

ANCHORAGE CHAMBER OF COMMERCE

STATE & LOCAL GOVERNMENT AFFAIRS COMMITTEE

ISSUE PAPER

**BALLOT MEASURE 1 ON THE NOVEMBER 5, 2002 BALLOT
(Calling a State Constitutional Convention)**

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PART I. FACTUAL & LEGAL BACKGROUND

What is the “constitutional convention” ballot?

In the state general election on November 5, 2002, Alaska voters will be asked to vote on the Ballot Measure 1, which asks “Shall there be a Constitutional Convention?”

What “constitution” are we talking about, and what is it?

The “constitution” in question is the constitution for the state of Alaska, not the U.S. Constitution. The Alaska State Constitution is the fundamental law of the state of Alaska, and it is the legal instrument by which the state government itself was created and under which that government remains in existence.¹ All of Alaska’s state laws and regulations are subject to the terms, conditions, requirements and limitations of the Alaska State Constitution. Any state law or regulation that violates or conflicts with the Alaska State Constitution is “unconstitutional” and invalid, and is not enforceable.²

What is a “constitutional convention”?

A “constitutional convention” is one of two ways under the Alaska State Constitution by which the state constitution itself can be amended.³ The convention would consist of delegates elected from around the state, and under current law there would be 55 of these delegates.⁴ There is no limit on what a constitutional convention can do in terms of rewriting the state constitution,⁵ so long as what it proposes does not violate the U.S. Constitution and other federal law. So a constitutional convention could propose one or more specific amendments to the Alaska State Constitution, or it could completely revise and rewrite the entire state constitution. But whatever a constitutional convention ends up proposing, its proposal is submitted to a vote of the people and does not become effective unless the people approve it in that election.⁶

The constitutional convention is not the legislature, and so it could not enact statutes. But it could adopt, subject to approval by the voters, “ordinances” governing the procedures for making the transition from the current state constitution to the new one if the people vote to ratify the convention’s constitutional proposals.⁷ The expenses of holding a constitutional convention — including travel and per diem for delegates and convention staff, supplies, professional or contractual services (e.g., making a record of the convention proceedings), etc. — would “constitute a first claim on the state treasury.”⁸

If a constitutional convention is one way to amend the state constitution, what is the other way?

The second way to amend the Alaska State Constitution is for the legislature, by a two-thirds vote of each house, to propose an amendment and submit it to a vote of the people for ratification.⁹ This is how the Alaska State Constitution has been amended all 27 times it has been changed since Statehood in 1959. A list of these amendments can be found on the internet at www.gov.state.ak.us/lsgov/akcon/summary.html.

But can't Alaskans use the initiative (petition) process to amend the state constitution?

No. The 1955 Constitutional Convention which wrote the present constitution specifically considered this, but voted not to allow it.¹⁰

Why are Alaskans voting this year on having a constitutional convention?

The Alaska State Constitution requires that, if 10 years go by without any constitutional convention being held, the people shall vote at the next general election on the question "Shall there be a Constitutional Convention?"¹¹ If the vote is against having a constitutional convention, then the question does not have to go on the ballot for another 10 years.¹² The reason we are voting on a constitutional convention this year is because the last time we voted on this question was in 1992, and that vote was "no". So now the 10 years are up and it's time to vote on it again.

What happens if a majority of Alaskans vote "no" this year on having a constitutional convention?

There wouldn't be a constitutional convention at this time. But the legislature¹³ still could call a constitutional convention at any time during the next 10 years if a majority of each legislative body thinks one is needed.¹⁴ If no convention is called before 2012, then Alaskans would again vote on having a constitutional convention in the 2012 general election.

If Alaskans vote this year against having a constitutional convention, that vote would have no effect at all on the legislature's independent power to propose constitutional amendments between now and 2012.¹⁵

What happens if a majority of Alaskans vote "yes" on having a constitutional convention?

After the vote is certified, the lieutenant governor would issue a formal call for the constitutional convention to be held.¹⁶ The call would specify how many delegates there will be, what the election districts are that the delegates will be elected from, the legal qualifications for seeking election as a delegate, how many signatures must be on the nominating petition for each person seeking election as a delegate, when the nominating petitions must be filed, when the election of delegates will be held, where the convention will meet, how long the convention may last, and the proposed budget for holding the convention¹⁷ (subject to change by the convention¹⁸ once it convenes). The legislature could enact legislation prescribing many of these things for the convention, but if it doesn't, then all these matters must conform as nearly as possible to the terms and procedures under the call of the original 1955 Constitutional Convention.¹⁹ The election of the delegates would be at the "next regular statewide election" — that is, the 2004 primary election — unless the legislature provides for a special statewide election to elect the delegates.²⁰

Who could seek election as a delegate to such a constitutional convention?

Absent a law providing otherwise, the qualifications to be a delegate would be as close as possible to those under the call for the 1955 Constitutional Convention.²¹

Back then delegates had to be qualified voters who would have lived in Alaska for at least three years before the first day of the convention, but anyone holding an “appointive office under the Federal Government” could not be delegates.²² It is questionable whether that blanket disqualification of appointed federal officials would be appropriate and constitutional today.²³ There is also some question about the constitutionality of a three-year residency requirement, although it probably is okay — certainly a one-year requirement would pass constitutional muster.²⁴ So the bottom-line is: any qualified Alaska voter with a minimum of three years of Alaska residency (perhaps as little as one year) could run.

As with other aspects of the procedures that are based on the call for the 1955 Constitutional Convention, if the legislature wanted to change the qualifications — for example, to make the residency requirement only one year instead of three in order to avoid litigation and potential delay in the election of the delegates — it could enact a law changing them.²⁵

Would the election of delegates be done on a partisan or non-partisan basis?

Delegates to the 1955 Constitutional Convention were nominated and elected on a strictly non-partisan basis,²⁶ and this would be the case again unless the legislature passes a law providing otherwise.²⁷

How could someone get on the ballot as a candidate to be a delegate to a constitutional convention?

Under the 1955 procedures, people who wanted to run for election as a delegate had to submit a nominating petition signed by the requisite number of qualified Alaskan voters in the district that the person would represent as a delegate, and pay a filing fee of \$10 (or \$40 if filing for one of the seven delegate seats to be elected at-large on an Alaska-wide basis).²⁸ At that time there were three tiers or levels of district that a delegate could represent: the single Alaska-wide district, four regional districts corresponding to the four Judicial Divisions that together covered all of Alaska, and 17 local districts that also collectively covered all of Alaska.²⁹ Each nominating petition had to be signed by a number of qualified voters in the district equal to at least 5% of the votes cast in that district in the last general election (1954), but in no case would more than 200 signatures be required nor fewer than 50 allowed.³⁰ A person signing a nominating petition for delegate from a given district could not sign more petitions for that district’s delegates than the number of delegates to be elected from that district — in other words, if five delegates were to be elected from the Judicial District where the petition-signer lived, he/she could only sign up to five petitions for delegates to represent that Judicial District. She/he could also sign only one petition for a candidate to represent the local district (each local district had only one delegate), and up to seven petitions for persons running at-large for the seven Alaska-wide delegate seats.³¹ These procedures must be followed as much as possible for any future constitutional convention, unless the legislature changes them by enacting a new law.³²

Would the state election campaign laws apply to the campaigns of people seeking election as a delegate to a constitutional convention?

