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retary of State, *supra*, and Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). *See also* Colorado Racing Commission v. Smaldone, Colo., 492 P.2d 619; Arnold v. Denver, 171 Colo. 1, 464 P.2d 515 (1970); and Goldman v. Knecht, 295 F.Supp. 897 (D.C.Colo.1969).

Judgment affirmed.

Minnie May CUNNINGHAM, Plaintiff-Appellant,

v.

SPRING VALLEY ESTATES, INC., a corporation, et al., Defendants-Appellees.

No. 72-068.

(Supreme Court No. 24727.)

Colorado Court of Appeals, Div. II.

June 6, 1972.

Rehearing Denied June 27, 1972.

Certiorari Granted Oct. 24, 1972.

Selected for Official Publication.

Owner of property by adverse possession brought action for damages for alleged trespass on such property through which sewer main was constructed by defendant city and to require defendants to restore property to its former condition. The District Court, Boulder County, Howard O. Ashton, J., determined that city had a right to sewer easement on basis of inverse condemnation, denied owner's request for injunctive relief and awarded monetary damages against defendants. Owner appealed. The Court of Appeals, Enoch, J., held that absent agreement or admissions by parties, resolution, at pretrial conference, of disputed issues as to city's right to easement on property and as to owner's right to injunctive relief was improper. The court further held that subject to any defenses which defendant might have had, owner was entitled to damages for any injury caused by construction of main from date of owner's adverse possession rather than merely from date of the judgment quieting title in owner.

Reversed and remanded for new trial.

1. Trial ⇐9(1)

Absent agreement or admissions by parties, in action for damages caused by defendant's alleged trespass on plaintiff's property and to require defendant to restore property to its former condition, resolution, at pretrial conference, of disputed issues as to defendant city's right to sewer easement on plaintiff's property on basis of inverse condemnation and as to plaintiff's right to injunctive relief was improper.

2. Adverse Possession ⇐106(5)

Subject to any defenses which defendant might have had, owner of property by adverse possession was entitled to damages for any injury caused by construction of sewer main through such property from date of owner's adverse possession rather than merely from date of judgment quieting title in plaintiff. 1967 Perm.Supp., C.R.S., section 118-7-1(1).

James H. Snyder, Boulder, Wesley H. Doan, Denver, for plaintiff-appellant.

Hollenbeck, King, French & Mills, Guy A. Hollenbeck, Peter C. Dietze, Boulder, for defendants-appellees, Spring Valley Estates, Inc. and James M. Burger.

Walter L. Wagenhals, City Atty., Gilbert M. Sackheim, Asst. City Atty., Boulder, for defendant-appellee, City of Boulder, Colo.

ENOCH, Judge.

This case was transferred from the Supreme Court pursuant to statute.

This action was brought by Minnie May Cunningham against the named defendants for damages caused by defendants' alleged trespass upon her property and to require

policies underlying Alaska Rule of Evidence 803(8)(b)(iii) which exempts from inclusion within the exception "factual findings offered by the state in criminal cases." We concluded that the factual findings exempted were limited to those resulting from "an investigation made pursuant to authority granted by law." *See* Alaska R.Evid. 803(8)(a). In so doing, we recognized, though we did not state, that Alaska Rule of Evidence 803(8)(b)(iv) specifically exempts from coverage under the exception "factual findings resulting from special investigation of a particular complaint, case, or incident." We agree that the factual findings offered by the state in a criminal case under subsection (iii) cover a broader category than factual findings resulting from special investigation of a particular complaint, case, or incident under subsection (iv). Nevertheless, we concluded that before a factual finding would fall within the bar of any of these subsections, it would have to be made under circumstances in which the person making the factual finding could foresee its use in litigation and use this knowledge to manipulate the ultimate decision in the litigation.

In applying this test to the various items contained within the breathalyzer packet, we are satisfied that a state employee could not tamper with the findings in time to affect a specific prosecution. Any effort by state employees to tamper with the results reported in the breathalyzer packet thereby making all defendants who were administered a breathalyzer test with a particular instrument falsely appear intoxicated would be readily discoverable.

Finally, we conclude that defendant has ample protection against negligent preparation of the breathalyzer packet in Alaska's broad rules of criminal discovery, the requirement that the breathalyzer machine be available for inspection by the defendant or his representative and with the defendant's right to discover sample "ampoules." *See Lauderdale v. State*, 548 P.2d 376 (Alaska 1976) and defendant's right to discover samples of his "breath". *See also Municipality of Anchorage v. Serrano*, 649 P.2d 256 (Alaska App., 1982) (defendant's breath samples must be preserved for their independent analysis or other means must be provided to check breathalyzer results); *Cooley v. Municipality of Anchorage*, 649 P.2d 251, 255 (Alaska App., 1982) (municipality has the burden to convince the jury that the breathalyzer is accurate). We conclude that the trial court did not err in finding the various documents within the breathalyzer packet to be within the public records exception to the hearsay rule.

Byrne does not complain that the various documents were not properly authenticated as did the defendants in *Huggins*. Consequently, it is not necessary for us to determine whether the factors which led us to remand those cases for further proceedings would warrant further action in this case.

The judgment of the district court is AFFIRMED.

ANCHORAGE, A Municipal Corporation, Appellant,

v.

Gregory RICHARDS, Appellee.

ANCHORAGE, A Municipal Corporation, Appellant,

v.

Douglas R. PHILLIPS, Appellee.

ANCHORAGE, A Municipal Corporation, Appellant,

v.

Michael B. PHELPS, Appellee.

ANCHORAGE, A Municipal Corporation, Appellant,

v.

Edward A. KEGLER, Appellee.

Nos. 6387, 6459, 6504 and 6540.

Court of Appeals of Alaska.

Nov. 19, 1982.

Municipality appealed from series of decisions of the District Court, Third Judi-

cial District, Anchorage, Beverly W. Cutler, Warren B. Tucker, and Elaine Andrews, JJ., dismissing prosecutions. The Court of Appeals, Singleton, J., held that a municipal ordinance regulating the carrying of a concealed weapon is not prohibited by the statute which prohibits someone from knowingly possessing a deadly weapon concealed "on his person."

Judgment reversed and remanded.

1. Municipal Corporations ⇐592(1)

Statute which prohibits someone from knowingly possessing a deadly weapon concealed "on his person" was not intended to expressly privilege the carrying of a weapon and, therefore, did not prohibit home rule municipality from enacting ordinance regulating carrying a concealed weapon. AS 11.61.220; Const. Art. 10, §§ 1, 11.

2. Municipal Corporations ⇐592(1)

Home rule municipalities are free to prohibit conduct that is not prohibited by state legislation. Const. Art. 10, § 11.

James F. Wolf, Asst. Municipal Prosecutor, Allen M. Bailey, Municipal Prosecutor, and Theodore D. Berns, Municipal Atty., Anchorage, for appellant.

Joan S. Schanen, Wasilla, for appellee Gregory Richards.

Jonathon A. Katcher, Asst. Public Defender, and Dana Fabe, Public Defender, Anchorage, for Douglas R. Phillips, Michael B. Phelps, and Edward A. Kegler, appellees.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

SINGLETON, Judge.

This is an appeal by the Municipality of Anchorage from a series of decisions of the trial court dismissing prosecutions. The decisions are final, and we have jurisdiction. *State v. Michel*, 634 P.2d 383 (Alaska App. 1981). The appeals have been joined, because they present a single issue of law: whether a municipal ordinance regulating carrying a concealed weapon is prohibited by state law. We conclude that the trial court erred in its construction of the interplay between the state legislation and the ordinance, and therefore we reverse.

Appellees were charged with separate violations of AMC 8.05.070 which provides as follows:

> A. It is unlawful for any person to carry concealed about his person in any manner:
>
> 1. a revolver, pistol or other firearm;
>
> . . .

In each complaint, it was alleged that the defendant concealed a firearm about his person by storing it in his vehicle.

The complaints were dismissed by the district court on the assumption that AMC 8.05.070 was in irreconcilable conflict with AS 11.61.220 which prohibits someone from knowingly possessing a deadly weapon concealed "on his person." The district court noted that AS 11.61.220, as originally contemplated, proscribed concealing a weapon in an automobile but that members of the legislature objected to this provision, and it was deleted. Consequently, the district court inferred that the legislature's decision not to prohibit carrying a concealed weapon in a vehicle precluded a municipality from enforcing such a prohibition. On the assumption that the Anchorage ordinance prohibited carrying a weapon in a vehicle, the trial court held the ordinance invalid.

Anchorage is a home rule municipality with broad powers of legislation. Article 10, section 1 of our state constitution provides in relevant part:

> The purpose of this article [governing local government] is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.

Article 10, section 11 provides in relevant part:

A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.

[1, 2] The district court reasoned that AMC 8.05.070 was prohibited by the enactment of AS 11.61.220. We have concluded that the district court erred in this determination and therefore we reverse. AS 11.61.220 does not address municipal powers and therefore cannot be construed to explicitly prohibit any municipal action. Nor do we believe that the statute can be interpreted to implicitly prohibit municipal action. Generally, legislation can take three positions regarding conduct: (1) it can prohibit conduct; (2) it can expressly license conduct, that is, create an express "privilege" to engage in certain conduct; or (3) it can ignore conduct. There is nothing in the statute in question suggesting that it was intended to expressly privilege carrying weapons. The most that can be said is that the legislature elected to tolerate such conduct. Such toleration does not rise to the level of the prohibition contemplated by Article 10, section 11 of our state constitution. Home rule municipalities are free to prohibit conduct that is not prohibited by state legislation. *See Cremer v. Anchorage*, 575 P.2d 306 (Alaska 1978).

Our holding today does not depart from *Simpson v. Municipality of Anchorage*, 635 P.2d 1197 (Alaska App.1981). In that case, a majority of this court held that AS 28.01.010(a) constituted a legislative prohibition of any municipal ordinance governing traffic regulation which was "inconsistent" with a state statute or rule regulating traffic. In determining whether an inconsistency existed, we determined that state-wide uniformity was a significant purpose of the traffic regulations. *Id.* at 1202. We then found AMC 9.28.030, which at that time prescribed driving with a .10% blood alcohol level, inconsistent with AS 28.35.030, because it did not prohibit driving with a .10% blood alcohol level unless driving was impaired. There is nothing in the criminal code suggesting that its provisions dealing with possession of weapons were intended to establish state-wide uniformity; nor is there any state statute regulating firearms which prohibits inconsistent municipal ordinances. Finally, we find absolutely nothing in the state statutes that would suggest an intent to encourage people to carry weapons in automobiles.

The judgment of this district court is REVERSED and these cases REMANDED for further proceedings consistent with this opinion.[1]

1. The parties in the district court proceeded on the assumption that the municipal ordinance in question prohibits concealing firearms in vehicles. The trial court either so found or simply accepted the parties' construction of the ordinance *arguendo* and went on to reach the constitutional issue. We express no opinion as to whether this interpretation of AMC 8.05.070 is appropriate. *But see State v. Crumal*, 54 Or. App. 41, 633 P.2d 1313 (1981), (interpreting an Oregon statute identical to the ordinance in this case). The Oregon court held that the import of the phrase "carries concealed about the person" contained in the statute governing carrying concealed weapons is that the concealed weapon must be carried in such a manner that it moves along with a person's body, not just in reasonable proximity to the person or some place where it could be deemed to be in his constructive possession. Therefore, a firearm under an automobile seat was held not to be carried about the driver's person. ORS 166.240, 166.240(1).

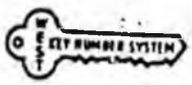
ichard E. O'Toole of Walentine, ›ole, McQuillan & Gordon, Omaha, for ·llees.

ASTINGS, C.J., BOSLAUGH, TE, CAPORALE, SHANAHAN, GRANT, JJ., and COLWELL ict Judge, Retired.

R CURIAM.

: plaintiffs-appellants, Robert J. and ·ia A. Luby, allege they were dam- by the conduct of defendants-appel- CBS Real Estate Company, Madeline y, and Jeannie Neff. The district sustained the demurrer of the de- nts on the basis that as real estate sionals they were entitled to the pro- of the 2-year period of limitations ble to professionals, embodied in ev1sStat. § 25-222 (Reissue 1985). *Zoucha*, 226 Neb. 476, 412 N.W.2d 987), holds that real estate brokers professionals within the meaning statute. Accordingly, the judgment district court is hereby reversed, and se is remanded for further proceed-

ISED AND REMANDED FOR FURTHER INGS.



neither of state court quoted here, Colo. & N.D. is absolute — ok's would be OK if qualified as N.D.'s do.

STATE of North Dakota, Plaintiff and Appellee,

v.

Elliot C. RICEHILL, Defendant and Appellant.

Cr. No. 870064.

Supreme Court of North Dakota.

Nov. 19, 1987.

Defendant was convicted in the District Court, Ramsey County, Lee A. Christofferson, J., of possession of firearm by convicted felon, and he appealed. The Supreme Court, VandeWalle, J., held that: (1) statute prohibiting convicted felons from possessing firearms did not violate state constitutional guaranty of right to keep and bear arms, and (2) defendant who alleged that he was denied effective assistance of counsel due to counsel's failure to subpoena witness was required to present proof of witness' proposed testimony.

Affirmed.

1. Weapons ⇐2

Although State Constitution prevents negation of right to keep and bear arms, that right nevertheless remains subject to reasonable regulation under State's police power. NDCC 62.1-02-01, subd. 1; Const. Art. 1, § 1.

2. Weapons ⇐3

Statute prohibiting persons previously convicted of felonies involving violence or intimidation from owning or possessing firearm for ten years from date of conviction or release did not violate state constitutional guaranty of right to keep and bear arms. NDCC 62.1-02-01, subd. 1; Const. Art. 1, § 1.

3. Criminal Law ⇐998(16)

Defendant who based his claim of ineffective assistance of counsel on counsel's failure to timely subpoena witness was required to present some form of proof as to what witness' testimony would have been by means of affidavit by proposed witness or by testimony in postconviction relief proceeding. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐1134(3)

Ineffective assistance of counsel claim is generally more effectively presented in postconviction relief proceeding, rather than on direct appeal. NDCC 29-32.1-01 et seq., U.S.C.A. Const.Amends. 6, 14.

Lewis C. Jorgenson, State's Atty., Devils Lake, for plaintiff and appellee State of N.D.

David C. Thompson of Craft & Thompson, P.C., Fargo, for defendant and appellant.

VANDE WALLE, Justice.

