council has to provide at least several names to the governor for any vacancy on the court, and the governor must pick from those names.²⁶ It is this type of process that explains why a conservative governor like Sarah Palin could pick a terrific judge like Morgan Christen to the Alaska Supreme Court (and who is now one of the most respected judges on the Ninth Circuit Court of Appeals).

In light of recent confirmation battles for the Supreme Court, I think that it would be great if presidents – whether Democrat or Republican – copied a form of the Alaska system. This would not require constitutional change or even a statute. A president could simply say "I'm going to create a blue ribbon commission composed of both Republicans and Democrats. I want you to send me three names for any vacancy. It has to be that two thirds of you approve these names, so that there will bipartisan support. And I promise to either pick from these names or ask you for additional names." If done that way, would it not do a great deal to end the confirmation mess that exists in Washington? I think then we

24. ALEKSANDR SOLZHENITSYN, *ONE DAY IN THE LIFE OF IVAN DENISOVICH* (1962).

25. ALASKA CONST. art. XV, § 16. (describing appointment procedures for the first judicial council).

26. ALASKA CONST. art. IV, § 5.

could move past the vituperative, increasingly polarized confirmation process that we have seen in recent decades.

There is precedent for this at least at the court of appeals level. When Jimmy Carter was President, he insisted on merit selection panels for federal court of appeals judgeships. He tried to require it for federal district court judgeships, but that effort was less successful as a result of senatorial prerogative. President Carter utilized merit selection for federal court of appeals judgeships, and I think by any measure he appointed some of the most talented and most diverse judges the country has ever seen. Prior to Carter, only two women had ever been appointed to the United States court of appeals. President Carter appointed nine women to the courts of appeals, among them, Ruth Bader Ginsburg.

That brings me to the second question that I wanted to address this morning. Where is it most likely to matter in the years ahead that Alaska has this robust tradition of Alaska constitutional law. We are likely to have a conservative Supreme Court for years to come, given the relatively young age of many of its conservative members. This core group of conservative justices could easily be together forming a solid block for 10 to 20 years. This means that if there is going to be any expansion respecting constitutional rights and liberties, it is most likely to originate under state constitutional law. Just as importantly, it also means that it is likely there is going to be retrenchment of existing constitutional liberties under the United States Constitution and it will require state constitutional law to keep those rights intact.

Let me identify a few examples where Alaska constitutional law will be important in the years ahead. One of these is in regard to reproductive freedom. I believe we are likely to have five Justices on the current Supreme Court who will either explicitly or effectively overrule *Roe v. Wade*.²⁷ Remember that it was the now-retired Justice Kennedy who was instrumental in protecting the right to abortion. In 1992, in *Planned Parenthood v Casey*,²⁸ Justice Kennedy was the fifth vote to reaffirm *Roe v. Wade*. More recently, Justice Kennedy was part of a five-person majority in a divided decision that struck down a Texas law that would have closed most of the clinics in the state that provided abortions.²⁹

Under *Planned Parenthood v Casey*, laws restricting abortion are allowed under the U.S. Constitution so long as they do not create an “undue burden” on women’s right to abortion. Since 2010, 43 states have adopted over 400 new laws that restrict abortion. If the Supreme Court upholds these statutes, this will largely negate abortion rights in the

27. 410 U.S. 113 (1973).

28. 505 U.S. 833 (1992).

29. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

United States. Even if the Court does not explicitly overrule *Roe v. Wade*, my own sense is that there are likely five votes to uphold many of these new statutory provisions.

The Alaska Supreme Court, however, provides greater protection for reproductive freedom. The Alaska Supreme Court held in *Valley Hospital Association v. Mat-su Coalition for Choice*³⁰ that restrictions on abortion in Alaska need to meet strict scrutiny, and thus need to be necessary to achieve a compelling government purpose. This was the test under *Roe v. Wade*, but it was abandoned when the undue burden test was adopted in *Casey*. Just two years ago in *Planned Parenthood of the Great Northwest v. State*,³¹ the Alaska Supreme Court reaffirmed that strict scrutiny must be used with regard to restrictions on abortion rights. That case involved a state law that required parental notification before a minor's abortion. Parental notification provisions have been upheld by the United States Supreme Court.³² But the Alaska Supreme Court struck down such a requirement under the Alaska Constitution not only because there has to be a compelling state interest, but also because any restriction on abortion has to be narrowly tailored. So even if the United States Supreme Court cuts back on the right to reproductive choice, it is likely secure under the Alaska Constitution.

A second area where the Alaska Constitution provides more protection than the United States Constitution, that likely will have future significance, is the free exercise of religion. In *Sherbert v. Verner*,³³ the Supreme Court said if the government significantly burdens religion, its action is constitutional under the free exercise clause only if necessary to achieve a compelling government purpose. But subsequently in *Employment Division v. Smith*,³⁴ the Supreme Court said the free exercise clause of the United States Constitution cannot be used to challenge a neutral law of general applicability. If a law is neutral in the sense that it is not motivated by a desire to interfere with the exercise of religion, and if it applies to everyone, then there is no basis for a free exercise challenge. That case involved an Oregon law prohibiting the consumption of peyote, a psychogenic substance. Native Americans challenged the law claiming the use of peyote was required as part of a religious ritual. The Supreme Court upheld the Oregon law and ruled against the Native Americans finding that the law was neutral, was not motivated by a desire to interfere with religion, and applied to everyone.

30. 948 P.2d 963 (Alaska 1997).

31. 375 P.3d 1122 (Alaska 2016).

32. *H.L. v. Matheson*, 450 U.S. 398 (1981).

33. 374 U.S. 398 (1963).