Yes, but only after the person has filed the necessary nominating petition to run for that office.³³ Once the nominating petition is filed, the nominee becomes a “candidate” for purposes of the state election campaign laws (AS 15.13), and those provisions — including those governing campaign contributions, campaign reporting, campaign expenditures and the regulatory authority of the Alaska Public Offices Commission (APOC) — specifically apply to campaigns for constitutional-convention delegate,³⁴ as well as APOC’s rules and regulations on election campaigns.

Does this mean that the state election campaign laws would not apply to a group that works, in an organized fashion, to gather signatures on nominating petitions for a slate of would-be candidates that the group wants to be elected as delegates to a constitutional convention?

That’s correct, except if the signature-gathering group is a political party or the state or regional executive committee of a political party. The present election campaign laws appear to be inapplicable to a nonpartisan group that is gathering signatures on nominating petitions for its slate of would-be candidates, until those petitions are filed.³⁵

So special-interest organizations like Greenpeace, for example, could go out and get signatures on a whole slate of candidates around the state without having to disclose that they are the organization behind those candidates?

Yes, this stealthy fielding of slates of special-interest candidates is legally possible under the present laws. The more likely form it would take, though, is that members of such a special-interest organization would organize themselves to gather signatures as an *ad hoc* entity or group that is legally separate from the primary organization itself, in order to avoid any activity directly by the primary organization that might cause problems with its tax-exempt status under the Internal Revenue Code.

Would the state laws governing lobbying apply to the lobbying of delegates at a constitutional convention?

No. The lobbying laws in AS 24.45 apply only to “influencing legislative or administrative action[.]” which is defined to be “promoting, advocating, supporting, modifying, opposing, or delaying or seeking to do the same with respect to any legislative or administrative action by means including but not limited to the provision or use of information, statistics, studies, or analyses in written or oral form or format[.]” *See* AS 24.45.171(6). The business and actions of a constitutional convention are neither “legislative action”³⁶ nor “administrative action”³⁷ as defined under the present lobbying laws. Consequently, lobbying to influence a constitutional convention would fall outside the scope of those laws.

How much would a constitutional convention cost?

No one can really say right now. It would depend on how many delegates there would be, how large a staff would be needed for the convention, how much logistical

and technical support (communications, printing, distribution of materials, recording the proceedings, etc.) the convention would require, where the convention would be held, how long the convention would last, whether it would be held during peak tourism season or off-season, and other factors.

The budget was \$300,000 for the 1955 Constitutional Convention,³⁸ which was held in the middle of winter at the University of Alaska campus outside Fairbanks and lasted 75 days for 55 delegates, with a single two-week recess in the middle. Simply in terms of inflation, the equivalent of that amount today would be approximately \$1.65 million.³⁹

PART II. LIKELY CHANGES TO THE ALASKA STATE CONSTITUTION THAT A CONSTITUTIONAL CONVENTION MIGHT CONSIDER MAKING

At the outset it is important to note that a constitutional convention would in no way be limited to the items discussed below. Thus, for example, even though it is unlikely that a constitutional convention would rewrite the Bill of Rights in Alaska's constitution, it nevertheless could do so if the delegates chose to.⁴⁰ The discretion of a constitutional convention in terms of how it might amend or revise the Alaska State Constitution is not limited under our present state constitution.⁴¹

The real question, however, is not so much what a constitutional convention might do as a hypothetical matter, but what types of constitutional matters and issues would be likely to come before it for consideration and possible action.

Several groups and organizations in Alaska have variously surveyed government officials, community leaders, individual Alaskans and/or other organizations to find out what types of amendments to the Alaska State Constitution are most commonly suggested or seem to be most popular.⁴² While numerous particular proposals were identified in these surveys, there seem to be several common themes or "clusters" of proposals on certain topics. These topics are:

A. State spending

- To "reform" the Constitutional Budget Reserve Fund
- To limit state spending⁴³
- To redefine how much money from the Permanent Fund is available for PFDs and/or other state spending⁴⁴
- To make PFDs part of the constitution
- To require a greater local contribution to pay for the costs of local schools
- To establish a "community dividends" program using part of the Permanent Fund's income
- To put the state on a two-year state budget cycle instead of having one-year state budgets
- To dedicate part of the Permanent Fund's net income to pay for education
- To require the Executive Branch to prioritize programs and expenditures

B. Structural alteration of the state government

- To limit legislative sessions to less than the current 121-day limit (e.g., 90 days)
- To elect the attorney general
- To establish term limits for members of the legislature
- To have a unicameral legislature
- To directly elect all state judges and state supreme court justices⁴⁵
- To shorten the time between reconfirmation elections for state judges and state supreme court justices⁴⁶
- To limit the governor to a single six-year term
- To make the legislature subject to the state “open meetings” law
- To allow the legislature to propose “revisions” to the state constitution instead of only being able under the present constitution to propose “amendments” to it⁴⁷
- To allow the people to propose and adopt constitutional amendments by the initiative process
- To elect legislators on a nonpartisan basis

C. Shifting the checks and balances between the Executive, Legislative & Judicial Branches of the state government

- To let the legislature annul regulations by resolution (non-vetoable) instead of by statute⁴⁸
- To require legislative confirmation of the boards of major state-owned public corporations (e.g., AHFC, Alaska Permanent Fund Corp.)⁴⁹
- To prohibit judicially ordered “appropriations” of state funds⁵⁰
- To grant the legislature authority to file lawsuits in the name of the state⁵¹

D. Social and public policy

- To authorize a subsistence preference for rural residents
- To allow publicly financed “school vouchers” usable at public or private schools
- To limit the type and/or amount of damages that may be claimed in lawsuits for certain kinds of wrongful actions (torts)
- To define when human life begins
- To reduce the role of “rehabilitation” as one of the purposes of criminal punishment, at least until there are means of achieving rehabilitation that have been shown to be truly effective
- To amend the Preamble of the state constitution to include a recognition of Alaska’s Native peoples
- To give Native villages civil and criminal jurisdiction over village residents, and to recognize and treat the traditional village councils as sovereign tribes

E. Natural resources

- To authorize a subsistence preference for rural residents
- To allow the use of waters “in their natural state” for mariculture (fish farming) instead of reserving them for “common use” by the people⁵²

The list above is incomplete and may be misleading in one important respect, because it does not reflect the possibility of other amendments regarding natural resources and the environment that are likely to be advocated by environmental groups and organizations

that were not included among the groups and people that were polled in the surveys and studies. This exclusion may well be due to the fact that those surveys and studies were commissioned by business organizations or pro-development interests.

Clearly there are innumerable policies regarding protection of fish and game, land use and preservation, emissions and discharges into the air or water, etc. that could be enshrined in the state constitution if the delegates to a constitutional convention chose to do so and the voters agreed. It would be astonishing, then, if environmental groups did not actively push hard to get such provisions added to the constitution if a constitutional convention is called.

PART III. PROS AND CONS OF CALLING A CONSTITUTIONAL CONVENTION NOW

PRO — The legislature has failed to put a subsistence amendment on the ballot, despite numerous regular sessions and several special sessions trying to do so. We need a constitutional convention so we can bypass this stalemate in the legislature and have a vote on a subsistence amendment that would allow the state government to take back the management of fish and game resources in Alaska from the federal government.

CON — The legislature's failure to put a subsistence amendment on the ballot is not a good reason to call a constitutional convention. The way to get a subsistence amendment is to vote out of office the legislators who have blocked or tried to sabotage a workable subsistence amendment, and replace them with legislators who will work to get such an amendment on the ballot. Calling a constitutional convention just to deal with subsistence is too extreme, since there is no way to limit the convention so it would deal only with subsistence.