Elliot Ricehill appealed from a judgment of conviction entered upon a jury verdict finding him guilty of the crime of possession of a firearm by a person previously convicted of a felony, in violation of Section 62.1-02-01(1), N.D.C.C. On appeal, Ricehill raises two issues:

1) That Section 62.1-02-01(1) is unconstitutional because it violates his right to keep and bear arms under Article I, Section 1, of the North Dakota Constitution, and

2) That he was denied effective assistance of counsel at trial.

We affirm, but without prejudice to Ricehill to raise his claim of ineffective assistance of counsel at a proceeding for postconviction relief.

The information in this case charged that on or about March 7, 1986, Ricehill had "in his possession and under his control a firearm, within 10 years from being incarcerated for a felony involving violence, to-wit: The said defendant had in his possession a pistol and had been incarcerated for the crime of murder within the last 10 years."

At trial, the State relied on the testimony of Mark Schimetz and city police officer Harry Johnson. Briefly related, the testimony of Schimetz was that on the evening in question Ricehill had invited him into his car where they had conversed and where Ricehill had shown him a rifle lying in the back seat and a revolver which Ricehill

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removed from the glove compartment.[1] Schimetz gave conflicting testimony as to the time of evening of this meeting. Schimetz also testified that he reported this encounter to the police on that same evening.

Officer Johnson testified that later that evening he stopped the Ricehill car. Although he had been watching the car since the report of Ricehill's possession of a weapon, the stop occurred after he observed the car, while being driven by Mrs. Ricehill, drive over the centerline. During the stop, Johnson saw an open can of beer at the feet of Ricehill, who was a passenger in the car. Because this is a violation of North Dakota's open-bottle law, Johnson placed Ricehill under arrest and conducted a search of the automobile, looking for other evidence of the open-bottle violation. This search produced a rifle, and a revolver which was removed from the locked glove compartment.

Ricehill testified on his own behalf at trial. He testified that the two guns belonged to his wife, and that although he had spoken with Schimetz about the two guns he had never handled them. He further testified that he could not have shown the revolver to Schimetz because it was locked in the glove compartment of the car and he did not have the keys to the car. Ricehill testified that Curtis Posey had driven him in Ricehill's car into Devils Lake, and that Posey maintained possession of the car keys.

Posey did not testify at trial. On the day prior to trial Ricehill's trial counsel had a subpoena issued to compel Posey to appear at trial. However, the sheriff of Benson County was unable to serve the subpoena. Ricehill now argues that he received ineffective assistance of counsel because trial counsel failed to seek a subpoena for Posey at a time early enough to allow for service of the subpoena, denying Ricehill the testimony of a crucial witness.

I

We first consider Ricehill's argument that Section 62.1-02-01(1) is unconstitutional because it violates his right to keep and bear arms under Article I, Section 1, North Dakota Constitution. Section 62.1-02-01(1) prohibits a person previously convicted of a felony involving violence or intimidation from owning or possessing a firearm for a period of 10 years from the date of conviction or release, whichever is the latter.[2] In this case it was alleged that Ricehill possessed a revolver within 10 years of his release from an Iowa correctional facility to which he had been sentenced on a charge of murder in the second degree.

Article I, Section 1, of the North Dakota Constitution contains a guarantee of the right to keep and bear arms. This section provides:

"All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; *and 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, which shall not be infringed.*" [Emphasis added.]

The guarantee of the right to keep and bear arms was only recently added to the North Dakota Constitution. The emphasized language above was added by means of an initiated amendment in November of 1984. This case presents the first occasion for this court to interpret this provision of the North Dakota Constitution.[3]

1. Although there was testimony concerning Ricehill's possession of the rifle, he was not charged with having possessed a rifle.

2. Section 62.1-02-01(1) provides:

"A person who has been convicted anywhere for a felony involving violence or intimidation, as defined in chapters 12.1-16 through 12.1-25, is prohibited from owning a firearm or having one in possession or under control for a period of ten years from the date of conviction or release from incarceration or probation, whichever is the latter."

3. In *State v. Swanson*, 407 N.W.2d 204 (N.D. 1987), we considered the dismissal by the trial court of a criminal complaint charging reckless

subpoena, denying Ricehill the test- of a crucial witness.

I

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[1] Ricehill argues that the right to bear arms is absolute. He argues that the language of the provision states that the right to bear arms "shall not be infringed," and that this means that the Legislature may place no limits on the possession of arms. We disagree with such a broad reading of the provision. Instead, we believe our Constitution's protection of the right to keep and bear arms is not absolute; although it prevents the negation of the right to keep and bear arms, that right nevertheless remains subject to reasonable regulation under the State's police power. As the Michigan Supreme Court stated in construing that State's right to bear arms, "regardless of the basis of the right to bear arms, the State, nevertheless, has the police power to reasonably regulate it." *People v. Brown*, 253 Mich. 537, 235 N.W. 245, 246 (1931).

In this case the Legislature prohibited the possession of firearms by persons who have previously committed serious crimes. It is patently reasonable for the Legislature to conclude that it is protecting the public welfare by enacting legislation that keeps firearms out of the hands of people who have shown a disposition to harm others. The Louisiana Supreme Court stated, in rejecting a State constitutional right-to-bear-arms challenge to its prohibition against possession of a firearm by a felon under a police-power rationale:

"It is beyond question that the statute challenged in the instant case was passed in the interest of the public and as an exercise of the police power vested in the legislature. Its purpose is to limit the possession of firearms by persons who, by their past commission of certain specified serious felonies, have demonstrated a dangerous disregard for the law and present a potential threat of further or future criminal activity." *State v. Amos*, 343 So.2d 166, 168 (La.1977).

Another State which has concluded that its constitutional provision protecting the right to bear arms is to be tempered by the State's police power is Colorado. In *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975), the defendants had been convicted of violating Colorado's law prohibiting the possession of a firearm by a person previously convicted of a felony. They challenged this conviction under Colorado's constitutional provision protecting the right to bear arms. That provision, which may appear to be more inclusive than that of North Dakota, states:

"Right to bear arms. 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." *Blue*, 544 P.2d at 390, quoting Art. II, § 13, Colo. Const.

The court rejected the defendants' argument that the right to bear arms was absolute and that the prohibition on firearm possession by a felon thus was unconstitutional. In so concluding, the court stated:

"When rights come into conflict, one must of necessity yield. The conflicting rights involved here are the individual's right to bear arms and the state's right, indeed its duty under its inherent police power, to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people.

"We do not read the Colorado Constitution as granting an absolute right to bear arms under all situations. It has limiting language dealing with defense of home, person, and property.... In our view, the statute here is a legitimate exercise of the police power.

"'. . . . To limit the possession of firearms by those who, by their past conduct, have demonstrated an unfitness to be entrusted with such dangerous instrumentalities, is clearly in the interest of the public health, safety, and welfare and within the scope of the Legislature's police power.' *Peo-*

2.1-25, is prohibited from owning a firearm having one in possession or under control or a period of ten years from the date of onviction or release from incarceration or robation, whichever is the latter."

In *State v. Swanson*, 407 N.W.2d 204 (N.D. 87), we considered the dismissal by the trial rt of a criminal complaint charging reckless endangerment on the basis of the right to bear arms. In *Swanson*, we declined to address the constitutional issue because we determined that the trial court erred in dismissing the complaint and that the right-to-bear-arms issue could not be resolved apart from facts which had yet to be determined.

ple v. Trujillo, 178 Colo. 147, 497 P.2d 1 [1978].

"To be sure, the state legislature cannot, in the name of the police power, enact laws which render nugatory our Bill of Rights and other constitutional protections. But we do not read this statute as an attempt to subvert the intent of Article II, Section 13. The statute simply limits the possession of guns and other weapons by persons who are likely to abuse such possession." 544 P.2d at 390–391. [Citations omitted.]

We agree with this analysis and thus the right to bear arms must be read in conjunction with the State's exercise of the police power. See also *State v. Krantz*, 24 Wash. 2d 350, 164 P.2d 453 (1945); *Carfield v. State*, 649 P.2d 865 (Wyo.1982), and cases cited therein.

[2] Therefore, we hold that Section 62.-1–02–01(1) does not violate the right to keep and bear arms in Article I, Section 1, of the North Dakota Constitution.

II

Ricehill next contends that he was denied effective assistance of counsel. Ricehill bases this claim on his trial counsel's request for a subpoena to compel Curtis Posey to appear at his trial. Ricehill claims that making the request the day before trial was unreasonable in that it did not provide sufficient time for service of the subpoena. Ricehill argues that because the sheriff of Benson County was unable to serve the subpoena in that one day, he was denied the presence of a witness whose testimony would have bolstered that of Ricehill. He argues that Posey could have testified that Ricehill could not have shown Schimetz the revolver because Posey had the car keys.

Effective assistance of counsel is guaranteed a defendant via the Sixth Amendment to the United States Constitution applied to the States through the Fourteenth Amendment, and by Article I, Section 12, of the North Dakota Constitution. In analyzing an ineffective-assistance-of-counsel claim this court utilizes the test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See, e.g., *State v. Micko*, 393 N.W.2d 741 (N.D. 1986); *State v. Patten*, 353 N.W.2d 30 (N.D.1984). Under the *Strickland* test a convicted defendant must establish two things. First, the defendant must show that his trial counsel's representation "fell below an objective standard of reasonableness." 466 U.S. at 688, 104 S.Ct. at 2064. In doing so, he must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689, 104 S.Ct. at 2065. Second, the defendant must establish that trial counsel's conduct was prejudicial to him: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694, 104 S.Ct. at 2068.

[3] In this case we decline to begin the ineffective-assistance-of-counsel analysis. We do so because the record before us is devoid of any indication of what Posey's testimony would have been, had he testified. The only indication we have of what that testimony would have been are the representations of Ricehill's counsel on appeal. While we do not dispute these representations, this court requires more than a mere representation of what the testimony would be; we require some form of proof, e.g., an affidavit by the proposed witness, or testimony in a post-conviction-relief proceeding.

[4] This case presents a situation where it would have been better for Ricehill to seek relief in a post-conviction-relief proceeding pursuant to Chapter 29–32.1, N.D. C.C. At that proceeding Ricehill could have established a record of what Posey's testimony would have been. Generally, an ineffective-assistance-of-counsel claim is more effectively presented in a post-conviction-relief proceeding because the court in those proceedings is the court before which the trial was held. As the Minnesota courts have stated:

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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. 54(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. *Vichueg 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.

107 Idaho 496

STATE of Idaho, Plaintiff-Respondent,

v.

Bruce L. GROB, Defendant-Appellant.

No. 14412.

Court of Appeals of Idaho.

Oct. 31, 1984.

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 firearm 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. Kerr*, 96 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 1164 (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

The portion of the judgment entered below awarding appellees $13,000 for personalty 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 a 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 protection. 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. Cowper, Fairbanks, Edgar Paul Boyko, Edgar 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[1] 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[2] when read together clearly indicate that a parol-

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.

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.[3] This rule has recently been applied and upheld in Kansas and Oregon.[4] New York courts consistently have held that Penal Code Sec. 510, which suspends all rights of a prisoner while incarcerated comprises the right to file a civil lawsuit.[5] 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.[6]

Bush 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-

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 Me. 228, 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. 640, 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 regrettable 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. 122, 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 230, 317 N.Y.S.2d 216 (1970); In re Cirello's Estate, 50 Misc.2d 1007, 271 N.Y.S.2d 841 (1966); Glena 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 § 70-b of the New York Civil Rights Law, McKinney's Consol.Laws, c. 6, a statutory due process clause. Thomas v. Gruppuso, 73 Misc.2d 427, 341 N.Y.S.2d 819, 822 (1973). The statute does not deprive *parolees* of civil process. *See* Glena v. State, 138 N.Y.S.2d at 858; Grant v. State, 77 N.Y.S.2d at 758.

6. *See* Panko v. Endicott Johnson Corp., 24 F.Supp. 678 (N.D.N.Y. 938); Bosteder v. Duling, 115 Neb. 557, 213 N.W. 809 (1927).

tend 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,[7] 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"[8] and violates the due process clauses of the Alaska and United States constitutions.[9] While we do not find the punishment provided to be so severe as to constitute "cruel and unusual punishment",[10] 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.[11] The nature of protection due "depends on the extent to which an individual will be 'condemned to suffer grievous loss.'"[12] The loss suffered must have some relationship to a "liberty or property" interest within the ambit of the fourteenth amendment.[13]

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:

> [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 484, 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 F.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,[14] 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.[15]

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.[16] Unlike the overburdened debtor, who was held in United States v. Kras[17] to have such adequate redress outside the Bankruptcy Act[18] 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;[19] here the bar is absolute and no ameliorative device exists. No "recognized, effective alternatives for the adjustment of differences remain."[20] 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.

doctrine.[21] 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."[22]

[2] We begin with the understanding that a chose in action, such as Bush's claim for personal injuries, is a form of property.[23] 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 parole 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*.[24] The deprivation is no less severe than the taking of disputed wages or property during the pendency of litigation.[25] 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.[26] 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[27] 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."[28]

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 445–447, 93 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 494.

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. Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 342, 89 S.Ct. 1820, 1823, 23 L.Ed.2d 349, 354 (1969) (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); Sniadach 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* Sniadach 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. 545, 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.[29]

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.[30] 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.[31] Where the litigant is a parolee, to state these arguments is to reveal their absurdity.[32] 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,[33] and art. I, sec. 1 of the Alaska Constitution.[34] 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,[35] nor the traditional,

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. Burson, 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; Sniadach v. Family Finance Corp. of Bay View, 395 U.S. at 339, 89 S.Ct. at 1821, 23 L.Ed.2d at 352.

31. 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).

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

In Leege v. Martin, 379 P.2d 447, 451–452 (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 (1969). 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

more lenient "rational basis" test[36] 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[37] 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.[38] 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 parole 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].[39]

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.

to the compelling interest of preserving the purity of elections.

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. 843 (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 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.

38. *Cf.* Price v. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1059, 92 L.Ed. 1356, 1369 (1948).

39. 408 U.S. at 478, 92 S.Ct. at 2598, 33 L.Ed.2d at 492-493.

THE NEW REPUBLIC
FEBRUARY 22, 1988

GO AHEAD, MAKE OUR DAY

The National Rifle Association has launched a new advertising campaign. "The new ads are in response to a trend we're seeing in the whole gun control debate," says NRA spokesman Michael Lashbrook. "We're saying, hey, let's get off these fringe issues." By fringe issues he means controversies over the NRA's support for legalized plastic guns that foil metal detectors, submachine guns, and armor-piercing bullets. Lashbrook says, "The core of this issue has always been self-defense. We just wanted to remind people of that."