34. 494 U.S. 872 (1990).

But the Alaska Supreme Court has made clear, under the Alaska Constitution, that any law that substantially burdens religion must meet strict scrutiny. This is so, even if it is a neutral law of general applicability. In *Frank v. State*,³⁵ the Supreme Court of Alaska prescribed strict scrutiny for the free exercise clause, and this position was reaffirmed even after *Employment Division v. Smith*.³⁶

The third area concerns the rights of criminal defendants. I predict that the conservative Roberts Court will cut back on the rights of criminal defendants in many areas, and there will be many areas in which Alaska's state constitutional provisions could be invoked to make a significant difference in protecting the rights of criminal defendants.

I taught criminal procedure this semester, and my students are learning a great deal about Alaska criminal procedure. There were so many examples throughout the course where I said that this is the rule under the Fourth Amendment, but in Alaska it is different. For example, under the Fourth Amendment, it is not a search if the police go through somebody's garbage because there is no reasonable expectation of privacy in what you throw out. But the Alaska courts have held that there is an expectation of privacy even when it comes to trash.³⁷ In another recent case, the Alaska Court of Appeals held – in a decision that is different than that of the Supreme Court's interpretation of the Fourth Amendment – that the police cannot look inside closed containers when they arrest somebody who was driving as part of a search incident to a lawful arrest.³⁸

There are many examples where the Alaska courts provide more rights for criminal defendants than under the United States Constitution. One area of particular importance is in the area of eyewitness identification. Many social psychologists, including my former colleague Elizabeth Loftus, have taught us about the power of eyewitness identification but also its fallibility. Social psychologists like Professor Loftus have identified serious reliability concerns especially with eyewitness testimony involving cross racial witness identification. Several years ago, in *Perry v. New Hampshire*,³⁹ the Supreme Court said that this social science evidence of concern with eyewitness testimony does not justify creating any special protections. But the Alaska courts have specifically said that there need to be significant protections with regard to eyewitness identification, and much more of an examination of

35. 604 P.2d 1068 (Alaska 1979).

36. See e.g., *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280–81 (Alaska 1994).

37. See e.g., *Smith v. State*, 510 P.2d 793 (Alaska 1973).

38. *Pitka v. State*, 378 P.3d 398, 399 (Alaska Ct. App. 2016).

39. 565 U.S. 228 (2012).

the suggestiveness in eyewitness identification procedures and their reliability.

I have tried intentionally to give a great deal of praise to the Alaska Supreme Court and the Alaska Court of Appeals. There are decisions where I disagree with the result because I did not think that the Alaska courts went far enough in protecting individual liberties or advancing equality. But overall, my evaluation is an enormously positive one.

So, while there is much that can be done under state constitutional law, there are also limits. I want to address that in the final part of my remarks. State constitutions can provide additional protections where the United States Constitution sets the floor on what must be provided. But if the constitution prohibits something, or federal law is found to preempt it, then there is little the state constitutions can do. So, for example, state constitutional law is irrelevant where the United States Supreme Court has said that a constitutional limit is imposed on the states. For example, if the Supreme Court overrules *Roe v. Wade*, states like California and Alaska can continue to protect reproductive freedom for women. But if the Supreme Court—as I expect that it will—holds that all forms of affirmative action violate the United States Constitution, then there is nothing that can be done under state constitutional law to effect the right of affirmative action. Or, if the Supreme Court were to interpret the United States Constitution to hold that a fetus was a person from the moment of conception—a ruling that I do not think likely, but believe is possible—then any law allowing an abortion would violate the fetus' right to equal protection, and there is nothing that state constitutional law could do about that.

Second, state constitutional law protections are inherently inefficient compared to United States constitutional law. To secure a right under state constitutional law requires doing so in all 50 states, and that would require separate litigation in each. On the other hand, to establish a right under the United States Constitution, you just need the decision of the Supreme Court which obviously has great benefits in terms of litigation efficiency.

Finally, one must remember that state constitutional law is not always effective. While there are states like Alaska that have a long tradition of recognizing state constitutional claims, other states do not have a strong tradition of state constitutional law. And even where there is a strong tradition of state constitutional law or a willingness to use state constitutions, often states are unwilling to do so. Take, as an example, abortion rights. If *Roe v. Wade* is overruled, then it is likely that abortion will become illegal immediately in about half of the states. And in those states, it is unlikely those state supreme courts would find that state constitutions protect reproductive freedom.

Consider the example of marriage equality. I regard marriage equality as one of the great triumphs of state constitutional law of recent years. We too easily forget that it was the Massachusetts Supreme Judicial Court in 2003, that under the Massachusetts Constitution, first found a right to marriage equality for gays and lesbians.⁴⁰ Advocates for marriage equality specifically chose to litigate in state court under state constitutions to keep the matter away from the federal courts and the Supreme Court. There was a loss in New York, a unanimous victory in Iowa, and then victory in California. Only after these successes did the lawyers determine to go to the federal courts. It is astounding that in a mere 12-year period, we went from the first decision in a state supreme court to the United States Supreme Court recognizing the right. But what if the Supreme Court had not recognized such a right? Or what if the Supreme Court with its new conservative majority were to overrule *Obergefell v. Hodges*.⁴¹ I predict that a number of states would then prohibit same sex marriage and a number of state courts would affirm such laws. It is hard to imagine many issues where you will have all of the state supreme courts recognize a right, especially given that in so many states, state justices face electoral review in partisan elections.

I understand that today is about celebrating the 60th anniversary of Alaska statehood and a little more than the 60th anniversary of the drafting of the Alaska constitution. My bottom line is there is that there is an enormous amount to celebrate.

40. *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

41. *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015).