PRO — Legislators are too preoccupied with furthering their political careers, too concerned about just getting re-elected in the next election, and too beholden to the well-heeled special-interest groups that support them in their election campaigns. That's why the legislature has been paralyzed in the face of the major crises facing Alaska such as the fiscal gap and subsistence. We need a constitutional convention so we can have a group of citizen-statesmen who will take two or three months out of their normal schedules and take care of these crises on the basis of what's best for Alaska, instead of what's best for the politicians.

CON — There is no assurance that "citizen-statesmen" would end up being elected to a constitutional convention. In fact, there is nothing to prevent all 60 legislators from seeking election as delegates to the constitutional convention, if one is called. Rather than having a constitutional convention to bypass the "politicians" and solve Alaska's crises, perhaps we should make being a legislator more attractive so that more "citizen-statesmen" will be willing to run for the legislature and take care of these crises.

PRO — Alaska has changed tremendously since the 1955 Constitutional Convention and what they drafted back then is out of date and inadequate to meet the needs of today's

Alaska. The proof of this lies in the fact that — after thousands of court decisions, tens of thousands of laws and regulations, and no less than 27 amendments to the constitution itself — the basic needs and challenges facing Alaska are still going unmet. We need a constitutional convention so we can rewrite the constitution to make it better suited for today, instead of the past.

CON — Constitutions establish the framework that the government works in, but they are different from what the government does within that framework. If the framework is working but what the government is doing within that framework is bad, then we should change what the government is doing, or change the people in government who are doing it. But it makes sense to rewrite a constitution only if the framework of the government is somehow defective or unnecessary. For example, do we no longer need a division of the government into three branches — one to write the laws, one to carry them out, and one to hear and decide disputes over the proper enforcement or meaning of those laws? Is there something wrong with our present system of checks and balances between and among the Executive, Legislative and Judicial Branches of the state government? Has the state Bill of Rights failed to work? If the answer is “yes” to any of these or similar questions about the fundamental nature and framework of our state government, then maybe we do need a constitutional convention. But otherwise, the fact that our state constitution is almost 50 years old, or that it has had to be amended 27 times, does not justify calling a convention to rewrite the whole thing. After all, the United States Constitution is over 200 years old, and it too has been amended 27 times. Yet it still seems to be better than any of the alternatives.

PRO — The Framers of Alaska’s present constitution were unaware of, or did not fully envision and appreciate, the enormous potential that is available to a state government that owns outright over one-third of the land and resources within its borders. Ownership opens the door to innumerable opportunities that are unavailable or inappropriate through the exercise of a state’s sovereign powers, because ownership allows for contracts and agreements to be made for people to make and do things voluntarily that the state, as a sovereign, could not otherwise compel them to make and do. The existing provisions of Alaska’s constitution regarding the management of resources need to be completely overhauled in order to enable Alaska to exploit fully the opportunities that such an “owner state” has.

CON — The existing provisions of Alaska’s constitution already allow for the state government to leverage its ownership of land and resources in order to induce voluntary action on the part of people that could not be compelled of them. What further ability to leverage its ownership would the state stand to get by rewriting the resource-management provisions of the state constitution? One must recognize that there still are limits under the U.S. Constitution to what even an “owner state” can do contractually. It cannot, for instance, contract with someone for that person to commit a crime, nor to take an action that impairs or frustrates a right or power specifically vested in or reserved to the federal government (except, perhaps, if the federal government consents). And there are limits on what Alaska, even as an “owner state,” can do in using a contract for the use of state land, for example, as a means to establish a blanket hiring preference for Alaska residents over nonresidents — such a contractually based system for Alaska Hire, if constitutional-

ly justifiable at all,⁵³ must be reasonably limited to the particular state-owned land and resources that are the subject of the contract, and it could not extend to persons who never handle the resource or enter onto state land. *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (the “Alaska Hire” case).⁵⁴

PART IV. THE SALGA COMMITTEE’S RECOMMENDATION TO THE CHAMBER BOARD OF DIRECTORS

Below are two alternative draft resolutions, one opposing the calling of a constitutional convention and the other supporting it. The State and Local Government Affairs Committee recommends that the Chamber Board of Directors adopt the “Alternative A” resolution *opposing* the calling of a state constitutional convention at this time and recommending that Chamber members vote “no” on the question “Shall there be a Constitutional Convention?” appearing on the ballot in the November 5, 2002 general election. The Committee believes that the constitutional issues facing Alaska at this time can be dealt with through the normal process of constitutional amendments proposed by the legislature, and that calling a constitutional convention and thereby opening up the entire state constitution to potential change is too drastic a measure to take for addressing Alaska’s present constitutional issues.

Alternative A – Opposing a Constitutional Convention

**Board of Directors, Anchorage Chamber of Commerce
Resolution 2002/03-__
Opposing Ballot Measure 1
(Calling of a Constitutional Convention to Rewrite Alaska’s State Constitution)**

WHEREAS, as required by Article XIII, section 3 of the Alaska State Constitution, the question “Shall there be a Constitutional Convention?” will appear on the ballot in the general election on November 5, 2002; and

WHEREAS, a constitutional convention, if called, would have plenary power to rewrite the state constitution entirely, or to amend or rewrite any portion or portions of it, as a simple majority of the convention may see fit — subject to ratification by a vote of the people at the first general election held after the convention; and

WHEREAS, under present law candidates seeking election as delegates to a constitutional convention would be nominated by petitions signed by 200 qualified Alaskan voters, and all candidates would run on a nonpartisan basis; and

WHEREAS, Alaska’s present election campaign laws would not apply to the gathering of signatures for nominating petitions of constitutional-delegate candidates, which would open the door for special-interest groups to field numerous candidates by gathering signatures for their candidates’ nominating petitions without having to disclose the identities of the special interests behind those candidates; and

WHEREAS, the Alaska State Constitution does not require a constitutional convention to submit its various proposed amendments and revisions as separate matters to be voted on, and it could

instead “package” its changes as a single proposition to be voted on — which could encourage delegates to engage in “log rolling” to get otherwise unpopular provisions included in a “package” of constitutional changes expected, on balance, to be popular with the voters; and

WHEREAS, Alaska’s present laws governing lobbying of the legislature would not apply to the lobbying of delegates at a constitutional convention; and

WHEREAS, the costs of holding a constitutional convention are not known, but may reasonably be expected to run into the millions of dollars; and

WHEREAS, there is no need to call a constitutional convention at this time because, even though there may be several important constitutional amendments that should be proposed by the legislature, none of them is so comprehensive as to constitute a revision of the constitution that only a constitutional convention could propose; in other words, the legislature is fully empowered under the present constitution to propose the necessary amendments to deal with the major constitutional issues facing Alaska today;

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the Anchorage Chamber of Commerce that the Board opposes calling a state constitutional convention this year and recommends that Chamber members vote “no” on the proposition “Shall there be a Constitutional Convention?” appearing on the ballot for the general election on November 5, 2002, and will inform the Chamber’s membership of this Resolution, and of the Board’s reasons for adopting it;

AND FURTHER RESOLVED that the Chamber will issue a press release and public announcement of this Resolution, and send copies of it to the other chambers of commerce in Alaska and the press.