NRA advertisements used to emphasize the use of guns for hunting and the portrayal of gun owners as normal, healthy Americans. Now nine full-page ads in the *Washington Post*, the *New York Times*, and other newspapers emphasize a different message. One shows a high-heeled shoe with the heel ripped off. The headline says: "He's followed you for two weeks. He'll rape you in two minutes." Another shows a bent and twisted woman's locket. It reads: "Your mother just surprised two burglars who don't like surprises." A third presents a pair of shattered glasses with the caption, "You were beaten to death last night." It ends by asking, "Who cares?"

These advertisements pay lip service to the idea that they're not advocating the ownership of guns, merely demanding the right for those who wish to exercise it. But their actual point is clear enough. The message to women is that they are always vulnerable except when they're armed. The message to men is that they may not be doing all they can to protect their families. The alternative to "a bat, a bodyguard, or a handgun" is "your kids [hearing] your screams." The ads also suggest that if an unarmed person is attacked, the assailant will be coddled by the media, the law, and the political system. Armed, at least you have a fighting chance.

The graphic nature and emotional manipulation of these ads have provoked criticism from gun control organizations and the media. But both sides in the gun debate have resorted to emotional advertising. What about the factual assertion that carrying or keeping a handgun is no more than a sensible precaution in a dangerous world? In several advertisements, the NRA offers statistics to strengthen its case. These deserve closer examination.

The U.S. Department of Justice found that only three percent of rape attempts against armed victims are completed. This is an impressive figure. It implies that carrying a gun can prevent rapes 97 percent of the time. It doesn't say what percentage of rape attempts against unarmed victims are completed. Nor does it say how many people are victimized by guns that were purchased to guard against rape attempts but found other uses. The source of the statistic is a Justice Department report published in 1979 called "Rape Victimization in 26 American Cities." Fewer than 56 victims were interviewed for the report, far fewer than the minimum needed to draw a statistically reliable conclusion. After the advertisement came out, the Justice Department released a statement rebutting the NRA's claim.

What more reliable studies have shown—and what the police say—is that pulling a handgun in a dangerous situation is more likely to end your life than to save it. Since most people aren't trained to handle a gun in such situations, attackers can often easily take the gun away. And even people who are trained have difficulty firing at a

tacks each year with privately owned firearms. This figure was calculated by Gary Kleck, a Florida State University criminologist. Kleck didn't actually do any research. Instead, he reinterpreted the results of a seven-year-old survey that asked respondents if they had *ever* used a handgun for self-protection. Since the term "self-protection" was broadly defined, respondents could answer positively if they heard a noise in the basement and checked it out with a gun. The study was based on a sample of about 1,000. Kleck extrapolated to come up with figures for the entire country. It's not clear how he came up with an annual figure when the original poll had no time limit.

By stressing the "preventive" uses of handguns, the NRA avoids confronting the fact that only a tiny percentage of handgun victims are criminals caught in the act of assault or burglary. Some 22,000 people were killed by handguns in 1986. Roughly 12,000 of those deaths were suicides, one statistic the NRA doesn't like to talk about. Another 1,000 deaths were fatal accidents. Then there were 9,345 intentional handgun killings. If the NRA's view of the world were accurate, these deaths would involve either a criminal shooting an innocent victim or an armed potential victim shooting a criminal. Now, anyone who purposely kills with a handgun, except in self-defense, is a criminal by definition. But most are not professional criminals, and many might not be criminals at all if it weren't for the easy availability of guns. According to the FBI, 60 percent of murder victims are related to or acquainted with their killers. Many of these killings were crimes of passion that occurred simply because a handgun was around.

According to data from FBI reports compiled by the National Coalition to Ban Handguns, there were only 193 homicides committed in self-defense in 1986. That means it was roughly 115 times more likely that a handgun would be used in a suicide, murder, or accident than in legitimate self-defense against a criminal. These statistics vary little from year to year.

WE SUPPORT the banning of handgun sales, as do some 40 percent of Americans, according to Gallup. But the NRA still has the influence to keep that from happening. Republicans in particular are susceptible to pressure. At a recent meeting of the Gun Owners of New Hampshire, all six Republican presidential candidates vowed to veto pending gun control legislation. "My idea of gun control is a steady aim," Jack Kemp said.

At the very least, we could make it harder for people to own a handgun. As things stand, gun ownership is regulated by a hodgepodge of laws that vary from state to state. We should apply the same standard to private gun ownership that we do to automobile ownership: by requiring that all gun owners pass a test to get a license, register guns with state bureaus, pay an annual tax on their guns, and carry mandatory insurance for gun-related accidents.

Perhaps it's encouraging that the NRA has been driven to new depths of deception and hysteria. It may be a sign that the gun lobby's long-standing campaign against common sense is getting more desperate.

NOTEBOOK

□ THEY NEVER STOP:

Job market looks dim for office workers in early '88

—*Orange County Register*, January 5

Job Prospects Bright for Office Workers, Study Says

—*Los Angeles Times*, same day

(thanks to Michael A. Fried, Garden Grove, California)

Profit at Recovering BankAmerica

—*New York Times*, January 22

BankAmerica's worst annual loss

—*New York Daily News*, same day

(thanks to Larry Mone, New York, New York)

Cocaine on Wane

—*San Francisco Chronicle*, January 18, page 18

Alas For Parents — Now It's Cocaine

—same paper, same day, same page

(thanks to Robert H. Glidden, Oakland, California)

Going to Europe? Don't hold your breath awaiting bargains

—*Minneapolis Star Tribune*, January 10

Low dollar hasn't killed bargains in Europe

—same paper, same day

□ SEE DICK RUN, CONTINUED: Representative Richard Gephardt made great hay in Iowa denouncing nasty foreigners for keeping out American goods, especially American farm goods. For example, he said in Cedar Rapids the week before the Iowa caucuses: "Rice in Japan—a staple of their diet—costs seven times what it does in the United States, because they won't let any foreign rice in. It's not right. It's not just. It's not fair." Japan's rice policy is deplorable, to be sure. Just as deplorable as America's sugar quotas, which keep out foreign sugar in order to protect the wealth of a tiny group of domestic sugar growers. Michael Wines notes in the *Los Angeles Times* that Gephardt voted twice in the past few years to retain the sugar program. Because of this policy, sugar costs more than three times as much in the United States as it does on the world market. Gephardt says the difference is that Japan bans foreign rice completely, while we merely restrict imported sugar through quotas. This is of little comfort to nations such as the Philippines—nations we are rather anxious to help—that find our market blocked. "We've had a devil of a time keeping our sugar people in business," Gephardt told Wines, explaining his votes. Sure, and the reason has nothing to do

Police, NRA Brace for Rematch on Gun Control

Emboldened by a last-minute comeback in the 99th Congress and fortified with new-found experience, organization and unity, law enforcement groups are digging in to defend the nation's gun control laws against new attacks from the redoubtable National Rifle Association (NRA).

In the 99th Congress, the NRA caught the police off duty and forced Senate passage of a bill that would have significantly rolled back the landmark 1968 gun control law.

But when the measure went to the House, the police groups, bolstered by Handgun Control Inc., a gun control lobby, entered the fray and kept the NRA in check during the last weeks of legislative skirmishing.

The law officers emerged with two notable come-from-behind victories. The final version of the gun bill (PL 99-308) barred the sale of new machine guns and maintained the ban on the interstate sale of handguns. *(1986 Weekly Report p. 1034)*

Now the NRA is taking aim at these issues and new fights are looming. The police are determined not to make the same mistakes again, and their year-old organization, the Law Enforcement Steering Committee, is preparing to hold the line.

But with memories of last year's bitter fight still lingering, the NRA's top legislative strategists want to keep the din of battle at a manageable level this time around.

"There has been a tendency to sensationalize these issues, to put headlines out there that bear little relationship to what the real situation is on a specific issue," says Wayne LaPierre, the director of the NRA's Institute for Legislative Action and the man who ran the 1985-86 gun campaign.

"We are going to be doing everything we can to urge people to look behind the sensational headline and focus on the real situation."

James J. Baker, the NRA's director of governmental affairs, echoes LaPierre's views, and, referring to the police groups, adds, "I don't think [the gun control fight] helped either of us."

"A lot of their members are our members as well. We should try to minimize our differences."

The NRA has designated Rep. Larry E. Craig, R-Idaho, to meet with those police who are NRA members and who supported the organization last year, in an effort to devise a plan for reconciling differences with the law enforcement groups.

—By Nadine Cohodas

NRA Wants to Lift Ban on Machine Guns

thing the gun lobby springs," says Hubert Williams, president of the Police Foundation, a research group in Washington, D.C., that is represented on the 12-member Steering Committee.

Detroit police officer Robert T. Scully, president of the 90,000-member National Association of Police Organizations, thinks of the committee, which meets regularly in Washington, as "preventive medicine."

"I hope we don't have continued confrontation with the NRA," he says. "But whatever pops up on a national level, we will be prepared."

The police message to the gun groups is, "Don't even think of trying to sneak something past us," says Martha Plotkin, associate director of the Police Executive Research Forum (PERF), a group providing research and technical support to local police organizations.

"We regret that we have to operate in this fashion.... We think it is unfair that we have to compete with other interest groups."

—Cornelius J. Behan, Baltimore police chief

But Richard Boyd, president of the Fraternal Order of Police (FOP), is doubtful of rapprochement. "We're not disposed to mend those fences unless the NRA significantly changes its views," says Boyd, whose organization represents 193,000 police officers.

Battle Preparations

Although the police groups say they are not looking for a fight, they are preparing for the worst, a testament to the gun lobby's political might. In the 1986 campaigns, for example, Federal Election Commission figures show the NRA spent more than $1.7 million to help its congressional candidates.

"We are definitely ready for any-

Baltimore police Chief Cornelius J. Behan, president of PERF, says the law enforcement community was forced into an activist role. "We regret that we have to operate in this fashion," he says. "We see ourselves as an arm of government. We think it is unfair that we have to compete with other interest groups." But until the police organized, Behan says, "we were not heard or listened to."

The police groups are now a formidable force, but gun lobbyists con-

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tend the Steering Committee does not represent the views of most policemen.

"I still think those organizations aren't representative of the feelings of the rank and file," says the NRA's Baker.

Comments like that anger police leaders, particularly Scully, who won re-election to his police group post in December. "The leadership of the NRA are not sworn police officers, and they are not elected to those positions by police officers," he says.

The police leaders say they have learned to play politics, and a major lesson, according to Boyd, is that members of Congress must be told they "will be held accountable at home" for their votes on law enforcement issues.

The police groups are encouraged by the Democratic takeover of the Senate. While many Democrats support the gun groups, the police are nonetheless optimistic about having more sympathetic ears at the Senate Judiciary Committee, which would be the starting point for most legislation.

Chairman Joseph R. Biden Jr., D-Del., said in an interview he will oppose efforts to eliminate the machine gun ban.

New Definitions, New Allies

The gun fight last year also created a new law enforcement litmus-test and brought about a partial realignment of political forces.

In the past, police groups generally supported members who were "tough on crime," favoring, among other things, preventive detention and the death penalty.

But while those issues remain important to the police, the gun control battle emphasized the significance of two other elements — police safety and the ability of law officers to protect the public. The law enforcement groups opposed the gun control bill because they felt it would create problems for the police in protecting themselves and in fighting crime, and they judged members on that basis.

This change in emphasis was reflected in the "congressman of the year" award Scully's organization gave to Sen. Howard M. Metzenbaum, D-Ohio, in December.

Metzenbaum, one of the Senate's most liberal members and hardly a conventional "law and order" man, was instrumental in crafting pro-police amendments to the Senate version of the gun control bill and in protecting law enforcement provisions in the House bill that eventually came back to the Senate for approval.

The Agenda

The NRA and its allies, Gun Owners of America and the Citizens' Committee for the Right to Keep and Bear Arms, will probably set the initial firearms agenda for the 100th Congress. The police groups are still sorting out their priorities, spokesmen say.

Almost before the ink was dry on last year's gun law, gun groups said they wanted to repeal the ban on new machine gun sales.

That section was a last-minute addition on the House floor that barred all future sales and possession of machine guns by private citizens. It did not affect existing machine guns.

The amendment was adopted by voice vote, and was later accepted by the Senate without change.

"The whole machine gun issue doesn't bear a lot of relationship to reality," says the NRA's LaPierre. He contends that there is no record of a lawfully owned machine gun ever having been used in a crime.

"How many do we have to have killed before we have to have a ban on it?" retorts FOP's Boyd. "Is it one or 10,000 a year? Why can't we have some preventive measures?"

The gun lobbyists are not optimistic that anything will be done soon.

"Philosophically, it's something I desire, but I think it is going to be hard in the 100th Congress," says John M. Snyder, public affairs director for the Citizens' Committee.

And Lawrence D. Pratt, executive director of Gun Owners, concedes, "It looks difficult."

Handgun Fight Less Predictable

The gun groups are more optimistic about repealing the ban on the interstate sale of handguns. When the gun bill passed the Senate in 1985, it included provisions lifting the handgun ban. But that was before the police got involved in the fight.

When gun legislation started moving through the House, the law officers organized and pressed hard to keep the handgun ban.

An amendment by William J. Hughes, D-N.J., restoring the ban prevailed 233-184. The Senate accepted that provision, even though it had killed a similar proposal in 1985, 69-26. *(1985 Almanac p. 228)*

Now the police are ready for a rematch on handguns.

"Just in the city of Detroit last year we had five police officers killed in the line of duty — one was from a shotgun, the other four by handguns," says Scully.

And Boyd argues that allowing unrestricted interstate sales of handguns would make it "almost impossible for us to keep a hand on the sale and exchange" of the weapons. "We can't even do it in-state now."

If the gun owners want the ban lifted, Boyd adds, "they'll have to give us something.... We'd offer them in return something like a 30-day waiting period."

Other Firearms Issues

A uniform waiting period between the purchase and receipt of a handgun is high on the agenda of Handgun Control, but it is anathema to the NRA.

Metzenbaum and Rep. Edward F. Feighan, D-Ohio, are expected to introduce waiting-period legislation early in February.

"A lot of [police group] members are our members as well. We should try to minimize our differences."

—James J. Baker, National Rifle Association

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While the 1968 law and the revisions last year include provisions that bar certain people, such as convicted felons and drug addicts, from purchasing guns, there is no way salesmen can validate an applicant's qualifications.

Proponents of a waiting period contend it would give the police a chance to check the credentials of purchasers.

