

SJR

39

Bradley  
3/17/86

Original sponsors: Rodey, Abood,  
Bennett, et al

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE JOINT RESOLUTION NO. 39 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 Proposing an amendment to the Constitu-  
6 tion of the State of Alaska relating to  
7 the right of a citizen to keep and bear  
8 ~~fire~~arms.

9 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 \* Section 1. Article I, sec. 19, Constitution of the State of Alaska,  
11 is amended to read:

12 SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The [A WELL-REGULATED  
13 MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right of  
14 each citizen of the state [THE PEOPLE] to keep and bear arms for  
15 personal defense and for the defense of family, property, and the  
16 state and for lawful hunting, recreation, and other lawful purposes,  
17 shall not be infringed by the state or by a borough or city of the  
18 state.

19 \* Sec. 2. LEGISLATIVE INTENT. (a) In proposing the amendment to art.  
20 I, sec. 19, Constitution of the State of Alaska, in sec. 1 of this resolu-  
21 tion, the legislature intends only that the amendment proposed clarify the  
22 Alaska Constitution by providing that the right to keep and bear arms is an  
23 individual right rather than a collective right. The amendment, if adopt-  
24 ed, should not be construed to preclude the regulation of the manner in  
25 which arms may be borne, carried, or used. For example, the adoption of  
26 this amendment should not be used to repeal or to render unconstitutional  
27 existing statutes such as AS 11.41.200 or 11.61.200 or existing municipal  
28 ordinances.

29 (b) In the preparation of its neutral summary under AS 15.58.020

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(6)(C), the Legislative Affairs Agency shall consider the statement of legislative intent contained in (a) of this section.

\* Sec. 3. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y - STATE CAPITOL  
JUNEAU ALASKA 99811  
907.465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 18, 1986

SUBJECT: "Commentary on Proposed Amendment to Alaska  
Right to Bear Arms Guarantee"  
[CSSJR 39(Judiciary)]

TO: Senator Pat Rodey  
Chair, Senate Judiciary Committee

FROM: Richard A. Bradley  
Legislative Counsel

Suzanne LaPierre has asked that I comment on a "Commentary on Proposed Amendment to Alaska Right to Bear Arms Guarantee." While the lack of time has prevented a more thorough analysis, I have some few reservations about points made within the "commentary."

The commentary addresses SJR 39 in the form that it was introduced.

The commentary states that the provision "explicitly protects the traditional rights that gun owners in Alaska always assumed were guaranteed." The statement is problematical: I believe that the existing provision of the Constitution is entitled to that reading and I am concerned with the suggestion that a changed constitutional provision will be read as being more traditional than the existing provision.

The problem may be with the understanding of what is included in the "traditional rights of gun owners." While I am not a follower of that question, it seems that there have been numerous controversies over just what rights the constitutional provisions guaranteed.

I. To Whom the Right Belongs

The commentary notes that SJR 39 speaks in terms of "each citizen of the state." The commentary suggests that the

Senator Pat Rodey  
Page 2  
March 18, 1986

"full enjoyment" of the rights of citizenship is not enjoyed by "convicted felons, lunatics, and illegal aliens."

I accept the statement and even its relevance to SJR 39; I have come to doubt the suggestion that the constitutional provision should limit the right to citizens. While it is accurate to say that the group described does not have the "full enjoyment" of the "rights of citizenship", it does not follow that the right to bear arms may be limited to those enjoying the "full benefits" of citizenship. And, of course, the provision is not written in that framework: It does not limit the right to bear arms to those "enjoying the full benefits of citizenship."

I would like to pass quickly over the phrase regarding "convicted felons, lunatics, and illegal aliens." An individual convicted of a felony not involving moral turpitude may vote. Art. V, sec. 2, Alaska Constitution. Even a person convicted of a felony involving moral turpitude may sue. Bush v. Reid, 516 P.2d 1215 (Alaska 1973). The term "lunatic" is, for better or worse, in disuse. To deprive an individual of the right to vote in this context an affirmative judicial determination of "unsound mind" is required. But that even here, while the individual suffering from such a determination may not vote, the person retains citizenship and can probably own a weapon. AS 11.66.200 - 11.66.220.

Concepts of citizenship would exclude all aliens, legal as well as illegal. Since legal aliens have many of the protections of the U.S. and Alaska Constitution though not the right to vote, the provision may be overbroad. Both the due process clause of the U.S. Constitution (14th Amendment, sec. 1) and the equal protection clause of the Alaska Constitution (art. I, sec. 1) protect "persons" without regard to citizenship.

While I assume that the purpose is not to permit discrimination against nonresident or noncitizen hunters, I note that the provision, if adopted, would seem to authorize legislation to prevent nonresident hunters from hunting in the state because as noncitizens, they may not bear arms.

Finally, while I have not reviewed the law review article from Oklahoma cited, I believe that the suggested reliance on State v. Kessler, 289 Or. 359, 614 P.2d 94, 99 (1980) is misplaced since the analagous Oregon constitutional provision extends the privilege to "the people", without regard to citizenship, unlike SJR 39.

## II. What Constitutes Arms.

Several points:

I have less information than the author of the Commentary on the arms that are kept by Alaskans. Others will have to determine whether Alaskans currently use machine guns, bazookas, and other more unusual weapons or only more "commonly" kept weapons.

Assuming that Alaskans do not use the less "commonly" used weapons, however, it seems clear that the basis for the understanding is something apart from the words of the resolution itself.

There does seem to be a legal history of such legislation going back to 1689, in England, according to State v. Kessler, 289 Or. 359, 614 P.2d 94 (Oregon 1980). The English Bill of Rights enacted in 1689 apparently contains the first instance of a legislature granting citizens the right "to have Arms for their Defence, suitable to their Conditions, and allowed by Law." See Kessler, 614 P.2d at 96.

There are, therefore, understandings regarding the meanings of similar provisions, at least when the language of the later provision was not inconsistent with the understandings. That is, these provisions are placed within the historical context unless the language in the particular provisions was so clear that there was no need to resort to the historical development of the idea.

The Kessler case as well as State v. Delgado, 692 P.2d 610 (Oregon 1984) present the problem. Oregon has a simple and direct provision: "The people have the right to bear arms for the defence [sic] of themselves, and the State, . . ." [Art. I, sec. 27, Oregon Const.] The two cases raise the question of the limits of the understanding of what is meant by "arms". The Kessler case was concerned with a "slugging weapon", a "billy".

The court noted that in the colonial and revolutionary war era, weapons used by militiamen and in defense of the person or the home were the same. The court noted that the historical analysis of the provision indicates that

the drafter intended "arms" to include the hand-carried weapons commonly used by individuals for personal

defense. The club is an effective, hand-carried weapon which cannot logically be excluded from this term. We hold that the defendant's possession of a billy club in his home is protected by Article I, section 27, of the Oregon Constitution. [614 P.2d at 100.]

The Delgado case presents the question of the possession of a "switchblade" knife.

The appropriate inquiry in the case at bar is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary or postrevolutionary era, or in 1859 when Oregon's constitution was adopted. In particular, it must be determined whether the drafters would have intended the word "arms" to include the switch-blade knife as a weapon commonly used by individuals for self defense. [692 P.2d at 612.]

The court agreed that if the law sought to prescribe possession of the "jackknife" or "mere pocketknives", the statute would be unconstitutional.

The only difference is the presence of the spring-operated mechanism that opens the knife. We are unconvinced by the state's argument that the switch-blade is so "substantially different from its historical antecedent" (the jackknife) that it could not have been within the contemplation of the constitutional drafters. They must have been aware that technological changes were occurring in weaponry as in tools generally. [692 F.2d at 614.]

To a large extent, the language of the Oregon Constitution is identical in function to that contained within SJR 39 (apart from the "people"/"citizen" problem). It would, therefore, be reasonable to expect them to be construed similarly. The provisions of the Alaska Statutes now prohibit possession of a switchblade. AS 11.66.200(e)(1)(D).

It is fair to say that the reference in SJR 39 to "lawful" uses may well be adequate to authorize legislative regulation of an "unlawful" use of arms. I note simply that a constitutional provision granting the legislature the authority to characterize uses as unlawful may authorize

Senator Pat Rodey  
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more regulation than was intended, notwithstanding several assurances in the commentary to the contrary.

### III. The Right to Keep and Bear Arms

The comments seem generally accurate.

### IV. The Right Shall Not be Infringed by the State or a Municipality

Much of what is suggested seems safe. I don't believe that much light is shed on the authority of a municipality under SJR 39 by the phrase stating that a municipality "could only enact legislation which was absolutely necessary and uniquely necessary" for the particular municipality; it does seem that this statement may be inconsistent with the suggestion of a required "uniformity throughout the state."

### V. Conclusions

The commentary concludes with some generalities that may be accurate.

For my own part, I suspect that the Oregon legislature was probably advised that its bills regulating the use of billys and switchblades were within the ambit of possible legislation. The Supreme Court of Oregon disagreed. The cases point up the problems in predicting what a court will do in its construction of similar constitutional provisions.

With regard to the "individual"/"collective" question, I suggest that an individual right may be recognized by language granting the right to a "person" or an "individual". I suggest that the concept of the right of belonging to a "citizen" be abandoned as unnecessary and diversionary from your more basic goals.

If I may be of further assistance, please advise.

RAB:mkr  
m4/015

A M E N D M E N T

#1

Offered in the SENATE

By the Judiciary Committee

TO: SJR 39

Section 2, page 1, line 22:

Add: "The Legislative Affairs Agency shall include  
in the summary of the proposition required under AS  
15.58.020 the following statement of legislative intent:

The legislature intends only for the proposed amend-  
ment to clarify the Alaska Constitution in providing  
that the right to keep and bear arms is an individual  
rather than a collective right. Nothing in the pro-  
posed language should be construed to preclude the  
manner in which arms may be borne, carried or used.  
For example, in the event this amendment is adopted  
by the voters, its passage shall not be used to  
repeal or render unconstitutional existing statutes  
or ordinances such as those enumerated in AS 11.41.200  
or AS 11.61.200.



person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President should be eligible to that of Vice President of the United States.<sup>20</sup>

### ARTICLE XIII.

§ 1. **Slavery abolished.** Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2. **Enforcement.** Congress shall have power to enforce this article by appropriate legislation.<sup>21</sup>

*Privileges & Immunities Clause of U.S. Constitution*  
ARTICLE XIV.<sup>1</sup>

§ 1. **Citizenship rights not to be abridged by states.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. **Apportionment of representatives in Congress.** Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such

20. Proposed by Congress on December 9, 1803, and declared ratified on September 25, 1804.

21. Proposed by Congress on January 31, 1865, and declared ratified on December 18, 1865.

SENATE AMENDMENT #1

By HALFORD

To: CS SENATE BILL No. SJR 39 (JUD)

To: \_\_\_\_\_ HOUSE BILL No. \_\_\_\_\_

PAGE: 1      LINE: 15

DELETE: personal      INSERT: lawful

DELETE: and for the defense of      INSERT: of self,

*would read "...for lawful defense of self,  
family, property, and the state ..."*

March 25, 1986

FOR IMMEDIATE RELEASE

A resolution which would expand the language of article I, sec. 19 of the Alaska State Constitution addressing the right of individual ~~citizens~~ to keep and bear arms passed the State Senate today. The resolution - SJR 39 - which was sponsored by Senator Patrick Rodey (D-Anch), received the unanimous endorsement from his senate colleagues who joined in force as co-sponsors to the proposal.

"Considering nearly 70% of the households in Alaska possess at least one firearm, and that 22,000 Alaskans are members of the National Rifle Association who also support this effort, it seems quite clear that the right to keep and bear arms is highly guarded by a majority of Alaskans. Considering our subsistence form of lifestyle and the popularity of hunting and recreational activities in Alaska, I feel this individual right is cherished by our residents - perhaps more than in any other state", said Senator Rodey.

The Senator further commented, "This proposal is a positive step toward minimizing state and local interference so law abiding Alaskan citizens can fully enjoy their individual right to own and use firearms for protection of personal defense and property, as well as sporting purposes. By adopting this clarifying language, it will ensure that Alaska will remain unfettered by restrictive gun legislation and that individual liberties will be enhanced and safeguarded."

"While some contend our Constitution allows for a "collective" rather than an "individual" right, I firmly believe it was the intent of our Constitutional framers to uphold an individual's right to bear arms. The purpose of this amendment is to remove any existing ambiguity in the constitutional interpretation.

To paraphrase President Theodore Roosevelt:

"The American people have not surrendered to any set of men, regardless of their position or character, the final right to determine the fundamental questions upon which free self government ultimately depends. The people must be the ultimate makers of their own constitution, and where interpretations of the constitution differ, the people themselves should be given the chance - after full and deliberate judgment - to settle what interpretation their representatives shall adopt as binding."

" I am proud to take the first step forward to represent, what I believe, is the opinion held by a majority of Alaskans. Of course, the final episode will be written only after the proposal passes the House and goes before the voters," remarked the Senator.

The proposal must pass the House by a 2/3 majority, before it will go on the November ballot for a final decision by the voters.

CONSTITUTIONAL AMENDMENTS FOR  
THE RIGHT TO KEEP AND BEAR ARMS

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

These words, from the Second Amendment of the Constitution of the United States, have been used both in defense of, and as an argument against, the individual American's right to keep and bear arms.

Strengthening of a state's constitutional protection of the right to keep and bear arms--or a first-statement of that right--is needed for the following reasons:

First, although it was clearly intended by the framers of the 14th Amendment that states would be precluded from infringing on the right to keep and bear arms, the 2nd Amendment's protections have not yet been incorporated by judges using the 14th Amendment. For the right to be protected from state and local interference, the guarantee must be in the state constitution.

Second, despite the clear intentions of the authors of state constitutions which include the right to keep and bear arms, some judges feel all too free to write their own views into the state constitution. Such judges too frequently take the view that the protection was not of an individual right (despite its listing among other personal rights) or is subject to almost any regulation which does not prohibit possession of all kinds of firearms by persons (even if the restriction is such that it is necessary to take time, effort, money, and even hire a lawyer in order to exercise a constitutionally recognized "right"); or judges just say times have changed, and the framers wouldn't really want widespread gun ownership. In short, they rewrite state constitutions according to their own ideologies, claiming that people really want "gun control" and that the state constitution wouldn't include such protection of the right to keep and bear arms were it being written today.

Thus, it is necessary to make it clear that people want the state constitutions to clarify matters for judges and localities. It must be re-emphasized that the right to keep and bear arms is an individual right (as recognized by seven-eighths of the public--DMI '75 and '78), one which is intended to restrict state and local interference with the ability of law-abiding citizens to own and use firearms for protection of person and property (as well as for the common defense) and for sporting purposes. As shown in public opinion surveys and state referenda and initiatives, the right is overwhelmingly by the people. The guarantees, their meaning, and their contemporaneity must be made clear to local legislative bodies and to the judiciary.

Thirty-nine states have constitutional amendments on the right to keep and bear arms. Most recently, the states of New Hampshire and Nevada approved of constitutional amendments which stressed an individual right to bear arms. Both states' provisions were approved by over seventy percent of the voters in those states during the 1982 election.

Senator Orrin Hatch's Sub-Committee on the Constitution report, completed this past year, has documented the right to keep and bear arms as a major individual right of American citizens. The Senate Sub-Committee, charged with the responsibility of interpreting the Constitution for the Senate, stated that: "The conclusion is thus inescapable that the history, concept, and wording of the Second Amendment to the Constitution of the United States, as well as its' interpretation by every major commentator and court in the first half-century after its ratification, indicates that what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner."

Some have argued that the Second Amendment applies only to the Federal Government, and the states can adopt gun laws without worrying about it.

The Sub-Committee points out that the Bill of Rights was originally intended to limit only federal actions. The Sub-Committee observed that the three Supreme Court decisions holding that the Second Amendment does not apply to the states come from the last century when most of the rights found in the Bill of Rights (including freedom of speech) were considered not to be restrictions on the states.

The case continually cited by "gun control" advocates as the Supreme Court's definitive ruling against the individual's right to keep and bear arms is U.S. v. Miller, 307 U.S. 174 (1939). In that case, the Supreme Court implicitly recognized that the rights guaranteed by the Second Amendment protected all individuals and not merely those who are members of the militia.

In more recent years, state courts, like the Supreme Courts of Colorado (City of Lakewood v. Pillow), Oregon (State v. Kessler), and Montana (State v. Nickerson), and the Courts of Appeals in Indiana (Schubert v. DeBard), Missouri (Taylor v. McNeal), and New Mexico (City of Las Vegas v. Moberg), in interpreting state constitutional provisions similar to the Second Amendment, have concluded that the right to keep arms guarantees the right to keep and bear arms, such as pistols and revolvers, for self-defense.

In some cases, members of the legislature have expressed concern that the absence of language providing for legislative regulation in a right to arms amendment would preclude regulation of the right of arms.

Old and new cases have shown that reasonable regulation is permissible although a state constitutional guarantee does not contain language authorizing regulation of right.

Article II of the Arkansas Constitution guarantees: "The citizens of this State shall have the right to keep and bear arms for their common defense." Authority to regulate the right was upheld in Haile v. State, 38 Ark. 564, 567 (1882). Article I of the Alabama Constitution guarantees: "That every citizen has a right to bear arms in defense of himself and the state." In Hyde v. Birmingham, 392 So. 2d 1225 (Ala. Crim. App. 1980), the court stated the right was subject to reasonable regulation. Article I of the Oregon Constitution guarantees: "The people shall have the right to bear arms for the defense of themselves, and the State, but the Military shall be kept in strict subordination to the civil power." The right to arms was held to be subject to reasonable regulation in State v. Kessler, 614 P. 2d 94, 99 (Or. 1980).

The Sub-Committee concluded that "given the legislative history of the Civil Rights Acts, and the Fourteenth Amendment, and the more expanded views of incorporation which have become accepted in our own century, it is clear that the right to keep and bear arms was meant to be, and should be, protected under the civil rights statutes and the Fourteenth Amendment against infringement of officials acting under color of state law."



NATIONAL RIFLE ASSOCIATION OF AMERICA  
INCORPORATED 1871

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RUPE ANDREWS  
FIELD REPRESENTATIVE  
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May 2, 1984

Senator Vic Fischer, Chairman  
Alaska Senate State Affairs Committee  
Alaska State Legislature

Dear Senator Fischer:

The following is testimony prepared for the official record  
of the State Affairs Committee.