DATED _____, 2002

Alternative B – Supporting a Constitutional Convention

**Board of Directors, Anchorage Chamber of Commerce
Resolution 2002/03-__
Supporting Ballot Measure 1
(Calling of a Constitutional Convention to Rewrite Alaska’s State Constitution)**

WHEREAS, as required by Article XIII, section 3 of the Alaska State Constitution, the question “Shall there be a Constitutional Convention?” will appear on the ballot in the general election on November 5, 2002; and

WHEREAS, federal law already creates a subsistence preference for rural Alaskans, and since our Congressional Delegation has advised us repeatedly that it is not possible to undo the federal provisions establishing that preference, the only way for the State to take back management of fish and game resources from the federal government is to adopt an amendment to the state constitution allowing state law to provide for such a rural subsistence preference; but despite repeated efforts the legislature has failed to place such a subsistence amendment on the ballot for the people of Alaska to vote on; and

WHEREAS, amendments to the state constitution may be necessary or prudent in order to solve

the State's long term "fiscal gap," including, for example, a new limitation on state spending, reforming the Constitutional Budget Reserve Fund, or establishing the role of the Permanent Fund, as a permanent public trust, in the State's fiscal picture; the legislature has tried, but failed to obtain the necessary two-thirds vote of each legislative house in order to place any such amendments on the ballot for the people to vote on; and

WHEREAS, other amendments or revisions of the state constitution may be necessary or appropriate in order to exploit more fully and effectively the opportunities presented by the State's ownership of so much land and resources within its borders, to revise the philosophy and implementation of the state criminal justice system, or to take measures to narrow or eliminate socio-economic and other divisions between Alaskans; and

WHEREAS, a constitutional convention is the only means that the people of Alaska have to bypass the impasses in the legislature and to have the necessary constitutional amendments placed on the ballot for the people to vote on;

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the Anchorage Chamber of Commerce that the Board supports calling a state constitutional convention this year and recommends that Chamber members vote "yes" on the proposition "Shall there be a Constitutional Convention?" appearing on the ballot for the general election on November 5, 2002, and will inform the Chamber's membership of this Resolution, and of the Board's reasons for adopting it;

AND FURTHER RESOLVED that the Chamber will issue a press release and public announcement of this Resolution, and send copies of it to the other chambers of commerce in Alaska and the press.

DATED _____, 2002

PART V. FOOTNOTES

¹ See Alaska State Constitution, Preamble (“We the people of Alaska ... do ordain and establish this constitution for the State of Alaska.”) and Article I, section 1 (“All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole.”). Cf. U.S. Supreme Court Chief Justice John Marshall, regarding the U.S. Constitution, in *Cohens v. Virginia*, 6 Wheat. 264, 389 (1821) (“The people made the Constitution, and the people can unmake it. It is the creature of their own will, and lives only to their will.”).

² However, United States Constitution, Article VI, clause 2 provides, “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.” Thus, even a state constitutional convention could not amend Alaska’s constitution in a way that violates or conflicts with federal law, and if it tried to do so, that change would be invalid and unenforceable even if Alaska voters ratified it.

³ See Alaska State Constitution, Article XIII, section 4 (“Constitutional conventions shall have plenary power to amend or revise the constitution, subject only to ratification by the people. No call for a constitutional convention shall limit these powers of the convention.”).

⁴ See Alaska State Constitution, Article XIII, section 3 (“... Unless other provisions have been made by law, the call [for a constitutional convention] shall conform as nearly as possible to the act calling the Alaska Constitutional Convention of 1955, including, but not limited to, number of members, ...”). The 1955 Constitutional Convention had 55 delegates: seven at-large delegates elected Alaska-wide, seven elected at-large within the First Judicial Division, four elected at-large within the Second Judicial Division, 12 elected at-large within the Third Judicial Division, eight elected at-large within the Fourth Judicial Division (the four Judicial Divisions collectively cover all of Alaska), and one each from 17 local election districts that also collectively covered all of Alaska. See sections 3 and 4, chapter 46, Session Laws of Alaska of 1955 (“SLA 1955”).

⁵ See Alaska State Constitution, Article XIII, section 4 (“Constitutional conventions shall have plenary power to amend or revise the constitution, subject only to ratification by the people. No call for a constitutional convention shall limit these powers of the convention.”).

⁶ See Alaska State Constitution, Article XIII, section 4 (“Constitutional conventions shall have plenary power to amend or revise the constitution, subject only to ratification by the people.”).

⁷ See Alaska State Constitution, Article XIII, section 3 (“Unless other provisions have been made by law, the call [for a constitutional convention] shall conform as nearly as possible to the act calling the Alaska Constitutional Convention of 1955, including ... submission and ratification of ... ordinances.”) The call for the 1955 Constitutional Convention stated in pertinent part that “After a constitution ... ha[s] been framed, the convention shall provide by ordinance for submission of the constitution, and such [transitional] ordinances as may properly be submitted, to the people of the proposed State for ratification or rejection at an election to be held at a date to be fixed by the convention” See section 14, chapter 46, SLA 1955; cf. sections 13, 15 and 16, chapter 46, SLA 1955.

⁸ See Alaska State Constitution, Article XIII, section 3 (“... The appropriation provisions [for the cost of the convention] ... shall constitute a first claim on the state treasury.”).

⁹ See Alaska State Constitution, Article XIII, section 1 (“Amendments to this constitution may be proposed by a two-thirds vote of each house of the legislature. The lieutenant governor shall prepare a ballot title and proposition summarizing each proposed amendment, and shall place them on the ballot for the

FOOTNOTES (continued)

next general election. If a majority of the votes cast on the proposition favor the amendment, it shall be adopted. ...”).

¹⁰ The following excerpts from the Minutes of the 1955 Constitutional Convention for January 5, 1956 set out the proposed amendment for allowing constitutional amendments by initiative and the vote on that amendment, although in the interest of space the discussion on it is omitted:

PRESIDENT EGAN: ... Mr. Kilcher, you may offer your amendment. The Chief Clerk will please read the proposed amendment.

CHIEF CLERK: "Amend Section 1 [of Article XI, relating to "Initiative, Referendum, and Recall"], line 2, to add after the first word 'laws', the words, 'and amendments to this constitution' and add after the second word 'laws' the words, 'and amendments to this constitution'. Add a new section [to Article XI] to be numbered Section 7 and to read as follows: 'Section 7. An initiative petition proposing a constitutional amendment shall be signed by twenty per cent of the number of votes cast for governor in the next preceding general election in which the governor was chosen. Initiative petitions proposing constitutional amendments shall be filed with the attorney general. If the proposed constitutional amendment, in substantially this form in which it was submitted, is not presented by the Legislature to the voters for their approval or rejection by the next regular session of the Legislature, the proposed constitutional amendment shall be submitted to the voters for their approval or rejection at the next general election, and be enforced, if sixty-five per cent of the votes cast are in favor of the amendment.' "

...

KILCHER: I would like to move that the amendment in its entirety be adopted.

PRESIDENT EGAN: Mr. Kilcher moves that the proposed amendment be adopted. Is there a second?

V. RIVERS: I second the motion.

...

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. Kilcher be adopted by the Convention?" All those in favor of the adoption of the proposed amendment will signify by saying "aye", all opposed by saying "no". The "noes" have it and the proposed amendment has failed of adoption.

¹¹ See Alaska State Constitution, Article XIII, section 3 ("If during any ten-year period a constitutional convention has not been held, the lieutenant governor shall place on the ballot for the next general election the question: 'Shall there be a Constitutional Convention?' ...").

¹² See Alaska State Constitution, Article XIII, section 3 ("... If a majority of the votes cast on the question [i.e., "Shall there be a Constitutional Convention?"] are in the negative, the question need not be placed on the ballot until the end of the next ten-year period. ...").