A gun bill that emerged from the Senate Judiciary Committee in 1982 included a 14-day waiting period, but the measure never reached the floor. *(1982 Almanac p. 415)*

Gun groups oppose the waiting period, claiming it is an unnecessary inconvenience and amounts to assuming a potential buyer is guilty until proved innocent.

Other firearms issues likely to emerge in this Congress include:

• **Ammunition Ban.** Rep. Mario Biaggi, D-N.Y., introduced a bill (HR 538) Jan. 8 to roll back provisions in the 1986 law that lifted licensing and record-keeping requirements on the interstate shipment of ammunition.

Biaggi's bill would ban in-state shipments except by federally licensed dealers, manufacturers, exporters and importers, and collectors shipping to one another.

Gun Owners of America seized upon the changes in the 1986 law, sending out mailings to members offering them special over-the-phone deals on ammunition.

Biaggi says the problem with mail-order ammunition is that there is no way to make sure it is not being sold to people who are prohibited by law from buying it. For example, no one under 18 is permitted to buy ammunition for rifles or shotguns, and no one under 21 can buy ammunition for handguns.

Pratt contends the bill is anti-consumer, but a Biaggi spokesman calls that "absurd."

"We fully support the rights of citizens to own and use firearms," he says. "We're looking for reasonable controls. . . . We're looking to help the law enforcement community."

• **Bullet Ban.** Sen. Daniel Patrick Moynihan, D-N.Y., has introduced a bill (S 25) to ban the production of .25 and .32 caliber bullets. Moynihan says a survey of shootings involving New York City police from 1975-85 showed that 25 percent of the bullets used were .25 or .32 caliber.

Gun groups flatly oppose the bill, and even some gun control advocates, while praising Moynihan's effort, think it may not be effective because it would prompt a shift to guns using different bullets.

• **Plastic Guns.** Rep. Robert J. Mrazek, D-N.Y., is planning to introduce a bill that would impose a "flexible ban" on plastic guns. The bill would ban the domestic manufacture or importation of any firearm the secretary of the Treasury determines cannot be detected by security devices.

Battles in Local Jurisdictions

In addition to its work on Capitol Hill, the NRA expects to be involved in several legislative battles on the state level. Last year, according to Ted Lattanzio, head of the NRA's State and Local Affairs Division, the NRA donated more than $750,000 to state and local candidates. Lattanzio says 83 percent of the NRA-supported candidates were elected.

A key item on the NRA's agenda is pushing "pre-emption" legislation that would prevent cities and counties from enacting gun control laws more stringent than statewide laws.

Lattanzio says legislation will be introduced on behalf of the NRA in 16 states, with highly visible fights expected in Michigan and Florida.

The NRA will be up against law enforcement groups in this arena as well. Spokesmen say the police groups will organize to defeat the pre-emption statutes.

Detroit officer Scully, who worked to stop a statute in Michigan last year, says, "We don't want to take local control away from city or county governments. That's a ploy by the NRA that cuts down on the individual police chief's [ability to do] his job."

Another legislative push — one that won't put the NRA at odds with the police — is a "hunter-harassment" proposal. Bills will be introduced in 13 states to create stiff civil penalties for people who try to interfere with lawful hunting. Lattanzio says it is aimed at animal rights groups that have published a "21-point pamphlet on how to stop a lawful hunt." ■

Hastings Responds to Charges

Federal District Judge Alcee L. Hastings of Florida has filed a two-pronged response to impeachment charges, stemming from his acquittal in 1983 on bribery charges.

Hastings, who is black, denounced the disciplinary procedure being used against him, saying it was "infected by a form of racism" and had more in common with a Moscow political trial than an American judicial proceeding. He claimed that the entire investigation and the underlying bribery prosecution were biased and were "conducted in a manner . . . to provide just cause for outrage as well as alarm."

The 11th U.S. Circuit Court of Appeals, which includes Florida, began investigating Hastings shortly after his acquittal. A special 11th Circuit investigative committee recommended that Hastings be removed from office, on the grounds that he had fabricated his defense and should have been convicted. The 11th Circuit accepted those findings and forwarded them to the Judicial Conference, which gave Hastings a chance to respond. *(1986 Weekly Report p. 2280)*

On Jan. 16 he petitioned the House and Senate to terminate the judicial investigation and to repeal or amend the 1980 judicial discipline law (PL 96-458) that is the basis for the probe.

The Judicial Conference is scheduled to meet in March and could decide then whether to end the investigation or to forward the impeachment recommendation to Congress.

Hastings' Senate petition was quickly referred to the Judiciary Committee, but as of Jan. 22, his House petition was still at the Speaker's office.

Rep. Robert W. Kastenmeier, D-Wis., who helped draft the 1980 discipline law, said in an interview Jan. 21 that it was unclear what Congress would do with the Hastings petition. Kastenmeier said he believed that the Judicial Conference should be allowed to proceed and either forward an impeachment recommendation to Congress or drop the matter.

Kastenmeier added, however, that he had intended to take another look at the judicial discipline law in the 100th Congress, even before Hastings suggested that.

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At the Capitol

NRA fails to resurrect its right-to-bear-arms measure

Botched effort may be sign of group's waning strength

By Dennis J. McGrath
Staff Writer

Gun proponents failed Wednesday in what might be their last attempt to breathe life into the right-to-bear-arms amendment to the Minnesota Constitution.

Although the gun proposal could be attached to another bill, that appears unlikely. The National Rifle Association (NRA) effort has been defeated in the Senate, and the best procedural avenue was closed to it yesterday in the House.

"I guess Tony Bouza wins," said Sen. Florian Chmielewski, DFL-Sturgeon Lake, referring to the Minneapolis police chief who has symbolized opposition to the NRA.

With yesterday's defeat in the House Rules Committee, the NRA, which brimmed with confidence at the start of the 1988 Legislature, likely will leave St. Paul bruised and battered, its lobbying effort in shambles.

It would be a rare defeat for the powerful gun lobby, — and one that in many ways it brought on itself.

Analysis

Because of strategic errors, the NRA was forced to retreat from debating the merits of the bill to defending its integrity and morality. One NRA official was accused of lying to legislators, and another prominent gun lobbyist was charged with soliciting undercover policewomen posing as prostitutes.

The bill's apparent demise and the surprising victory by NRA opponents raise questions about how much remains of the gun group's once formidable political strength.

"Their effectiveness went down a few notches," said House Speaker Robert Vanasek, DFL-New Prague. "It doesn't mean they're not going to continue to have influence in future years, but it shows they're not invincible."

Some gun opponents see this defeat as evidence of the gun lobby's fall from power, locally and nationally. Bouza and other anti-NRA activists say the NRA has alienated supporters by taking extremist positions on reasonable gun-regulation legislation.

"I think people are beginning to see the blood . . . where the NRA is concerned," Bouza said. "Their support is eroding as people are coming to their senses."

But local NRA supporters say that the gun group's lobbying problems should not cause state politicians to underestimate the interest and voting power of sportsmen and gun owners in Minnesota elections.

"The leadership of the NRA has taken a lot of stands a lot of us don't support," said Rep. Robert Neuenschwander, DFL-International Falls, sponsor of the gun amendment in the House. "But nobody in rural Minnesota is adamantly saying people should not have the right to keep and bear arms."

Neuenschwander said he would continue to work in the final days of the legislative session to persuade Vanasek, who voted against the gun lobby yesterday, to change his mind and move the issue to the House floor.

NRA supporters say they were victims of lies by opponents, and that their efforts were thwarted by a key committee stacked with Twin Cities legislators who are cool to gun owners' rights.

Yesterday's vote was in the House Rules Committee, where pro-gun lawmakers attempted to move the bill to the House floor, where it likely would be approved. But the move by House Minority Leader William (Bill) Schreiber, IR-Brooklyn Park, fell short by one vote, when the Rules Committee voted 11-10 in favor of Duluth Rep. Willard Munger's motion to table Schreiber's motion until the Senate acted on the gun bill. The Senate Judiciary Committee has defeated the bill.

"That's the ballgame," said Norm Jensvold, vice president of the Committee for Effective Crime Control, an NRA affiliate. "I would say the bill is done for this year."

The bill's apparent failure is curious because it seemed at one point to be well on its way to the governor's desk. After the bill survived its first and most difficult test in the Senate Judiciary Committee, NRA officials were gleeful, even though the committee approved its own compromise version, not the NRA proposal.

Jensvold acknowledges that the gun lobby should have clearly stated then that the committee's language was unacceptable, instead of expressing tenative approval for the thrust of the compromise. When an NRA official subsequently told a House committee to reject the Senate version and restore the NRA's original language, opponents quickly tagged the gun lobby as liars. Although NRA officials denied the accusation, they have been unable to shake it. "The issue turned into the NRA rather than the right-to-bear-arms bill," Jensvold said.

The alleged deception also gave several lawmakers an excuse to vote against the NRA and defeat the bill when it was reconsidered in the Senate committee. And that gave opponents in the House the chance to sit on it.

Then Jensvold himself became part of the issue, when he was charged in February with soliciting undercover St. Paul policewomen posing as prostitutes. He denies the charge, and gun proponents say Jensvold was framed to undermine the gun lobby.

According to the police report on the incident, the policewomen said Jensvold told them that an important DFL legislator would be joining the three of them. The legislator, whose support for the bill was critical, never showed up, and he denies being in St. Paul the night of the incident. Since then, that legislator has provided no help in advancing the bill.

Gun proponents vow to be back next year.

Anchorage Police Department Employees Assoc.

P.O. Box 1539
786-8787

Anchorage, Alaska 99510

May 3, 1988

Honorable John Sund
Chairman, House Judiciary Committee
Room 120
Capitol Bldg.
Juneau, AK. 99811

Dear Representative Sund and Judiciary Committee Members,

We are writing to re-state our strongest opposition to Senate Joint Resolution 15 that is now before you. We fail to see the need for such ammending of the State Constitution.

We feel the existing language in the current constitution allows for controls on dangerous and illegal weapons and provides the necessary controls on use of firearms by those who are ineligible.

We find the existing laws to be reasonable and necessary. By considering and changing the constitution wording, the legislative intent can be loosely and broadly interpreted to allow further breeching of public safety.

The recent and tragic death of an Anchorage woman indicates a need for some restrictions in firearms rights in comparison to opening up the system to make it looser. The firearm used in her death was purchased the day of the offense, only 90 minutes before the attack.

We expect that changing the constitution to reflect the issue of individual right versus the collective right will open up pandora's box. We feel the present law is not broken so it does not need repair.

Sincerely,

Gregory C. Hansen
Chairman
Legislative Affairs Committee

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
555 CAPITOL MALL, SUITE 455
SACRAMENTO, CA 95814
(916) 446-2455

April 6, 1988

I did not agree

Representative John Sund
State Capitol, Room 122
Pouch V
Juneau, AK 99811

APR 8 1988

Dear Representative Sund:

Thank you again for taking the time to meet with us last week regarding SJR 15, the Constitutional Amendment for the right to keep and bear arms.

You agreed that our language would not change the current statutes regarding ownership and possession of firearms by felons but you did express concern regarding other reasonable regulations which might be invalidated (i.e., concealed carrying, possession by intoxicated persons).

I have included, for convenient reference, a copy of the analysis given to you last week along with the constitutional language from each state from which a court case is cited. You will note that regardless of the specific language contained in the individual state's constitution, courts regularly and routinely rule that the right to bear arms is subject to reasonable regulation.

Representative Gruenberg offered alternative language to that which passed out of the State Affairs Committee. His proposed language is shorter and more concise than the current version of SJR 15, attributes which the National Rifle Association certainly agrees are desirable in constitutional language. Representative Gruenberg's proposal, which the NRA supports and has given to the Alaska Peace Officers Association for comment, reads as follows:

> "The right of the people to keep and bear arms for lawful purposes shall not be infringed by the state or any political subdivision thereof."

Your support for this alternate language would be greatly appreciated by the National Rifle Association and all law-abiding gun owners in Alaska. As we discussed, a hearing date some time during the week of April 18 would be desirable. Please have your staff contact me when a date has been selected.

Sincerely,

Brian Judy
State Liaison

BJ:bsw

Enclosure

B. Gatto
Research — find the different versions of the bill that were reviewed in 1986 legislature

JAN 26 1988

Governor's Criminal Justice Working Group

January 14, 1988

The Honorable Fran Ulmer
Chair, State Affairs Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Ulmer:

As you may be aware, the Governor has appointed the undersigned representatives of various state and local agencies to an ad hoc working group on criminal justice. The members of the group meet together on a regular basis to consider, and occasionally to comment upon, issues that could affect the fair and efficient administration of criminal justice in Alaska.

At the end of the last session, the Senate adopted CS for Senate Joint Resolution 15 (Judiciary), which proposes an amendment to the Constitution of the State of Alaska. We understand that CS SJR 15 (Jud) has been referred to the House State Affairs Committee for consideration. We are writing as a body to strongly urge you and your fellow representatives to amend the language of the present resolution to clearly preserve the present power to reasonably regulate the possession and use of arms.

If passed by the legislature, CS SJR 15 (Jud) would place a proposed constitutional amendment before the voters at the next general election. The resolution contains an amendment to art. I, sec. 19 of the state constitution, relating to a citizen's right to keep and bear arms. As presently drafted, SJR 15 would make the following changes in the state constitution:

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 the people to keep and bear arms shall not be infringed.

The stated purpose of the proposed amendment is to establish that the right to keep and bear arms under the state constitution is an individual right, rather than a collective one. We are concerned that the present language, if adopted by the voters at the next election, 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 shotguns,

prohibits possession of a firearm while intoxicated, 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 11.61.200-11.61.220.)

These statutes serve an important public safety function by restricting the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If the legislature does not intend that the proposed amendment of art. I, sec. 19 would render these statutes unenforceable, nor 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.

We suggest the addition of language such as: "The right of the people to keep and bear arms shall not be infringed, except that the state or a political subdivision of the state may regulate the manner in which arms may be borne, carried, or used." or "...except that the manner of keeping and bearing arms may be regulated by law."

Section 2 of CS SJR 15 (Jud) contains a statement of "legislative intent" indicating that the constitutional amendment, if adopted, "should not be construed to preclude the regulation of the manner in which arms may be borne, carried, or used." We are concerned, however, that this statement of legislative intent will not be effective to preserve the present power to reasonably regulate the possession and use of weapons.