Mr. Chairman, members of the Senate State Affairs Committee,  
my name is Rupe Andrews. I am the Alaska Field Representative  
for the National Rifle Association of America and as such I  
am expressing the collective concerns of 19,000 Alaska members.  
My purpose today is to speak in favor of SJR 28 and to urge  
your favorable consideration of this resolution.

The reasons for NRA support of SJR 28 are several, not the  
least is the overwhelming desire of Alaskans to own and bear  
arms for the defense of self, home and property and for the  
lawful use of firearms for hunting, recreational shooting or  
for other lawful purposes. As it stands now, the individual  
right of Alaskans to bear firearms for the above purposes may  
be endangered and/or ambiguous in light of recent legal opinions.

Our concern and interest in the passage of SJR 28 stems primar-  
ily from the Alaska Attorney General's opinion released April  
13, 1983 on the meaning of Article 1. Section 19 of the Alaska  
Constitution.

The opinion, first sent to Senator Pat Rodey and Representative  
Charlie Bussel noted that: "The modern judicial view has in-  
creasingly found that the guaranteed right to keep and bear  
arms is not an individually protected right, but rather a coll-  
ective right which allows the people of the various states to  
serve in a militia."

The very concept of a Declaration of Rights in Article 1 in  
the Alaska Constitution is to protect individual liberties.

The Alaska arms guarantee was not enacted to grant the state the right to have a militia or to protect a nebulous collective right by the people to bear arms. The U.S. Supreme Court has held that the state's power to legislate on militia matters existed prior to the formation of the federal constitution and remains with the states. Houston v. Moore, 18 U.S., 16-17 (1820). Various Supreme Court cases decided long before Alaska became a state, clearly demonstrate that a state has the inherent power to have a militia and to train a militia. This power in no way depends on a state constitutional guarantee. The framers of the Alaska Constitution were undoubtedly aware of this jurisprudential principle and thus in our opinion would not have cluttered up the Alaska Declaration of Rights with an impotent and useless guarantee.

Research has revealed that in this instance there is no written history of intent by the Constitutional framers on the right to bear arms. It is therefore assumed that when the Constitution was framed, the framers and the people who voted approval of the Constitution took for granted what appeared to be obvious—that of the right to own and bear arms for all lawful purposes including hunting and recreational shooting. The constitutional framers some 26 years ago could hardly foresee the disturbing trend that is developing in several parts of the country and especially with the 1983 Alaska Attorney General's opinion. The conclusion reached by many Alaskans from reading the Attorney General's opinion and learning that there is no written intent pertaining to Article 1, Section 19; there is no individual guarantee for the right of self defense, hunting or recreational shooting provided by the constitution.

Alaska is not alone in having a constitutional provision that tracks the language of the federal constitution. Hawaii, Virginia North and South Carolina follow the 2nd Amendment. However, the constitutions of 39 other states contain a right to bear arms guarantee. These states wisely decided on a constitutional guarantee that removes any ambiguous decision making and state in language that the lay citizen can clearly understand as the individual right to bear arms for self defense of self, property, and recreational use for hunting and shooting.

Amending Article 1, Section 19 of the Alaska Constitution will ensure firearm owners in the future that their rights are protected as well as end any potential for ambiguity.



Field Representative, Alaska

# Municipality of Anchorage



POUCH 6-650  
ANCHORAGE, ALASKA 99502-0650  
(907) 264-4545

TONY KNOWLES,  
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

February 25, 1986

TO: Members of the Senate Judiciary Committee

Re: Senate Joint Resolution No. 39

The proposed amendment to Article I, Section 19 of the State Constitution set forth in Senate Joint Resolution No. 39 could, in its original form, preclude the regulation of conduct which has traditionally been considered to be criminal. Of particular concern is the clause beginning on line 15 which specifies "...personal defense and for the defense of family, property...". This provision could be read to invalidate all existing state and municipal laws governing the use of firearms for self-defense and the defense of property. Historically, the right to use firearms to protect self, family, and property has been curtailed. The amendment in its present form would cast doubt on the viability of continued regulation of such items.

The amendment, in its present form, would also have the likely affect of nullifying state and municipalities laws regulating the possession of firearms. This is because of the deletion of provisions referencing a "well regulated militia." Historically, the courts have interpreted that phrase as creating not a personal right to bear arms, but rather a right of the state to maintain a militia. The deletion of that phrase would cast doubt on the validity of all previous court decisions pertaining to the interpretation of section 19, and a similar provision of the Federal Constitution. With the deletion of that body of law, the phrase "shall not be infringed" would take on a whole new meaning. Thus, the state and local governments could lose the ability to regulate such activities as the carrying of concealed weapons and the obliteration of serial numbers on firearms.

The provision could easily be amended so as to affirm the right of the individual to own and possess firearms (as opposed to the right of the state to maintain a militia) without precluding the Legislature's ability to prescribe certain conduct with respect

February 25, 1986

Page 2

to the use and possession of deadly weapons. First, I would propose a change to line 15 whereby the term "personal" would be replaced by "lawful" and the phrase "and for the defense" be replaced by the phrase "of self". In addition, line 17 should be changed by adding language after the term "city" which would read "...except that the manner in which arms are possessed may be subject to reasonable regulations designed to protect the public safety".

In addition, if the Committee's intent is merely to establish a personal right to the ownership and possession of firearms and not to overturn existing laws governing the use of firearms, then such intent should be plainly set forth in a permanent report that will serve in the future to guide the courts. Furthermore, if the additional language I have suggested is added to the amendment, the Committee report should clarify the Committee's intent by specifying that the ability of state and local government to impose reasonable regulations on the possession of firearms would include laws curtailing the possession of concealed weapons or weapons that have altered identification marks, but would not include the right of the state or local government to enact an outright ban on the ownership or possession of arms.

Very truly yours,

DEPARTMENT OF LAW



Jerry Wertzbaugher  
Municipal Attorney

JW:gml

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Bill Sheffield, Governor

POUCH K - STATE CAPITOL  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-3600

June 27, 1983

The Honorable Patrick M. Rodey  
Senator  
Alaska State Legislature  
Pouch V  
Juneau, AK 99811

Re: SJR-28  
A. G. #366-444-83

Dear Senator Rodey:

The Department of Law has completed a preliminary analysis of Senate Joint Resolution 28 regarding the proposed amendment to the Alaska Constitution pertaining to the right of a person to keep and bear arms.

You may wish to consider inserting the word "lawful" after the term "for" and before the word "defense". With this insertion, the new constitutional clause would read as follows:

The right of a person to keep and bear arms for lawful defense of self, home and property, or for lawful hunting and recreational use, or for other lawful purposes shall not be infringed.

I believe it would be wise to make explicit that the Constitution provides for lawful activities, which of course are established by the legislature. In the absence of the term "lawful", I can envision a situation where persons attempt to use the constitutional language as a defense to behavior which ordinarily would constitute a violation of the Alaska criminal statutes. Also, I'm not sure the explicit mention of lawful hunting, recreational use and other specific activities is necessary to insure that individuals have a guaranteed right to keep and bear arms, however, I realize this language may be reassuring to certain groups within our state.

\* You may wish to review the language in other state Constitutions which relates directly to the right to keep and bear arms. In many instances this right is explicitly characterized as an individual right without mentioning specifically what constitutes appropriate use by an individual citizen. The

constitutional clauses relating to arms from the thirty-seven states which have such constitutional language are as follows:

Alabama: That every citizen has a right to bear arms in defense of himself and the state. ALA. CONST. art I, §26.

Alaska: A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. ALASKA CONST. art. I, § 19.

Arizona: The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. ARIZ. CONST. art. II, § 26.

Arkansas: The citizens of this State shall have the right to keep and bear arms for their common defense. ARK. CONST. art. II, § 5.

Colorado: The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons. COLO. CONST. art. II, § 13.

Connecticut: Every citizen has a right to bear arms in defense of himself and the state. CONN. CONST. art. I, § 15.

Florida: The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law. FLA. CONST. art. I, § 8.

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Idaho: The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation

providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms, except those actually used in the commission of a felony. IDAHO CONST. art. I, § 11.

Illinois: Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed. ILL. CONST. art. I, § 22.

Indiana: The people shall have a right to bear arms, for the defense of themselves and the State. IND. CONST. art I, § 32.

Kansas: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power. KAN. CONST., Bill of Rights, § 4.

Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: ...The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons. KY. CONST. § 1.

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Maine: Every citizen has the right to keep and bear arms for the common defense; and this right shall never be questioned. ME. CONST. art1, § 16.

Massachusetts: The people have a right to keep and bear arms for the common defence. And as, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it. MASS. CONST. pt. 1, art. 17.

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North Carolina: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice. N.C. CONST. art. I, § 30.

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South Dakota: The right of the citizens to bear arms in defense of themselves and the state shall not be denied. S.D. CONST. art. VI, § 24.

Tennessee: That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime. TENN. CONST. art. I, § 26.

Texas: Every citizen shall have the right to keep and bear arms in the lawful defence of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime. TEX. CONST. art. I, § 23.

Utah: The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law. UTAH CONST. art. I, § 6.

Vermont: That the people have a right to bear arms for the defence of themselves and the State-and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should b kept under strict subordination to and governed by the civil power. VT. CONST. ch. 1, art. 16.

Virginia: That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the

people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that all cases the military should be under strict subordination to, and governed by, the civil power. VA. CONST. art. I, § 13.

Washington: The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. WASH. CONST. art. I, § 24.

Wyoming: The right of citizens to bear arms in defense of themselves and of the state shall not be denied. WYO. CONST. art I, § 24.

In addition, thirteen states do not have express constitutional provisions related to the right to keep and bear arms.

I would be happy to discuss this matter with you in more detail.

Sincerely,



Norman C. Gorsuch  
Attorney General

NCG:ml

Distribution of  
identical letter: The Honorable Jalmar M. Kerttula  
Alaska State Senate

The Honorable Rick Halford  
Alaska State Senate

The Honorable Don Bennett  
Alaska State Senate

DEPARTMENT OF PUBLIC SAFETY

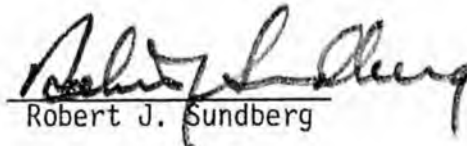
POSITION PAPER - SJR 39

Support

February 26, 1986

SJR 39 - "Proposing an amendment to the Constitution of the State of Alaska relating to the right of a citizen to keep and bear arms."

The Department supports the concept of this resolution but is concerned that the statement "shall not be infringed by the state or by a borough or city of the state" might be taken as abrogating existing laws related to firearms control and use, as well as possible future weapon laws needed for the protection and safety of the state populace.

  
Robert J. Sundberg

# STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date : \_\_\_\_\_

**REQUEST**

Bill/Resolution No. : SJR 39  
 Title : "Proposing an amendment to the Constitution of the State of Alaska relating..right...to keep and bear arms."  
 Sponsor : Rodev  
 Requestor : S Judiciary  
 Date of Request : \_\_\_\_\_

**FISCAL DETAIL**

Agency Affected : Public Safety  
 BRU : DPS Administration  
 Components : \_\_\_\_\_

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>		0	0	0	0	0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

**FUNDING : (Thousands of Dollars)**

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>		0	0	0	0	0

**POSITIONS :**

FULL-TIME						
PART-TIME						
TEMPORARY						

**ANALYSIS :** Attach a separate page if necessary

Prepared by: *K. Niles* Kathy Niles, Admin Assistant Phone : 465-4336  
 Division : Commissioner's Office Date : 2/26/86

Approved by Commissioner : *[Signature]* Date : 2/26/86  
 Agency : Public Safety

Distribution (by Agency preparing fiscal note) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

COMMITTEE REPORT  
SENATE

FURTHER:

2/13/86

Date 3/18/86

Mr. President

The Committee on JUDICIARY considered SJR 39

proposing an amendment to the Constitution of the State of Alaska relating to the right of a citizen to keep and bear arms.

and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass
- do pass with attached amendment(s)
- replace with/or adopt CS for SJR 39 (JUDICIARY)
- new title
- same title and recommends \_\_\_\_\_
- and attached a 'LETTER OF INTENT'  NEW FISCAL NOTE
- reports it back without recommendation
- recommends referral to \_\_\_\_\_ Committee

MEMBERS SIGNING  
DO PASS

Tom Kelly  
(as sub)  
Rick Halford  
(ziegler)

MEMBERS HAVING  
OTHER RECOMMENDATIONS

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Patrick R. Kelly  
 \_\_\_\_\_  
 Chairman

Chairman recommendation

CE CENTER  
VA. 22645

Western  
Union Mailgram



4-009522S110002 04/19/84 ICS IPMMTZZ CSP WHSR  
1 2028286375 MGM TDMT WASHINGTON DC 04-19 1037A EST

NATIONAL RIFLE ASSN L HUBBARD  
1600 RHODE ISLAND AVE NORTHWEST  
WASHINGTON DC 20036

THIS IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

2028286375 TDMT WASHINGTON DC 432 04-19 1037A EST  
PMS HONORABLE VIC FISCHER, ALASKA STATE LEGISLATURE  
POUCH V (MS 3100)  
JUNEAU AK 99811  
DEAR SENATOR FISCHER,

WE WANTED TO TAKE THIS OPPORTUNITY TO DISCUSS THE PROPOSED  
CONSTITUTIONAL AMENDMENT FOR THE RIGHT TO KEEP AND BEAR ARMS WHICH IS  
CURRENTLY BEING CONSIDERED BY YOUR COMMITTEE.

SENATE JOINT RESOLUTION #28, SPONSORED BY SENATORS PAT RODEY, JAY  
KERTTULA, DON BENNETT AND RICK HALFORD, WILL AFFIRM AN INDIVIDUAL  
RIGHT TO KEEP AND BEAR ARMS AND WILL CLEARLY SPECIFY THAT THE RIGHT  
TO KEEP AND BEAR ARMS EXTENDS TO: "THE DEFENSE OF SELF, HOME AND  
PROPERTY, OR FOR LAWFUL HUNTING AND RECREATIONAL USE, OR FOR OTHER  
LAWFUL PURPOSES.

AS ONE OF THE ORIGINAL FRAMERS OF THE ALASKAN CONSTITUTIONAL  
PROVISION FOR THE RIGHT TO KEEP AND BEAR ARMS IN ALASKA, WE VERY MUCH  
APPRECIATE YOUR EFFORTS IN THE 1955 CONSTITUTIONAL CONVENTION IN THE  
LAST TERRITORIAL LEGISLATURE IN 1956.

OUR DESIRE TO ASSIST SENATORS RODEY, KERTTULA BENNETT AND HALFORD IN  
STRENGTHENING THE "INDIVIDUALS" RIGHT TO BEAR ARMS PROVISION IS BASED  
ON OUR CONCERN THAT SOME HAVE FORGOTTEN THE INTENTION OF YOUR  
ORIGINAL PROVISION.

MANY OF OUR ALASKAN MEMBERS VOICE CONCERN WHEN ATTORNEY GENERAL  
NORMAN C GORSUCH RELEASED AN APRIL 13, 1983, OPINION ON THE MEANING  
OF ARTICLE 1, SECTION 19 OF THE ALASKA CONSTITUTION.

THE OPINION, FIRST SENT TO SENATOR PAT RODEY AND REPRESENTATIVE  
CHARLIE BUSSELL NOTED THAT: "THE MODERN JUDICIAL VIEW HAS  
INCREASINGLY FOUND THAT THE GUARANTEED RIGHT TO KEEP AND BEAR ARMS IS  
NOT AN INDIVIDUALLY PROTECTED RIGHT, BUT RATHER A COLLECTIVE RIGHT  
WHICH ALLOWS THE PEOPLE OF THE VARIOUS STATES TO SERVE IN A MILITIA."

THE EFFORTS OF OUR ALASKAN MEMBERS TO STRENGTHEN THE RIGHT TO KEEP  
AND BEAR ARMS PROVISION OF THE CONSTITUTION WAS MOTIVATED BY THE  
TO REPLY BY MAILGRAM MESSAGE, SEE REVERSE SIDE FOR WESTERN UNION'S TOLL - FREE PHONE NUMBERS



NUMEROUS STATES THROUGHOUT THE UNITED STATES WHERE LAW-ABIDING GUN OWNERS HAVE SOUGHT TO EMPHASIZE THAT THE RIGHT TO BEAR ARMS IS AN INDIVIDUAL RIGHT.

AS MORE AND MORE COMMUNITIES ATTEMPT TO ENACT RESTRICTIVE GUN CONTROL ORDINANCES, LAW-ABIDING FIREARMS OWNERS ARE ATTEMPTING TO OFFSET THIS PATTERN THROUGH THE PASSAGE OF CONSTITUTIONAL REFORMS.

IDAHO PASSED SUCH REFORM LEGISLATION IN 1979. IN 1982 THE STATES OF NEW HAMPSHIRE AND NEVADA PASSED SIMILAR AMENDMENTS BY OVERWHELMING PERCENTAGES, AND UTAH VOTERS WILL BE VOTING ON A STRENGTHENED AMENDMENT THIS FALL.

THE ATTORNEY GENERAL'S OPIONION HAS CAUSED CONCERN AMONG OUR MEMBERSHIP WHO FELT THAT WE COULD HELP PROTECT THE RIGHTS WHICH ALASKANS HOLD DEAR TO THEM BY INCLUDING LANGUAGE WHICH SPECIFICALLY EXTENDS TO PROTECTION BY SELF-DEFENSE AND LAWFUL HUNTING/RECREATION USE AND OTHER LAWFUL PURPOSES,

WE HOPE THAT THROUGH THE AMENDATORY LANGUAGE CONTAINED IN SENATE JOINT RESOLUTION #28, THE RIGHTS WHICH YOU SOUGHT TO PROTECT IN 1955 WILL BE FURTHER PROTECTED FOR A FUTURE GENERATION OF ALASKANS.

SINCERELY,  
LOUIS J BRUNE III STATE LIAISON

10:38 EST

MGMCOMP



NATIONAL RIFLE ASSOCIATION OF AMERICA  
INCORPORATED 1871

1600 RHODE ISLAND AVENUE, N.W.  
WASHINGTON, D.C. 20036

RUPE ANDREWS  
FIELD REPRESENTATIVE  
ALASKA

9416 LONGRUN DRIVE  
JUNEAU AK 99801  
907/789-7422

May 2, 1984

Senator Vic Fischer, Chairman  
Alaska Senate State Affairs Committee  
Alaska State Legislature

Dear Senator Fischer:

The following is testimony prepared for the official record of the State Affairs Committee.

Mr. Chairman, members of the Senate State Affairs Committee, my name is Rupe Andrews. I am the Alaska Field Representative for the National Rifle Association of America and as such I am expressing the collective concerns of 19,000 Alaska members. My purpose today is to speak in favor of SJR 28 and to urge your favorable consideration of this resolution.

The reasons for NRA support of SJR 28 are several, not the least is the overwhelming desire of Alaskans to own and bear arms for the defense of self, home and property and for the lawful use of firearms for hunting, recreational shooting or for other lawful purposes. As it stands now, the individual right of Alaskans to bear firearms for the above purposes may be endangered and/or ambiguous in light of recent legal opinions.

Our concern and interest in the passage of SJR 28 stems primarily from the Alaska Attorney General's opinion released April 13, 1983 on the meaning of Article 1. Section 19 of the Alaska Constitution.

The opinion, first sent to Senator Pat Rodey and Representative Charlie Bussel noted that: "The modern judicial view has increasingly found that the guaranteed right to keep and bear arms is not an individually protected right, but rather a collective right which allows the people of the various states to serve in a militia."

The very concept of a Declaration of Rights in Article 1 in the Alaska Constitution is to protect individual liberties.

The Alaska arms guarantee was not enacted to grant the state the right to have a militia or to protect a nebulous collective right by the people to bear arms. The U.S. Supreme Court has held that the state's power to legislate on militia matters existed prior to the formation of the federal constitution and remains with the states. Houston v. Moore, 18 U.S., 16-17 (1820). Various Supreme Court cases decided long before Alaska became a state, clearly demonstrate that a state has the inherent power to have a militia and to train a militia. This power in no way depends on a state constitutional guarantee. The framers of the Alaska Constitution were undoubtedly aware of this jurisprudential principle and thus in our opinion would not have cluttered up the Alaska Declaration of Rights with an impotent and useless guarantee.

Research has revealed that in this instance there is no written history of intent by the Constitutional framers on the right to bear arms. It is therefore assumed that when the Constitution was framed, the framers and the people who voted approval of the Constitution took for granted what appeared to be obvious—that of the right to own and bear arms for all lawful purposes including hunting and recreational shooting. The constitutional framers some 26 years ago could hardly foresee the disturbing trend that is developing in several parts of the country and especially with the 1983 Alaska Attorney General's opinion. The conclusion reached by many Alaskans from reading the Attorney General's opinion and learning that there is no written intent pertaining to Article 1, Section 19; there is no individual guarantee for the right of self defense, hunting or recreational shooting provided by the constitution.

Alaska is not alone in having a constitutional provision that tracks the language of the federal constitution. Hawaii, Virginia North and South Carolina follow the 2nd Amendment. However, the constitutions of 39 other states contain a right to bear arms guarantee. These states wisely decided on a constitutional guarantee that removes any ambiguous decision making and state in language that the lay citizen can clearly understand as the individual right to bear arms for self defense of self, property, and recreational use for hunting and shooting.

Amending Article 1, Section 19 of the Alaska Constitution will ensure firearm owners in the future that their rights are protected as well as end any potential for ambiguity.



Field Representative, Alaska

MEMORANDUM

TO: Theodore A. Lattanzio

FROM: Bob Dowlut

RE: Nebraska's Proposed Guarantee to Keep and Bear Arms

DATE: November 14, 1985

→ 6345  
BD 202 828 6366 Lou Beune

-----  
I suggest the following language be employed:

The right of all citizens to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, shall not be infringed by the state or any subdivision thereof.

The above language tracks the North Dakota constitutional guarantee. I suggest that Nebraska follow the language of North Dakota's guarantee to keep and bear arms because following the language of a sister state assuages fears. There are two minor deviations from the North Dakota guarantee. The use of the term citizen means that the right is only guaranteed to persons who have the right to exercise all political and civil rights of citizenship, such as the right to vote, enter into a contract, and enjoy the liberty to travel. Prisoners, convicted felons, lunatics, and infants are not entitled to the full rights guaranteed to a citizen. This should fend off the usual alarmist rhetoric. Furthermore, the admonition that the right to keep and bear arms may not be infringed by the state or any subdivision thereof achieves the desired goal of preemption.

The right to keep and bear arms to defend property may cause a staccato of shrill shrieks from opponents who will claim that this sanctions the use of deadly force against trespassers and tricycle thieves. Therefore, the reference to property may be substituted with the word home in the event such a move becomes necessary or advantageous.

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Bill Sheffield, Governor

POUCH K - STATE CAPITOL  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-3600

June 27, 1983

The Honorable Patrick M. Rodey  
Senator  
Alaska State Legislature  
Pouch V  
Juneau, AK 99811

Re: SJR-28  
A. G. #366-444-83

Dear Senator Rodey:

The Department of Law has completed a preliminary analysis of Senate Joint Resolution 28 regarding the proposed amendment to the Alaska Constitution pertaining to the right of a person to keep and bear arms.

You may wish to consider inserting the word "lawful" after the term "for" and before the word "defense". With this insertion, the new constitutional clause would read as follows:

The right of a person to keep and bear arms for lawful defense of self, home and property, or for lawful hunting and recreational use, or for other lawful purposes shall not be infringed.

I believe it would be wise to make explicit that the Constitution provides for lawful activities, which of course are established by the legislature. In the absence of the term "lawful", I can envision a situation where persons attempt to use the constitutional language as a defense to behavior which ordinarily would constitute a violation of the Alaska criminal statutes. Also, I'm not sure the explicit mention of lawful hunting, recreational use and other specific activities is necessary to insure that individuals have a guaranteed right to keep and bear arms, however, I realize this language may be reassuring to certain groups within our state.

\* You may wish to review the language in other state Constitutions which relates directly to the right to keep and bear arms. In many instances this right is explicitly characterized as an individual right without mentioning specifically what constitutes appropriate use by an individual citizen. The

constitutional clauses relating to arms from the thirty-seven states which have such constitutional language are as follows:

Alabama: That every citizen has a right to bear arms in defense of himself and the state. ALA. CONST. art I, §26.

Alaska: A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. ALASKA CONST. art. I, § 19.

Arizona: The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. ARIZ. CONST. art. II, § 26.

Arkansas: The citizens of this State shall have the right to keep and bear arms for their common defense. ARK. CONST. art. II, § 5.

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providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms, except those actually used in the commission of a felony. IDAHO CONST. art. I, § 11.

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South Dakota: The right of the citizens to bear arms in defense of themselves and the state shall not be denied. S.D. CONST. art. VI, § 24.

Tennessee: That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime. TENN. CONST. art. I, § 26.

Texas: Every citizen shall have the right to keep and bear arms in the lawful defence of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime. TEX. CONST. art. I, § 23.

Utah: The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law. UTAH CONST. art. I, § 6.

Vermont: That the people have a right to bear arms for the defence of themselves and the State-and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should b kept under strict subordination to and governed by the civil power. VT. CONST. ch. 1, art. 16.

Virginia: That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the

people to keep and bear arms shall not be infringed; that standing armies, in time of peace should be avoided as dangerous to liberty; and that all cases the military should be under strict subordination to, and governed by, the civil power. VA. CONST. art. I, § 13.

Washington: The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. WASH. CONST. art. I, § 24.

Wyoming: The right of citizens to bear arms in defense of themselves and of the state shall not be denied. WYO. CONST. art I, § 24.

In addition, thirteen states do not have express constitutional provisions related to the right to keep and bear arms.

I would be happy to discuss this matter with you in more detail.

Sincerely,



Norman C. Gorsuch  
Attorney General

NCG:ml

Distribution of  
identical letter: The Honorable Jalmar M. Kerttula  
Alaska State Senate  
  
The Honorable Rick Halford  
Alaska State Senate  
  
The Honorable Don Bennett  
Alaska State Senate

# Municipality of Anchorage



POUCH 6-650  
ANCHORAGE, ALASKA 99502-0650  
(907) 264-4545

TONY KNOWLES  
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

February 25, 1986

TO: Members of the Senate Judiciary Committee

Re: Senate Joint Resolution No. 39

The proposed amendment to Article I, Section 19 of the State Constitution set forth in Senate Joint Resolution No. 39 could, in its original form, preclude the regulation of conduct which has traditionally been considered to be criminal. Of particular concern is the clause beginning on line 15 which specifies "...personal defense and for the defense of family, property...". This provision could be read to invalidate all existing state and municipal laws governing the use of firearms for self-defense and the defense of property. Historically, the right to use firearms to protect self, family, and property has been curtailed. The amendment in its present form would cast doubt on the viability of continued regulation of such items.

The amendment, in its present form, would also have the likely affect of nullifying state and municipalities laws regulating the possession of firearms. This is because of the deletion of provisions referencing a "well regulated militia." Historically, the courts have interpreted that phrase as creating not a personal right to bear arms, but rather a right of the state to maintain a militia. The deletion of that phrase would cast doubt on the validity of all previous court decisions pertaining to the interpretation of section 19, and a similar provision of the Federal Constitution. With the deletion of that body of law, the phrase "shall not be infringed" would take on a whole new meaning. Thus, the state and local governments could lose the ability to regulate such activities as the carrying of concealed weapons and the obliteration of serial numbers on firearms.

The provision could easily be amended so as to affirm the right of the individual to own and possess firearms (as opposed to the right of the state to maintain a militia) without precluding the Legislature's ability to prescribe certain conduct with respect

February 25, 1986  
Page 2

to the use and possession of deadly weapons. First, I would propose a change to line 15 whereby the term "personal" would be replaced by "lawful" and the phrase "and for the defense" be replaced by the phrase "of self". In addition, line 17 should be changed by adding language after the term "city" which would read "...except that the manner in which arms are possessed may be subject to reasonable regulations designed to protect the public safety".

In addition, if the Committee's intent is merely to establish a personal right to the ownership and possession of firearms and not to overturn existing laws governing the use of firearms, then such intent should be plainly set forth in a permanent report that will serve in the future to guide the courts. Furthermore, if the additional language I have suggested is added to the amendment, the Committee report should clarify the Committee's intent by specifying that the ability of state and local government to impose reasonable regulations on the possession of firearms would include laws curtailing the possession of concealed weapons or weapons that have altered identification marks, but would not include the right of the state or local government to enact an outright ban on the ownership or possession of arms.

Very truly yours,

DEPARTMENT OF LAW



Jerry Wertzbaugher  
Municipal Attorney

JW:gml

STATE OF ALASKA  
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY  
1000 EAST BARTON  
JUNEAU, ALASKA 99801  
907-586-3000

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

April 14, 1983

SUBJECT: The right to bear arms  
(Work Order No. 13-1175)

TO: Senator Patrick M. Rodey

FROM: Tamara Brandt Cook  
Legislative Counsel

TBC

You have asked whether the state constitution protects the right of private individuals to own firearms. Article I, section 19 provides:

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

This section has never been considered by the Alaska Supreme Court. The wording is identical to that in the Second Amendment of the United States Constitution, so court decisions regarding that amendment would be helpful in judging the nature of the right conferred under the state constitution. However, since it was adopted the Second Amendment has received little attention from the federal courts, so questions regarding the nature and scope of the right to bear arms remain largely unsettled. (For a historical analysis of the adoption of the Second Amendment, see, Feller and Gotting, The Second Amendment: A Second Look, 61 N.W.U.L.R. 46 (1966).)

It is argued by legal scholars that the sole concern of the framers of the Second Amendment was to prevent federal interferences with state militias and the consequent destruction of local autonomy. Under this reasoning, the amendment guarantees only the right of the people collectively to bear arms as part of a militia, but provides no guarantee of the right of the individual to bear arms for other lawful purposes. Tribe, American Constitutional Law, page 226, note 6; Feller and Gotting, supra; United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588 (1876). It has been held that a state may

prohibit groups of people other than organized militia from drilling with arms. Presser v. Illinois, 116 U.S. 252 (1886). Congress may also regulate the possession of firearms if the regulation is not shown to interfere with the preservation of state militia. U.S. v. Miller, 307 U.S. 174 (1939). However, the Supreme Court has never directly considered whether the Second Amendment provides any protection to the private ownership of arms for lawful purposes.

It is clear that the Second Amendment itself is a limit on the power of the federal government and does not apply to the states or their subdivisions. Eckert v. City of Philadelphia, 329 F.Supp. 845, affirmed 477 F.2d 610, cert. denied 94 S.Ct. 89, 414 U.S. 839, 38 L.Ed.2d 74 (1973) and 94 S.Ct. 104, 414 U.S. 843, 38 L.Ed.2d 81 (1973). Most state constitutions do contain a guarantee similar to the federal guarantee. State court decisions construing the guarantee represent widely divergent points of view about the nature of the right to bear arms. Some states have taken the position that the right to bear arms is a collective right to function as a state militia, but not a right to individually own firearms. U.S. v. Warin, 530 F.2d 103 (CA Ohio), cert. denied 96 S.Ct. 3168, 426 U.S. 948, 49 L.Ed.2d 1185 (1976); Commonwealth v. Davis, 343 N.E.2d 845 (Mass 1976); Salina v. Blaksley, 83 P. 619 (Kansas 1905); People ex rel. Leo v. Hill, 27 N.E. 789 (New York 1891); Aymette v. State, 21 Tenn 154 (1840). On the other hand, the right has been construed to allow the private ownership of arms customarily kept by law abiding citizens. State v. Hart, 157 P.2d 72 (Idaho 1945); People v. Brown, 235 N.W. 245 (Michigan 1931); Kerner v. State, 107 S.E. 222 (North Carolina 1921).

While it is undoubtedly true that the particular language of a state's constitution will affect the construction of the right to bear arms, it must be noted that even language that closely follows the federal wording of the Second Amendment and contains references to the need for a militia has been construed in some states as a guarantee of the right of individuals to own firearms for lawful purposes. For your information I have included a copy of State v. Dawson, 159 S.E.2d 1 (North Carolina 1968) which construes a constitutional provision to include a guarantee of the right of an individual to own firearms for lawful purposes, even though the provision appears to be narrower than that contained in the Alaska Constitution. It may be that, should the question be presented, the court will construe the Alaska guarantee in the same way. I cannot find, however, an indication that

Senator Patrick M. Rodey

Page 3

April 14, 1983

the framers of the state constitution contemplated the right to bear arms as being any greater than that right as it exists under the federal constitution. One commentator notes generally that ". . . efforts . . . to strengthen guarantees of individual freedoms were not successful". Fischer, Alaska's Constitutional Convention, 1975, page 70.

The letter that you attached with your request refers to a new amendment to the Constitution of New Hampshire which guarantees the right of private ownership of guns. I have included a copy of that amendment for your consideration. It is interesting to note that Senator Conley in moving that amendment believed it to be a ". . . similar provision to that of the federal Constitution." (Senate Journal 21, April, 1981). If the federal Constitution does not in fact guarantee a private right to bear arms, one wonders what is being accomplished with the language added to the Constitution of New Hampshire. It does, however, appear more clearly applicable to the question of individual ownership of arms than the Second Amendment of the federal constitution.

In concluding I must stress that until the Supreme Court of Alaska construes Article I, section 19 of the state constitution, it cannot be determined whether it is necessary to amend the Alaska Constitution to insure that an individual has the right to keep and bear arms for lawful purposes. An amendment might make this interpretation of the right to bear arms more likely to be applied in Alaska.

TBC:ljb

Enclosure

14/023

SB 142, relative to the enforcement powers of agents of the liquor commission. Inexpedient to legislate. Sen. Brown for the committee.

SEN. BROWN: SB 142 is written by the liquor inspectors. They want the same powers that the county sheriff would have. They want to be authorized to carry firearms. It was testified that the main purpose was that they wanted to get into Group II which is considered a hazardous group which gives them more protection. The Liquor Commission testified that the Commission now has the right to provide them a firearm if necessary. It was also testified by numerous people that they are not supposed to get involved in violence but to see that the licenses are posted correctly, that the dues are paid and he doesn't need a gun to do that sort of thing. The committee found it inexpedient to legislate.

Adopted.

CACR 6, relative to the right to bear arms. Ought to pass. Sen. Conley for the committee.

Senator Conley moved a floor amendment.

SEN. CONLEY: The amendment which is put on the table this morning is the result of perusal of this bill just before coming to the floor today. We found that Legislative Services has again made an error in the bill and this corrects the error in it so that the wording is appropriate for the change in the Constitution. This Constitutional amendment reaffirms that all persons have the right to keep and bear arms in defense of themselves, their family, their property, and the state. It simply spells out that we believe that the New Hampshire Constitution should have a similar provision to that of the federal Constitution. The federal courts, on several occasions, have interpreted the Second Amendment as imposing a limitation on the national government only and therefore does not speak to the States' rights. Thirty-seven states have Constitutional provisions guaranteeing the right to bear arms. Thirteen states have no Constitutional provisions and in the New England states only the state of New Hampshire has no such provision. This subject matter ap-

peared on a ballot in the year 1978 and narrowly missed passage. 160,628 people believe that we should amend the Constitution and 87,807 voted no. In other words, we had a 65% vote where we needed a 66-2/3% vote. When that many people favor a proposition I believe we ought to give them the right once again to support the inclusion of the right to bear arms in our State Constitution. I would hope that the Senate goes on record as supporting this amendment to our state Constitution as amended here in this constitutional amendment.

#### Amendment to CACR 6

Amend article 2-a, part first, as inserted by paragraph I of the resolution by striking out same and inserting in place thereof the following:

[Art.] 2-a. [The Bearing of Arms.] All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state.

Amendment adopted.

Roll Call.

The following Senators voted yes: Lamontagne, Conley, Freese, Hough, Bergeron, Chandler, Wiggins, Monier, Blaisdell, Stabile, Boyer, Kelly, Podles, Sanborn, Stephen, Brown, Champagne, Lessard, Roy, and Preston.

The following Senators voted no: Rice, and Splaine.

20 yeas 2 nays

Ordered to third reading by necessary 2/3 vote.

SB 246, relative to the use of force in defense of premises. Ought to pass. Sen. Conley for the committee.

SEN. CONLEY: SB 246 was heard in committee and the vote of ought to pass was unanimous. This bill clarifies existing law and broadens the right to use deadly force in defense of a person's home. Our clear intent in filing this bill is to provide a protective statute for homeowners attacked in

# STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date : \_\_\_\_\_

**REQUEST**

Bill/Resolution No. : CSSJR 39 (JUD)am  
 Title : "Proposing an amendment to the  
 Constitution of the State of Alaska  
 relating right...to keep and bear arms."  
 Sponsor : Rodey  
 Requestor : House Judiciary  
 Date of Request : \_\_\_\_\_

**FISCAL DETAIL**

Agency Affected : Public Safety  
 BRU : DPS Administration  
 Components : \_\_\_\_\_

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>		0	0	0	0	0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

**FUNDING : (Thousands of Dollars)**

GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>		0	0	0	0	0

**POSITIONS :**

FULL-TIME						
PART-TIME						
TEMPORARY						

**ANALYSIS :** Attach a separate page if necessary

Prepared by : Kathy Niles  
 Division : Commissioner's Office

Phone : 465-4336  
 Date : 3/24/86

Approved by Commissioner : [Signature]  
 Agency : Public Safety

Date : 4/2/86

Distribution (by Agency preparing fiscal note) :

- Legislative Finance
- Legislative Sponsor
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- Office of Management and Budget
- Impacted Agency(ies)

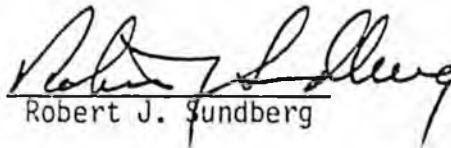
DEPARTMENT OF PUBLIC SAFETY  
POSITION PAPER - CSSJR 39 (Jud) am

Support

March 27, 1986

CSSJR 39(Jud) am - "Proposing an amendment to the Constitution of the State of Alaska relating to the right of a citizen to keep and bear arms."

The Department supports the concept of this resolution as the intent does not abrogate existing laws related to firearms control and use, as well as possible future weapon laws needed for the protection and safety of the state populace.

  
Robert J. Sundberg

# STATE OF ALASKA

DISTRIBUTED BY SEN. VIC FISCHER

Bill Sheffield, Governor

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

FOUCH K - STATE CAPITOL  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-3600

March 26, 1986

The Honorable Vic Fischer  
Alaska State Legislature  
P.O. Box V  
Juneau, Alaska 99811

Re: S.J.R. 39

Dear Senator Fischer:

You have asked for the Department of Law's comments upon the current language of S.J.R. 39, a resolution proposing an amendment to Article I, sec. 19 of the state constitution, relating to a citizen's right to keep and bear arms. As I understand it, S.J.R. 39, as amended on the Senate floor yesterday, provides that art. I, sec. 19 of the Alaska Constitution will be amended to read:

SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The [A WELL-REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right of each citizen of the state [THE PEOPLE] to keep and bear arms for lawful defense of self, family, property, and the state and for lawful hunting, recreation, and other lawful purposes, shall not be infringed by a state or by a borough or city of the state.

We are concerned that the language presently contained in S.J.R. 39 might allow later constitutional challenge to some existing state statutes. Present law, for example, prohibits a convicted felon from possessing a concealable firearm, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shot guns, prohibits possession of a firearm while intoxicated, or the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.61.200-.220.)

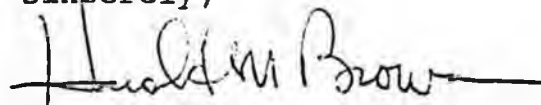
These statutes serve an important public safety function by carefully regulating the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If the legislature does not intend to render

these statutes unenforceable, nor to foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds, for example), then the legislature's intent to continue to allow reasonable regulation by law should be made clear. The possibility that the language proposed in S.J.R. 39 could be interpreted as invalidating some portions of Alaska's present criminal code is a real one. See, for example, State v. Kessler, 614 P.2d 94 (Ore. 1980), and State v. Delgado, 692 P.2d 610 (Ore. 1984).

We believe that any possible ambiguity could be eliminated by the addition, at the end of the current language, of the phrase "except that the manner of keeping and bearing arms may be regulated by law." This suggested language is based upon similar provisions in the constitutions of several other states, including Florida (art. I, sec. 8), Georgia (art. I, sec. 1), and Utah (art. I, sec. 6). The addition of this clause would make it clear that, although a citizen's basic right to keep and bear arms may not be infringed, reasonable and appropriate regulation of the manner in which arms are kept or borne (i.e., possession by felons, by minors, in a bar, while intoxicated, etc.) is not an infringement on an individual's constitutional right. Mr. Rupe Andrews, Alaska Field Representative for the National Rifle Association, has indicated that his organization would not object to the inclusion of this additional language in S.J.R. 39. I also suggest that you consider retaining the language in the present constitutional provision "the people," rather than change it to "each citizen of the state." State constitutional provisions have traditionally recognized the equal rights of all residents of the state, regardless of the resident's national origin.

A carefully drafted amendment would minimize the possibility that, should the proposed constitutional amendment be adopted, a criminal defendant would later be able to argue that a criminal weapons misconduct statute is unconstitutional because it violates his right to keep and bear arms under art. I, sec. 19 of the state constitution.

Sincerely,



Harold M. Brown  
Attorney General

DISTRIB. BY V. FISCHER

M E M O R A N D U M

MUNICIPALITY OF ANCHORAGE

To: Members of the Senate  
From: Chip Dennerlein  
Re: SJR 39

The Municipality has been asked to comment on the present form of SJR 39, including any potential effects the resolution might have on existing municipal ordinances concerning the possession and use of firearms. First, it is our understanding that the intent of SJR 39 is to clarify the constitutional right to keep and bear arms as an "individual" right in Alaska, and to give Alaskans the opportunity to vote on this proposition. We support this intent and approach.

However, the language of SJR 39 raises a serious question beyond the basic intent. That is, does SJR 39 override existing municipal code regarding the prohibition against carrying concealed weapons? Based on careful review by legal counsel, the answer is yes. I will explain.

The language provides specifically for the "lawful defense of self, etc." This insures that the "use" of arms which is protected by SJR 39 is "lawful" use. However, the actual keeping and bearing of arms (their "possession") has no such qualifier. In other words, while "use" must be "lawful", "possession" is an absolute constitutional "right". As long as a person uses or intends to use a firearm in a lawful manner, that person can carry it in any manner he or she chooses. As currently written SJR 39 would authorize the carrying of concealed weapons, overriding municipal code.

The Municipality has previously suggested language to correct this problem. Please refer to the attached letter from the Anchorage Municipal Attorney.

# Municipality of Anchorage



POUCH 6-650  
ANCHORAGE, ALASKA 99502-0650  
(907) 264-4545

TONY KNOWLES,  
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

February 25, 1986

TO: Members of the Senate Judiciary Committee

Re: Senate Joint Resolution No. 39

The proposed amendment to Article I, Section 19 of the State Constitution set forth in Senate Joint Resolution No. 39 could, in its original form, preclude the regulation of conduct which has traditionally been considered to be criminal. Of particular concern is the clause beginning on line 15 which specifies "...personal defense and for the defense of family, property...". This provision could be read to invalidate all existing state and municipal laws governing the use of firearms for self-defense and the defense of property. Historically, the right to use firearms to protect self, family, and property has been curtailed. The amendment in its present form would cast doubt on the viability of continued regulation of such items.

The amendment, in its present form, would also have the likely affect of nullifying state and municipalities laws regulating the possession of firearms. This is because of the deletion of provisions referencing a "well regulated militia." Historically, the courts have interpreted that phrase as creating not a personal right to bear arms, but rather a right of the state to maintain a militia. The deletion of that phrase would cast doubt on the validity of all previous court decisions pertaining to the interpretation of section 19, and a similar provision of the Federal Constitution. With the deletion of that body of law, the phrase "shall not be infringed" would take on a whole new meaning. Thus, the state and local governments could lose the ability to regulate such activities as the carrying of concealed weapons and the obliteration of serial numbers on firearms.

The provision could easily be amended so as to affirm the right of the individual to own and possess firearms (as opposed to the right of the state to maintain a militia) without precluding the Legislature's ability to prescribe certain conduct with respect

February 25, 1986  
Page 2

to the use and possession of deadly weapons. First, I would propose a change to line 15 whereby the term "personal" would be replaced by "lawful" and the phrase "and for the defense" be replaced by the phrase "of self". In addition, line 17 should be changed by adding language after the term "city" which would read "...except that the manner in which arms are possessed may be subject to reasonable regulations designed to protect the public safety".

In addition, if the Committee's intent is merely to establish a personal right to the ownership and possession of firearms and not to overturn existing laws governing the use of firearms, then such intent should be plainly set forth in a permanent report that will serve in the future to guide the courts. Furthermore, if the additional language I have suggested is added to the amendment, the Committee report should clarify the Committee's intent by specifying that the ability of state and local government to impose reasonable regulations on the possession of firearms would include laws curtailing the possession of concealed weapons or weapons that have altered identification marks, but would not include the right of the state or local government to enact an outright ban on the ownership or possession of arms.

Very truly yours,

DEPARTMENT OF LAW



Jerry Wertzbaugher  
Municipal Attorney

JW:gml

COMMENTARY ON PROPOSED AMENDMENT TO ALASKA

RIGHT TO BEAR ARMS GUARANTEE

Article I, Section 19 of the Constitution of Alaska would be amended to read as follows:

The right of each citizen of the state to keep and bear arms for personal defense and for the defense of family, property, and the state and for lawful hunting, recreation, and other lawful purposes shall not be infringed by the state or by a borough or city of the state.

This proposal guarantees a broad individual right and explicitly protects the traditional rights that gun owners in Alaska always assumed were guaranteed. The Alaska proposal is a blending of the New Mexico, Nevada, New Hampshire, North Dakota, Colorado, Mississippi, Missouri, Montana, Oklahoma, and Utah guarantees.

I.  
TO WHOM THE RIGHT BELONGS

This guarantee would belong to the citizen of the state. Citizenship includes the full enjoyment of all rights and privileges. The full enjoyment of all rights and privileges is obviously not enjoyed by certain groups, including the following: convicted felons, lunatics, and illegal aliens. This principle of law is so well established that commentators only mention it briefly in passing. See Dowlut & Knoop, State Constitutions and the Right to Keep and Bear Arms, 7 Okl. City Univ. L.Rev. 177, 191 (1982). See also State v. Kessler, 289 Or. 359, 614 P.2d 94, 99 (1980).

II.  
WHAT CONSTITUTES ARMS

Constitutionally protected arms are those arms that are commonly kept by the people. The people of Alaska commonly keep and bear rifles, shotguns, pistols, revolvers, edged weapons, hatchets, and clubs. They do not possess weapons that are exclusively used by the military or weapons of mass destruction. Therefore, bombs, poison gas, or cannons do not come under the umbrella of the constitutional guarantee.

III.  
THE RIGHT TO KEEP AND BEAR ARMS

Arms may be kept or borne for defensive, recreational, and other traditional lawful purposes. Alaska's frontier tradition is to carry arms openly. See Nunn v. State, 1 Ga. (1 Kel.) 243 (1846); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921); Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928); City of Las Vegas v. Moberg, 485 P.2d 737 (N.M. App. 1971); City of Lakewood v. Pillow, 180 Colo. 29, 501 P.2d 744 (1972). The concealed carrying of arms may be prohibited in a public place. The state may require the obtaining of a license to carry an arm concealed. However, a concealed carrying license statute would have to be equitably administered. See Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980).

The constitutional purpose for bearing arms would not be frustrated by a prohibition on carrying arms while drunk, to a polling place, court, public assembly, or in a manner calculated to inspire terror. The keeping or bearing of arms in the home or

place of business may be either open or concealed, keeping the castle doctrine in mind and the purpose of protecting a place of business.

IV.  
THE RIGHT SHALL NOT BE INFRINGED BY THE  
STATE OR ANY SUBDIVISION THEREOF

Neither the State nor any subdivision of the state could prevent the people from keeping or bearing constitutionally protected arms within the perimeters of the constitutional guarantee. Laws forbidding the sale of arms or ammunition, or preventing the repair, bearing, or keeping of constitutionally protected arms, laws requiring a license to possess or acquire arms, or the payment of special taxes, or requiring registration would be an infringement on the right to keep and bear arms. The guarantee would also provide for uniformity throughout the state. This would be a form of preemption. Units of local government could only enact legislation which was absolutely necessary and uniquely necessary for a unit of local government. Therefore, a city or village could regulate the discharge of firearms within its boundaries without infringing the right to keep and bear arms.

V.  
CONCLUSION

The proposal guarantees the fundamental right of a citizen to keep and bear arms for traditional purposes. This right may not be infringed. The misuse of arms falls outside the boundaries of the constitutional guarantee. The types of

misconduct that the legislature may forbid and punish are well-known and self-evident; examples include using arms to rob, harass, intimidate, or recklessly endanger someone, shooting in an unsafe place or manner, and poaching. Therefore, this proposal will not hinder the legislature in performing its duty to punish the misuse of arms.

298 Or. 395

STATE of Oregon, Petitioner  
on Review,

v.

Joseph Luna DELGADO,  
Respondent on Review.

TC CR83-946, CA A30962, SC S31059

Supreme Court of Oregon,  
In Banc.

Argued and Submitted Nov. 6, 1984.

Decided Dec. 28, 1984.

Defendant was convicted in the District Court, Polk County, Walter W. Foster, J., of unlawful possession of a stabbing weapon, and he appealed. The Court of Appeals, 69 Or.App. 254, 684 P.2d 630, reversed, and appeal was taken. The Supreme Court, Lent, J., held that defendant's constitutional right to bear arms was violated by prohibition of mere possession and mere carrying of a switchblade knife.

Decision of the Court of Appeals affirmed.

#### Weapons ⇐1

Defendant's constitutional right to bear arms was violated by prohibition of mere possession and mere carrying of a switchblade knife. Const. Art. 1, § 27; ORS 166.510, 166.510(1).

Robert W. Muir, Asst. Atty. Gen., Salem, argued the cause for petitioner on review. With him on the briefs were Dave Frohnmayer, Atty. Gen., James E. Mountain, Jr., Sol. Gen., and Lynn Torno, Certified Law Student.

Susan M. Garrett, Salem, argued the cause and filed briefs for respondent on review.

1. The defendant had also filed a motion to suppress the knife as evidence on the basis that it was obtained as a result of an unlawful search

Robert Dowlut, Washington, D.C., and Steven L. Krasik, Salem, filed a brief *amicus curiae* for Nat. Rifle Ass'n.

LENT, Justice.

The issue is whether ORS 166.510(1), insofar as it prohibits the mere possession and mere carrying of a switchblade knife, violates defendant's right to bear arms under Article I, section 27, of the Oregon Constitution. We hold that in that respect the statute does violate defendant's constitutional right.

ORS 166.510(1) provides, in relevant part:

" \* \* \* [A]ny person who manufactures, causes to be manufactured, sells, keeps for sale, offers, gives, loans, carries or possesses an instrument or weapon having a blade which projects or swings into position by force of a spring or other device and commonly known as a switch-blade knife or an instrument or weapon commonly known as a blackjack, slung shot, sandclub, sandbag, sap glove or metal knuckles, or who carries a dirk, dagger or stiletto commits a Class A misdemeanor." (Emphasis added)

Article I, section 27, of the Oregon Constitution provides:

"The people shall have the right to bear arms for the defence of themselves, and the State \* \* \* [.]"

The accusatory instrument charged that defendant "did unlawfully possess and carry" a weapon commonly known as a switch-blade knife in violation of ORS 166.510. Defendant demurred to the accusatory instrument on the ground that the statute was overbroad as impinging on the right guaranteed to him under Article I, section 27, of the Oregon Constitution. The trial court overruled the demurrer.<sup>1</sup>

Trial then proceeded on the basis of facts stipulated to be the same as those found by the trial court in the hearing on the motion

and seizure. The trial court's denial of that motion was not assigned as error.

to suppress mentioned in footnote 1, *supra*. Those facts are as follows.

On October 3, 1983, defendant was walking with a companion on a public street. The two appeared disorderly to an officer nearby, and when defendant reached up as he passed a street sign and tapped or struck it with his hand, the officer confronted both individuals and conducted a patdown search. Defendant was found with a switch-blade knife in his back pocket. Defendant told the arresting officer that he carried the knife "for protection" (defendant evidently feared attack by a jealous rival for his present girl friend).<sup>2</sup>

Defendant moved for judgment of acquittal, which was denied. The trial court then found defendant guilty and eventually sentenced defendant to jail "suspended on the condition" that defendant meet certain terms of probation.

Defendant appealed, assigning as error the trial court's overruling of his demurrer and denial of his motion for judgment of acquittal. The Court of Appeals, 69 Or. App. 254, 684 P.2d 630, per curiam, reversed on the basis of our decisions in *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981), and *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980). We allowed review to determine whether a switch-blade knife is within the constitutional guarantee. 298 Or. 37, 688 P.2d 845 (1984).

In *State v. Kessler*, *supra*, this court for the first time considered the scope of Article I, section 27. There, following the discovery by police officers of two billy clubs in his apartment, defendant was charged with the possession of billy clubs in violation of ORS 166.510(1), the same statute at issue in the case at bar. On appeal defendant argued that the statute violated Article

2. We have in mind that defendant's principal argument is that, insofar as this charge of criminal conduct is concerned, the statute is overbroad in proscribing conduct in which he has a state constitutional right to engage. Ordinarily, we would have no reason to go beyond the facts described in the accusatory instrument to resolve whether error was committed in overrul-

ing defendant's demurrer. In this case, however, a factual record was developed, and the defendant also assigned as error the denial of his motion for judgment of acquittal. The facts are recounted to show that there is no evidence to support any possible charge of an illegal intent to use the weapon or an illegal use of the weapon.

In *Kessler*, we examined the historical roots of Article I, section 27. We concluded that the drafters of Oregon's constitution did not wish to limit the right to bear arms to a citizen militia, but rather intended that the private citizen also have the right to "possess certain arms for the defense of person and property." 289 Or. at 371, 614 P.2d at 98.

Our analysis in *Kessler* of the meaning of the term "arms" is central to the case at bar and so merits a further discussion. We reasoned that because settlers during the revolutionary era used many of the same weapons for both personal and military defense, the term "arms," as contemplated by the constitutional framers, was not limited to firearms but included those hand-carried weapons commonly used for personal defense. 289 Or. at 368, 614 P.2d at 98. Thus, the term "arms" "includes weapons commonly used for either purpose, even if a particular weapon is unlikely to be used as a militia weapon." 289 Or. at 369, 614 P.2d at 98. On the basis of this historical examination, we held that the possession of a billy club was constitutionally protected:

"Our historical analysis of Article I, section 27, indicates that the drafters intended 'arms' to include the hand-carried weapons commonly used by individuals for personal defense. The club is an effective, hand-carried weapon which cannot logically be excluded from this term."

ing defendant's demurrer. In this case, however, a factual record was developed, and the defendant also assigned as error the denial of his motion for judgment of acquittal. The facts are recounted to show that there is no evidence to support any possible charge of an illegal intent to use the weapon or an illegal use of the weapon.

289 Or. at 372, 614 P.2d at 100.<sup>3</sup>

The state argues that a switch-blade is not a weapon "commonly used for personal defense," and is therefore not an "arm" within the meaning of the Oregon Constitution. It insists that the switch-blade is an offensive weapon used primarily by criminals. In support of this argument we are referred to various authorities, especially the Federal Anti-Switchblade Act, 15 USC §§ 1241-44 (Supp. IV, 1980), which is aimed at prohibiting the introduction of switch-blade knives into interstate commerce because they are "almost exclusively the weapon of the thug and the delinquent." S.Rep. No. 1980, 85th Cong., 2d Sess., reprinted in 1958 U.S.Code Cong. & Ad.News 3435, 3437.

We note, first, that that material offers no more than impressionistic observations on the criminal use of switch-blades. More importantly, however, we are unpersuaded by this distinction which the state urges of "offensive" and "defensive" weapons. All hand-held weapons necessarily share both characteristics. A kitchen knife can as easily be raised in attack as in defense. The spring mechanism does not, instantly and irrevocably, convert the jackknife into an "offensive" weapon.<sup>4</sup> Similarly, the clasp feature of the common jackknife does not mean that it is incapable of aggressive and violent purposes. It is not the design of the knife but the use to which it is put that determines its "offensive" or "defensive" character.

There are statutes now on the books that concern the manner in which weapons are carried, the intent with which they are carried, the use to which they may not be put

3. One year later, in *State v. Blocker*, 291 Or. 255, 259, 630 P.2d 824, 826 (1981), we held that the possession of a billy club outside as well as inside the home is constitutionally protected.
4. At one time the single-action, single-shot handgun was carried by many men for defense. Did the development of the double-action feature of the handgun or the addition of the revolving cylinder which enabled one to fire the gun several times without pausing to reload, as a matter of law, transform the handgun from a defensive

and the status of a person that results in forbidding his possessing a weapon.

"This state has several such regulatory statutes, with which we are not concerned in this case: ORS 166.220(1) prohibiting possession of a dangerous weapon with intent to use such weapon unlawfully against another; ORS 166.240, prohibiting carrying certain weapons concealed about one's person; ORS 166.250, prohibiting carrying any firearm concealed upon the person or within any vehicle without a license to do so." (Footnote omitted.)

*State v. Blocker*, *supra*, 291 Or. at 259-260, 630 P.2d at 826. See, also, ORS 166.270, which prohibits an exconvict from possessing a firearm concealable on the person, which this court held not to offend Article I, section 27, of the Oregon Constitution in *State v. Robinson*, 217 Or. 612, 619, 343 P.2d 886 (1959).

The appropriate inquiry in the case at bar is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era,<sup>5</sup> or in 1859 when Oregon's constitution was adopted. In particular, it must be determined whether the drafters would have intended the word "arms" to include the switch-blade knife as a weapon commonly used by individuals for self defense. To answer that question we must journey briefly into the history of knives. We have resorted primarily to three books by H. Peterson for that history: *Arms and Armour in Colonial America, 1526-1783* (1956); *American Knives* (1958); *Daggers and Fighting Knives of the Western World* (1968). What we have to say generally in

weapon to an offensive weapon? Obviously, the gun, both before and after such changes, could be used for either defense or offense.

5. Article I, section 27, of the Oregon Constitution was taken verbatim from sections 32 and 33 of the Indiana Constitution of 1851. Indiana's bill of rights liberally drew upon the state constitutions of Kentucky, Ohio, Tennessee, and Pennsylvania, which were drafted between 1776 and 1802. See *State v. Kessler*, 289 Or. 359, 365, 614 P.2d 94, 95 (1980).

the next few paragraphs is drawn from those works.

The popularity of the fighting knife has had an uneven history, even to today. During the Roman civilization and for several centuries thereafter, for example, the knife was little appreciated as a tool of combat, but during the Viking Period of the 9th and 10th centuries large knives (scramasax), used for general purposes as well as for war, were popular among the Northmen, Germans, Franks and Anglo-Saxons. It was during the Middle Ages that the real flowering of the fighting knife and dagger occurred. New shapes appeared and the knife became part of the standard dress for all classes: from the knights and their men-at-arms as an adjunct to the sword, to the laborer and peasant for protection and convenience. During the 16th century the dagger came to be used by the aristocracy, mainly in conjunction with the sword, and was used primarily for combat; indeed, during the early part of that century the technique of fighting with sword and dagger developed, thus giving rise to the modern school of knife fighting. Through the 16th and 17th centuries knives and daggers declined in importance and were no longer an important part of the daily civilian costume.

In early colonial America the sword and dagger were the most commonly used edged weapons. During the American colonial era every colonist had a knife. As long as a man was required to defend his life, to obtain or produce his own food or to fashion articles from raw materials, a knife was a constant necessity. Around 1650 one form of dagger popular in the colonies was the "plug bayonet," so called because it fit into the muzzle of a musket. It was used both as a dagger or as a general utility knife. Other knives became popular during the 17th and 18th centuries. The American frontiersman used a large knife to ward off danger from Indian attacks and to hunt and trap; along with that he carried a smaller knife, the blade being three to four inches long, in his rifle bag.

In the 19th century, daggers remained popular, but in the west, the renowned Bowie knife became the weapon favored by the lawless and law-abiding alike. These were violent times, particularly from the 1820s through the Civil War, when a weapon might be needed at a moment's notice. In response, "the well-equipped gentleman carried a pistol in his pocket and a knife beneath his coattails."

Of the many varieties of knives, none has been a more constant or enduring companion to man than the pocket knife. Specimens of folding pocket knives have been discovered in Roman archeological sites, indicating that such knives were popular at least from the first century A.D. They have been manufactured for their utility as both instruments of labor and combat. One of the most common of the specific named knives is the jackknife, a word of uncertain origin, which was a large single-bladed folding knife, ranging in size from four to seven inches when closed. By the early 1700s, when the eastern seaboard had become a highly settled area with large towns and cities and relatively good roads, men normally carried a folding pocket knife. Even when they joined the American army during the revolution, the knife they carried was the jackknife, which was mentioned frequently in colonial records. During the American Revolution at least two states, New Hampshire and New York, required their militiamen to carry a jackknife. Even during the mid-18th century, some of these "jackknives" were rather more lethal than their name suggests, measuring two feet long with the blade extended, and designed solely for fighting. G. Neumann, *Swords and Blades of the American Revolution* 247 (1973). Some others had blades over 16 inches long, extending well beyond the hilt even when folded, and were designed to be used open or closed. "Gentlemen" and officers during this same era often carried canes with slender daggers mounted inside which could be drawn with a quick tug and were used for personal defense. Neumann, *Swords and Blades of the American Revolution*, *supra*, at 239. In the early 19th century a special form of

dagger also developed, the pocket or folding dagger, with blades ranging in size from four to sixteen inches; they were intended to be carried in the pocket or in special sheathes.

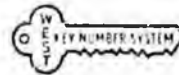
It is clear, then, that knives have played an important role in American life, both as tools and as weapons. The folding pocket-knife, in particular, since the early 18th century has been commonly carried by men in America and used primarily for work, but also for fighting.

This brings us to the switch-blade knife. A switch-blade is defined as a "pocketknife having the blade spring-operated so that pressure on a release catch causes it to fly open." Webster's Third International Dictionary 2314 (1971). If ORS 166.510(1) proscribed the possession of mere pocket-knives, there can be no question but that the statute would be held to conflict directly with Article I, section 27. The only difference is the presence of the spring-operated mechanism that opens the knife. We are unconvinced by the state's argument that the switch-blade is so "substantially different from its historical antecedent" (the jackknife) that it could not have been within the contemplation of the constitutional drafters. They must have been aware that technological changes were occurring in weaponry as in tools generally. The format and efficiency of weaponry was proceeding apace. This was the period of development of the Gatling gun, breach loading rifles, metallic cartridges and repeating rifles. The addition of a spring to open the blade of a jackknife

is hardly a more astonishing innovation than those just mentioned.<sup>6</sup>

We stress again, as we have stressed before, that this decision does not mean individuals have an unfettered right to possess or use constitutionally protected arms in any way they please. The legislature may, if it chooses to do so, regulate possession and use. See *State v. Blocker, supra*, 291 Or. at 259, 630 P.2d at 826; *State v. Kessler, supra*, 289 Or. at 370, 614 P.2d at 100. This court recognizes the seriousness with which the legislature views the possession of certain weapons, especially switch-blades.<sup>7</sup> The problem here is that ORS 166.510(1) absolutely proscribes the mere possession or carrying of such arms. This the constitution does not permit.<sup>8</sup>

The decision of the Court of Appeals is affirmed.



71 Or.App. 356

Gerald Lee ALBERS, Appellant,

v.

Hoyt C. CUPP, Superintendent, Oregon  
State Penitentiary, Respondent.

137975; CA A31762.

Court of Appeals of Oregon.

Argued and Submitted Nov. 28, 1984.

Decided Dec. 12, 1984.

Reconsideration Denied Jan. 25, 1985.

Review Denied Feb. 12, 1985.

Appeal from Circuit Court, Marion County, Clarke C. Brown, Judge.

6. Charles Dickens, in his novel *Martin Chuzzlewit*, published in 1842 shortly after his return from America, referred to a certain Scadder, who "picked his teeth with a sort of young bayonet that flew out of his knife when he touched a spring." This suggests that America could have been the origin of the switch-blade. See A. Popkess, *Flick Knives*, [1959] *Crim.L.&R.* 640.

7. ORS 166.510(1) was amended in 1957 to include, for the first time, proscription against the possession of switch-blades. Or.Laws 1957, ch. 290, § 1.

8. The analysis we have employed in *State v. Kessler* and *State v. Blocker, supra*, at footnotes

3 and 5, concerning clubs and in the case at bar concerning a knife may not be the same analysis that would be appropriate to the application of Article I, section 27, of the Oregon Constitution to a weapon such as a can of mace, not having a pre-twentieth century form or counterpart. It has been suggested that it is incongruous to believe that a woman today to defend herself from a rapist would have constitutional sanction for carrying a switch-blade knife but not for the can of mace because the latter was unknown to the mid-nineteenth century. Such a case is not before us. The time to deal with that case is when it is presented.

(b) It is an affirmative defense to a prosecution under (a)(1) of this section that

(1) the defendant took reasonable steps to remove the substance from the highway; and

(2) no person suffered physical injury as a result of the presence of the substance on the highway.

(c) Obstruction of highways is a class B misdemeanor. (§ 7 ch 166 SLA 1978)

**Collateral references.** — 39 Am. Jur. 2d. Highways, Streets and Bridges, §§ 281-310.

39A C.J.S., Highways, §§ 217-231.

### Article 2. Weapons and Explosives.

Section	Section
200. Misconduct involving weapons in the first degree	230. Possession of burglary tools
210. Misconduct involving weapons in the second degree	240. Criminal possession of explosives
220. Misconduct involving weapons in the third degree	250. Unlawful furnishing of explosives

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**Collateral references.** — Validity and construction of gun control laws, 28 ALR3d 845.

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**Sec. 11.61.200. Misconduct involving weapons in the first degree.** (a) A person commits the crime of misconduct involving weapons in the first degree if the person

(1) knowingly possesses a firearm capable of being concealed on one's person after having been convicted of a felony by a court of this state, a court of the United States, or a court of another state or territory;

(2) knowingly sells or transfers a firearm capable of being concealed on one's person to a person who has been convicted of a felony by a court of this state, a court of the United States, or a court of another state or territory;

(3) manufactures, possesses, transports, sells, or transfers a prohibited weapon;

(4) knowingly sells or transfers a firearm to another whose physical or mental condition is substantially impaired as a result of the introduction of an intoxicating liquor or drug into that other person's body;

(5) removes, covers, alters, or destroys the manufacturer's serial number on a firearm with intent to render the firearm untraceable; or

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(6) possesses a firearm on which the manufacturer's serial number has been removed, covered, altered, or destroyed, knowing that the serial number has been removed, covered, altered, or destroyed with the intent of rendering the firearm untraceable.

(b) It is an affirmative defense to a prosecution under (a)(1) or (2) of this section that

(1) the person convicted of the prior offense on which the action is based received a pardon for that conviction;

(2) the underlying conviction upon which the action is based has been set aside under AS 12.55.085 or as a result of post-conviction proceedings; or

(3) a period of five years or more has elapsed between the date of the person's unconditional discharge on the prior offense and the date of the possession, sale, or transfer of the firearm.

(c) It is an affirmative defense to a prosecution under (a)(3) of this section that the manufacture, possession, transportation, sale, or transfer of the prohibited weapon was in accordance with registration under 26 U.S.C. 5801-5872 (National Firearms Act).

(d) The provisions of (a)(3) of this section do not apply to a peace officer acting within the scope and authority of the officer's employment.

(e) As used in this section,

(1) "prohibited weapon" means any

(A) explosive, incendiary, or noxious gas

(i) mine or device that is designed, made, or adapted for the purpose of inflicting serious physical injury or death;

(ii) rocket, other than an emergency flare, having a propellant charge of more than four ounces;

(iii) bomb;

(iv) grenade;

(B) device designed, made, or adapted to muffle the report of a firearm;

(C) metal knuckles;

(D) switchblade or gravity knife;

(E) firearm that is capable of shooting more than one shot automatically, without manual reloading, by a single function of the trigger; or

(F) rifle with a barrel length of less than 16 inches, shotgun with a barrel length of less than 18 inches, or firearm made from a rifle or shotgun which, as modified, has an overall length of less than 26 inches;

(2) "unconditional discharge" has the meaning ascribed to it in AS 12.55.185.

(f) Misconduct involving weapons in the first degree is a class C felony. (§ 7 ch 166 SLA 1978)

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The portion of the judgment entered below awarding appellees \$13,000 for personality taken, plus interest and attorney's fees thereon, is vacated and the case remanded for a new trial on the issues as limited by this opinion.



James F. BUSH, Appellant,

v.

James REID and Clarence Reid, Appellees.

No. 1841.

Supreme Court of Alaska.

Dec. 14, 1973.

Parolee brought action for injuries sustained in automobile accident and defendants filed motion to dismiss. The Superior Court, Third Judicial District, Anchorage, Ralph E. Moody, J., granted defendants' motion and the parolee appealed. The Supreme Court, Boochever, J., held that statutes suspending parolee's civil rights during time he was in custody of parole board denied parolee due process and equal protection to extent that they denied him the right to institute civil suit.

Reversed and remanded.

Connor, Erwin and Fitzgerald, JJ., did not participate.

**1. Constitutional Law** ⇨250.3(2), 272  
**Pardon and Parole** ⇨2

Statutes suspending parolee's civil rights during time he was in custody of parole board denied parolee his right to initiate a civil suit but, to that extent, statutes denied parolee due process and equal pro-

**1. AS 11.05.070 provides:**

A judgment of imprisonment in the penitentiary for a term less than for life suspends the civil rights of the person sentenced, and forfeits all public offices and all private trusts, authority, or power during the term or duration of imprisonment.

tection. AS 11.05.070, 33.15.190; Const. art. 1, §§ 7, 12; U.S.C.A.Const. Amend. 14.

**2. Constitutional Law** ⇨277(1)

A chose in action is a form of "property" within due process protection. U.S. C.A.Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

Barry Donnellan, Anchorage, Stephen C. Cooper, Fairbanks, Edgar Paul Boyko, Esq., or Paul Boyko & Associates, Anchorage, for appellant.

No appearance for appellees.

Robert Wagstaff as amicus curiae, for American Civil Liberties Union.

Before RABINOWITZ, Chief Justice, BOOCHEVER, Justice, and EBEN H. LEWIS, Superior Court Judge.

OPINION

BOOCHEVER, Justice.

James F. Bush originally filed this lawsuit in superior court to recover damages for injuries received in an automobile accident. At the time of the accident and the filing of the suit, appellant Bush was a felon on parole. The Reids, as defendants below, filed, and the superior court subsequently granted, a motion to dismiss the complaint on the ground that AS 11.05.070<sup>1</sup> suspends the civil rights of a person sentenced to imprisonment in the penitentiary for a term less than life. Bush here appeals on the grounds that the superior court erred in interpreting the statute, or, alternatively, that the statute if interpreted to bar appellant from access to the courts, violates the Alaska and United States constitutions.

AS 11.05.070 and AS 33.15.190<sup>2</sup> when read together clearly indicate that a parol-

**2. AS 33.15.190 provides:**

The board may permit a parolee to return to his home if it is in the state, or to go elsewhere in the state, upon such terms and conditions, including personal reports from the paroled person as the board prescribes. The board may permit the parolee

ee's civil rights, similarly to those of a prisoner, remain suspended during the time he is in the custody of the parole board. The first question presented to this court is whether the right to bring and maintain a civil suit is among the civil rights suspended by AS 11.05.070.

[1] The general rule has been that in a jurisdiction where a convict loses his civil rights, he cannot sue while under such disability.<sup>3</sup> This rule has recently been applied and upheld in Kansas and Oregon.<sup>4</sup> New York courts consistently have held

to go into another state upon terms and conditions as the board prescribes, and subject to the provisions of any compact executed under the authority of ch. 10 of this title and amendments to it. A prisoner released on parole remains in the legal custody of the board until the expiration of the maximum term or terms to which he was sentenced, less good time allowances provided by law. While in the custody of the board, a person is subject to the disabilities imposed by AS 11.05.070.

3. *Quick v. Western Ry. of Alabama*, 207 Ala. 376, 92 So. 608, 609 (1922); *Sullivan v. Prudential Ins. Co. of America*, 131 Mo. 229, 160 A. 777, 779 (1932); *McLaughlin v. McLaughlin*, 228 Mo. 635, 129 S.W. 21, 23 (1910); *Avery v. Everett*, 110 N.Y. 317, 18 N.E. 148, 154 (1888); *Miller v. Turner*, 64 N.D. 463, 253 N.W. 437, 439 (1934).

The supporting rationale for this suspension of civil rights of prisoners is explained in *Tabor v. Hardwick*, 224 F.2d 526, 529 (5th Cir. 1955), cert. denied, 350 U.S. 971, 76 S.Ct. 445, 100 L.Ed. 843 (1956):

We do not question the wisdom of the rule recognized by such decisions as *Ex parte Hull* [ 312 U.S. 546, 61 S.Ct. 610, 85 L.Ed. 1034] and *White v. Ragen* [ 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed. 1348], supra, that penitentiary inmates ought to have their right to inquire into the validity of their restraint of personal liberty and freedom zealously safeguarded by the courts, but we think that the principle of the cases so holding should not be extended to give them an absolute and unrestricted right to file any civil action they might desire. Otherwise, penitentiary wardens and the courts might be swamped with an endless number of unnecessary and even spurious law suits filed by inmates in remote jurisdictions in the hope of obtaining leave to appear at the hearing of any such case, with the consequent disruption of prison routine and concomitant hazard of escape from custody. As a matter of necessity, however regret-

that Penal Code Sec. 510, which suspends all rights of a prisoner while incarcerated comprises the right to file a civil lawsuit.<sup>5</sup> Cases which allow convicts the right to initiate civil actions have been decided in the absence of statutes suspending civil rights such as the one in point here.<sup>6</sup>

Rush argues, however, that this court should consider the use of "the civil rights" instead of "all civil rights" in AS 11.05.070 (Kansas, Oregon, and New York provisions use "all civil rights"), and liberally construe the provision so as not to ex-

clude the rule may be, it is well settled that, "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." [citations omitted].

4. *Hammett v. San Ore Construction Co.*, 195 Kan. 22, 402 P.2d 820 (1965); *Chinn v. State*, 6 Or.App. 350, 488 P.2d 293 (1971). In *Hammett*, 402 P.2d at 822, the Kansas court said:

Under well-established authorities it is recognized (1) that the use of court process is a "civil right" within a statute providing that sentence of imprisonment in state prison for a term less than life suspends all civil rights during the term of sentence and (2) that the right to sue is a right which is suspended under a statute providing that sentence of imprisonment in state prison for a term less than life suspends all civil rights during term of sentence. See *Nastasi v. State*, 186 Misc. 1051, 61 N.Y.S.2d 438; *Lipschultz v. State*, 192 Misc. 70, 78 N.Y.S.2d 731; *Application of White*, 166 Misc. 481, 2 N.Y.S.2d 582.

5. *Lynch v. Quinlan*, 65 Misc.2d 236, 317 N.Y.S.2d 216 (1970); *In re Cirolo's Estate*, 50 Misc.2d 1007, 271 N.Y.S.2d 841 (1966); *Glenn v. State*, 207 Misc. 776, 138 N.Y.S.2d 857 (1955); *Lipschultz v. State*, 192 Misc. 70, 78 N.Y.S.2d 731 (1948); *Grant v. State*, 192 Misc. 45, 77 N.Y.S.2d 756 (1948). These cases are inapplicable to an action commenced before incarceration because so applied, they would violate § 79-b of the New York Civil Rights Law, McKinney's Consol.Laws, c. 6, a statutory due process clause. *Thomas v. Gruppiso*, 73 Misc.2d 427, 341 N.Y.S.2d 819, 822 (1973). The statute does not deprive parolees of civil process. See *Glenn v. State*, 138 N.Y.S.2d at 858; *Grant v. State*, 77 N.Y.S.2d at 758.

6. See *Panko v. Indicott Johnson Corp.*, 24 F.Supp. 678 (N.D.N.Y.1938); *Bosteder v. Duling*, 115 Neb. 557, 213 N.W. 809 (1927).

read denial of civil access to the courts. The substitution of "the" for "all", while seemingly minor, does allow the possibility that certain civil rights might not be denied. We have been given no authority for such distinction however, and find no indication that this was the intent of the legislature. In light of this absence of indications of such legislative intent, and the strong common-law authority holding that convicts are denied civil access to the courts,<sup>7</sup> we hold that AS 11.05.070 and AS 33.15.190 combine to deny parolees the right to initiate civil suit.

Such finding, however, does not conclude our inquiry. We must also consider Bush's contention that these statutes, if read to bar him from access to the courts, are contrary to the Alaska and United States constitutions. Bush argues that AS 11.05.070 provides for "cruel and unusual punishment"<sup>8</sup> and violates the due process clauses of the Alaska and United States constitutions.<sup>9</sup> While we do not find the punishment provided to be so severe as to constitute "cruel and unusual punishment",<sup>10</sup> nor the statute void for vagueness, we do hold that AS 33.15.190 violates the

due process and equal protection clauses of the Alaska and United States constitutions insofar as it prohibits parolees from having access to the civil courts.

Both art. I, sec. 7 of the Alaska Constitution and sec. 1 of the fourteenth amendment of the United States Constitution prohibit the state from depriving any person of "life, liberty, or property, without due process of law." Bush contends that the right to bring a civil action for damages is property, and that therefore the suspension of such right is a deprivation of property without due process of law.

Any suggestion that a parolee was deprived by his custodial status of standing to assert a denial of due process was dissolved by the United States Supreme Court in *Morrissey v. Brewer*.<sup>11</sup> The nature of protection due "depends on the extent to which an individual will be 'condemned to suffer grievous loss.'"<sup>12</sup> The loss suffered must have some relationship to a "liberty or property" interest within the ambit of the fourteenth amendment.<sup>13</sup>

Because Bush seeks to overcome a statutory denial of access to the courts as a

7. There is no Alaska case involving the right of an imprisoned convict to have access to the courts. We do not here reach that issue.

8. Art. I, sec. 12 of the Alaska Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

The eighth amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

9. Art. I, sec. 7 of the Alaska Constitution provides:

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

Sec. 1 of the fourteenth amendment to the United States Constitution provides in relevant part:

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[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . .

10. This court in *Lanier v. State*, 486 P.2d 981, 990 (Alaska 1971), defined "cruel and unusual punishment" to be that punishment which is:

inhuman and barbarous, or so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice. [citing *Green v. State*, 390 P.2d 433, 435 (Alaska 1964)].

11. 408 U.S. 471, 481-482, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 481, 494-495 (1972). This does not mean that the due process rights of ordinary citizens may not be somewhat modified by the necessities of the criminal correction process. *Sostre v. McGinnis*, 442 P.2d 178, 188-189 (2nd Cir. 1971), cert. denied sub nom. *Sostre v. Oswald*, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740 (1972), cert. denied sub nom. *Oswald v. Sostre*, 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed.2d 254 (1972).

12. *Morrissey v. Brewer*, 408 U.S. at 481, 92 S.Ct. at 2600, 33 L.Ed.2d at 494.

13. *Id.*

plaintiff, the starting point of our analysis must be *Boddie v. Connecticut*,<sup>14</sup> in which the United States Supreme Court held that a state could not deprive indigents of access to divorce tribunals by imposing a prohibitive filing fee.

Justice Harlan, writing for the Court in *Boddie*, recognized the centrality of the concept of due process in maintaining both order and justice in the resolution of the disputes which inevitably arise from human interaction. Upon that jurisprudential foundation he built the holding that where the state commands a monopoly over the only available legitimate means of dispute settlement and the relationship underlying the dispute is warp and woof of the fabric of society, the state may not deny access to the forum of settlement on account of poverty.<sup>15</sup>

We note superficial distinctions between the social context of the instant dispute and that in *Boddie*, but upon reflection we conclude that the denial of access to the civil courts rends the fabric of justice as surely here as in *Boddie*.

Although the collision of automobiles results in a dispute at first subject to private resolution, often the reconciliation of competing interests may be accomplished only by resort to the formal judicial process. The state exercises a monopoly over that paramount process where the "private structuring of individual relationships and repair of their breach" has failed.<sup>16</sup> Unlike the overburdened debtor, who was held in *United States v. Kras*<sup>17</sup> to have such

adequate redress outside the Bankruptcy Act<sup>18</sup> that his right of access to bankruptcy adjudication could be denied by the imposition of a substantial filing fee, the injured citizen has no recourse but to the courts when those who caused his injuries refuse to enter a consensual resolution of the conflict, whether out of recalcitrance or in the assertion of a good faith defense. We further distinguish *Kras* because the prospective bankrupt could pay the required filing fee in unburdensome \$2.00 per week installments;<sup>19</sup> here the bar is absolute and no ameliorative device exists. No "recognized, effective alternatives for the adjustment of differences remain."<sup>20</sup> Thus the initial element of the *Boddie* analysis exists here.

The second aspect of *Boddie* dealt with the importance of the marital relationship. Based on the hierarchy of social values the resolution of personal injury lawsuits might not be considered of such grave importance so as to justify invalidating this statute, although in the instance of a gravely-injured plaintiff, the very quality of his future existence may be dependent upon the outcome. In *Boddie* Justice Harlan sought the fundamental human relationship doctrine to satisfy the due process clause only because denial of access to a divorce court does not impair a simpler "liberty or property" interest. *United States v. Kras* instructs that one must search for a fundamental interest justifying access to the particular dispute resolution process in order to actuate the *Boddie*

14. 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

15. *Id.* at 374-376, 383, 91 S.Ct. at 784-785, 28 L.Ed.2d at 117, 122.

16. *Id.* at 375-376, 91 S.Ct. at 785, 28 L.Ed.2d at 117.

17. 409 U.S. 434, 443-444, 93 S.Ct. 631, 637, 34 L.Ed.2d 626, 635-636 (1973).

18. Because the actual disposition of payment remains in the debtor's control, consensual settlement was a viable option in *Kras*; mere non-action could settle the controversy forcibly to the debtor through the passage of the

statutory limitations period; a state-law composition of creditors could be effected. Further, discharge in bankruptcy would effect no change in the debtor's ability to obtain and hold sufficient funds for life's necessities because of statutory protection of wages and welfare payments from assignment or civil process. *United States v. Kras*, 409 U.S. at 445, 93 S.Ct. at 638, 34 L.Ed.2d at 636.

19. *United States v. Kras*, 409 U.S. at 445, 93 S.Ct. at 638, 34 L.Ed.2d at 636.

20. *Boddie v. Connecticut*, 401 U.S. at 376, 91 S.Ct. at 785, 28 L.Ed.2d at 117.

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[2] We that a chose for person property.<sup>23</sup> reduce income where private to extinguish judgments for substantial ing solvency claims for market value. courts thus induce the el the ability to convert it value and status. Be the "proper ed claim is by collective that use de value of his non sui juris severe than or proper

21. *United States v. Kras*, 409 U.S. at 447, 93 S.Ct. at 637.

22. *Morris v. Gaudin*, 392 U.S. at 2.

23. *Sumner v. Pratt*, 101 U.S. 1968; *Y. Inc.*, 17 (City of P. 1,2d 618.) Colo. 363

24. *Shiada v. View*, 390 U.S. 23 L.Ed.2d 11 407 U.S. L.Ed.2d 5

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doctrine.<sup>21</sup> The Court in *Kras* held that debtors do not have a fundamental right to an adjudication of bankruptcy. But here we must apply the test of *Morrissey*; whether the individual is "condemned to suffer grievous loss" in conjunction with an interest "within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."<sup>22</sup>

[2] We begin with the understanding that a chose in action, such as Bush's claim for personal injuries, is a form of property.<sup>23</sup> The judicial process exists to reduce inchoate claims to money judgment where private settlement is unavailing (or to extinguish them as non-meritorious). Judgments may be executed or assigned for substantially their face value, presuming solvency of the debtor. Unlitigated claims for personal injury have slight market value. Deprivation of access to the courts thus denies both the ability to reduce the claim to a money judgment and the ability to collect the claim or otherwise convert it into property of an appreciable value and liquid nature during the parolee status. Because the only reasonable use of the "property" represented by an unlitigated claim is reduction to judgment followed by collection or assignment, deprivation of that use deprives the claimant of the whole value of his property so long as he remains *non sui juris*.<sup>24</sup> The deprivation is no less severe than the taking of disputed wages or property during the pendency of

litigation.<sup>25</sup> Additionally, the denial of access to the courts creates an unfair leverage in the potential defendant who may avoid or reduce a meritorious claim because the ordinarily penurious state of the parolee dictates an early settlement on whatever terms are available.<sup>26</sup> Finally, the risk of loss of the entire property due to staleness of evidence, loss of witnesses and similar complications constitutes an unreasonable burden. We note that the tolling of the statute of limitations<sup>27</sup> during disability prevents the baldest of takings; nevertheless, the disability robs the parolee of the opportunity to be heard "at a meaningful time and in a meaningful manner."<sup>28</sup>

We conclude that a parolee denied access to the judicial process by reason of his custodial status is thereby condemned to suffer a grievous loss of property rights protected by the due process clause of the fourteenth amendment of the United States Constitution. We further declare that we would reach an identical result in interpreting the due process provisions of the Alaska Constitution alone, finding as we do that Justice Harlan's insightful analysis of the social compact applies with equal force to our constitution. We have several times held that "we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution." Finding as we do that "civil death" of parolees violates the

21. *United States v. Kras*, 409 U.S. at 415-417, 92 S.Ct. at 638-639, 34 L.Ed.2d at 636-637.

22. *Morrissey v. Brewer*, 408 U.S. at 481, 92 S.Ct. at 2600, 33 L.Ed.2d at 491.

23. *Sanner v. Trustees of Sheppard and Enoch Pratt Hospital*, 278 F.Supp. 138, 142 (D.Md. 1968); *Martinez v. Fox Valley Bus Lines, Inc.*, 17 F.Supp. 576, 577 (N.D.Ill.1936); *City of Phoenix v. Dickson*, 40 Ariz. 403, 12 P.2d 618, 619 (1932); *Rosane v. Senger*, 112 Colo. 363, 149 P.2d 372, 375 (1944).

24. *Snidach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342, 89 S.Ct. 1820, 1823, 23 L.Ed.2d 349, 354 (1966) (concurring opinion of Harlan, J.). See *Fuentes v. Shevin*, 407 U.S. 67, 84-85, 92 S.Ct. 1983, 1996, 32 L.Ed.2d 556, 572-573 (1972).

25. See *Fuentes v. Shevin*, 407 U.S. 67, 84-85, 92 S.Ct. 1983, 1996, 32 L.Ed.2d 556, 572-573 (1972); *Snidach v. Family Finance Corp. of Bay View*, 395 U.S. at 342, 89 S.Ct. at 1823, 23 L.Ed.2d at 354.

26. See *Snidach v. Family Finance Corp. of Bay View*, 395 U.S. at 339-341, 89 S.Ct. at 1821-1822, 23 L.Ed.2d at 352-353.

27. AS 09.10.140.

28. *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113, 119 (1971), quoting from *Armstrong v. Manzo*, 380 U.S. 515, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62, 66 (1965) and *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865, 873 (1950).

spirit and intention of the Alaska Constitution, we would not be impeded in our constitutional progress by a narrower holding of the United States Supreme Court.<sup>29</sup>

The finding of a deprivation of a property right does not conclude a due process analysis; the assessment of what process is due requires a balancing of the individual's interest against the state's justification for its enactment.<sup>30</sup> Denial of incarcerated felons' access to the civil judicial process has been justified by fears of disruption of prison routine, spurious litigation commenced in the hope of spending a few hours beyond the bars of prison and increased risks of escape by prisoners en route to hearings.<sup>31</sup> Where the litigant is a parolee, to state these arguments is to reveal their absurdity.<sup>32</sup> No argument has been pressed that engaging in civil litigation will encourage recidivism or otherwise interfere with the rehabilitation of an offender. If one may anticipate any effect, it is that active participation in the system

of justice will develop added respect for the system and a sense of belonging in the mainstream of society.

Given this utter vacancy of rationale for the continued deprivation of access to the judicial process, we hold that AS 33.15.190, insofar as it suspends, in conjunction with AS 11.05.070, the access of parolees to civil courts, violates the due process clauses of the Alaska and United States constitutions.

Additionally, we find that AS 33.15.190 denies parolees "the equal protection of the laws", in violation of the fourteenth amendment to the United States Constitution,<sup>33</sup> and art. I, sec. 1 of the Alaska Constitution.<sup>34</sup> The state, by AS 33.15.190 and 11.05.070, denies parolees the right of access to the civil courts possessed by other persons. We find that the state interest in denying parolees this right satisfies neither the "compelling state interest" test applied when a "fundamental right" is at stake,<sup>35</sup> nor the traditional,

and protection under the law: and that all persons have corresponding obligations to the people and to the State.

In *Leage v. Martin*, 379 P.2d 447, 451-52 (Alaska 1963), this court explained:

The statutory denial of a stay is also without legal effect because it deprives appellees of "equal rights, opportunities, and protection under the law", to which they are entitled under art. I, § 1 of the state constitution. This constitutional guarantee of equal treatment, like the equal protection clause of the federal constitution, is the embodiment of the fundamental principle that all men are equal before the law. It is a prohibition against laws which, in their application, make unjust distinctions between persons. As to this case, the guarantee of equality of treatment prohibits legislation which denies to one group of persons the enjoyment of certain rights which are afforded to another group, when considering the purpose of the legislation, there is no reasonable basis for not treating both groups the same. [footnote omitted].

See *Alex v. State*, 484 P.2d 677, 684 (Alaska 1971).

35. See *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1966). In *Ramirez v. Brown*, 9 Cal.3d 199, 107 Cal.Rptr. 137, 507 P.2d 1345, 1355-1357 (Cal.1973), the California Supreme Court held that the disenfranchisement of ex-felons was not necessary

29. *Baker v. City of Fairbanks*, 471 P.2d 386, 401-402 (Alaska 1970); *R. L. R. v. State*, 487 P.2d 27 (Alaska 1971); see *Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969).

30. *Morrissey v. Brewer*, 408 U.S. at 483, 92 S.Ct. at 2594, 33 L.Ed.2d at 495-496; *Bell v. Busson*, 402 U.S. 535, 540-541, 91 S.Ct. 1586, 1590, 29 L.Ed.2d 90, 95 (1971); *Boddie v. Connecticut*, 401 U.S. at 381-383, 91 S.Ct. at 783, 28 L.Ed.2d at 121; *Shindach v. Family Finance Corp. of Bay View*, 395 U.S. at 339, 89 S.Ct. at 1824, 23 L.Ed.2d at 352.

31. *Tabor v. Hardwick*, 224 P.2d 526, 529 (5th Cir. 1955), cert. denied, 350 U.S. 971, 76 S.Ct. 415, 100 L.Ed. 843 (1956).

32. See *Morrissey v. Brewer*, 408 U.S. at 478, 92 S.Ct. at 2598, 33 L.Ed.2d at 492-493 and our discussion *infra* notes 37 to 39 and accompanying text.

33. The fourteenth amendment provides in relevant part:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

34. Art. I, sec. 1 provides:

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities,

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more lenient "rational basis" test<sup>36</sup> otherwise applicable.

The state may have a reasonable basis for denying convicts while imprisoned access to civil courts for the reasons expressed in *Tabor v. Hardwick*<sup>37</sup> already discussed in this opinion. But the administration of a parole system differs so substantially from the administration of a prison that these reasons cannot logically support the "civil death" of parolees.<sup>38</sup> The conditions and purposes of parole were recently described by the United States Supreme Court in *Morrissey v. Brewer*:

To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. Typically parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community and incurring substantial indebtedness.

The parole officers are part of the administrative system designed to assist parolees and to offer them guidance. The conditions of parole serve a dual purpose; they prohibit, either absolutely or conditionally, behavior which is deemed dangerous to the restoration of the individual into normal society. And through the requirement of reporting to the pa-

role officer and seeking guidance and permission before doing many things, the officer is provided with information about the parolee and an opportunity to advise him. The combination puts the parole officer into the position in which he can try to guide the parolee into constructive development. [Footnote omitted].<sup>39</sup>

Thus, although the state has a legitimate interest in restricting some activities of parolees, prohibiting a parolee from initiating civil actions has no logical connection with such an interest. The only interest here pertinent is preventing behavior which is detrimental to the restoration of a parolee into normal society. Since the parolee is no longer incarcerated, there is no justification based on the furthering of smooth penal administration. The parolee's ability to avail himself of the civil judicial process in order to vindicate his rights and protect his property interests in fact furthers, rather than restricts, the parolee's constructive development and restoration into normal society.

Failing to find either a "compelling state interest" or a "rational basis" for the state's denial to parolees of the right to initiate civil actions, we therefore hold that AS 33.15.190 denies parolees the "equal protection of the laws", in violation of the Alaska and United States constitutions.

For the reasons expressed above, we reverse the judgment of the superior court and remand the case for proceedings in accordance with this opinion.

Reversed and remanded.

CONNOR, ERWIN and FITZGERALD, JJ., not participating.

do not, however, express an opinion now as to the state's interest in denying prisoners access to civil courts. We instead confine our holding here to the rights of parolees.

36. See *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

37. 224 F.2d 526 (5th Cir. 1955), cert. denied 350 U.S. 971, 76 S.Ct. 445, 100 L.Ed. 842 (1956). See *Chinn v. State*, 6 Or.App. 350, 488 P.2d 293 (1971); *Harrell v. State*, 17 Misc.2d 950, 188 N.Y.S.2d 683 (1959). We

38. Cf. *Price v. Johnston*, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356, 1369 (1948).

39. 408 U.S. at 478, 92 S.Ct. at 2598, 33 L.Ed.2d at 192-193.

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107 Idaho 496

STATE of Idaho, Plaintiff-Respondent,

v.

Bruce L. GROB, Defendant-Appellant.

No. 14412.

Court of Appeals of Idaho.

Oct. 31, 1984.

*Change in  
case  
provision*

to reinstate a defaulted interest in an entirely separate mining property where Jackson and Eustler were co-investors. Jackson said he did not know why the source of this money was B.R. Goodwin rather than Eustler himself. However, he stated that this fact had not concerned him.

[6] Upon this evidence the jury well could have inferred the existence of a fraud and conspiracy embracing Wulfenstein and Jackson. In doing so the jury would have chosen to disbelieve protestations by these defendants that they were unaware of any fraudulent scheme. But the jury did not make this choice. The jury, having heard and observed the witnesses, elected instead to find that the alleged conspiracy had not been proven. We decline to disturb this finding. The circumstantial evidence, though highly suggestive, was not so conclusive as to put the matter beyond disagreement among reasonable minds. Therefore, the jury verdict must be upheld.

### III

[7,8] On cross appeal the defendants have argued that the trial judge should have granted their request for attorney fees under I.C. § 12-121. The trial judge found that the plaintiffs' cause "was not brought and pursued frivolously, unreasonably, or without foundation." Therefore, under I.C. § 12-121 and I.R.C.P. 53(e)(1), the court denied an award of attorney fees. The decision to grant or to deny attorney fees under section 12-121 is committed to the sound discretion of the trial court. We will not overturn that determination unless an abuse of discretion is shown. *Viehweg v. Thompson*, 103 Idaho 265, 647 P.2d 311 (Ct.App.1982). In this case, genuine issues were presented at trial. Consequently, we find no abuse of discretion in denying attorney fees.

The judgment of the district court is affirmed. Costs to respondents, Wulfenstein and Jackson. No attorney fees on appeal.

WALTERS, C.J., and SWANSTROM, J., concur.

Defendant was convicted in the First Judicial District Court, Kootenai County, James G. Towles, J., of first-degree kidnapping with intent to rape, second-degree kidnapping, aggravated battery, and using a firearm during the commission of a felony, and the defendant appealed as to sentence. The Court of Appeals, Burnett, J., held that: (1) the Court of Appeals could consider defendant's contention, raised for first time on appeal, that his additional sentence for use of a firearm impermissibly infringed upon his constitutional right to bear arms; (2) the statute does not infringe the right to bear arms; (3) the trial judge did not act beyond his authority in imposing additional sentence for the use of the firearm; and (4) the trial did not abuse his sentencing discretion since the length of the defendant's confinement as computed for purposes of sentencing review could reasonably be viewed if not exceeding the period necessary to achieve the goals of protecting society, retribution and deterrence.

Affirmed.

#### 1. Criminal Law §1028

In criminal appeal, Court of Appeals will not consider issues raised for first time on appeal unless they relate to fundamental error.

#### 2. Criminal Law §1030(2)

Constitutional question may be considered for first time on appeal if such

## 15. Criminal Law Ⓞ1205

Deterrence of others is sufficient ground for imposing substantial prison sentence.

## 16. Assault and Battery Ⓞ100

Criminal Law Ⓞ1208.6(2)

Kidnapping Ⓞ6

Trial judge did not abuse his discretion in sentencing defendant to indeterminate life sentence for first-degree kidnapping of adult woman with intent to rape her, concurrent and indeterminate 15-year sentence for second-degree kidnapping of her companion, consecutive and fixed ten-year sentence for aggravated battery, and another consecutive fixed ten-year sentence for use of firearm during commission of a felony, as facts of case could reasonably be viewed to indicate that length of defendant's confinement would not exceed period necessary to achieve goals of protecting society, retribution and deterrence.

Eric T. Nordlof, Seattle, Wash. (formerly of Coeur d'Alene), for defendant-appellant.

Jim Jones, Atty. Gen. by Lynn E. Thomas, Sol. Gen., and Myrna A.I. Stahman (argued), Deputy Atty. Gen., Boise, for plaintiff-respondent.

BURNETT, Judge.

This is a sentence review case. Appellant Grob has challenged a four-part series of sentences imposed for violent crimes committed against two female victims. After pleading guilty to each of the crimes, Grob received (1) an indeterminate life sentence for the first degree kidnapping of an adult woman with intent to rape her; (2) a concurrent and indeterminate fifteen-year sentence for the second degree kidnapping of her companion; (3) a consecutive and fixed ten-year sentence for an aggravated battery committed by shooting one of the victims; and (4) another consecutive, fixed ten-year sentence for using a firearm during commission of a felony. We affirm the sentences.

Grob's attack upon the sentences is two-pronged. First, he contends that the fire-

arm sentence is unconstitutional. Second, he argues that the sentences, taken as a whole, were unduly harsh. We will consider these points in turn.

I

[1-3] The first issue is whether the additional sentence for use of a firearm impermissibly infringes upon the right to bear arms as provided in the Idaho Constitution. We deem it clear that this sentence represented an enhancement of the sentence for aggravated battery—the only offense which the prosecutor charged as having been committed by use of a firearm. Prefatorily, we note that the constitutional issue has been raised for the first time on appeal. In a criminal appeal, we will not consider such issues unless they relate to fundamental error. E.g., *State v. Wells*, 103 Idaho 137, 645 P.2d 371 (Ct.App.1982). Here, Grob contends that the district judge lacked authority to impose the firearm sentence. Moreover, a constitutional question may be considered for the first time on appeal if such consideration is necessary for subsequent proceedings in a case. *Messmer v. Ker*, 95 Idaho 75, 524 P.2d 536 (1974). Grob's contention, were it not addressed on appeal, could be embodied in a subsequent motion under I.C.R. 35 to correct an allegedly illegal sentence. Accordingly, we deem it appropriate to consider the issue now.

[4] Idaho Code § 19-2520, enacted in 1977, provides in pertinent part that a person convicted of using a firearm while engaged in kidnapping or aggravated battery, "shall, in addition to the sentence imposed for the commission of the crime, be imprisoned in the state prison for not less than three (3) nor more than fifteen (15) years." The right to bear arms is set forth at Article 1, § 11, of the Idaho Constitution. When I.C. § 19-2520 was enacted, the constitutional provision read as follows: "The people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law." In 1978, Article 1, § 11, was amend-

ed to narrow the scope of such regulation. However, the Legislature was authorized, *inter alia*, to prescribe "minimum sentences for crimes committed while in possession of a firearm" and to punish the unlawful "use of a firearm." Thus, whether examined against the 1978 or pre-1978 versions of Article 1, § 11, we believe I.C. § 19-2520 passes constitutional muster.

[5] In a related line of argument, Grob contends that prior to the 1978 amendment of Article 1, § 11, a mandatory sentencing law—such as I.C. § 19-2520—impermissibly infringed upon the constitutional separation of legislative and judicial functions. Grob further argues that the infirm statute could not be saved by a subsequent constitutional amendment. Grob's argument is based upon the pre-1978 decision of our Supreme Court in *State v. McCoy*, 94 Idaho 236, 486 P.2d 247 (1971). In that case the Court struck down a statute imposing a mandatory minimum sentence for driving while intoxicated. However, we need not ponder the implications of *McCoy* in this appeal. In *State v. Cardona*, 102 Idaho 668, 637 P.2d 1161 (1981), the Supreme Court held the rule of *McCoy* inapposite to I.C. § 19-2520. The statute was upheld against a separation-of-powers attack. Consequently, the statute does not depend for its validity upon the 1978 amendment to Article 1, § 11. We hold that the district judge in this case did not act beyond his authority by imposing an additional sentence for use of a firearm, as provided by section 19-2520.

## II

Grob next contends that his sentences were unduly harsh. Grob could have been sentenced to death or life imprisonment for first degree kidnapping, twenty-five years for second degree kidnapping, fifteen years for aggravated battery and fifteen additional years for use of a firearm. See I.C. §§ 18-4504(1), 18-4504(2), 18-908 and 19-2520. Therefore, the sentences imposed were within the maximum statutory limits. Aside from the general issue of undue harshness, the propriety of imposing a

fixed sentence under section 19-2520 has not been placed at issue in this appeal.

[6-8] A sentence within statutory limits will not be disturbed unless a clear abuse of discretion is shown. *State v. Bartholomew*, 102 Idaho 106, 625 P.2d 1109 (1981). Such an abuse of discretion may be found if the sentence imposed is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 645 P.2d 323 (1982). A sentence is reasonable to the extent it appears necessary, at the time of sentencing, to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case. *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct.App.1982).

[9] Sentencing determinations cannot be made with precision. In deference to the discretionary authority vested in Idaho's trial courts, an appellate court will not substitute its view for that of a sentencing judge where reasonable minds might differ. The appellant must show that, under any reasonable view of the facts, his sentence was excessive in light of the criteria of protection of society, retribution, deterrence and rehabilitation. *State v. Toohill, supra*.

[10-12] In applying the *Toohill* standard, we first must determine the actual measure of confinement for sentencing review purposes. With respect to the indeterminate life sentence, ten years is the measure of confinement. *State v. Wilde*, 104 Idaho 461, 660 P.2d 73 (Ct.App.1983). For the fifteen-year indeterminate sentence, one-third (or five years) is the appropriate measure under *Toohill*. That period is concurrent with the ten-year period on the indeterminate life sentence. With regard to the fixed sentences, the duration of confinement is deemed to be the term of the sentence less the statutory formula reduction available as a matter of right for good conduct. *State v. Miller*, 105 Idaho 838, 673 P.2d 438 (Ct.App.1983). Where, as here, the fixed sentence is ten years or more, an inmate may receive a reduction of

ten days § 20-101A reduction for sentences, he two-thirds all of the gate measure is late review of act

[13] The finement f under any be longer t primary ob to achieve deterrence. When wei sentence, c tences, ou cuses upon upon the t turn first t

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289 Or. 359

STATE of Oregon, Respondent,

v.

Randy KESSLER, Petitioner.

TC DA 160004-7811; CA 14296 and  
SC 26705.

Supreme Court of Oregon.

Argued and Submitted March 4, 1980.

Decided July 15, 1980.

Defendant was convicted in the District Court, Multnomah County, Philip T. Abraham, J., of disorderly conduct and possession of two billy clubs and he appealed. The Court of Appeals, 43 Or.App. 303, 602 P.2d 1096, affirmed and review was allowed. The Supreme Court, Lent, J., held that: (1) defendant's contention that his act did not constitute the crime of disorderly conduct did not present the exceptional circumstance or manifest error which would justify consideration of such claim on appeal, where it was not raised at trial, and (2) defendant's possession of a billy club in his home was protected by right to bear arms provision of Oregon Constitution.

Defendant's conviction for disorderly conduct affirmed; defendant's conviction for possession of a slugging weapon reversed.

### 1. Weapons ⊆ 1

Term "arms" in right to bear arms provision of Oregon Constitution does not include modern weapons used exclusively by the military. Const. Art. 1, § 27.

See publication Words and Phrases for other judicial constructions and definitions.

### 2. Weapons ⊆ 1

Term "arms" in right to bear arms provision of Oregon Constitution includes modern day equivalents of weapons used by colonial militiamen and weapons used for personal defense. Const. Art. 1, § 27.

### 3. Weapons ⊆ 1

Oregon constitutional guarantee that persons have right to "bear arms" does not mean that all individuals have an unrestricted right to carry or use personal weapons in all circumstances. Const. Art. 1, § 27.

### 4. Appeal and Error ⊆ 169, 181

Criminal Law ⊆ 1028, 1030(1)

Generally, in both civil and criminal cases, a question not raised and preserved in the trial court will not be considered on appeal; however, failure to raise an objection at trial court does not automatically preclude appellate review.

### 5. Criminal Law ⊆ 1030(3)

Defendant's contention that his acts did not constitute crime of disorderly conduct did not present exceptional circumstance or manifest error which would justify consideration of the claim on appeal, where it was not raised at trial. ORS 166.025.

### 6. Weapons ⊆ 1

Right to bear arms provision of Oregon Constitution includes a right to possess certain arms for defense of person and property. Const. Art. 1, § 27.

### 7. Weapons ⊆ 1

Defendant's possession of a billy club in his home was protected by right to bear arms provision of Oregon Constitution and therefore he could not be prosecuted under statute prohibiting mere possession of a club. ORS 166.510; Const. Art. 1, § 27.

David L. Slader, Portland, argued the cause and filed the brief, for petitioner.

W. Benny Won, Asst. Atty. Gen., Salem, argued the cause, for respondent. With him on the brief was James A. Redden, Atty. Gen., and Walter L. Barrie, Sol. Gen., Salem.

Before DENECKE, C. J., and TONGUE, HOWELL, LENT and PETERSON, JJ.

LENT, Justice.

The defendant in this case was convicted of "possession of a slugging weapon," ORS 166.510(1).<sup>1</sup> We allowed review to consider his claim that the legislative prohibition of the possession of a "billy"<sup>2</sup> in ORS 166.510(1) violates Article I, section 27, of the Oregon Constitution. That provision states:

"The people shall have the right to bear arms for the defence [sic] of themselves, and the State, but the Military shall be kept in strict subordination to the civil power."

The language of this provision raises several questions in this case, including:

- (a) To whom does the right belong?
- (b) What is the meaning of "defense of themselves"?
- (c) What is the meaning of "arms," and what, if any, weapons of current usage are included in this term?

The scope of Article I, section 27, has not previously been analyzed by Oregon courts.<sup>3</sup> The decisions construing the second amendment to the United States Constitution are not particularly helpful because the wording of the second amendment differs sub-

1. ORS 166.510(1) provides:

"(1) Except as provided in ORS 166.515 or 166.520, any person who manufactures, causes to be manufactured, sells, keeps for sale, offers, gives, loans, carries or possesses an instrument or weapon having a blade which projects or swings into position by force of a spring or other device and commonly known as a switch-blade knife or an instrument or weapon commonly known as a blackjack, slung shot, billy, sandclub, sandbag, sap glove or metal knuckles or who carries a dirk, dagger or stiletto commits a Class A misdemeanor."

Although the words "slugging weapon" are not used in ORS 166.510, this term was used in the complaint filed in this case.

2. Webster's Third International Dictionary defines a "billy" as "a heavy usually wooden weapon for delivering blows; club, especially a policeman's club."

3. In *State v. Robinson*, 217 Or. 612, 619, 343 P.2d 686 (1959) this court held that ORS 166.270 which prohibits ex-convicts from possessing concealed weapons did not violate Article I, section 27, of the Oregon Constitution. Ac-

stantially from our state provision. The second amendment has not yet been held to apply to state limitations on the bearing of arms.<sup>4</sup> The wording of Oregon's right to bear arms provision also differs from many other state constitutional provisions.<sup>5</sup>

Despite the many variations in wording, the states' constitutional provisions guaranteeing the right to bear arms share a common historical background. We begin first with an examination of this historical background and then with an examination of the meaning and purpose of the particular words chosen by the Oregon drafters. We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.

#### 1. The historical background

The first article of Oregon's constitution of 1859 contains the state's bill of rights.

cord, *State v. Cartwright*, 246 Or. 120, 134-137, 418 P.2d 822 (1967).

4. The second amendment to the United States Constitution provides:

"A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

In early cases the United States Supreme Court held that the second amendment prohibition applies only to Congress. *Presser v. Illinois*, 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615 (1886); *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1876). The second amendment has not yet been held applicable to the states, either directly or through selective incorporation in the fourteenth amendment. See Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 Catholic U.L.Rev. 53 (1966).

5. For a helpful categorization of various state constitutional right to bear arms provisions see Note, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U.Chi.L.Rev. 185 (1970).

Article I, section 27, regarding the right to bear arms was taken verbatim from sections 32 and 33 of the Indiana Constitution of 1851. C. Carey, *A History of the Oregon Constitution* 469 (1926); Palmer, *The Sources of the Oregon Constitution*, 5 Or.L. Rev. 200, 202 (1926).

The original Indiana constitution was adopted in 1816 at Indiana's first statehood convention. Indiana's constitution was revised in 1851, but the 1816 version of the right to bear arms provision remained unchanged. See W. Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 3, p. 345-400 (1974).

The drafters of Indiana's bill of rights of 1816 borrowed freely from the wording of other state constitutions, most notably the constitutions of Kentucky, Ohio, Tennessee, and Pennsylvania. Twomley, *The Indiana Bill of Rights*, 20 Ind.L.J. 211, 212-213 (1945). These state constitutions were drafted between 1776 and 1802. Oregon's right to bear arms provision therefore can be traced to state provisions drafted in the revolutionary and post-revolutionary war era.

The constitutions adopted by the original colonies generally included a bill or declaration of rights. Many of the declarations of rights were patterned largely upon the English Bill of Rights of 1689.<sup>6</sup> The background of the English Bill of Rights sheds some light upon the meaning of the right to bear arms provisions in the colonial constitutions.

James II, a Catholic king, ascended the English throne in 1685 amidst domestic religious controversy between the Catholics and Protestants. James II established a strong standing army which he quartered in private homes. He sought to repeal certain laws of Parliament which barred Catholics from public offices. The Protestants revolted in the "Glorious Revolution" of 1688 and succeeded in deposing James II and

bringing to power the king's Protestant daughter, Mary, and her husband, William of Orange. William and Mary were offered the crown in 1689 on condition that they sign the Declaration of Rights. The Declaration was later enacted as a statute, which was divided into two parts, first listing the allegedly illegal actions of James II, then declaring the rights of the people. The first part stated that James II:

" \* \* \* did endeavor to subvert and extirpate the Protestant Religion and the Laws and Liberties of this Kingdom \* \* \* ."

"5. By raising and keeping a Standing army within this Kingdom in Time of Peace without Consent of Parliament and quartering Soldiers contrary to Law.

"6. By causing several good Subjects, being Protestants, to be disarmed at the same Time when Papists were both armed and employed contrary to Law."

The parallel provisions of the declaration of rights provided:

" \* \* \* 5. That the raising or keeping a Standing Army within the Kingdom unless it be with the Consent of Parliament is against Law.

"6. That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law."<sup>7</sup>

Historians have noted that the early colonial legislatures perceived themselves as descendants of the House of Commons who shared many of the same political experiences of their 17th century English counterparts. See B. Schwartz, *The Great Rights of Mankind* 15, 31-32 (1977). The French and Indian War ending in 1763 brought large numbers of British soldiers to the colonies. King George III maintained and increased these standing armies following that war, and ordered the troops to be quartered in private homes. The colonists who were accustomed to relying on their

6. See generally, B. Schwartz, *The Great Rights of Mankind* 1-36 (1977); Feller and Gottlieb, *The Second Amendment: A Second Look*, 61 *Northwestern U.L.Rev.* 46, 47-56 (1966).

7. Bill of Rights, 1 W. & M., sess. 2, c. 2 (1689), reprinted in Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 *Hastings Const.L.Q.* 961, 973 (1975).

own citizen militias viewed the standing armies as an unlawful instrument of oppression. See Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const.L.Q. 961, 975-978 (1975). The state constitutions drafted in the revolutionary war era therefore included provisions guaranteeing the right to bear arms and prohibiting standing armies in time of peace. The relevant provisions of the English Bill of Rights of 1689 provided a useful model for the colonial drafters.

## II. The Oregon right to bear arms

### A. "Defense of themselves and the state"

We have noted that Oregon's constitutional right to bear arms provision, Or. Const. Art. I, § 27, was taken verbatim from the Indiana constitutional provision drafted in 1816. The phrase "for defense of themselves and the state" in Indiana's provision was most likely taken from the Kentucky provision in its 1799 constitution, or the Ohio provision in its 1802 constitution.<sup>8</sup> The phrase "for defense of themselves and the state" appears in the present day consti-

8. Art. X, §§ 23 and 24, of the 1799 Kentucky constitution provided:

"Sec. 23. That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned.

"Sec. 24. That no standing army shall, in time of peace, be kept up, without the consent of the legislature; and the military shall, in all cases and at all times, be in strict subordination to the civil power."

W. Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 4, p. 163 (1975).

Art. VIII, § 20, of the 1802 Ohio constitution provided:

"Sec. 20. That the people have a right to bear arms for the defence of themselves and the State, and as standing armies, in time of peace, are dangerous to liberty, they shall not be kept up, and that the military shall be kept under strict subordination to the civil power."

W. Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 7, p. 555 (1978). Ohio's constitutional provision was most likely taken from Art. XIII of Pennsylvania's constitutional Bill of Rights of 1776 which provided:

"That the people have a right to bear arms for the defence of themselves and the state, and as standing armies in the time of peace are dangerous to liberty, they ought not to be

tutions of Oregon, Indiana, and six other states.<sup>9</sup> The language is subject to varying interpretations. It has been suggested that the language includes three separate justifications for a state constitutional right to bear arms: (a) The preference for a militia over a standing army; (b) the deterrence of governmental oppression; and (c) the right of personal defense.<sup>10</sup>

The language "the right to bear arms . . . for defense of . . . the state" more likely refers to the historical preference for a citizen militia rather than a standing army as outlined above.<sup>11</sup> See *People v. Brown*, 253 Mich. 537, 235 N.W. 245, 246 (1931):

"It is generally recognized that . . . the right to bear arms had its origin in the fear of the American colonists of a standing army and its use to oppress the people, and in their attachment to a militia composed of all able-bodied men. Probably the necessity of self protection in a frontier society also was a factor."

The phrase "the right to bear arms in defense of themselves" has a suggested purpose which is closely related to the prefer-

kept up; And that the military should be kept under strict subordination to, and governed by, the civil power."

W. Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 8, p. 279 (1979).

9. The phrase "for defense of themselves and the state" appears in the constitutions of Florida, Declaration of Rights § 20; Kentucky Bill of Rights § 1; Pennsylvania, art. I, § 21; South Dakota, art. VI, § 24; Vermont, ch. I, art. 16; and Wyoming, art. I, § 24.

10. See Note, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U.Chi.L.Rev. 185, 190-198 (1970).

11. Despite the early Americans' objection to standing armies and their preference for citizen militias, our society today apparently prefers the maintenance of federally controlled standing armies. The federal government has assumed total responsibility for training and supplying the "state militias," i. e., the National Guard. See, e. g., 32 U.S.C., §§ 101, 102, 501, 502, 701 (1976); Rohmer, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 Cath.U.L.Rev. 53, 72 (1966).

ence for citizen militias. That suggested purpose is the deterrence of government from oppressing unarmed segments of the population. For example, King James II attempted to disarm the Protestants while allowing Catholics to bear arms, thus prompting the guarantee in the 1689 Bill of Rights that Protestants could have "arms for their defense."<sup>12</sup> Joseph Story wrote that,

"The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."

J. Story, *Commentaries on the Constitution*, Vol. 3, p. 746 (1833). Cf., *Carlton v. State*, 63 Fla. 1, 58 So. 486, 488 (1912) (state provision was "intended to give the people the means of protecting themselves against oppression and public outrage").

"Defense of themselves" has also been said to include an individual's right to bear arms to protect his person and home. *Schubert v. DeBard*, Ind.App., 398 N.E.2d 1339, 1341 (1980) (Indiana constitution provides citizenry the right to bear arms for their personal self-defense). Self-defense has been recognized as a privilege in both civil and criminal law since about 1400 in England and at all times in the United States.<sup>13</sup> Although the right to bear arms for self-protection does not appear to have been an important development in England, the justification for a right to bear arms in defense of person and home probably reflects

12. See text accompanying note 7 *supra*.

13. "The privilege of self-defense rests upon the necessity of permitting a man who is attacked to take reasonable steps to prevent harm to himself, where there is no time to resort to the law. The early English law, with its views of strict liability, did not recognize such a privilege; \* \* \*. But since about 1400 the privilege has been recognized, and it is now undisputed, in the law of torts as well as in the criminal law." (citations omitted) W. Prosser, *Law of Torts* 108 (4th ed. 1971).

the exigencies of the rural American experience. See *People v. P. own, supra*. Cf., *Matthews v. State*, 237 Ind. 677, 689-692, 148 N.E.2d 334, 339-341 (1958) (Emmert, C. J., dissenting) (constitutional guarantee based on historical necessity for personal defense.)<sup>14</sup>

#### B. The meaning of the term "arms"

The term "arms" is also subject to several interpretations. In the colonial and revolutionary war era, weapons used by militiamen and weapons used in defense of person and home were one and the same. A colonist usually had only one gun which was used for hunting, protection, and militia duty, plus a hatchet, sword, and knife. G. Neumann, *Swords and Blades of the American Revolution* 6-15, 252-254 (1973). When the revolutionary war began, the colonists came equipped with their hunting muskets or rifles, hatchets, swords, and knives. The colonists suffered a severe shortage of firearms in the early years of the war, so many soldiers had to rely primarily on swords, hatchets, knives, and pikes (long staffs with a spear head). W. Moore, *Weapons of the American Revolution* 8 (1967).

Therefore, the term "arms" as used by the drafters of the constitutions probably was intended to include those weapons used by settlers for both personal and military defense. The term "arms" was not limited to firearms, but included several hand-carried weapons commonly used for defense. The term "arms" would not have included cannon or other heavy ordnance not kept by militiamen or private citizens.

14. Compare the provisions in several state constitutions which guarantee that a person has the right to bear arms "in defense of his home, person and property." Colo.Const., Art. II, § 13; Miss.Const., Art. III, § 12; Mo.Const., Art. I, § 23; Mont.Const., Art. III, § 13; Okla. Const., Art. II, § 26; *State v. Nickerson*, 126 Mont. 157, 247 P.2d 188 (1952) (defendant cannot be convicted of assault if he pointed a loaded gun at a trespasser in his home); accord. *State v. Plassard*, 355 Mo. 90, 195 S.W.2d 495 (1946).

The revolutionary war era ended at a time when the rapid social and economic changes of the so-called Industrial Revolution began. The technology of weapons and warfare entered an unprecedented era of change. P. Cleator, *Weapons of War* 143-152 (1967). Firearms and other hand-carried weapons remained the weapons of personal defense, but the arrival of steam power, mechanization, and chemical discoveries completely changed the weapons of military warfare. The development of powerful explosives in the mid-nineteenth century, combined with the development of mass-produced metal parts, made possible the automatic weapons, explosives, and chemicals of modern warfare. P. Cleator, *Weapons of War* 153-177 (1967).

[1] These advanced weapons of modern warfare have never been intended for personal possession and protection. When the constitutional drafters referred to an individual's "right to bear arms," the arms used by the militia and for personal protection were basically the same weapons. Modern weapons used exclusively by the military are not "arms" which are commonly possessed by individuals for defense, therefore, the term "arms" in the constitution does not include such weapons.

[2] If the text and purpose of the constitutional guarantee relied exclusively on the preference for a militia "for defense of the State," then the term "arms" most likely would include only the modern day equivalents of the weapons used by colonial militiamen. The Oregon provision, however, guarantees a right to bear arms "for defense of *themselves*, and the State." The term "arms" in our constitution therefore would include weapons commonly used for either purpose, even if a particular weapon is unlikely to be used as a militia weapon.

[3] The constitutional guarantee that persons have the right to "bear arms" does not mean that all individuals have an unrestricted right to carry or use personal weap-

ons in all circumstances. For example, the danger of firearms was recognized shortly after the development of gunpowder. The English Statute of Northampton in 1327 forbade persons to ride at night carrying a firearm for the purpose of terrifying the people.<sup>15</sup> A 1678 Massachusetts law forbade shooting near any house, barn, garden, or highway in any town where a person may be "killed, wounded, or otherwise damaged."<sup>16</sup> The courts of many states have upheld statutes which restrict the possession or manner of carrying personal weapons. The reasoning of the courts is generally that a regulation is valid if the aim of public safety does not frustrate the guarantees of the state constitution. For example many courts have upheld statutes prohibiting the carrying of concealed weapons, *see, e. g., State v. Hart*, 66 Idaho 217, 157 P.2d 72 (1945); and statutes prohibiting possession of firearms by felons, *see, e. g., State v. Cartwright*, 246 Or. 120, 418 P.2d 922 (1966).

### III. *The present case*

We now turn to the facts of the present case. The defendant was involved in an off and on verbal argument with his apartment manager in the course of the day on November 13, 1978. The dispute escalated into name calling, colorful words, and object throwing. At one point the defendant kicked the elevator door in the apartment building. The police were called and arrested the defendant. The defendant asked the police to get his coat from his apartment. The officers found two "billy clubs" in the defendant's apartment.

The defendant was charged with disorderly conduct, ORS 166.025, and possession of a slugging weapon, ORS 166.510. The matter went to trial without a jury. The defendant at trial demurred to and moved to dismiss the second charge on the grounds that it failed to state a crime. The motion was denied and the defendant was found guilty as charged on both counts.

15. 2 Edward III, ch. 3 (1328), reprinted in J. Bishop, *Statutory Crimes*, § 783 (3d ed. 1901).

16. Council held in Boston, March 28, 1678; referred to in Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 Chi. Kent L. Rev. 148, 150, n. 18 (1971).

[4, 5] The defendant appealed to the Court of Appeals, contending first that his acts did not amount to the crime of disorderly conduct, and second that the statute prohibiting possession of billy clubs, ORS 166.510(1), violates Article I, section 27, of the Oregon Constitution. The Court of Appeals did not consider defendant's first contention because it was not raised at trial.<sup>17</sup> The Court of Appeals held that ORS 166.510(1) was within the reasonable exercise of the "police power" of the state to curb crime. 43 Or.App. 303, 307, 602 P.2d 1096 (1979).

[6] The defendant contends that his conviction for possession of a billy club violates his right to possess arms in his home for personal defense. Pursuant to our previous discussion regarding the purpose and scope of the right to bear arms provision, we hold that Article I, section 27, of the Oregon Constitution includes a right to possess certain arms for defense of person and property. The remaining question is whether the defendant's possession of a billy club in this case is protected by Article I, section 27.

The club is considered the first personal weapon fashioned by humans. O. Hogg, *Clubs to Cannon* 19 (1968). The club is still used today as a personal weapon, commonly carried by the police. ORS 166.510 prohibits possession of a "billy;" however, ORS 166.520 states that peace officers are not prohibited from carrying or possessing a weapon commonly known as a "blackjack" <sup>18</sup> or "billy."

The statute in this case, ORS 166.510, prohibits the mere possession of a club. The defendant concedes that the legislature could prohibit carrying a club in a public

17. The general rule in both civil and criminal cases is that a question not raised and preserved in the trial court will not be considered on appeal. *State v. Abel*, 241 Or. 465, 467, 406 P.2d 902 (1965). Failure to raise an objection in trial court does not automatically preclude appellate review. The defendant's contention that his acts did not constitute the crime of disorderly conduct, however, does not present the exceptional circumstance or manifest error which justifies this court's consideration of such a claim. It follows that defendant's conviction of disorderly conduct is affirmed. Note

place in a concealed manner, but the defendant maintains that the legislature cannot prohibit all persons from possessing a club in the home. The defendant argued that a person may prefer to keep in his home a billy club rather than a firearm to defend against intruders.

[7] Our historical analysis of Article I, section 27, indicates that the drafters intended "arms" to include the hand-carried weapons commonly used by individuals for personal defense. The club is an effective, hand-carried weapon which cannot logically be excluded from this term. We hold that the defendant's possession of a billy club in his home is protected by Article I, section 27, of the Oregon Constitution.

The defendant's conviction for disorderly conduct is affirmed, and his conviction for possession of a slugging weapon is reversed.



289 Or. 511  
DEPARTMENT OF REVENUE, State of Oregon, Respondent,

v.  
Donald W. GREAVES and Norma P. Greaves, Appellants.  
TC 1373; SC 26873.

Supreme Court of Oregon,  
In Banc.

Argued and Submitted June 21, 1980.

Decided July 23, 1980.

Department of Revenue petitioned for statutory writ of mandamus commanding

that this case is not concerned with that aspect of the statute prohibiting disorderly conduct which we held to be unconstitutional in *State v. Spencer*, 289 Or. 225, 611 P.2d 1147 (1980).

18. Webster's Third International Dictionary defines a "blackjack" as " \* \* \* 4. a small striking weapon typically consisting at the striking end of a leather enclosed piece of lead or other heavy metal and at the handle end of a strap or springy shaft that increases the force of impact."

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