¹³ Although the initiative process cannot be used to propose a constitutional amendment directly, an initiative could be used to call a constitutional convention. Section 11 of Article XII provides in part, "Unless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of Article XI." The Minutes of the Constitutional Convention for January 28 show that the question was specifically raised whether Section 11 of Article XII meant that an initiative could be used to call a constitutional convention even though it cannot be used to propose an amendment to the constitution directly. Here is the portion of the Minutes recording that discussion:

KILCHER: In Section 2 [of Article XIII], it says ["The legislature may provide for a constitutional convention."] Does that ["legislature"] in this case also mean the law including initiative? We have a general policy [i.e., Section 11 of Article XII] that was adopted a few days ago that "the legislature" would include initiative and also, I think Mr. Robertson yesterday in a discussion seemed

FOOTNOTES (continued)

to have been of the opinion that an initiative can call an amendment, when we discussed the capital question, so I wanted to have this understood.

DAVIS: If that was addressed to me I was reading a note here and didn't get the first part of it. However, in my opinion the mere use of the word "legislature" at this point under the policy statement we adopted a while ago does not limit it to the word "legislature". Now, it's my remembrance that the initiative article itself is not made applicable to the constitutional amendments, but I am not certain. I haven't checked it.

PRESIDENT EGAN: Mr. Ralph Rivers.

R. RIVERS: If I may, the initiative article is not applicable as far as amending the constitution by initiative, but it wouldn't prevent the initiative from operating to bring about a referendum.

PRESIDENT EGAN: Mr. Kilcher, does that answer your question?

KILCHER: I am not satisfied. I don't quite understand. I mean, my vote on Mr. Davis' amendment will hinge on this question.

PRESIDENT EGAN: Mr. McLaughlin, could you answer?

MCLAUGHLIN: Mr. Chairman, I am convinced that the word "legislature" in Section 2 means that the people can, by the initiative, pass an act calling a constitutional convention and making provision in it.

HINCKEL: Mr. President.

PRESIDENT EGAN: Mr. Hinckel, Mr. Kilcher still has the floor.

KILCHER: No, it was only a question.

PRESIDENT EGAN: Mr. Hinckel.

HINCKEL: I was going to attempt to answer Mr. Kilcher's question. During the Committee meeting, it was discussed at considerable length, and it was the intent of the Committee that through the initiative they could initiate a call for the convention, but the people could not initiate an amendment to the constitution itself.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. Davis be adopted by the Convention?" All those in favor of adopting the amendment will signify by saying "aye"; all opposed by saying "no". The "ayes" have it and the amendment is ordered adopted. [emphasis added]

As one can see, it was agreed no less than three different times by three different delegates (Messrs. Davis, McLaughlin and Hinckel) that the initiative could be used to exercise the legislature's power under section 2 of Article XIII to call a constitutional convention, and this is almost certainly what Delegate Ralph Rivers meant as well when he said "referendum" — i.e., a vote of the people to call a constitutional convention — or else he seems to have misspoken and meant to say "convention" instead of "referendum."

¹⁴ See Alaska State Constitution, Article XIII, section 2 ("The legislature may call constitutional conventions at any time."). The use of the word "may" means the authority is permissive instead of mandatory, so the legislature can exercise this authority whenever it wants, but is not required to do so.

¹⁵ See Alaska State Constitution, Article XIII, section 1 ("Amendments to this constitution may be proposed by a two-thirds vote of each house of the legislature. The lieutenant governor shall prepare a ballot title and proposition summarizing each proposed amendment, and shall place them on the ballot for the next general election. If a majority of the votes cast on the proposition favor the amendment, it shall be adopted. Unless otherwise provided in the amendment, it becomes effective thirty days after the certification of the election returns by the lieutenant governor."). There is nothing in section 1 that conditions this authority of the legislature upon the outcome of a vote under Article XIII, section 3.

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¹⁶ See Alaska State Constitution, Article XIII, section 3 (“... If a majority of the votes cast on the question [i.e., “Shall there be a Constitutional Convention?”] are in the affirmative, ... [t]he lieutenant governor shall issue the call for the convention. ...”).

¹⁷ See Alaska State Constitution, Article XIII, section 3 (“... Unless other provisions have been made by law, the call shall conform as nearly as possible to the act calling the Alaska Constitutional Convention of 1955, including, but not limited to, number of members, districts, election and certification of delegates, ...”) (emphasis added). Items in the main text that are not specifically listed in constitutional provision quoted in the preceding sentence were included in the call for the 1955 Constitutional Convention. See chapter 46, SLA 1955.

¹⁸ See Alaska State Constitution, Article XIII, section 3 (“... Unless other provisions have been made by law, the call shall conform as nearly as possible to the act calling the Alaska Constitutional Convention of 1955, including ... ordinances. ...”). Under section 18 of the call for the 1955 Constitutional Convention, “The convention shall have power to incur such expenses as may be necessary, including but not limited to expenses for employment of such clerical, technical, and professional personnel as it may require, in order to exercise the powers conferred and to perform the duties imposed by this Act.” See section 18, chapter 46, SLA 1955. Thus a new constitutional convention would be able to change its budget from the amount set out in its call unless the legislature enacts a law to prevent section 18 of the 1955 call from operating.

¹⁹ See Alaska State Constitution, Article XIII, section 3 (“... Unless other provisions have been made by law, the call shall conform as nearly as possible to the act calling the Alaska Constitutional Convention of 1955”).

²⁰ See Alaska State Constitution, Article XIII, section 3 (“... If a majority of the votes cast on the question are in the affirmative, delegates to the convention shall be chosen at the next regular statewide election, unless the legislature provides for the election of the delegates at a special election. ...”).

²¹ See Alaska State Constitution, Article XIII, section 3 (“... Unless other provisions have been made by law, the call shall conform as nearly as possible to the act calling the Alaska Constitutional Convention of 1955, including ... election and certification of delegates, ...”).

²² See section 2, chapter 46, SLA 1955 (“Delegates to the convention shall possess the qualifications of legal voters of Alaska and shall have been residents of Alaska for not less than three years immediately preceding the first day of the convention. The holding of the office of delegate or any other office of the convention shall not constitute a disqualification for selection for or the holding of any other office, and the holding of any other office, except an appointive office under the Federal Government, shall not constitute a disqualification for election to or the holding of office as a delegate or any other office of the convention.”).

²³ Clearly, such a requirement distinguishes between appointed federal officials and everyone else and discriminates against the former, and the question is whether that discrimination would violate the Equal Protection clauses of the U.S. Constitution. See U.S. Constitution, Amendment XIV, section 1 (“No state shall ... deny to any person within its jurisdiction the equal protection of the laws.”). The most lenient standard for reviewing governmental discrimination between classes of citizens is whether the discrimination has a “rational basis.” In Territorial days, the discrimination against federal officials might have been justified under this lenient standard on the basis of not wanting all the employees in the Territorial government (other than the Territorial legislators) from dominating the constitutional convention. However, there is no similar justification today, nor does any legitimate basis for such discrimination come readily to mind.

²⁴ The doctrines of federal constitutional law have evolved significantly against residency requirements since 1955.

FOOTNOTES (continued)

Durational residence laws penalize those persons who have traveled from one place to another to establish a new residence during the qualifying period. Such laws divide residents into two classes, old residents and new residents, and discriminate against the latter The constitutional question presented is whether the Equal Protection Clause of the Fourteenth Amendment permits a State to discriminate in this way among its citizen. To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. ... In the present case, whether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel) we conclude that the State must show a substantial and compelling reason for imposing durational residence requirements.