As a general rule, a statute or constitutional provision will be interpreted according to the plain meaning of the language on its face. If the intent behind the adoption of the amendment were to later become an issue, it is the intent of the voters who adopted the measure, rather than the intent of the legislators who drafted it, that will be relevant. Although the resolution directs the Legislative Affairs Agency to consider the statement contained in section 2 when preparing its neutral summary for the election pamphlet, the intent language will not appear on the ballot itself, and may well not be contained verbatim in the election pamphlet. See art. XIII, sec. 1 of the Alaska Constitution and AS 15.58.010.

Principles of both common sense and responsible draftsmanship dictate that a well-drafted statute or constitutional provision should reduce the need for disputes about

interpretation. Statements of "legislative intent" are not an adequate substitute for clear, unambiguous language in the proposed constitutional amendment. A more precisely 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.

We urge you to amend CS SJR 15 (Jud) to address the concerns discussed above.

Sincerely yours,

Grace Berg Schaible
Grace Berg Schaible
Attorney General

Arthur H. Snowden, II
Arthur Snowden
Administrative Director
Alaska Court System

Arthur English
Arthur English
Commissioner
Department of Public Safety

Dana Fabe
Dana Fabe
Public Defender

Myra M. Munson
Myra Munson
Commissioner
Department of Health &
Social Services

Susan H. Humphrey-Barnett
Susan Humphrey-Barnett
Commissioner
Department of Corrections

Del Smith
Del Smith
President
Alaska Association of Chiefs
of Police

Brant McGee
Brant McGee
Public Advocate

Harold M. Brown
Executive Director
Alaska Judicial Council

John Havelock
Consultant on Criminal
Justice Planning

cc: All members of the House State Affairs Committee
John Sund, Chair, House Judiciary Committee

SJR 15

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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

May 8, 1986

The Honorable M. Mike Miller
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Miller:

You have asked this office to comment upon the effect of "legislative intent" language currently contained in a resolution now under consideration by the House Judiciary Committee: CS SJR 39 (Jud) am. This resolution, if passed, would place a proposed constitutional amendment before the voters at the next general election. The resolution contains an amendment to art. I, sec. 19 of the state constitution, relating to a citizen's right to keep and bear arms. The stated purpose of the proposed amendment is to establish that the right to keep and bear arms under the state constitution is an individual right, rather than a collective one.

The proposed constitutional amendment now states that a citizen's right to keep and bear arms "shall not be infringed by the state or by a borough or city of the state." During consideration of CS SJR 39 (Jud) am on the Senate floor Senator Vic Fischer proposed an amendment which would have added the phrase "except that the manner of keeping and bearing arms may be regulated by law." This proposed amendment was rejected by the Senate on a vote of 16 to 2. See Senate Journal, March 26, 1986, at pp. 2166-2167. The Judiciary Committee version of the resolution, adopted with amendment by the Senate, contains a section entitled "legislative intent." Section 2 of CS SJR 39 (Jud) am now provides, in part, that the proposed constitutional amendment "should not be construed to preclude the regulation of the manner in which arms may be borne, carried, or used."

We are concerned that the language presently contained in CS SJR 39 (Jud) am 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, 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 11.61.200-11.61.220.)

These statutes serve an important public safety function by restricting the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If the legislature does not intend that the proposed amendment of art. I, sec. 19 would render these statutes unenforceable, nor 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.

It may be that the Senate, in rejecting the amendment proposed by Senator Fischer but adopting section 2 of CS SJR 39 (Jud) am, believed that it was not necessary to explicitly state in the proposed constitutional provision that regulation of firearms by law is allowed, as this point is included in their "legislative intent" language. As a general rule, however, a measure will be enforced according to the plain meaning of the language on its face. 2A C. Sands, Sutherland Statutory Construction § 45.02 at 4 (4th ed. 1984); Wilson v. Municipality of Anchorage, 669 P.2d 569, 571 (Alaska 1983). It is a "fundamental principle of statutory interpretation ... that a statute means what its language reasonably conveys to others..." North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 540 (Alaska 1978); South Central Health Planning v. Commissioner, Dept. of Administration, 628 P.2d 551, 553 (Alaska 1981). 1/

While the courts in Alaska may consider a measure's legislative history to the extent it may assist the court in correctly interpreting the measure, a legislative committee report or formal statement of legislative intent may not be used to give the statute a meaning not fairly contained within its words. Chicago, M., St. P. & P. R. Co. v. Acme Fast Freight, 336 U.S. 465, 93 L.Ed.2d 817, 69 S.Ct. 692 (1949); North Slope Borough, 585 P.2d at 540.

1/ Although general rules of legal interpretation are most often expressed in the context of statutory interpretation, the same rules apply to the interpretation of legislative resolutions and constitutional amendments. 1A C. Sands, Sutherland Statutory Construction § 29.08 at 500 (4th ed. 1985).

When a reviewing court decides that it must consider the legislature's intent in order to construe a provision, the text of the measure itself is still considered the best evidence of legislative intent. See 2A C. Sands, Sutherland Statutory Construction § 46.03 at 82 (4th ed. 1984) and the cases cited there. Where the terms of a provision are clear and straightforward, the intent of the legislature will be based on those terms, even if the apparent intent conflicts with a statement of legislative intent or a committee report. See Caminetti v. United States, 242 U.S. 470, 61 L.Ed. 442, 37 S.Ct. 192 (1917) and 2A C. Sands, Sutherland Statutory Construction § 48.06 at 308 (4th ed. 1984).

In Commercial Fisheries Entry Commission v. Apokedak, 680 P.2d 486 (Alaska 1984) Apokedak, relying upon legislative intent language contained in the "preamble" to the Limited Entry Act, urged the state supreme court not to adopt a literal construction of the act. The court refused to adopt the interpretation suggested by Apokedak, stating: "a statutory preamble ... can neither restrain nor extend the meaning of an unambiguous statute; nor can it be used to create doubt or uncertainty which does not otherwise exist." 680 P.2d at 488, n.3. Thus, to the extent that language contained in the "legislative intent" section of CS SJR 39 (Jud) am conflicts with the plain meaning of the terms of the constitutional provision, it is the constitutional language which will control.

The courts may also consider the history of legislative action taken on a given measure when determining legislative intent. Generally, the rejection of a proposed amendment indicates that the legislature did not intend the bill to include the provisions embodied in the rejected amendment. Lapina v. Williams, 232 U.S. 78, 58 L.Ed. 515, 34 S.Ct. 196 (1914); United States v. Great Northern Railway Co., 287 U.S. 144, 155, 77 L.Ed. 223, 53 S.Ct. 28 (1932); 2A C. Sands, Sutherland Statutory Construction § 48.04 at 302, § 48.18 at 341 (4th ed. 1984). Thus, a reviewing court may well conclude that if the legislature had intended to allow the continued regulation by law of some aspects of a person's right to possess arms it would have adopted the language proposed by Senator Fischer during the Senate's consideration of the resolution. See, e.g., North Slope Borough, 585 P.2d at 541; Wilson, 669 P.2d at 571.

Perhaps the most important consideration here is that in the case of a measure (such as this one) which is to be decided by a vote of the electorate, descriptive statements accompanying the proposition are an important source of

guidance for interpretation. 2A C. Sands, Sutherland Statutory Construction § 48.04 at 301, § 48.19 at 345 (4th ed. 1984); State v. Lewis, 559 P.2d 630, 637-638 (Alaska 1977), cert. denied, 97 S.Ct. 2943, 432 U.S. 901, 53 L.Ed.2d 1073.

Under art. XIII, sec. 1 of the Alaska Constitution, the lieutenant governor is required to prepare a ballot title and a summary of the proposed constitutional amendment. The election pamphlet prepared pursuant to AS 15.58.010 must contain: 1) the text of the proposed constitutional amendment, 2) the ballot title and summary prepared by the lieutenant governor, 3) "a neutral summary" of the proposition prepared by the Legislative Affairs Agency, and 4) advocatory statements for and against the proposed amendment. AS 15.58.020(6). Thus, although the resolution directs the Legislative Affairs Agency to "consider" the statement contained in section 2 of CS SJR 39 (Jud) am when preparing its neutral summary for the ballot, this language will not appear on the ballot, and may well not appear in the elections pamphlet. Since, in the final instance, a reviewing court will look to the intent in the minds of the voters who voted to adopt the constitutional amendment, the legislature's statement of its intent when placing the measure on the ballot has limited significance. Lewis, 559 P.2d at 637-638.

One of the main purposes of a constitution is to limit legislative power. Ordinary acts of the legislature (i.e., statutes), whether adopted before or after a given constitutional provision, cannot be given effect if the statute conflicts with a substantive provision in the constitution. Thus, an amendment to the constitution may expressly, or by implication, repeal existing legislative enactments. Rhode Island v. Palmer, 253 U.S. 350, 64 L.Ed. 946, 40 S.Ct. 486 (1919); 1A C. Sands, Sutherland Statutory Construction § 23.20 at 387 (4th ed. 1985). The possibility that the language proposed in SJR 39 could be interpreted as invalidating some portions of Alaska's present criminal code is a real one, as this has occurred in similar circumstances in other states. See, for example, State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980) and State v. Delgado, 298 Or. 395, 692 P.2d 610 (1984).

Principals of both common sense and responsible draftsmanship dictate that a well-drafted statute or constitutional provision should reduce the need for disputes about interpretation. 2A C. Sands, Sutherland Statutory Construction § 45.02 at 5 (4th ed. 1984). Statements of "legislative intent" are not an adequate substitute for clear, unambiguous language in the proposed constitutional amendment. A more precisely 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

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

[illegible]
JUNEAU ALASKA 99811
907 465 3867

MEMORANDUM April 30, 1986

SUBJECT: Right of a citizen to keep and bear arms [CSSJR 39(Judiciary) am].

TO: Representative M. Mike Miller
Chair, House Judiciary Committee

FROM: Richard A. Bradley
Legislative Counsel

Hayden Kaden has asked that I comment on three issues relating to this resolution proposing a constitutional amendment.

The amendment proposed under CSSJR 39(Judiciary) am would amend art. I, sec. 19 of the Alaska Constitution, "Right to Bear Arms". The resolution contains a statement of "Legislative Intent".

It may be desirable to summarize each to set the stage for the comments that follow.

Section 1 of CSSJR 39(Judiciary) am amends as follows:

> 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 the state or by a borough or city of the state.

Sec. 2(a) of CSSJR 39(Judiciary) am states legislative intent: "the legislature intends only that the amendment . . . [provide] that the right to keep and bear arms is an individual rather than a collective right." And the "amendment, if adopted, should not be construed to preclude the regulation of the manner in which arms may be borne, carried, or used." [It] "should not be used to repeal or to

render unconstitutional existing statutes . . . or existing municipal ordinances."

I. What is the effect of an expression of legislative intent in a constitutional amendment?

I believe that the courts will give deference to legislative intent. There is an existing history of them doing that. In Alaska Public Employees Ass'n v. State, 525 P.2d 12, 17 - 18 and in Seward Marine Services, Inc. v. Anderson, 643 P.2d 493, the Alaska Supreme Court considered the extent to which it would consider evidence of legislative intent apart from that stated in the legislation itself. In each case, even though it would seem that extraneous evidence is weaker than legislative intent stated within the legislation itself, it considered the offered evidence carefully.

A statement of legislative intent in the context of a constitutional amendment would be entitled to equal weight as compared to a statement of legislative intent in legislation if everything were equal. Everything is not, however, equal.

There is a unique mechanical problem in the case of a constitutional amendment. In the usual statement of legislative intent, the theory and the fact is that those who vote for the bill have the statement of the legislative intent before them (if it is incorporated into the bill) as they vote or, in the case of the governor, when it is reviewed before signature or veto.

There is a difference here. The voters of the state who actually approve or reject the amendment will not have the statement of legislative intent before them. As a matter of law, it seems that they will have only section 1 of the resolution before them. See art. XIII, sec. 1 of the Alaska Constitution: the "lieutenant governor shall prepare a ballot title and proposition summarizing each proposed amendment, and shall place them on the ballot . . . ."

In an attempt to address that problem, sec. 2(b) of CSSJR 39(Judiciary) am directs the Legislative Affairs Agency, as it prepares the "neutral summary" under AS 15.58.020, to "consider" the statement of legislative intent. It is presumably only through the neutral summary published in the voter's pamphlet that a voter may become aware of sec. 2(a) of the resolution.

I am satisfied that the Agency, when it considers CSSJR 39(Judiciary) am, will prepare a neutral summary. The law requires no less. Some of the problems that the Agency may have in the preparation of the summary are suggested below.

The general rule is that the legislative intent will be considered only after the substantive language has itself been considered and then only if the court is unable to determine what the legislature intended from the substantive language. The corollary of the rule is that the legislative intent will not be considered if the substantive language is clear or to the extent that the legislative intent contradicts, in some fashion, the substantive language.

It is these points that present the problem for legislative intent.

Sec. 2(a) states that the legislature intends that the "right to keep and bear arms" be "an individual right rather than a collective right." Consistently with that, the amendment deletes the reference to the "well-regulated militia being necessary to the security of a free state".

The very substantial problem is that the language added in provides that the purpose of the right to bear arms is "for lawful defense of self, family, property, and the state". [Emphasis added.] It seems clear that the focus of the amendment is broadened; individual purposes for the right are affirmed. But the amendment also states a collective purpose: the "defense of . . . the state". To the extent that the "legislative purpose" seems inconsistent the substantive language of the amendment itself, the court must disregard the legislative purpose.

I assume that the legislative purpose of the amendment "not [being] used to repeal or render unconstitutional existing statutes . . . or existing municipal ordinances" will be effective.

II. What is the likely effect of the language of the amendment on existing laws against concealed weapons, etc.?

The legislative purpose says that the amendment should have no effect on those laws; predictions of actual effect in this area are, however, somewhat difficult.

The amendment and its analogs in the U.S. Constitution and in the constitutions of other states have a long history: I

think it is fair to say that the amendment has a meaning and an understanding that is larger then the language of the section itself; I see no reason to suggest that the amendment changes these understandings.

It has been said that the provision in the U.S. Constitution goes back to 1689. The English Bill of Rights, enacted by Parliament in 1689, granted the English the right "to have Arms for their Defence, suitable to their Conditions, and allowed by Law." See State v. Kessler, 289 Or. 359, 614 P.2d 94 (Oregon 1980).

The Kessler case and State v. Delgado, 692 P.2d 610 (Oregon 1984) construed the Oregon version of art. I, sec. 19. It provides "The people have the right to bear arms for the defence (sic) of themselves, and the State, . . ." [Art. I, sec. 27, Oregon Constitution.] It seems clear that the language of the Oregon Constitution is identical in function and almost identical in language to that contained in CSSJR 39(Judiciary) am. It should be reasonable, therefore, to expect them to be construed similarly.