Dunn v. Blumstein, 405 U.S. 330, 334-335 (1972) (citations and footnotes omitted). “[M]oving from State to State or to the District of Columbia [is] a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.” *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). In *Dunn* a one-year residency requirement in order to vote was found unconstitutional for lack of a “compelling” governmental interest for the one-year requirement. However, a one-year residency requirement in order to get a divorce is constitutionally permissible, *Sosna v. Iowa*, 419 U.S. 393 (1975), and to qualify for lower in-state tuition at a state college or university, *Starns v. Malkerson*, 326 F.Supp. 234 (D.Minn. 1970), affirmed per curiam, 401 U.S. 985 (1971). In *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), the U.S. Supreme Court identified two factors in the right-to-travel cases for deciding whether a “compelling” governmental interest has to be shown: “First, ... whether the waiting period would deter migration[.] Second, ... the extent to which the residence requirement served to penalize the exercise of the right to travel.” 415 U.S. at 257 (citation omitted).

In 1974 the Alaska Supreme Court applied the federal “strict scrutiny/compelling interest” test and upheld the three-year residency requirement under section 2 of Article II for people to qualify to run for the legislature. *Gilbert v. State*, 526 P.2d 1131 (Alaska 1974). The court cited a “compelling” governmental interest in permitting a candidate to become exposed to and known by his/her prospective constituents so they could judge her/his character, knowledge and reputation, and a further “compelling” interest in ensuring that persons elected to the legislature will be familiar with the diverse character of the state for which they will participate in the law-making process. If these interests are “compelling” in the case of candidates who will help make a state’s statutory law, then *a fortiori* they should be so with respect to candidates who will participate in rewriting the state’s constitution.

²⁵ See Alaska State Constitution, Article XIII, section 3 (“... Unless other provisions have been made by law, the call shall conform as nearly as possible to the act calling the Alaska Constitutional Convention of 1955, including ... election ... of delegates,”) (emphasis added).

²⁶ See section 11, chapter 46, SLA 1955 (“The election of delegates shall be conducted without any reference to the political party affiliations of the candidates, and the ballots used shall be nonpartisan in every respect. ...”).

²⁷ See Alaska State Constitution, Article XIII, section 3 (“... Unless other provisions have been made by law, the call shall conform as nearly as possible to the act calling the Alaska Constitutional Convention of 1955, including ... election ... of delegates,”).

²⁸ See section 6, chapter 46, SLA 1955 (“Candidates for the office of delegate shall be nominated by petition filed in person or by mail with the clerk of the court of the judicial division in which the candidate is a resident on or before May 10, 1955. Each petition shall be accompanied by a fee of ten dollars, except that the fee for candidates for election from the Territory at large shall be forty dollars. ...”).

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²⁹ These tiers of delegate districts, and the number of delegates from each, are described in footnote 4 above. In light of the U.S. Supreme Court’s decisions since 1955 on reapportionment and the “one man, one vote” principle for state legislative districts, it is highly likely that — even if the three-tier system of electing delegates to the convention were followed for a new convention — the number of delegates representing some of the districts would have to be changed. For example, the “Anchorage Recording District” (i.e., basically all of what is today’s Municipality of Anchorage) elected only one local delegate in 1955, the same as each of the 16 other local districts. There were only 12 delegates elected on a region-wide basis for the Third Judicial Division (which includes Anchorage, the Kenai Peninsula and the Mat-Su valley), versus 55 delegates in total. Such representation clearly would not reflect today’s population density in these areas.

³⁰ See section 7, chapter 46, SLA 1955 (“... Each nominating petition shall be signed by legally qualified voters of Alaska residing within the election district in and for which the delegates nominated are to be elected equal in number to at least five per cent of the number of votes cast in the election district in the General Election of 1954, provided that no nominating petition need contain more than two hundred signatures nor may it contain less than fifty signatures, in any election district.”)

³¹ See section 7, chapter 46, SLA 1955 (“... No voter shall sign a petition or petitions for a greater number of candidates than are to be elected in the election district in which he resides, except that any petitioner may sign not more than seven petitions of candidates for election as delegates from the district composed of the Territory of Alaska at large, in addition to the petition or petitions of candidates from the petitioner’s local and judicial election districts. It is the intent of this Act that qualified petitioners may sign not more nominating petitions than there are delegates authorized from the local and judicial election districts in which the petitioner resides, and in addition may sign not more than seven nominating petitions for candidates seeking election from the Territory at Large.”).

³² See Alaska State Constitution, Article XIII, section 3 (“... Unless other provisions have been made by law, the call shall conform as nearly as possible to the act calling the Alaska Constitutional Convention of 1955 ...”) (emphasis added).

³³ AS 15.13 applies to “candidates,” “political parties” and certain “groups” as defined therein. AS 15.13.400(1)(A) defines a “candidate” to be “an individual who files for election ... for constitutional convention delegate, or who campaigns as a write-in candidate for any of these offices” (emphasis added). The procedure for becoming a candidate for constitutional convention delegate “shall conform as nearly as possible to the act calling the Alaska Constitutional Convention of 1955” “[u]nless other provisions have been made by law” (see Alaska State Constitution, Article XIII, section 3), and under the 1955 procedure the gathering of signatures on a would-be candidate’s nominating petition occurs before the petition is filed, at which point the person (if otherwise qualified) qualifies to have her/his name appear on the ballot in the election of the constitutional convention delegates. See section 6, Chapter 46, SLA 1955. So a person gathering signatures on a nominating petition for himself/herself, or on whose behalf such signatures are being gathered, would not be a “candidate” — and hence not subject to AS 15.13 — until that nominating petition is filed.

³⁴ See AS 15.13.010(a) (“This chapter applies ... in every election for governor, lieutenant governor, a member of the state legislature, a delegate to a constitutional convention, or judge seeking electoral confirmation.”).

³⁵ This is because the signature-gathering group would not be a “group” as defined for purposes of the state election campaign laws. AS 15.13.400(5) provides:

- (5) “group” means
 - (A) every state and regional executive committee of a political party; and
 - (B) any combination of two or more individuals acting jointly who organize for the principal purpose of influencing the outcome of one or more elections *and* who take action the major purpose

FOOTNOTES (continued)

of which is to influence the outcome of an election; a group that makes expenditures or receives contributions with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate shall be considered to be controlled by that candidate; a group whose major purpose is to further the nomination, election, or candidacy of only one individual, or intends to expend more than 50 percent of its money on a single candidate, shall be considered to be controlled by that candidate and its actions done with the candidate's knowledge and consent unless, within 10 days from the date the candidate learns of the existence of the group the candidate files with the commission, on a form provided by the commission, an affidavit that the group is operating without the candidate's control; a group organized for more than one year preceding an election and endorsing candidates for more than one office or more than one political party is presumed not to be controlled by a candidate; however, a group that contributes more than 50 percent of its money to or on behalf of one candidate shall be considered to support only one candidate for purposes of AS 15.13.070, whether or not control of the group has been disclaimed by the candidate [emphasis added]

The underlined portion of paragraph (B) is the actual definition of “group.” The rest of that paragraph describes when such a “group” is deemed to be “under the control” of a “candidate.” It is implicit, from the context of these actions to imply “control” over a “group,” that “influencing the outcome of an election” occurs after a person has filed for election and become a “candidate.” This conclusion is also explicit from the language of the actual definition itself. Gathering signature’s for someone’s nominating petition is not, in itself, “organiz[ing] ... to influence the outcome ... of an election” or “act[ing] ... to influence the outcome ... of an election” because, unless the petitions are actually filed, the gathering of signatures on it cannot “influence” the election outcome. In other words, if the person to be nominated by a nominating petition never files that petition, then the gathering of signatures on the petition is a nullity as far as the election itself goes. Since the “purpose” and “action” of the group cannot, by themselves, “influence the outcome” of the election of constitutional convention delegates, then the signature-gathering group is not a “group” as defined in AS 15.13.400(5) for purposes of the state election campaign laws.

³⁶ See AS 24.45.171(7) (“ ‘legislative action’ means the preparation, research, drafting, introduction, consideration, modification, amendment, approval, passage, enactment, defeat, or rejection of any bill, resolution, amendment, motion, report, nomination, appointment, or other matter by the legislature, or by a member or employee of the legislature acting in an official capacity; it includes, but is not limited, to the action of the governor in approving or vetoing a bill or the action of the legislature in considering, overriding, or sustaining that veto and the action of the legislature in considering, confirming, or rejecting an executive appointment of the governor”) (emphasis added). A constitutional convention is not the legislature, and no delegate to such a convention is a member or employee of the legislature. Thus, “legislative action” as now defined does not include action by a constitutional convention or any delegate or employee of such a convention.

³⁷ See AS 24.45.171(1) (“ ‘administrative action’ means the proposal, drafting, development, consideration, amendment, adoption, approval, promulgation, issuance, modification, rejection, or postponement by any state agency of any rule, regulation, order, decision, determination, or any other quasi-legislative or quasi-judicial action or proceeding whether or not governed by AS 44.62 (Administrative Procedure Act)”). “[A]gency” in turn is defined to be “a state department, division, commission, board, office, bureau, institution, corporation, authority, organization, committee, council or board in the executive branch, or independent of the executive branch, of state government” (see AS 24.45.171(2)). A constitutional convention might well be an “institution [or] organization ... independent of the executive branch[.]” and thus would be an “agency” for purposes of AS 24.45. But a constitutional amendment or a new state constitution is not a “rule, regulation, order, decision, determination, or ... other quasi-legislative or quasi-judicial action or proceeding[.]” and so the convention’s actions in approving constitutional amendments or revisions would not be “administrative action” as now defined in these statutes.

³⁸ See section 20, chapter 46, SLA 1955 (“There is hereby appropriated the sum of \$300,000, or so much thereof as may be necessary, for defraying the expenses of the elections provided for herein and the expenses of the convention, including compensation of the delegates, and for all other purposes of this Act.”).

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³⁹ For the conversion of \$300,000 in 1955 to today's equivalent buying power based on the U.S. GDP deflator (measuring national inflation), see Samuel H. Williamson, *What is the Relative Value?* (Economic History Services: 2002), on the internet at www.eh.net/hmit/compare/.

⁴⁰ Of course, the Bill of Rights in the first 10 Amendments of the U.S. Constitution would still apply in Alaska, and anything put into the Alaska constitution that violated those federal rights would be unconstitutional and invalid under the U.S. Constitution.

⁴¹ See Alaska State Constitution, Article XIII, section 4 (“Constitutional conventions shall have plenary power to amend or revise the constitution, subject only to ratification by the people. No call for a constitutional convention shall limit these powers of the convention.”). “Plenary” means “complete in all respects; unlimited or full” (emphasis added). *American Heritage® Dictionary of the English Language* (4th ed. 2000).

⁴² The State and Local Government Affairs Committee would like to give special acknowledgment and appreciation to Commonwealth North for sharing information regarding some of the surveys it has conducted.

⁴³ There is already a spending limit in the Alaska State Constitution. Section 16 of Article IX, which the voters approved as a constitutional amendment in 1982, limits state spending to \$2.5 billion a year, adjusted for inflation and for increases in state population, with one third of the limit to be “reserved for capital projects and loan appropriations.” In FY 1982 state revenues exceeded \$4 billion a year. The present limit is too high to provide a meaningful limitation on state spending today.

⁴⁴ The Trustees of the Permanent Fund Corporation have recommended that the amount available for state spending each year, including for PFDs, be 5% of the average year-end value of the Permanent Fund over the most recent five years. This is a well recognized and widely used approach, and many private foundations and endowments that are tax-exempt under the Internal Revenue Code use a percentage of their assets similar to this for determining how much money they distribute each year.

Currently, section 15 of Article IX of the Alaska State Constitution says that “[a]ll income from the permanent fund shall be deposited in the general fund unless otherwise provided by law[.]” but does not prescribe how to determine the amount of this “income.” Instead, “income” is defined by statute, and it is net income determined “in accordance with generally accepted accounting principles, excluding any unrealized gains or losses.” See AS 37.13.140. There are two problems with the present scheme. First, managers of the Fund can “play games” with the its “income” by realizing gains from their investments and deferring the realization of their losses, thereby overstating the Fund’s actual performance. This has not been a problem in the past, but that fact doesn’t guarantee there couldn’t be one in the future. Second, PFDs use up 52½% of the Fund’s realized income instead of half. This is easy to show: The total PFD amount each year is “50 percent of the income available for distribution” (see AS 37.13.145(b)), and this “income available for distribution” is defined to be “21 percent [not 20%] of the net income of the fund for the last five fiscal years” (see AS 37.13.140). If “Avg” represents the average net income each year during the last five years, then by definition the total net income of the Permanent Fund for those five years equals $5 \times Avg$. The “income available for distribution” equals 21% of that, or $21\% \times (5 \times Avg)$. The total amount for PFDs equals 50% of this “income available for distribution,” or $50\% \times \{21\% \times (5 \times Avg)\}$, and

$$\begin{aligned} 50\% \times \{21\% \times (5 \times Avg)\} &= 50\% \times \{105\% \times Avg\} \\ &= 52\frac{1}{2}\% \times Avg. \end{aligned}$$

This shows that, over time, PFDs take 52½% of the Permanent Fund’s realized net income, not half.

⁴⁵ Currently section 5 of Article IV of the Alaska State Constitution provides, “The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council.”

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⁴⁶ Currently section 6 of Article IV of the Alaska State Constitution provides, “Each supreme court justice and superior court judge shall, in the manner provided by law, be subject to approval or rejection on a nonpartisan ballot at the first general election held more than three years after his appointment. Thereafter, each supreme court justice shall be subject to approval or rejection in a like manner every tenth year, and each superior court judge, every sixth year.”

⁴⁷ Proposals along this line appear to be reactions to the Alaska Supreme Court’s decision in *Bess v. Ulmer*, 985 P.2d 979 (Alaska 1999). There the court reviewed three separate constitutional changes that 2/3 of each house of the legislature had approved for submission to the voters — one to give state prisoners only the minimum rights and privileges guaranteed them by the U.S. Constitution, a second to define “marriage” as exclusively between a man and woman and forbid any interpretations of state law to extend “marriage” to same-sex couples, and the third to transfer the authority to reapportion legislative districts after each U.S. census from the governor to an independent body. The court took the proposal regarding prisoners off the ballot completely, on the grounds that it was a “revision” of the state constitution and not merely an “amendment” to it (the court also deleted the sentence in the marriage amendment about the interpretation of state law regarding marriage, but it did so on the grounds that the definition of “marriage” in the first sentence made the second one surplusage). In taking the prisoner proposition off the ballot, the court pointed out that the original draft of Article XIII offered to the 1955 Constitutional Convention allowed successive legislatures to amend or revise the constitution, but the final constitution only provides for the legislature to propose amendments. The court summarized the distinction made by the constitutional framers between “amending” and “revising” the constitution as follows:

In debating the text of article XIII, section 4, one constitutional convention delegate stated “[t]here is a big difference between revisions, which implies rewriting the constitution, and making amendments to specific articles or sections of the constitution.” Although no precise definition of the term was reached by the Framers (perhaps because such a task is not possible), there was consensus that “amendments” contemplated simple change, whereas “revision” would encompass broader and more comprehensive changes. The Framers also understood that “[r]evision includes amendment but amendment does not include revision.”