The Kessler case involved a prosecution for the possession of a "billy", an item the possession of which was prohibited as a "slugging weapon."

The Oregon court noted that in colonial time and during the Revolutionary War, weapons used by militiamen and by individuals in the defense of their home or their person were the same. The court noted that the historical analysis of the provision indicated 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 involved possession of a switchblade.

> 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 posttrevolutionary era, or in 1859 when Oregon's consti-

> tution 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 Oregon Supreme Court agreed that a law that sought to prohibit possession of the "jackknife" or "mere pocketknives" would violate the Oregon constitution.

> 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 P.2d at 614.]

Note that the provisions of Alaska law now prohibit the possession of a switchblade. See AS 11.61.200.

It is possible that the reference in the amendment to art. I, sec. 19 to "lawful" uses may be adequate to authorize regulation of an "unlawful" use, that is, to define what is unlawful.

On the other hand, a constitutional provision granting the legislature the authority to characterize a use as unlawful may then authorize a regulation that was unintended by the sponsors of the amendment.

I agree that such a result in this state is unlikely for more practical reasons. But that result occurs because of the understandings on the amendment, not really because of the language itself.

III. Elimination of militia concepts.

Your third question asks whether it would be possible to eliminate the "well-regulated militia" concepts while permitting reasonable regulation. The answer is a qualified yes; I think it is clear that some context for the regulation must be offered. Consider the section with the "militia" eliminated:

SECTION 19. RIGHT TO BEAR ARMS. The [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.

With no context for the regulation, the statement becomes absolute and no regulation would be possible. Accordingly, I believe that some threshold basis for the regulation (such as that in SJR 39) must be offered by the constitution.

If I may be of further assistance, please advise.

RAB:mkr
m5/046

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM May 9, 1986

SUBJECT: Right to bear arms
(Work Order No. 14-SJ39)

TO: Representative M. Mike Miller
Chair, House Judiciary Committee

FROM: Richard A. Bradley
Legislative Counsel

Hayden Kaden has requested a CS for SJR 39. It is enclosed as requested.

The amendment is changed in the second house. I believe we may have provided you with a concurrent resolution to address the question.

The resolution continues the "legislative intent" language in sec. 2. As my April 30 memorandum to your committee on the Senate version of this resolution suggested, we do not believe that "legislative history" is placed before the voters and therefore will not be considered before them.

Thus, the language of sec. 3 that directs the lieutenant governor to place the "legislative history" before the voters may be ineffective. Article XXX, sec. 1 of the Alaska Constitution tells the lieutenant governor what to place before the voters; it provides, in pertinent part:

> SECTION 1. AMENDMENTS. * * * The lieutenant governor shall prepare a ballot title and proposition summarizing each proposed amendment, and shall place them on the ballot for the next general election. * * *

Thus, as you see, the amendment itself is not placed before the voters but only "a ballot title and proposition summarizing each proposed amendment". If the lieutenant governor follows the constitution, which seems to offer mandatory

language, the lieutenant governor may not follow the instructions added in sec. 3 of the resolution.

And I also believe that the amendment to sec. 2(b) of the resolution is also ineffective in its instruction to the Legislative Affairs Agency to "include" the statement of legislative intent in the neutral summary.

Since the language in sec. 2 of the resolution is not law and has not (and cannot) amend the instructions to the Agency, the Agency will continue to be bound by the requirements of AS 15.58.020(6)(C). Those provisions now provide:

> Sec. 15.58.020. CONTENTS OF PAMPHLET. Each election pamphlet shall contain
>
> * * *
>
> (6) for each ballot proposition submitted to the voters by initiative or referendum petition or by the legislature,
>
> * * *
>
> (C) a neutral summary of the proposition prepared by the Legislative Affairs Agency;
>
> * * *

It seems that the obligation of the Agency is to prepare a summary (rather than simply accept a summary not prepared in the Agency). The Agency is also obligated to ensure that the summary is neutral (not weighted by any external considerations beyond the language of the actual proposed amendment itself).

I believe, therefore, that the Agency may consider the legislative history but cannot "include" as its own the legislative history suggested in sec. 2(a).

If I may be of further assistance, please advise.

RAB:ml
095/ml

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

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

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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

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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.

Georgia: The right of the people to keep and bear arms, shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne. GA. CONST. art I, § 1.

Hawaii: 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. HAWAII CONST. art I, § 15.

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.

Louisiana: The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person. LA. CONST. art. I, § 4.

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

Michigan: Every person has a right to keep and bear arms for the defense of himself and the state. MICH. CONST. art I, § 6.

Mississippi: The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power where thereto legally summoned, shall not be called question, but the legislature may regulate or forbid carrying concealed weapons. MISS. CONST. art. III, § 12.

Missouri: That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons. MO. CONST. art I, § 23.

Montana: The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons. MONT. CONST. art II, § 12.

New Mexico: No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreation use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. N.M. CONST. art. II, § 6.

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.

Ohio: 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 kept up; and the military shall be in strict subordination to the civil power. OHIO CONST. art I, § 4.

Oklahoma: The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons. OKLA. CONST. art. II, § 26.

Oregon: 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. OR. CONST. art. I, § 27.

Pennsylvania: The right of the citizens to bear arms in defence of themselves and the State shall not be questioned. PA. CONST. art. I, § 22.

South 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. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner not in time of war but in the manner prescribed by law. S.C. CONST. art I, § 20.

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

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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RECEIVED
MAR 26 1986
Dept. of Law
Administration

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

those 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), than 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

HMB:GAH:gb-12

SJR15

STATE CONSTITUTIONAL GUARANTEES ON THE RIGHT TO KEEP AND BEAR ARMS

Forty-one (41) states have constitutional guarantees on the right to keep and bear arms.

Alabama: That every citizen has a right to bear arms in defense of himself and the state. Article I, Section 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. Article I, Section 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. Article 2, Section 26.

Arkansas: The citizens of this State shall have the right to keep and bear arms for their common defense. Article II, Section 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. Article II, Section 13.

Connecticut: Every citizen has a right to bear arms in defense of himself and the state. Article I, Section 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. Article I, Section 8.

Georgia: The right of the people to keep and bear arms, shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne. Article I, Section I, para. VIII.

Hawaii: 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. Article I, Section 15.

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 passage of legislation providing penalties for the possession of firearms by a convicted

felon, nor prevent the passage of legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony. Article I, Section 11.

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

Indiana: The people shall have a right to bear arms, for the defense of themselves and the State. Article I, Section 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. Kansas Bill of Rights, Section 4.

Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: *** 7. 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. Kentucky Bill of Rights, Section I, para. 7.

Louisiana: The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person. Article I, Section 11.

Maine: Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned. Article I, Section 16.

Massachusetts: The people have a right to keep and bear arms for the common defense. 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. Massachusetts Declaration of Rights, Part I, Article XVII.

Michigan: Every person has a right to keep and bear arms for the defense of himself and the state. Article I, Section 6.

Mississippi: The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power where thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons. Article 3, Section 12.

Missouri: That the right of every citizen to keep and bear

arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons. Article I, Section 23.

Montana: The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons. Article II, Section 12.

Nevada: Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes. Art. 1, Section II, para. 1.

New Hampshire: All persons have the right to keep and bear arms in defense of themselves, their families, their property, and the state. Part First, Art. 2-a.

New Mexico: No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms. Article II, Section 6.

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. Article I, Section 30.

North Dakota: All individuals are by nature equally free and independent and have certain inalienable rights, among which are ... to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreatnal, and other lawful purposes, which shall not be infringed. Article I, Section 1.

Ohio: 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 kept up; and the military shall be in strict subordination to the civil power. Article I, Section 4.

Oklahoma: The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the

Legislature from regulating the carrying of weapons. Article 2, Section 26.

Oregon: The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power. Article I, Section 27.

Pennsylvania: The right of the citizens to bear arms in defence of themselves and the State shall not be questioned. Article I, Section 21.

Rhode Island: The right of the people to keep and bear arms shall not be infringed. Article I, Section 22.

South 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. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law. Article I, Section 20.

South Dakota: The right of the citizens to bear arms in defense of themselves and the state shall not be denied. Article VI, Section 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. Article I, Section 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. Article I, Section 23.

Utah: The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the State, as well as for the other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms. Article I, Section 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 be kept under strict subordination to and governed by the civil power. Chapter I, Article 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 in all cases the military should be under strict subordination to, and governed by, the civil power. Article I, Section 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. Article I, Section 24.

West Virginia: A person has the right to keep and bear arms for the defense of self, family, home, and state, and for lawful hunting and recreational use. Article III, Section 22.

Wyoming: The right of citizens to bear arms in defense of themselves and of the state shall not be denied. Article I, Section 24.

STATES WITHOUT CONSTITUTIONAL PROVISIONS:

Nine (9) states do not have a constitutional provision on arms: California, Delaware, Iowa, Maryland, Minnesota, Nebraska, New Jersey, New York, and Wisconsin.

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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

RECEIVED
MAR 26 1986
Dept. of Law
Administration

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

HMB:GAH:gb-13

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. 20, 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.

70. Livestock

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71. Pets

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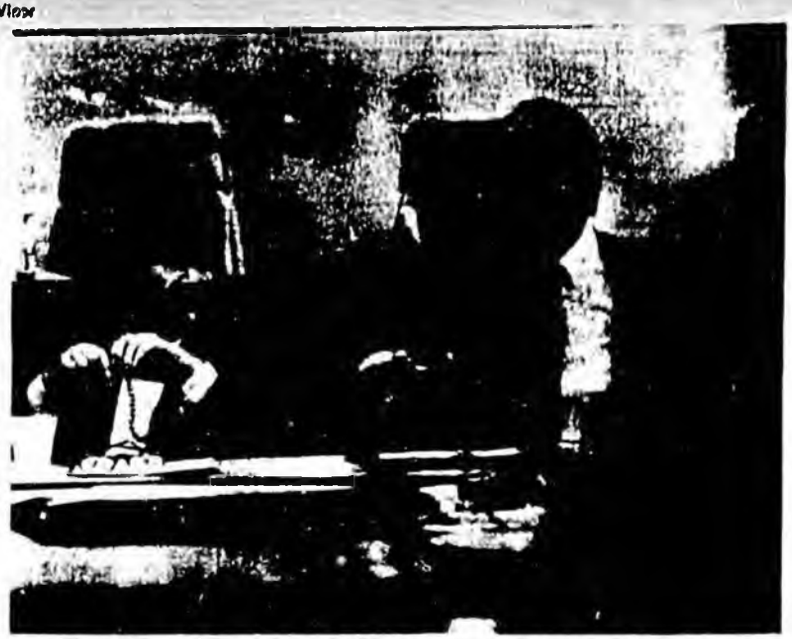

Attorney General Grace Berg Schaible, left, and UAA official Lee Gorsuch met in Kenai last week.

Group eyes gun control for Alaska

There may be a need for a cool-down period in the purchase of guns in Alaska, but members of the state's Criminal Justice Operations Group are afraid that the National Rifle Association and grassroots sentiment against gun control in Alaska make such legislation unlikely.

The members of the group held their monthly meeting last week at Kenai City Hall.

Clipped to their agendas for the meeting was a newspaper report of the Anchorage shooting case in which William O'Shea, who was under a court domestic order to leave Renee Vega alone, stands accused of killing her with a handgun he bought a short while before the shooting occurred at a local store.

Many people see this as a case where a "cooling-off period" might have helped, said Larry Weeks, head of the Department of Law's Criminal Division. But, he said, "that's a big step in this state to sort of take a position on something like this."

Some states have laws that require gun buyers to wait a few days after purchase to pick up the weapon.

Art English, commissioner of the Department of Safety, said that "the NRA has already put me on notice" regarding gun legislation. He said the NRA's national lobby will probably aim for legislation in the next Alaska Legislature to seek banning restrictions on firearms.

English said he agreed with Weeks that a cool-down period might have helped in a case like the Vega killing, but "it's going to be darn tough" to achieve. He added later that he was also unconvinced that it would work.

Myra Munson, commissioner of Health and Social Services, suggested that it might be possible to deal with NRA pressures in the context of a "horror story" like the Vega case. She said the state should consider introducing legislation so that it would be on the pro end of a resulting public debate, rather than let the NRA initiate proposals and place the state in the negative position of attacking the bills.

Dana Fabe, head of the Public Defender Agency, said legislation might achieve two protections: postponing the effects of immediate anger and allowing time for a routine check of an individual's record before giving that person possession of a gun.

Weeks seemed to agree, saying that the best defense might be a good offense. "They can tell me I'm wrong all day, but they're not going to convince me," he said. "I can get shot at by those people all day."

He added that O'Shea had a record of two felony convictions and "at least half a dozen misdemeanors" when he bought the gun.

However, Weeks went on to suggest that the group consider nothing more than exploration of the idea at this time. "Before we take a position for the administration, we better make sure the administration is involved in all this," he said.

John Havelock, an ex-attorney general who is the group's coordinator, and English expressed strong reservations about any such legislation having a chance of becoming law in Alaska. English said that the opposition, including the NRA, makes politicians afraid of gun control.

Attorney General Grace Berg Schaible was more optimistic, saying, "There is an increasing body of people who are concerned about the Saturday night specials (small handguns)."

Fabe said, "You need 'Mothers Against Saturday Night Specials'," or some such strong grassroots support.

Duane Udland, outgoing Soldotna chief of police, agreed about the strength of the opposition. "I think the NRA is going to flood this state... They've got a lot of arguments about these things with a lot of common sense about why these things don't work," he said.

The group took no action on the matter. English said, "The stands we take, we want to make darn sure we want to take."

The Criminal Justice Operations Group is more of an administration intercommunications and brainstorming group than an action group, but Havelock, after the meeting, said its discussions often lead to consensus or action later on.

The group did go on record last year, he said, in unanimous opposition to an NRA proposal for a constitutional amendment against gun control.

Taking a last look back at the O'Shea case as Monday's group meeting ended, Munson said that the nature of the case meant that "somebody's got to be blamed." But she said the NRA would make certain the public debate is not framed around the idea that there is a need for a cooling-off period in gun sales.

No representatives of the NRA spoke at the meeting.

HJR

7 (FILE 3)

97th Congress
2d Session

COMMITTEE PRINT

THE RIGHT TO KEEP AND BEAR ARMS

REPORT

OF THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

FEBRUARY 1982

Printed for the use of the Committee on the Judiciary

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CORRECTION

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02-576(2/77)

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PREFACE

"To preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them." (Richard Henry Lee, Virginia delegate to the Continental Congress, initiator of the Declaration of Independence, and member of the first Senate, which passed the Bill of Rights.)

"The great object is that every man be armed . . . Everyone who is able may have a gun." (Patrick Henry, in the Virginia Convention on the ratification of the Constitution.)

"The advantage of being armed . . . the Americans possess over the people of all other nations . . . Notwithstanding the military establishments in the several Kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms." (James Madison, author of the Bill of Rights, in his Federalist Paper No. 26.)

"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." (Second Amendment to the Constitution.)

In my studies as an attorney and as a United States Senator, I have constantly been amazed by the indifference or even hostility shown the Second Amendment by courts, legislatures, and commentators. James Madison would be startled to hear that his recognition of a right to keep and bear arms, which passed the House by a voice vote without objection and hardly a debate, has since been construed in but a single, and most ambiguous, Supreme Court decision, whereas his proposals for freedom of religion, which he made reluctantly out of fear that they would be rejected or narrowed beyond use, and those for freedom of assembly, which passed only after a lengthy and bitter debate, are the subject of scores of detailed and favorable decisions. Thomas Jefferson, who kept a veritable armory of pistols, rifles and shotguns at Monticello, and advised his nephew to forsake other sports in favor of hunting, would be astounded to hear supposed civil libertarians claim firearm ownerhsip should be restricted. Samuel Adams, a handgun owner who pressed for an amendment stating that the "Constitution shall never be construed . . . to prevent the people of the United States who are peaceable citizens from keeping their own arms," would be shocked to hear that his native state today imposes a year's sentence, without probation or parole, for carrying a firearm without a police permit.

This is not to imply that courts have totally ignored the impact of the Second Amendment in the Bill of Rights. No fewer than twenty-one decisions by the courts of our states have recognized an individual right to keep and bear arms, and a majority of these have not only recognized the right but invalidated laws or regulations which abridged it. Yet in all too many instances, courts or commentators have sought, for reasons only tangentially related to constitutional history, to construe this right out of existence. They argue that the Second Amendment's words "right of the people" mean "a right of the state"—apparently overlooking the impact of those same words when used in the First and Fourth Amendments. The "right of the people" to assemble or to be free from unreasonable searches and seizures is not contested as an individual guarantee. Still they ignore consistency and claim that the right to "bear arms" relates only to military uses. This not only violates a consistent constitutional reading of "right of the people" but also ignores that the second amendment protects a right to "keep" arms. These commentators contend instead that the amendment's preamble regarding the necessity of a "well regulated militia . . . to a free state" means that the right to keep and bear arms applies only to a National Guard. Such a reading fails to note that the Framers used the term "militia" to relate to every citizen capable of bearing arms, and that Congress has established the present National Guard under its power to raise armies, expressly stating that it was not doing so under its power to organize and arm the militia.

When the first Congress convened for the purpose of drafting a Bill of Rights, it delegated the task to James Madison. Madison did not write upon a blank tablet. Instead, he obtained a pamphlet listing the State proposals for a bill of rights and sought to produce a briefer version incorporating all the vital proposals of these. His purpose was to incorporate, not distinguish by technical changes, proposals such as that of the Pennsylvania minority, Sam Adams or the New Hampshire delegates. Madison proposed among other rights that "That right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." In the House, this was initially modified so that the militia clause came before the proposal recognizing the right. The proposals for the Bill of Rights were then trimmed in the interests of brevity. The conscientious objector clause was removed following objections by Elbridge Gerry, who complained that future Congresses might abuse the exemption to excuse everyone from military service.

The proposal finally passed the House in its present form: "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 this form it was submitted into the Senate, which passed it the following day. The Senate in the process indicated its intent that the right be an individual one, for private purposes, by rejecting an amendment which would have limited the keeping and bearing of arms to bearing "For the common defense".

The earliest American constitutional commentators concurred in giving this broad reading to the amendment. When St. George

Tucker, later Chief Justice of the Virginia Supreme Court, in 1803 published an edition of Blackstone annotated to American law, he followed Blackstone's citation of the right of the subject "of having arms suitable to their condition and degree, and such as are allowed by law" with a citation to the Second Amendment, "And this without any qualification as to their condition or degree, as is the case in the British government." William Rawle's "View of the Constitution" published in Philadelphia in 1825 noted that under the Second Amendment: "The prohibition is general. No clause in the Constitution could by a rule of construction be conceived to give to Congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretense by a state legislature. But if in blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both." The Jefferson papers in the Library of Congress show that both Tucker and Rawle were friends of, and corresponded with, Thomas Jefferson. Their views are those of contemporaries of Jefferson, Madison and others, and are entitled to special weight. A few years later, Joseph Story in his "Commentaries on the Constitution" considered the right to keep and bear arms as "the palladium of the liberties of t[illegible]epublic", which deterred tyranny and enabled the citizenry at large to overthrow it should it come to pass.

Subsequent legislation in the second Congress likewise supports the interpretation of the Second Amendment that creates an individual right. In the Militia Act of 1792, the second Congress defined "militia of the United States" to include almost every free adult male in the United States. These persons were obligated by law to possess a firearm and a minimum supply of ammunition and military equipment. This statute, incidentally, remained in effect into the early years of the present century as a legal requirement of gun ownership for most of the population of the United States. There can be little doubt from this that when the Congress and the people spoke of a "militia", they had reference to the traditional concept of the entire populace capable of bearing arms, and not to any formal group such as what is today called the National Guard. The purpose was to create an armed citizenry, which the political theorists at the time considered essential to ward off tyranny. From this militia, appropriate measures might create a "well regulated militia" of individuals trained in their duties and responsibilities as citizens and owners of firearms.

If gun laws in fact worked, the sponsors of this type of legislation should have no difficulty drawing upon long lists of examples of crime rates reduced by such legislation. That they cannot do so after a century and a half of trying—that they must sweep under the rug the southern attempts at gun control in the 1870–1910 period, the northeastern attempts in the 1920–1939 period, the attempts at both Federal and State levels in 1965–1976—establishes the repeated, complete and inevitable failure of gun laws to control serious crime.

Immediately upon assuming chairmanship of the Subcommittee on the Constitution, I sponsored the report which follows as an effort to study, rather than ignore, the history of the controversy over the right to keep and bear arms. Utilizing the research capa-

bilities of the Subcommittee on the Constitution, the resources of the Library of Congress, and the assistance of constitutional scholars such as Mary Kaaren Jolly, Steven Halbrook, and David T. Hardy, the subcommittee has managed to uncover information on the right to keep and bear arms which documents quite clearly its status as a major individual right of American citizens. We did not guess at the purpose of the British 1689 Declaration of Rights; we located the Journals of the House of Commons and private notes of the Declaration's sponsors, now dead for two centuries. We did not make suppositions as to colonial interpretations of that Declaration's right to keep arms; we examined colonial newspapers which discussed it. We did not speculate as to the intent of the framers of the second amendment; we examined James Madison's drafts for it, his handwritten outlines of speeches upon the Bill of Rights, and discussions of the second amendment by early scholars who were personal friends of Madison, Jefferson, and Washington and wrote while these still lived. What the Subcommittee on the Constitution uncovered was clear—and long-lost—proof that the second amendment to our Constitution was intended as an individual right of the American citizen to keep and carry arms in a peaceful manner, for protection of himself, his family, and his freedoms. The summary of our research and findings forms the first portion of this report.

In the interest of fairness and the presentation of a complete picture, we also invited groups which were likely to oppose this recognition of freedoms to submit their views. The statements of two associations who replied are reproduced here following the report of the Subcommittee. The Subcommittee also invited statements by Messrs. Halbrook and Hardy, and by the National Rifle Association, whose statements likewise follow our report.

When I became chairman of the Subcommittee on the Constitution, I hoped that I would be able to assist in the protection of the constitutional rights of American citizens, rights which have too often been eroded in the belief that government could be relied upon for quick solutions to difficult problems.

Both as an American citizen and as a United States Senator I repudiate this view. I likewise repudiate the approach of those who believe to solve American problems you simply become something other than American. To my mind, the uniqueness of our free institutions, the fact that an American citizen can boast freedoms unknown in any other land, is all the more reason to resist any erosion of our individual rights. When our ancestors forged a land "conceived in liberty", they did so with musket and rifle. When they reacted to attempts to dissolve their free institutions, and established their identity as a free nation, they did so as a nation of armed freemen. When they sought to record forever a guarantee of their rights, they devoted one full amendment out of ten to nothing but the protection of their right to keep and bear arms against government interference. Under my chairmanship the Subcommittee on the Constitution will concern itself with a proper recognition of, and respect for, this right most valued by free men.

ORRIN G. HATCH,
Chairman,
Subcommittee on the Constitution

JANUARY 20, 1982.

The right to bear arms is a tradition with deep roots in American society. Thomas Jefferson proposed that "no free man shall ever be debarred the use of arms," and Samuel Adams called for an amendment banning any law "to prevent the people of the United States who are peaceable citizens from keeping their own arms." The Constitution of the State of Arizona, for example, recognizes the "right of an individual citizen to bear arms in defense of himself or the State."

Even though the tradition has deep roots, its application to modern America is the subject of intense controversy. Indeed, it is a controversy into which the Congress is beginning, once again, to immerse itself. I have personally been disappointed that so important an issue should have generally been so thinly researched and so minimally debated both in Congress and the courts. Our Supreme Court has but once touched on its meaning at the Federal level and that decision, now nearly a half-century old, is so ambiguous that any school of thought can find some support in it. All Supreme Court decisions on the second amendment's application to the States came in the last century, when constitutional law was far different than it is today. As ranking minority member of the Subcommittee on the Constitution, I, therefore, welcome the effort which led to this report—a report based not only upon the independent research of the subcommittee staff, but also upon full and fair presentation of the cases by all interested groups and individual scholars.

I personally believe that it is necessary for the Congress to amend the Gun Control Act of 1968. I welcome the opportunity to introduce this discussion of how best these amendments might be made.

The Constitution subcommittee staff has prepared this monograph bringing together proponents of both sides of the debate over the 1968 Act. I believe that the statements contained herein present the arguments fairly and thoroughly. I commend Senator Hatch, chairman of the subcommittee, for having this excellent reference work prepared. I am sure that it will be of great assistance to the Congress as it debates the second amendment and considers legislation to amend the Gun Control Act.

DENNIS DECONCINI,
Ranking Minority Member,
Subcommittee on the Constitution.

JANUARY 20, 1982.

History: Second Amendment Right To "Keep and Bear Arms"

The right to keep and bear arms as a part of English and American law antedates not only the Constitution, but also the discovery of firearms. Under the laws of Alfred the Great, whose reign began in 872 A.D., all English citizens from the nobility to the peasants were obliged to privately purchase weapons and be available for military duty.[1] This was in sharp contrast to the feudal system as it evolved in Europe, under which armament and military duties were concentrated in the nobility. The body of armed citizens were known as the "fyrd".

While a great many of the Saxon rights were abridged following the Norman conquest, the right and duty of arms possession was retained. Under the Assize of Arms of 1181, "the whole community of freemen" between the ages of 15 and 40 were required by law to possess certain arms, which were arranged in proportion to their possessions.[2] They were required twice a year to demonstrate to Royal officials that they were appropriately armed. In 1253, another Assize of Arms expanded the duty of armament to include not only freemen, but also villeins, who were the English equivalent of serfs. Now all "citizens, burgesses, free tenants, villeins and others from 15 to 60 years of age" were obliged to be armed.[3] While on the Continent the villeins were regarded as little more than animals hungering for rebellion, the English legal system not only permitted, but affirmatively required them, to be armed.

The thirteenth century saw further definitions of this right as the long bow, a formidable armor-piercing weapon, became increasingly the mainstay of British national policy. In 1285, Edward I commanded that all persons comply with the earlier Assizes and added that "anyone else who can afford them shall keep bows and arrows".[4] The right of armament was subject only to narrow limitations. In 1279, it was ordered that those appearing in Parliament or other public assemblies "shall come without all force and armor, well and peaceably".[5] In 1328, the statute of Northampton ordered that no one use their arms in "affray of the peace, nor to go nor ride armed by day or by night in fairs, markets, nor in the presence of the justices or other ministers".[6] English courts construed this ban consistently with the general right of private armament as applying only to wearing of arms "accompanied with such circumstances as are apt to terrify the people".[7] In 1369, the King ordered that the sheriffs of London require all citizens "at leisure time on holidays" to "use in their recreation bowes and arrows" and to stop all other games which might distract them from this practice.[8]

The Tudor kings experimented with limits upon specialized weapons—mainly crossbows and the then-new firearms. These measures were not intended to disarm the citizenry, but on the contrary, to prevent their being diverted from longbow practice by

sport with other weapons which were considered less effective. Even these narrow measures were shortlived. In 1503, Henry VII limited shooting (but not possession) of crossbows to those with land worth 200 marks annual rental, but provided an exception for those who "shote owt of a howse for the lawefull defens of the same".[9] In 1511, Henry VIII increased the property requirement to 300 marks. He also expanded the requirement of longbow ownership, requiring all citizens to "use and exercyse shootyng in longbowes, and also have a bowe and arrowes contynually" in the house.[10] Fathers were required by law to purchase bows and arrows for their sons between the age of 7 and 14 and to train them in longbow use.