985 P.2d at xxx (footnotes omitted; square brackets are by the court in its opinion).

The court is correct that the Alaska State Constitution makes a distinction between an “amendment” to the constitution and a “revision” of it, and it vests the legislature with the power only to propose “amendments” to the constitution: “Amendments to this constitution may be proposed by ... the legislature” (emphasis added). See Alaska State Constitution, Article XIII, section 1. In contrast, “Constitutional conventions shall have plenary power to amend or revise the constitution” (emphasis added). See Alaska State Constitution, Article XIII, section 4.

⁴⁸ A constitutional amendment allowing the legislature to annul regulations by joint resolution instead of by statute has been voted on at least once before, and possibly twice, and was rejected by the people.

⁴⁹ This is similar to a proposed constitutional amendment to require legislative confirmation of deputy commissioners and division directors, instead of only confirming the commissioners of the principal departments in the Executive Branch. In *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976), the Alaska Supreme Court had held that under the “Separation of Powers” Doctrine, the legislative authority under the constitution to confirm the governor’s appointments must be narrowly construed. The court ruled that the legislature could not require legislative confirmation of deputy commissioners and division directors because they are not within the scope of office for which legislative confirmation is prescribed under sections 25 and 26 of Article III of the Alaska State Constitution. The amendment was proposed to overturn the result of the *Bradner* case, but the people voted it down.

⁵⁰ An example of court-ordered “appropriations” might be the courts’ orders build more state prisons and improve the conditions in the existing ones, because of extreme overcrowding and run-down prisons

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violate the prisons' constitutional right against "cruel and unusual" punishment under the Eighth Amendment of the U.S. Constitution and section 12 of Article I of the Alaska State Constitution , both of which provide, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

⁵¹ This may well be a reaction to the U.S. Supreme Court's refusal to let the legislature assume the legal representation of the state in the *Katie John* appeal after Governor Knowles had decided to drop that appeal. Although the legislature under the state constitution is to provide for the procedures for suing the state under Article II, section 21, it is the Executive Branch that represents the state under Article III, section 16.

⁵² Section 3 of Article VIII of the Alaska State Constitution provides, "Wherever occurring in their natural state, fish, wildlife and waters are reserved to the people for common use." This section has been held to prevent people acquiring legal ownership of tidelands from the state (i.e., lands submerged during high tides) from keeping the public out. *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988). It would seem from this decision that, where waters are constantly present instead of intermittently at high tide, it would be impermissible to create floating "fish farms" because they would impede the public's "common use" of the waters within those farms for fishing and navigation.

⁵³ The U.S. Supreme court has held, for example, that rewarding state residents for enduring past hardships and for their past contributions to Alaska is not even permissible as a state purpose for discriminating among residents on the basis of their length of residency. *Zobel v. Williams*, 457 U.S. 55 (1982).

⁵⁴ In *Hicklin*, the lessees in question were oil companies leasing state land on the North Slope for oil and gas exploration and development, and they or their pipeline-company affiliates were going to lease additional state lands for a right-of-way for a pipeline from the North Slope to Valdez. State law required the Department of Natural Resources (DNR) to offer state lands for lease for pipeline right-of-way purposes only on the condition that the pipeline lessees would — 1) give preference to Alaska residents over non-residents in hiring workers to build the Trans Alaska Pipeline System, and 2) would contractually require their contractors and subcontractors to agree, as part of their respective contracts, to give similar preference in their own hiring for TAPS-related work and supplies. Since the companies were anxious to build TAPS, they voluntarily entered into a contractual right-of-way lease with the state containing this discrimination-against-nonresidents clause.

Regarding the "owner state" view, the U.S. Supreme Court wrote:

Alaska contends that because the oil and gas that are the subject to Alaska Hire are owned by the State, this ownership, of itself, is sufficient justification of the [Alaska Hire] Act's discrimination against nonresidents, and takes the Act totally without [i.e., outside] the scope of the Privileges and Immunities Clause [of the U.S. Constitution].

...

Dispositive though this factor [i.e., state ownership] may be in many cases in which a State discriminates against nonresidents, it is not dispositive here.

The reason is that Alaska has little or no proprietary interest in much of the activity swept within the ambit of Alaska Hire; and the connection of the State's oil and gas with much of the covered activity is sufficiently attenuated so that it cannot justifiably be the basis for requiring private employers to discriminate against nonresidents.

...

Alaska Hire ... goes so far as to reach suppliers who provide goods or services to subcontractors who, in turn, perform work for contractors despite the fact that none of these employers may themselves have direct dealings with the State's oil and gas or ever set foot on state land.

...

FOOTNOTES (continued)

We believe that Alaska's ownership of the oil and gas that is the subject matter of Alaska Hire simply constitutes insufficient justification for the pervasive discrimination against nonresidents that the act mandates.

437 U.S. at 528 – 531. In other words, state ownership might have justified discriminating against nonresidents in hiring people to work directly with the oil and gas or on the physical construction of the pipeline itself on state lands, but the 1970s version of Alaska Hire simply went too far beyond this.

Other portions of the Court's decision in *Hicklin* suggest, however, that even if Alaska Hire had been limited just to the hiring of workers to work directly with oil and gas from state lands or on the construction of the pipeline on state lands, it still might have been unconstitutional. The Court cited prior cases in which it had required an inquiry into whether nonresidents constitute a particular "evil" that could be solved by the particular discrimination being practiced against them, or whether there is any other "substantial reason" for the discrimination which the actual discrimination being practiced would solve. In terms of justifying Alaska Hire on the basis of an "evil" represented by nonresidents, the Court wrote, "the record ... indicates that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment[.]" *Id.*, at 526 – 528. In other words nonresidents weren't the cause of the "evil" of Alaska's high unemployment. Instead, the Court saw the record as showing that the cause of this "evil" was principally "the fact that a substantial number of Alaska jobless residents — especially the unemployed Eskimo and Indian residents — were unable to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities[.]" *Id.* The only relationship between nonresidents and this "evil" was in the fact "that the employment of nonresidents threatened to deny jobs to Alaska residents only to the extent that jobs for which untrained residents were being prepared might be filled by nonresidents before the residents' training was completed." *Id.* The Court then assumed for the sake of argument that this connection between nonresidents and the "evil" of unemployment among residents might be sufficient to justify discrimination against nonresidents, but it concluded that Alaska Hire again went too far afield in addressing this contribution by nonresidents to the "evil" of high unemployment:

[T]he discrimination the Act works against nonresidents does not bear a substantial relationship to the particular "evil" they are said to present. Alaska Hire simply grants all Alaskans, regardless of their employment status, education, or training, a flat employment preference for all jobs covered by the Act. A highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job-training program. If Alaska is to attempt to ease its unemployment problem by forcing employers within the State to discriminate against nonresidents — again, a policy which may present serious constitutional questions — the means by which it does so must be more closely tailored to aid the unemployed the Act is intended to benefit.

Id., at 527 – 528. Probably the best conclusion to be drawn from *Hicklin* is that, even for an "owner state," it must be careful to craft a contractual resident-hire preference that it is not overly inclusive in its application and does not overreach beyond the particular "evil" or other permissible and "substantial" state interest that it is meant to deal with.