In 1514 the ban on crossbows was extended to include firearms.[11] But in 1533, Henry reduced the property qualification to 100 pounds per year; in 1541 he limited it to possession of small firearms ("of the length of one hole yard" for some firearms and "thre quarters of a yarde" for others)[12] and eventually he repealed the entire statute by proclamation.[13] The later Tudor monarchs continued the system and Elizabeth added to it by creating what came to be known as "train bands", selected portions of the citizenry chosen for special training. These trained bands were distinguished from the "militia", which term was first used during the Spanish Armada crisis to designate the entire of the armed citizenry.[14]

The militia continued to be a pivotal force in the English political system. The British historian Charles Oman considers the existence of the armed citizenry to be a major reason for the moderation of monarchical rule in Great Britain; "More than once he [Henry VIII] had to restrain himself, when he discovered that the general feeling of his subjects was against him. . . . His 'gentlemen pensioners' and his yeomen of the guard were but a handful, and bills or bows were in every farm and cottage".[15]

When civil war broke out in 1642, the critical issue was whether the King or Parliament had the right to control the militia.[16] The aftermath of the civil war saw England in temporary control of a military government, which repeatedly dissolved Parliament and authorized its officers to "search for, and seize all arms" owned by Catholics, opponents of the government, "or any other person whom the commissioners had judged dangerous to the peace of this Commonwealth".[17]

The military government ended with the restoration of Charles II. Charles in turn opened his reign with a variety of repressive legislation, expanding the definition of treason, establishing press censorship and ordering his supporters to form their own troops, "the officers to be numerous, disaffected persons watched and not allowed to assemble, and their arms seized".[18] In 1662, a Militia Act was enacted empowering officials "to search for and seize all arms in the custody or possession of any person or persons whom the said lieutenants or any two or more of their deputies shall judge dangerous to the peace of the kingdom".[19] Gunsmiths were ordered to deliver to the government lists of all purchasers.[20] These confiscations were continued under James II, who directed them particularly against the Irish population: "Although the

country was infested by predatory bands, a Protestant gentleman could scarcely obtain permission to keep a brace of pistols."[21]

In 1668, the government of James was overturned in a peaceful uprising which came to be known as "The Glorious Revolution". Parliament resolved that James had abdicated and promulgated a Declaration of Rights, later enacted as the Bill of Rights. Before coronation, his successor William of Orange, was required to swear to respect these rights. The debates in the House of Commons over this Declaration of Rights focused largely upon the disarmament under the 1662 Militia Act. One member complained that "an act of Parliament was made to disarm all Englishmen, who the lieutenant should suspect, by day or night, by force or otherwise—this was done in Ireland for the sake of putting arms into Irish hands." The speech of another is summarized as "militia bill—power to disarm all England—now done in Ireland." A third complained "Arbitrary power exercised by the ministry. . . . Militia—imprisoning without reason; disarming—himself disarmed." Yet another summarized his complaints "Militia Act—an abominable thing to disarm the nation. . . ."[22]

The Bill of Rights, as drafted in the House of Commons, simply provided that "the acts concerning the militia are grievous to the subject" and that "it is necessary for the public Safety that the Subjects, which are Protestants, should provide and keep arms for the common defense; And that the Arms which have been seized, and taken from them, be restored."[23] The House of Lords changed this to make it a more positive declaration of an individual right under English law: "That the subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law."[24] The only limitation was on ownership by Catholics, who at that time composed only a few percent of the British population and were subject to a wide variety of punitive legislation. The Parliament subsequently made clear what it meant by "suitable to their conditions and as allowed by law". The poorer citizens had been restricted from owning firearms, as well as traps and other commodities useful for hunting, by the 1671 Game Act. Following the Bill of Rights, Parliament reenacted that statute, leaving its operative parts unchanged with one exception—which removed the word "guns" from the list of items forbidden to the poorer citizens.[25] The right to keep and bear arms would henceforth belong to all English subjects, rich and poor alike.

In the colonies, availability of hunting and need for defense led to armament statutes comparable to those of the early Saxon times. In 1623, Virginia forbade its colonists to travel unless they were "well armed"; in 1631 it required colonists to engage in target practice on Sunday and to "bring their peeces to church."[26] In 1658 it required every householder to have a functioning firearm within his house and in 1673 its laws provided that a citizen who claimed he was too poor to purchase a firearm would have one purchased for him by the government, which would then require him to pay a reasonable price when able to do so.[27] In Massachusetts, the first session of the legislature ordered that not only freemen, but also indentured servants own firearms and in 1644 it imposed a stern 6 shilling fine upon any citizen who was not armed.[28]

When the British government began to increase its military presence in the colonies in the mid-eighteenth century, Massachusetts responded by calling upon its citizens to arm themselves in defense. One colonial newspaper argued that it was impossible to complain that his act was illegal since they were "British subjects, to whom the privilege of possessing arms is expressly recognized by the Bill of Rights" while another argued that this "is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defense".[29] The newspaper cited Blackstone's commentaries on the laws of England, which had listed the "having and using arms for self preservation and defense" among the "absolute rights of individuals." The colonists felt they had an absolute right at common law to own firearms.

Together with freedom of the press, the right to keep and bear arms became one of the individual rights most prized by the colonists. When British troops seized a militia arsenal in September, 1774, and incorrect rumors that colonists had been killed spread through Massachusetts, 60,000 citizens took up arms.[30] A few months later, when Patrick Henry delivered his famed "Give me liberty or give me death" speech, he spoke in support of a proposition "that a well regulated militia, composed of gentlemen and freemen, is the natural strength and only security of a free government. . . ." Throughout the following revolution, formal and informal units of armed citizens obstructed British communication, cut off foraging parties, and harassed the thinly stretched regular forces. When seven states adopted state "bills of rights" following the Declaration of Independence, each of those bills of rights provided either for protection of the concept of a militia or for an express right to keep and bear arms.[31]

Following the revolution but previous to the adoption of the Constitution, debates over militia proposals occupied a large part of the policital scene. A variety of plans were put forth by figures ranging from George Washington to Baron von Steuben.[32] All of the proposals called for a general duty of all citizens to be armed, although some proposals (most notably von Steuben's) also emphasized a "select militia" which would be paid for its services and given special training. In this respect, this "select militia" was the successor of the "trained bands" and the predecessor of what is today the "national guard". In the debates over the Constitution, von Steuben's proposals were criticized as undemocratic. In Connecticut one writer complained of a proposal that "this looks too much like Baron von Steuben's militia, by which a standing army was meant and intended."[33] In Pennsylvania, a delegate argued "Congress may give us a select militia which will, in fact, be a standing army—or Congress, afraid of a general militia, may say there will be no militia at all. When a select militia is formed, the people in general may be disarmed."[34] Richard Henry Lee, in his widely read pamphlet "Letters from the Federal Farmer to the Republican" worried that the people might be disarmed "by modeling the militia. Should one fifth or one eighth part of the people capable of bearing arms be made into a select militia, as has been proposed, and those the young and ardent parts of the community, possessed of little or no property, the former will answer all the purposes of an army, while the latter will be defenseless." He

proposed that "the Constitution ought to secure a genuine, and guard against a select militia," adding that "to preserve liberty, it is essential that the whole body of the people always possess arms and be taught alike, especially when young, how to use them."[35]

The suspicion of select militia units expressed in these passages is a clear indication that the framers of the Constitution did not seek to guarantee a State right to maintain formed groups similar to the National Guard, but rather to protect the right of individual citizens to keep and bear arms. Lee, in particular, sat in the Senate which approved the Bill of Rights. He would hardly have meant the second amendment to apply only to the select militias he so feared and disliked.

Other figures of the period were of like mind. In the Virginia convention, George Mason, drafter of the Virginia Bill of Rights, accused the British of having plotted "to disarm the people—that was the best and most effective way to enslave them", while Patrick Henry oberved that "The great object is that every man be armed" and "everyone who is able may have a gun".[36]

Nor were the antifederalist, to whom we owe credit for a Bill of Rights, alone on this account. Federalist arguments also provide a source of support for an individual rights view. Their arguments in favor of the proposed Constitution also relied heavily upon universal armament. The proposed Constitution had been heavily criticized for its failure to ban or even limit standing armies. Unable to deny this omission, the Constitution's supporters frequently argued to the people that the universal armament of Americans made such limitations unnecessary. A pamphlet written by Noah Webster, aimed at swaying Pennsylvania toward ratification, observed

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword, because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretense, raised in the United States.[37]

In the Masssachusetts convention, Sedgwick echoed the same thought, rhetorically asking if an oppressive army could be formed or "if raised, whether they could subdue a Nation of freemen, who know how to prize liberty, and who have arms in their hands?"[38] In Federalist Paper 46, Madison, later author of the Second Amendment, mentioned "The advantage of being armed, which the Americans possess over the people of all other countries" and that "notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms."

A third and even more compelling case for an individual rights perspective on the Second Amendment comes from the State demands for a bill of rights. Numerous state ratifications called for adoption of a Bill of Rights as a part of the Constitution. The first such call came from a group of Pennsylvania delegates. Their proposals, which were not adopted but had a critical effect on future debates, proposed among other rights that "the people have

a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or a real danger of public injury from individuals."[39] In Massachusetts, Sam Adams unsuccessfully pushed for a ratification conditioned on adoption of a Bill of Rights, beginning with a guarantee "That the said Constitution shall never be construed to authorize Congress to infringe the just liberty of the press or the rights of conscience; or to prevent the people of the United States who are peaceable citizens from keeping their own arms. . . ."[40] When New Hampshire gave the Constitution the ninth vote needed for its passing into effect, it called for adoption of a Bill of Rights which included the provision that "Congress shall never disarm any citizen unless such as are or have been in actual rebellion".[41] Virginia and North Carolina thereafter called for a provision "that the people have the right to keep and bear arms; 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."[42]

When the first Congress convened for the purpose of drafting a Bill of Rights, it delegated the task to James Madison. Madison did not write upon a blank tablet. Instead, he obtained a pamphlet listing the State proposals for a Bill of Rights and sought to produce a briefer version incorporating all the vital proposals of these. His purpose was to incorporate, not distinguish by technical changes, proposals such as that of the Pennsylvania minority, Sam Adams, and the New Hampshire delegates. Madison proposed among other rights that:

> "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[43]

In the House, this was initially modified so that the militia clause came before the proposal recognizing the right. The proposals for the Bill of Rights were then trimmed in the interests of brevity. The conscientious objector clause was removed following objections by Elbridge Gerry, who complained that future Congresses might abuse the exemption for the scrupulous to excuse everyone from militia service.

The proposal finally passed the House in its present form: "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 this form it was submitted into the Senate, which passed it the following day. The Senate in the process indicated its intent that the right be an individual one, for private purposes, by rejecting an amendment which would have limited the keeping and bearing of arms to bearing "for the common defense".

The earliest American constitutional commentators concurred in giving this broad reading to the amendment. When St. George Tucker, later Chief Justice of the Virginia Supreme Court, in 1803 published an edition of Blackstone annotated to American law, he followed Blackstone's citation of the right of the subject "of having

arms suitable to their condition and degree, and such as are allowed by law" with a citation to the Second Amendment, "And this without any qualification as to their condition or degree, as is the case in the British government".[44] William Rawle's "View of the Constitution" published in Philadelphia in 1825 noted that under the Second Amendment

> The prohibition is general. No clause in the Constitution could by a rule of constuction be conceived to give to Congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretense by a state legislature. But if in blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both."[45]

The Jefferson papers in the Library of Congress show that both Tucker and Rawle were friends of, and corresponded with Thomas Jefferson. This suggests that their assessment, as contemporaries of the Constitution's drafters, should be afforded special consideration.

Later commentators agreed with Tucker and Rawle. For instance, Joseph Story in his "Commentaries on the Constitution" considered the right to keep and bear arms as "the palladium of the liberties of the republic", which deterred tyranny and enabled the citizenry at large to overthrow it should it come to pass.[46]

Subsequent legislation in the Second Congress likewise supports the interpretation of the second amendment that creates an individual right. In the Militia Act of 1792, the second Congress defined "militia of the United States" to include almost every free adult male in the United States. These persons were obligated by law to possess a firearm and a minimum supply of ammunition and military equipment.[47] This statute, incidentally remained in effect into the early years of the present century as a legal requirement of gun ownership for most of the population of the United States. There can be little doubt from this that when the Congress and the people spoke of a "militia", they had reference to the traditional concept of the entire populace capable of bearing arms, and not to any formal group such as what is today called the National Guard. The purpose was to create an armed citizenry, such as the political theorists at the time considered essential to ward off tyranny. From this militia, appropriate measures might create a "well regulated militia" of individuals trained in their duties and responsibilities as citizens and owners of firearms.

The Second Amendment as such was rarely litigated prior to the passage of the Fourteenth Amendment. Prior to that time, most courts accepted that the commands of the federal Bill of Rights did not apply to the states. Since there was no federal firearms legislation at this time, there was no legislation which was directly subject to the Second Amendment, if the accepted interpretations were followed. However, a broad variety of state legislation was struck down under state guarantees of the right to keep and bear arms and even in a few cases, under the Second Amendment, when it came before courts which considered the federal protections applicable to the states. Kentucky in 1813 enacted the first carrying concealed weapon statute in the United States; in 1822, the Ken-

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tucky Court of Appeals struck down the law as a violation of the state constitutional protection of the right to keep and bear arms: "And can there be entertained a reasonable doubt but the provisions of that act import a restraint on the right of the citizen to bear arms? The court apprehends it not. The right existed at the adoption of the Constitution; it then had no limit short of the moral power of the citizens to exercise it, and in fact consisted of nothing else but the liberty of the citizen to bear arms."[48] On the other hand, a similar measure was sustained in Indiana, not upon the grounds that a right to keep and bear arms did not apply, but rather upon the notion that a statute banning only concealed carrying still permitted the carrying of arms and merely regulated one possible way of carrying them.[49] A few years later, the Supreme Court of Alabama upheld a similar statute but added "We do not desire to be understood as maintaining, that in regulating the manner of wearing arms, the legislature has no other limit than its own discretion. A statute which, under the pretense of regulation, amounts to a destruction of that right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional."[50] When the Arkansas Supreme Court in 1842 upheld a carrying concealed weapons statute, the chief justice explained that the statute would not "detract anything from the power of the people to defend their free state and the established institutions of the country. It prohibits only the wearing of certain arms concealed. This is simply a regulation as to the manner of bearing such arms as are specified", while the dissenting justice proclaimed "I deny that any just or free government upon earth has the power to disarm its citizens".[51]

Sometimes courts went farther. When in 1837, Georgia totally banned the sale of pistols (excepting the larger pistols "known and used as horsemen's pistols") and other weapons, the Georgia Supreme Court in *Nunn* v. *State* held the statute unconstitutional under the Second Amendment to the federal Constitution. The court held that the Bill of Rights protected natural rights which were fully as capable of infringement by states as by the federal government and that the Second Amendment provided "the right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not merely such as are used by the militia, shall not be infringed, curtailed, or broken in on, in the slightest degree; and all this for the important end to be attained: the rearing up and qualifying of a well regulated militia, so vitally necessary to the security of a free state."[52] Prior to the Civil War, the Supreme Court of the United States likewise indicated that the privileges of citizenship included the individual right to own and carry firearms. In the notorious *Dred Scott* case, the court held that black Americans were not citizens and could not be made such by any state. This decision, which by striking down the Missouri Compromise did so much to bring on the Civil War, listed what the Supreme Court considered the rights of American citizens by way of illustrating what rights would have to be given to black Americans if the Court were to recognize them as full fledged citizens: