A SHOT IN THE DARK: WHY STRICT SCRUTINY WOULD MISS THE MARK FOR FELON-IN-POSSESSION RESTRICTIONS

GABRIEL A. BLUMBERG*

ABSTRACT

In light of Judge Mannheimer's lengthy dissent in Wilson v. State *regarding the 1994 amendment to article I, section 19 of the Alaska Constitution, this Note takes an in-depth look at the history of that amendment. The amendment clearly established an individual right to bear arms for Alaska citizens, but Judge Mannheimer interpreted it as also requiring courts to implement strict scrutiny when reviewing the constitutionality of firearm prohibitions. This Note thoroughly examines the legislative history of the amendment and the 1994 election pamphlet to determine whether felon-in-possession laws should be subjected to strict scrutiny review. While the legislative history did leave the door open to a higher standard of review for felon-in-possession statutes, the court of appeals firmly shut that through its post-1994 rulings. This Note argues that the court has correctly applied the legislative intent, and the principle of stare decisis was correctly utilized in* Wilson v. State *to forego application of strict scrutiny.*

INTRODUCTION

In 1994, the voters of Alaska approved an amendment to article I, section 19 of the Alaska Constitution.[1] The amendment states: "The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State."[2] Over the next fifteen

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* J.D. Candidate, Duke University School of Law (2011). B.S. Economics and B.S. Psychology, University of Florida (2008).

1. *See 1994 General Election Official Results, Statewide Summary, November 8, 1994*, STATE OF ALASKA DIVISION OF ELECTIONS, http://www.elections.alaska.gov/results/94GENR/result94.htm#bal 1 (last visited Feb. 19, 2011). The amendment passed by a margin of 153,300 to 57,636. *Id.*

2. *See* ALASKA CONST. art. I, § 19.

years, three Alaska cases interpreted this amendment, and all three reached the same conclusion: the amendment guarantees an individual right to bear arms but still allows the legislature to promulgate firearm restrictions for certain dangerous classes regardless of whether such restrictions are narrowly tailored to meet a compelling government interest.[3] In 2009, the Alaska Court of Appeals addressed this issue for a fourth time in *Wilson v. State*.[4] This case marked the first opportunity for the court to construe article I, section 19 since the United States Supreme Court held in *District of Columbia v. Heller*[5] that the Second Amendment of the United States Constitution protects an individual right to bear arms apart from any militia service.[6]

In *Wilson*, Allen Wilson was found in possession of a loaded handgun after being pulled over for a traffic violation.[7] Since he had previously been convicted of a felony, Wilson was charged with violating section 11.61.200(a)(1) of the Alaska Statutes.[8] This provision states that "[a] person commits the crime of misconduct involving weapons in the third degree if the person . . . knowingly possesses a firearm capable of being concealed on one's person after having been convicted of a felony."[9] At trial, Wilson asserted that this statute was unconstitutional under the 1994 amendment to article I, section 19 because it did not distinguish between violent and non-violent prior felonies.[10] The trial court denied his motion to dismiss, and Wilson was convicted.[11]

Wilson raised the same issue on appeal, and the court of appeals disagreed with Wilson and affirmed the conviction.[12] Chief Judge Coats authored the opinion and relied heavily on the court's prior decision in *Gibson v. State*,[13] which concluded that the legislative history and voter intent of the 1994 amendment demonstrated that certain restrictions, such as prohibiting felons and intoxicated citizens from possessing

3. *See* DeMars v. State, Nos. A-7002, 4100, 1999 WL 652444, at *2 (Alaska Ct. App. Aug. 18, 1999); Morgan v. State, 943 P.2d 1208, 1212 (Alaska Ct. App. 1997); Gibson v. State, 930 P.2d 1300, 1301–03 (Alaska Ct. App. 1997).

4. 207 P.3d 565 (Alaska Ct. App. 2009).

5. 554 U.S. 570 (2008).

6. *Id.* at 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

7. *Wilson*, 207 P.3d at 566.

8. *Id.*

9. ALASKA STAT. § 11.61.200(a)(1) (2010).

10. *See Wilson*, 207 P.3d at 566.

11. *See id.*

12. *Id.*

13. 930 P.2d 1300 (Alaska Ct. App. 1997).

firearms, should not be invalidated by the amendment.[14] He also referenced *District of Columbia v. Heller*[15] in order to demonstrate the United States Supreme Court's view that even though individuals have a right to bear arms under the Second Amendment (which at the time of *Gibson* had not yet been incorporated against the states[16]), the right is not absolute with regard to convicted felons.[17]

Judge Stewart wrote a concurring opinion that supported Chief Judge Coats' conclusion by noting the value of common sense and stare decisis.[18] Judge Stewart appropriately interpreted the 1994 amendment in light of the Alaska Supreme Court's guidance regarding constitutional interpretation. He announced that appellate courts should apply independent judgment to questions of constitutional law and give constitutional provisions "a reasonable and practical interpretation in accordance with common sense."[19] Additionally, the proper review requires that courts "look to the plain meaning and purpose of the provision and the intent of the framers."[20] Judge Stewart immediately applied these standards to decipher the intent of the voters because they had been the ones ultimately responsible for approving the amendment.[21] Indeed, a key aspect of his analysis is its practical focus. Judge Stewart pointed out that most citizens were likely not aware of the standard of review that applied to firearm restrictions,[22] nor that the adoption of this amendment could implicate the standard.[23] Neither the election pamphlet nor the ballot made any reference to a standard of review.[24] Not even the neutral opinion of the Legislative Affairs Agency

14. *See Wilson*, 207 P.3d at 567–68.
15. 554 U.S. 570 (2008).
16. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (holding that the Second Amendment is fully applicable to the states). Interestingly, the Court explicitly reaffirmed its statement in *Heller* that the holding should "not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill.'" *Id.* at 3047 (quoting *Heller*, 554 U.S. at 626).
17. *Wilson*, 207 P.3d at 566–67; *see also Heller*, 554 U.S. at 626. *Heller* is a federal case and thus is not a source of binding precedent for Alaska courts interpreting the Alaska Constitution. The reference by Chief Judge Coats, though, is beneficial for a broader perspective of the issue and as a general justification for a state's ability to place some limitations on the right to bear arms.
18. *Wilson*, 207 P.3d at 569–70 (Stewart, J., concurring).
19. *Id.* at 569 (quoting Arco Alaska, Inc. v. State, 824 P.2d 708, 710 (Alaska 1992)).
20. *Id.* (quoting *Arco Alaska*, 824 P.2d at 710).
21. *See id.*
22. *See id.*
23. *See id.*
24. *See id.* at 583–86 (Mannheimer, J., dissenting).

made any mention of a potential change to it.[25] Accordingly, Judge Stewart came to the conclusion that the 1994 amendment did not require the court to use strict scrutiny review in felon-in-possession cases.[26]

In response to the majority's short and seemingly straightforward decision, Judge Mannheimer penned a twenty-four-page dissent thoroughly analyzing the legislative history of the 1994 amendment. He passionately and persuasively argued that the Legislature intended to apply strict scrutiny to firearm regulations. This Note aims to demonstrate that the only aspect of the resolution that is binding on the courts is its adoption of an individual right to bear arms. The committee meetings are replete with legislators stating that the *purpose* of the amendment is to guarantee an individual right to bear arms.[27] Similarly, the *plain meaning* of the amendment demonstrates an *intent* to clarify that article I, section 19 grants an individual right rather than a collective right. The legislature specifically began the amendment with the phrase "[t]he individual right."

In light of Judge Mannheimer's forceful dissent regarding the need for strict scrutiny, this Note will evaluate the court's current approach to the level of review for firearm cases.[28] It will argue that the court in *Gibson* opened the door to implementing a heightened standard of review for felon-in-possession laws because of its unique opportunity to analyze them in connection with privacy claims under article I, section

25. *See id.* at 583.

26. *See id.* at 569 (Steward, J., concurring).

27. *See, e.g.*, MINUTES OF THE S. STATE AFFAIRS COMM., Jan. 21, 1994, 18th Leg., Tape 94-3, Side A at no. 142, *available at* http://www.legis.state.ak.us/basis/get_single_minute.asp?house=S&session=18&comm=STA&date=19940121&time=0905 (statement of Chairman Leman).

28. The Author agrees with Judge Mannheimer that the Legislature cannot make conclusive findings on whether a law passes constitutional muster. *See Wilson*, 207 P.3d at 590 (Mannheimer, J., dissenting) ("The courts are not bound by either legislators' or voters' predictions of how an amended constitutional provision will be interpreted and applied—unless that 'prediction' is actually codified in the amendment itself."). However, the Author also notes that the Legislature cannot unilaterally establish the level of scrutiny for the court to use. In Alaska, the supreme court applies its own "independent judgment to questions of constitutional law and review[s] *de novo* the construction of the Alaska and federal Constitutions." Alaskans for a Common Language v. Kritz, 170 P.3d 183, 189 (Alaska 2007); *see also* Marbury v. Madison, 5 U.S. 137 (1803) (establishing the process of judicial review); David L. Faigman, *Amicus Brief of Constitutional Law Professors David L. Faigman and Ashutosh A. Bhagwat, et al., in the Case of Gonzales v. Carhart*, 34 HASTINGS CONST. L.Q. 69, 71 (2006) (noting that the Court has a "constitutional obligation to exercise its own independent legal judgment" and that by relying entirely on the Legislature's choices, courts would "ignore these well-settled constitutional principles and would have the legislative fox guarding the constitutional henhouse").

22 of the Alaska Constitution.[29] In privacy cases, the court either applies a "compelling interest" test[30] or intermediate scrutiny[31] depending on whether the individual has a fundamental right and whether the individual's action "interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare."[32]

Through independent analysis of the legislative history and prior cases, this Note aims to demonstrate that the Alaska courts have been correctly interpreting article I, section 19 of the Alaska Constitution by eschewing strict scrutiny when reviewing constitutional challenges to felon-in-possession statutes. The legislative history of section 19, as well as its interpretation by the Alaska courts, demonstrates that at most the proper standard is a level of review that requires a "close and substantial relationship" to a legitimate government interest. This standard satisfies Alaska's desire for strong protections against government intrusions,[33] but it still allows statutes that prohibit firearm possession by felons.

Part I of this Note begins by reviewing the history of article I, section 19 of the Alaska Constitution and its similarities to the Second Amendment of the U.S. Constitution. This portion next conducts a thorough examination of the legislative history of the 1994 amendment, which reveals a legislative intent to clarify an individual right to bear arms and to retain restrictions for convicted felons. The Note then assesses the effect of the election pamphlet given to voters in the 1994 election. Part I.D looks at the three pre-*Wilson* cases that addressed section 19 claims in the aftermath of the 1994 amendment. Lastly, Part II of the Note contends that even if an argument could be made for implementing strict scrutiny, stare decisis requires that the courts

29. *See* ALASKA CONST. art. I, § 22 (explicitly guaranteeing the right to privacy in Alaska).

30. Strict scrutiny in this context requires that the "constraints are justified by a compelling state interest, and no less restrictive means could advance that interest." *See, e.g.*, Valley Hosp. Ass'n v. Mat-Su Coal. for Choice, 948 P.2d 963, 969 (Alaska 1997).

31. Intermediate scrutiny in this context requires that legislation bear a "close and substantial relationship" to a "legitimate state interest." Ravin v. State, 537 P.2d 494, 506 (Alaska 1975).

32. *Compare Valley Hosp. Ass'n*, 948 P.2d at 969 (applying strict scrutiny to a woman's fundamental right to reproductive choice), *with Ravin*, 537 P.2d at 506 (applying intermediate scrutiny when defendant had no fundamental right to possess marijuana and his action might interfere "in a serious manner with the health, safety, rights and privileges of others or with the public welfare").

33. *See Ravin*, 537 P.2d at 515–16 (Boochever, J., concurring) (affirmatively stating that the test employed in *Ravin* is a departure from the two-tier strict scrutiny/rational basis model and that it implements a balancing test that explicitly rejects looking for a mere rational basis).

continue utilizing a lower standard of review when considering felon-in-possession firearm challenges.

I. JUDICIAL SCRUTINY AND THE RIGHT TO BEAR ARMS

A. General Background of Article I, Section 19

In 1955, four years before Alaska became a state, delegates from across the territory convened in Fairbanks to craft a constitution that would bolster their case for statehood.[34] The delegates chose to use the United States Constitution as a framework with the idea that by mirroring the U.S. Constitution, their chances for being granted statehood would increase substantially.[35] In fact, many sections of the Alaska Constitution use wording almost identical to that found in the U.S. Constitution.[36] One such provision is section 19 of article I, which states "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."[37] This controversial clause closely tracks the Second Amendment of the U.S. Constitution, the meaning of which has been heavily debated for many years.

Currently, the ultimate meaning of the Second Amendment is becoming clearer.[38] Prior to the United States Supreme Court's rulings in *Heller* and *McDonald*, though, there was no definitive answer to whether the amendment provided a "collective" right—one connected to service in a militia—or an "individual" right—one that was not militia-related.[39]

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34. GORDON S. HARRISON, ALASKA LEGISLATIVE AFFAIRS AGENCY, ALASKA'S CONSTITUTION: A CITIZEN'S GUIDE 3 (4th ed. 2002), *available at* http://w3.legis.state.ak.us/docs/pdf/citizens_guide.pdf.

35. *Id.*

36. *See, e.g.*, ALASKA CONST. art. I, § 4 ("No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof."); *cf.* U.S. CONST. amend. I (using identical language).

37. ALASKA CONST. art. I, § 19; *cf.* U.S. CONST. amend. II ("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.").

38. *See* District of Columbia v. Heller, 554 U.S. 570, 595 (2008) (announcing that the Second Amendment guarantees an individual right to bear arms); *see also* McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (announcing that the Second Amendment is applicable to the states via the Due Process Clause of the Fourteenth Amendment).

39. Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL'Y REV. 597, 597–600 (2006) (stating that the debate regarding the Second Amendment has been almost entirely focused on whether it protects an individual or collective right). Winkler defines the individual versus collective argument as a "first-order" question, while noting the debate regarding standard of review is merely a "second-order" question that has unanimously

As federal case law developed, it became apparent that the prevailing opinion was that the Second Amendment provided only a collective right to bear arms.[40] In response, many states began amending their constitutions to clarify that their "right to bear arms" provisions were intended to create an individual right.[41] The Alaska Legislature had attempted to add a similar provision repeatedly, but the proposals never made it out of the Legislature.[42] In 1994, however, Alaska finally joined these other states by amending article I, section 19 of its constitution.[43] The amendment added the sentence: "The individual right to keep and

been decided in favor of deferential scrutiny. *Id.* at 597–98. Winkler's conclusion was that even if the Second Amendment was construed to give rise to an individual right, it would be mainly symbolic and would not affect most firearm restrictions. *Id.* at 613.

40. *See* United States v. Hale, 978 F.2d 1016, 1019–20 (8th Cir. 1992); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976); Cases v. United States, 131 F.2d 916, 921–23 (1st Cir. 1942). Following the 1994 amendment to the Alaska Constitution, the trend grew stronger as even more circuits adopted the collective right interpretation of the Second Amendment. *See* Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999); United States v. Rybar, 103 F.3d 273, 286 (3d Cir. 1996); Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995). Most importantly, though, was the 1996 decision supporting a collective right in the Ninth Circuit. *See* Hickman v. Block, 81 F.3d 98, 101–02 (9th Cir. 1996) (expressly establishing that the Second Amendment only guarantees a collective right). *See generally* Roger I. Roots, *The Approaching Death of the Collective Right Theory of the Second Amendment*, 39 DUQ. L. REV. 71, 77–78 (2000) (explaining which circuits emphasized that the Second Amendment guaranteed a collective right rather than an individual right to bear arms).

41. *See* Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 736–39 (2005) (detailing other states' movements to amend their constitutions to include or clarify an individual right to bear arms). Prior to Alaska's amendment in 1994, Nebraska (in 1988) and Maine (in 1987) each passed amendments to assure their citizens that the right to bear arms was individual rather than collective. *Id.* at 736. More importantly, Utah enacted a similar amendment in 1984 to guarantee an individual right. *Id.* at 738–39. Utah's amendment is especially apropos because its original language used the term "people" similar to the U.S. Constitution and the Alaska Constitution. *Id.* In 1984, though, the state eliminated the ambiguity by explicitly using the term "individual right." *Id.* at 739.

42. *See* MINUTES OF THE S. FIN. COMM., Feb. 15, 1994, 18th Leg., Tape SFC-94, No. 25, Side 1, *available at* http://www.legis.state.ak.us/basis/get_single_minute.asp?house=S&session=18&comm=FIN&date=19940215&time=0920 (statement of Co-Chairman Frank) (mentioning that amendments had been suggested in past years).

43. To amend the Alaska Constitution, a proposed amendment must pass both the Senate and the House of Representatives by a two-thirds vote. After the amendment passes the Legislature, it is placed on the general election ballot. If it receives more than fifty percent of the vote, the amendment is enacted. ALASKA CONST. art. XIII, § 1. Additionally, when the amendment is placed on the ballot, it must be presented with a summary prepared by the lieutenant governor. *Id.*

bear arms shall not be denied or infringed by the State or a political subdivision of the State."[44]

B. Legislative History of the 1994 Amendment

1. *Senate State Affairs Committee*

The 1994 amendment began its journey through the Alaska Legislature as Senate Joint Resolution 39 (SJR 39). The first public hearing on the resolution was held on January 21, 1994, in the Senate State Affairs Committee.[45] The summary for the resolution notes that "in addition to the right of the people to keep and bear arms as approved by the voters at the time of ratification of the state Constitution, . . . the individual right to keep and bear arms shall not be denied or infringed."[46] This summary mentions specifically that the amendment aims to establish an *individual* right for the citizens of Alaska.[47] But nowhere in the summary is there any mention of a strict scrutiny standard or indeed of any standard of review.

The first witness to testify at the hearing on the amendment was Duane Udland, the Deputy Chief of Police for the Anchorage Police Department.[48] He noted that there was concern that the new amendment would jeopardize the government's ability to pass reasonable firearm restrictions.[49] However, as soon as Udland voiced this concern, the chairman of the committee asked Portia Babcock, the Senate State Affairs Committee legislative aide, to give an overview of the amendment.[50] And in response, Babcock announced that the purpose of the Amendment was to "protect and insure [sic] the right to keep and bear arms in the future."[51]

Following Babcock's remarks, Senator Dave Donley noted his belief that "the proper judicial standard of review in terms of balancing firearms rights of individuals versus the protection of society[] is a compelling public safety interest standard."[52] Later in the hearing, after

44. ALASKA CONST. art. I, § 19.
45. *See* MINUTES OF THE S. STATE AFFAIRS COMM., *supra* note 27, Tape 94-2, Side B at no. 483 (statement of Chairman Leman).
46. *See* MINUTES OF THE S. FIN. COMM., *supra* note 42. This summary was identical for each committee and never once mentioned a level of judicial scrutiny. *See, e.g.*, *id.*
47. *See* MINUTES OF THE S. STATE AFFAIRS COMM., *supra* note 27, Tape 94-2, Side B at no. 483.
48. *Id.* at no. 463 (statement of Duane Udland).
49. *Id.* at no. 425.
50. *Id.* at no. 285 (statement of Chairman Leman).
51. *Id.* at no. 273 (statement of Portia Babcock).
52. *Id.* at no. 218 (statement of Senator Donley).

Senator Loren Leman had advised a citizen that "SJR 39 will not restrict municipalities from dealing with appropriate local restrictions on firearms," Senator Robin Taylor echoed Senator Donley's comments regarding standard of review.[53] Senator Taylor expressed that "it is the intent of the committee that a standard of compelling public safety interest will allow municipalities and the state to continue to pass laws regarding appropriate restrictions on the right to keep and bear arms."[54] One must note that Senator Taylor went so far as to state that "appropriate" restrictions would still be allowed if SJR 39 passed.[55] Senator Leman also reiterated, "[I]t is not [my] intent to restrict the passage of laws regulating firearms where there is a concern of public safety."[56] Furthermore, Senator Leman believed SJR 39 was necessary to illuminate the meaning of article I, section 19 because of "concern that current constitutional law could be interpreted as a collective right to bear arms and not an individual right. This would clarify the right to keep and bear arms as an individual right."[57]

The hearing concluded with testimony from local individuals whose comments focused on the need to pass SJR 39 and the argument that all gun controls should be unconstitutional.[58] Not one of these witnesses made reference to a heightened form of judicial review. For example, Dan Puritte stated, "the federal government is doing everything it can to take away our freedom, our rights, and our guns."[59] This statement demonstrates the growing concern among Alaskans at the time that article I, section 19 could be viewed as protecting only a collective right. It was this fear that drove passage of the amendment—not a desire to change the level of judicial scrutiny applied to firearm restrictions. After all the witnesses testified, SJR 39 was discharged from the Senate State Affairs Committee.[60]

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53. *Id.* Tape 94-3, Side A at nos. 091–095 (statements of Chairman Leman and Senator Taylor).

54. *Id.* at no. 095 (statement of Senator Taylor).

55. *Id.* This is an example of the Legislature clearly stating its desire that certain prohibitions, such as those relating to felons in possession, be maintained even if merely "appropriate." This language suggests a standard of review much more relaxed than strict scrutiny.

56. *Id.* at no. 142 (statement of Chairman Leman).

57. *Id.*

58. *See* Wilson v. State, 207 P.3d 565, 574 (Alaska Ct. App. 2009) (Mannheimer, J., dissenting) (listing three witnesses in order to demonstrate the public opinion regarding SJR 39).

59. *See* MINUTES OF THE S. STATE AFFAIRS COMM., *supra* note 27, Tape 94-2, Side B at no. 183 (statement of Dan Puritte).

60. *Id.* Tape 94-3, Side A at no. 180 (statement of Chairman Leman).

2. *Senate Judiciary Committee*

SJR 39 then went to the Senate Judiciary Committee on February 4, 1994.[61] Senator Leman, the chair of the committee where the proposal was introduced, opened the discussion by reiterating that the amendment would not bar governmental bodies from passing firearm restrictions.[62] Furthermore, he noted, "the consensus of his hearings was that any change to the constitution *should be clear and as simple as possible*."[63] Since the people of Alaska had growing concerns that article I, section 19 (a nearly exact replica of the Second Amendment to the U.S. Constitution) was going to be construed as protecting only a collective right, they wanted to act quickly to cement their right to keep and bear arms as an individual one. Legislators likely feared that language implicating the standard of review would hinder the amendment's successful passage on the ballot.

Assistant Attorney General Dean Guaneli was the first witness to testify about SJR 39 at the Senate Judiciary Committee hearing.[64] Guaneli expressed concerns that SJR 39 could cause the courts to impose strict scrutiny and overturn existing laws such as the convicted-felon-in-possession laws.[65] Senator Leman, however, quashed this suggestion by stating "Mr. Guaneli's fear of a clean constitutional amendment [i]s not founded in fact" and "appropriate restrictions [would still be valid after this amendment]."[66] While it is true that Senator Donley then stated that the proper level of review should be strict scrutiny, he immediately undercut this statement by asserting that "the compelling public safety interest should be the test regarding whether laws are upheld or not; with firearms *very few safety requirements are not reasonable*."[67]

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61. *Bill History/Action for 18 Legislature, Bill SJR 39*, ALASKA STATE LEGISLATURE (May 27, 1994), http://www.legis.state.ak.us/basis/get_complete_bill.asp?session=18&bill=SJR39.

62. MINUTES OF THE S. JUDICIARY COMM., Feb. 4, 1994, 18th Leg., Tape 94-6, Side B at no. 523, *available at* http://www.legis.state.ak.us/basis/get_single_minute.asp?house=S&session=18&comm=JUD&date=19940204&time=1342 (statement of Senator Leman).

63. *Id.* (emphasis added).

64. *Id.* (statement of Dean Guaneli).

65. *Id.*

66. *Id.* at no. 240 (statement of Senator Leman).

67. *Id.* at no. 121 (statement of Senator Donley) (emphasis added). Senator Donley later weakened this position even further by submitting a letter of intent, which revealed that he had a standard other than strict scrutiny in mind for felon-in-possession challenges. *See* S. JOURNAL, 18th Leg., 2d Sess. 3032–34 (Alaska 1994), *available at* http://www.legis.state.ak.us/basis/get_single_journal.asp?session=18&date=19940302&beg_page=3019&end_page=3049&chamber=S; *see also infra* Part I.B.4 (discussing Senator Donley's letter of intent and how it demonstrates that he actually was referring to a lesser standard than strict scrutiny as courts apply it with regards to convicted felons).

After Portia Babcock testified that municipalities support SJR 39[68] and Senator Donley noted he would file a letter of intent regarding the standard of review for the proposed amendment,[69] the Senate Judiciary Committee passed SJR 39.[70]

3. Senate Finance Committee

The next public discussion of the bill occurred in the Senate Finance Committee on February 15, 1994.[71] Portia Babcock, aide to the Senate State Affairs Committee, again was asked to testify.[72] She clearly stated that the resolution was intended "to better guarantee the individual right to keep and bear arms in the future for the state of Alaska."[73] She then went on to note that over "the past ten years this issue had come up and in polls taken it was estimated that [seventy-eight to ninety] percent of Alaskans supported this resolution . . . to better guarantee the individual right to keep and bear arms."[74]

It is particularly important to note the time period to which Babcock referred in her statements. The ten-year period preceding 1994 was the time during which federal courts of appeal were creating precedent that the Second Amendment to the U.S. Constitution protected a collective right rather than an individual right.[75] And perhaps more importantly, this period came immediately after a 1983 Alaska Attorney General opinion stated that article I, section 19 conferred only a collective right to bear arms.[76] Only after Babcock again mentioned the public support for an amendment to clarify an individual right did the topic of judicial review even come into play.[77] Senator Steve Rieger questioned her regarding how it would affect current firearm restrictions and again Babcock (similar to Senator Leman) asserted that it was aimed only at "very unreasonable restrictions."[78]

Mr. Guaneli was also present at this meeting, and he repeated his concerns about SJR 39.[79] He posited that some firearm restrictions might

68. MINUTES OF THE S. JUDICIARY COMM., *supra* note 62, Tape 94-6, Side A at no. 200 (statement of Portia Babcock).
69. *Id.* at no. 250 (statement of Senator Donley).
70. *Id.* at no. 290 (statement of Senator Jacko).
71. MINUTES OF THE S. FIN. COMM., *supra* note 42.
72. *Id.*
73. *Id.* (statement of Portia Babcock).
74. *Id.*
75. *See supra* note 40.
76. *See* 2 Op. Att'y Gen. Alaska 1, 1983 Alas. AG Lexis 322, File No. 366-444-83 (Alaska 1983).
77. *See* MINUTES OF THE S. FIN. COMM., *supra* note 42 (statement of Portia Babcock).
78. *Id.* (statement of Senator Rieger).
79. *Id.* (statement of Dean J. Guaneli).

be questioned under the amendment if there was no explicit provision stating that the current standard of review would remain applicable.[80] Guaneli later stated, however, that "this resolution did not give the court enough to go on for intent."[81] But again, when Guaneli raised these concerns, a senator immediately addressed his opinions. Senator Frank explained that he "did not see any heightened protection in this amendment but a clarification that it was an individual rather than a collective right."[82] Guaneli responded to this statement by noting that courts view changes to the constitution as an instruction that something has changed.[83] Guaneli observed that the proposed amendment may indicate that "instead of a reasonable basis test, the Legislature wanted to apply some higher standard of scrutiny."[84] Seemingly in response to such concerns, Senator Donley produced a letter of intent regarding the proper standard of review.[85]

4. Senate Floor

The full Senate convened on March 2, 1994, to vote on SJR 39.[86] At the beginning of this meeting, Senator Donley provided a letter of intent for SJR 39.[87] It had three main points: (1) SJR 39 was not to be used to interfere with private conduct; (2) SJR 39 should be considered to implement a "legitimate and compelling governmental interest" standard to restrictions on firearm access; and (3) SJR 39 "does not

80. *See id.*

81. *Id.* This comment was made in regard to a possible heightened scrutiny that may attach if rational basis was not expressly noted as the proper standard of review.

82. *Id.* (statement of Co-Chairman Frank).

83. Wilson v. State, 207 P.3d 565, 578 (Alaska Ct. App. 2009) (Mannheimer, J., dissenting).

84. MINUTES OF THE S. FIN. COMM., *supra* note 42 (statement of Dean J. Guaneli).

85. *See* S. JOURNAL, *supra* note 67, at 3033. In Alaska, letters of intent written by legislators are relevant legislative history and can provide insight into the Legislature's understanding of a bill. *See* LEGISLATIVE REFERENCE LIBRARY, ALASKA STATE LEGISLATURE, GUIDE TO ALASKA LEGISLATIVE HISTORY MATERIALS 3 (2009), *available at* http://w3.legis.state.ak.us/docs/pdf/leghistory/Legh.pdf.

86. S. JOURNAL, *supra* note 67, at 3032.

87. *Id.* at 3032–34. The letter of intent was agreed to by a vote of fifteen to four, with Senator Jacko absent during the vote. *Id.* at 3035. SJR 39 was then voted on and passed by a fifteen to five margin that included Senator Jacko. *Id.* After the voting, Senator Duncan gave notice of reconsideration, and the final vote was held the next day on March 3, 1994. The letter of intent and SJR 39 were both passed by a vote of sixteen to three, with Senator Kelly being excused from voting. *Id.* at 3064–65, *available at* http://www.legis.state.ak.us/basis/get_single_journal.asp?session=18&date=19940303&beg_page=3051&end_page=3076&chamber=S.

prevent the legislature from limiting access and possession of arms by convicted felons and those convicted of crimes of violence."[88]

The letter of intent began by mentioning the distinct similarity between the Second Amendment to the U.S. Constitution and article I, section 19 of the Alaska Constitution.[89] Next, Senator Donley expressed the intent to use a "legitimate and compelling governmental interest" standard to review constitutional challenges arising under SJR 39.[90] Noting the comparability between the wording of this amendment and the phrasing of article I, section 22 (which guarantees the right to privacy),[91] Senator Donley argued that the standard of review used in cases under section 22 should be borrowed and made to apply to challenges to gun laws.[92] Specifically, Senator Donley asserted that "interference with the right may be justified only by a legitimate and compelling governmental interest"—which is the test used for privacy challenges.[93]

The last section of the letter of intent provided a specific legislative finding that the Legislature had the ability to prohibit possession of firearms by convicted felons or people convicted of crimes of violence.[94] Senator Donley explicitly stated that "the proposed amendment of art. I, sec. 19 does not preclude the appropriate exercise of the police power."[95] He followed this statement by asserting that

> the legislature finds that there is both a legitimate and a compelling governmental interest in the enactment and enforcement of legislation prohibiting the possession of and access to firearms by those who, by their past conduct, have demonstrated an unfitness to be entrusted with their possession. . . . Specifically the legislature finds a legitimate and a compelling governmental interest in the enactment and enforcement of legislation limiting access and possession of

88. *Id.* at 3032–34, *available at* http://www.legis.state.ak.us/basis/get_single_journal.asp?session=18&date=19940302&beg_page=3019&end_page=3049&chamber=S.

89. *Id.* at 3032. Because of this resemblance, the senator urged that the interpretation of the Second Amendment (that it "does not apply to regulate or interfere with private conduct") is equally applicable to article I, section 19. *Id.* at 3032–33.

90. *Id.* at 3033.

91. *Id.*

92. *See id.*

93. *Id.*; *see also supra* notes 30–32 and accompanying text (explaining the two-tier standard of review system for privacy challenges).

94. S. JOURNAL, *supra* note 67, at 3034.

95. *Id.*

> arms by convicted felons and those convicted of crimes of violence.[96]

This letter of intent indicates in a number of ways that the Alaska felon-in-possession statute should not be subjected to strict scrutiny. First, the document began by noting the comparability of the original version of article I, section 19 with the Second Amendment of the U.S. Constitution.[97] Such a comparison again emphasizes the import of SJR 39: to clarify that Alaska had intended to create an individual right to bear arms. Second, the Legislature stated its desire for courts reviewing article I, section 19 claims to implement the standard of review utilized for article I, section 22 claims regarding privacy. This is a flexible standard that varies depending on the right involved and the effect that the exercise of that right has on other members of the public.[98] While granting an individual right to bear arms would likely imply that the interest is fundamental,[99] this still would not prevent the courts from utilizing the lower standard of review for convicted felons. In fact, the United States Supreme Court has itself carved out an exception to heightened scrutiny for convicted felons and other dangerous classes of people.[100] Moreover, even when the U.S. Constitution closely resembles the Alaska Constitution, the Alaska Supreme Court has noted:

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96. *Id.*

97. *See id.* at 3032.

98. *See supra* notes 30–32 and accompanying text.

99. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3042 (2010) (holding "it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty"). The language "ordered liberty" is very similar to that used by the Alaska Supreme Court when determining whether a right is fundamental. *See* Baker v. Fairbanks, 471 P.2d 386, 401–02 (Alaska 1970). Thus, it is worth noting that even though *McDonald* deemed the right to bear arms fundamental, it expressly affirmed the notion in *District of Columbia v. Heller* that its holding "did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons.'" *McDonald*, 130 S. Ct at 3047 (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

100. *See, e.g.*, *Heller*, 554 U.S. at 629 nn.26–27 (affirming the constitutionality of felon-in-possession laws because they were "presumptively lawful regulatory measures" but requiring heightened judicial scrutiny for most other Second Amendment challenges by asserting that rational basis review is inappropriate). This appears to be the Court's method of carving out an exception to the requirement for heightened scrutiny because the defining feature of rational basis review is that laws are presumed valid. *See* Lindsay Goldberg, Note, District of Columbia v. Heller: *Failing to Establish a Standard for the Future*, 68 MD. L. REV. 889, 911 (2009) (noting that strict scrutiny would work for most Second Amendment claims, but there would have to be "exceptions where a more deferential standard is appropriate").

> We are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.[101]

The phrase "necessary for the kind of civilized life and ordered liberty" provides ample justification for the court to differentiate convicted felons from other citizens asserting their article I, section 19 right. By having committed a felony, regardless of whether it was violent in nature, the convicted felon has shown an indifference towards maintaining "ordered liberty."[102]

In Alaska, the Senate history reveals a manifest intention to retain felon-in-possession restrictions. The Senate could not have been clearer when it announced its intent to promote legislation that prevented all convicted felons from possessing firearms. Furthermore, when making this legislative finding, Senator Donley explicitly disconnected the term "convicted felons" from the separate category of "those convicted of crimes of violence."[103] That is, the Senate sought to prohibit *all* persons convicted of felonies (including non-violent felonies) from possessing firearms. However, such a categorical prohibition would likely lead to problems with over-inclusivity under a strict scrutiny review. Intermediate scrutiny, on the other hand, would require only a substantial relationship, which could be met by the State showing a general correlation between convicted felons and propensity for future criminal activity with firearms.[104] In short, the Senate meant to keep wide-ranging felon-in-possession restrictions; application of strict scrutiny would make it less likely that such broad restrictions would

101. *Baker*, 471 P.2d at 401–02.

102. *See* United States v. Everist, 368 F.3d 517, 519 (5th Cir. 2004) ("Irrespective of whether his offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens."). This case is especially persuasive since the Fifth Circuit had already deemed the Second Amendment to grant an individual right by 2004. *See* United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001).

103. *See* S. JOURNAL, *supra* note 67, at 3034.

104. *See* United States v. Miller, 604 F. Supp. 2d 1162, 1171–72 (W.D. Tenn. 2009) (holding that the federal felon-in-possession statute survives intermediate scrutiny); *see also* United States v. Schultz, No. 1:08-CR-75-TS, 2009 WL 35225, at *5 (N.D. Ind. Jan. 5, 2009).

pass constitutional muster, which in turn suggests that the Legislature viewed a lesser level of scrutiny to be appropriate.

5. House Judiciary Committee

SJR 39 first appeared in the House Judiciary Committee on April 16, 1994.[105] There were two major issues addressed during this meeting: (1) the main purpose of the amendment, which was to clarify that article I, section 19 granted an individual right to keep and bear arms; and (2) whether to accept a committee substitute version that added the word "unreasonably" to the amendment.[106] Under that proposal, the individual right to keep and bear arms could not be "unreasonably" denied by the State. All members of the committee and the witnesses who testified appeared to agree on the first issue.[107] As noted above, a 1983 Opinion by the Alaska Attorney General had suggested that article I, section 19 protected only a collective right.[108] In the 1994 House Judiciary meeting, multiple people testified regarding this 1983 opinion.[109] Portia Babcock, as the Senate State Affairs Committee legislative aide, explained the effect of this opinion: "[i]t was only after this opinion was written in 1983 that they started questioning whether they actually had an individual right to bear arms . . . . When that was brought into question, people wanted this clarified."[110] Chairman Porter seconded this belief and noted "the only law in the books is the attorney general's opinion that says there is no individual right to keep and bear arms in the state of Alaska. Consequently. . .we would like to expand that to recognize the individual right to keep and bear arms."[111]

Discussion during the House Judiciary meeting centered upon the inclusion of the word "unreasonably."[112] Such concerns mirrored the

105. MINUTES OF THE H. JUDICIARY COMM., Apr. 16, 1994, 18th Leg., Tape 94-60, Side A at no. 210 (Alaska 1994), *available at* http://www.legis.state.ak.us/basis/get_single_minute.asp?house=H&session=18&comm=JUD&date=19940416&time=1300.

106. *See generally id.* at nos. 252–764. The amended proposal read: "The individual right to keep and bear arms shall not be unreasonably denied or infringed by the State or a political subdivision of the State." It also would have amended article XV, section 29 to read: "The 1994 amendment of Section 19 of Article I does not change the level of judicial scrutiny applicable to the review of laws relating to weapons." *Id.*

107. *See id.* at nos. 252–807.

108. *See id.* at no. 287 (statement of Portia Babcock).

109. *See, e.g., id.* at no. 764 (statement of Chairman Porter) (reminding everyone that "the attorney general's opinion is in effect until it is superseded by law, or challenged").

110. *Id.* at no. 287 (statement of Portia Babcock).

111. *Id.* at no. 750 (statement of Chairman Porter).

112. *See generally id.* at nos. 508–807.

complaints that had been heard in the Senate, where it was feared that if the term "unreasonably" were included in the amendment, courts might continue using only rational basis review.[113] This standard worried members of the Committee because they thought it would be too low to protect against illegitimate government intrusion into the right they were trying to protect.[114] Portia Babcock claimed, "they are worried about the courts using that word unreasonably to mean any law that has any positive justification [should be upheld], rather than [requiring proof of] a compelling governmental interest" to uphold a law that limits the right.[115] Representative Phillips repeated the fear about releasing an amendment with the potential for reasonableness review when she noted that she "did not agree that the people of Alaska would buy into adding the word 'unreasonably' or the level of judicial scrutiny as part of our constitutional statement on the right to bear arms."[116] This critical statement perfectly encapsulates why the other versions of SJR 39 were repeatedly shot down. As Representative Phillips pointed out, the omission resulted from legislators' conclusions that their constituents might not accept the passage of a bill that had *any* wording related to a standard of review.[117]

Witnesses also expressly declared their opposition to the word "unreasonably."[118] Conspicuously absent from any of their comments, though, was any reference to a form of strict scrutiny. The voters' main concern regarding this proposal was that it would ensure an individual

113. *See* McCracken v. State, 743 P.2d 382, 384 (Alaska Ct. App 1987) (holding § 11.61.200(b) constitutional on equal protection grounds because the "statute is a reasonable and rational attempt to achieve the statutory goal. Nothing more is required."). This standard exemplifies rational basis review and its extreme judicial deference, which legislators and citizens alike wanted to avoid for constitutional analysis under article I, section 19.

114. *See* MINUTES OF THE H. JUDICIARY COMM., *supra* note 105, at no. 508 (statement of Portia Babcock).

115. *Id.*

116. MINUTES OF THE H. JUDICIARY COMM., Apr. 18, 1994, 18th Leg., Tape 94-61, Side B at no. 000 (Alaska 1994) *available at* http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=H&beg_line=1071&end_line=1344&session=18&comm=JUD&date=19940418&time=1300 (statement of Representative Phillips).

117. *Id.; see also* MINUTES OF THE H. JUDICIARY COMM., *supra* note 105, at no. 440 (statement of Portia Babcock). Regarding including standard of review in the amendment, Babcock stated: "People who are going in to vote on this would have no idea what this means." *Id.* This is an excellent point by Ms. Babcock and perfectly encapsulates why the courts are ultimately responsible for choosing the level of scrutiny to apply to laws that are facing constitutional challenges.

118. *See, e.g.*, MINUTES OF THE H. JUDICIARY COMM., *supra* note 105, at no. 200 (statement of Konrad Schaad) (stating that "he comes in contact with hundreds of people. Of those people, nobody is in opposition to the bill, but they do oppose the term 'unreasonably.'").

right to bear arms and that if adopted, it could not be restricted by judges who exercised wide latitude under the term "unreasonably."

Such concerns could have been alleviated through the use of the "close and substantial relationship" test for felon-in-possession laws. These restrictions are not rubber-stamped by the judiciary but must demonstrate a substantial relationship to a legitimate government interest.[119] Indeed, this standard—as opposed to strict scrutiny—most closely resembles the one described by legislators through the legislative history regarding felon-in-possession restrictions.

After hearing from witnesses, the committee ended the meeting and scheduled a closed meeting for April 18.[120] Chairman Porter decided to propose his substitute bill that included the term "unreasonably" even though he knowingly acknowledged the public's disagreement with it.[121] The substitute bill passed[122] and then went to the House Finance Committee for review.

6. House Finance Committee

Representative Porter's proposal and SJR 39 were addressed in the House Finance Committee on April 30, 1994.[123] Portia Babcock opened the proceedings by remarking on the status of article I, section 19: "[c]urrent language is ambiguous, whereas, several attempts have been made in past Legislature[s] to clarify the right of the 'individual' citizen to own a firearm."[124] Next, Representative Porter testified in favor of the substitute version that contained the word "unreasonably."[125] He noted that it was safer to include this phrase and that opponents were overly worried about the effect of this word.[126]

Mr. Guaneli, the Assistant Attorney General at the time, followed and mentioned that "the Alaska Supreme Court uses a sliding scale of scrutiny which applies to the Constitution and state laws for protection

119. *See, e.g.*, Gibson v. State, 930 P.2d 1300, 1302 (Alaska Ct. App. 1997).

120. MINUTES OF THE H. JUDICIARY COMM., *supra* note 105, at no. 675.

121. MINUTES OF THE H. JUDICIARY COMM., *supra* note 116, at no. 129 (statement of Chairman Porter).

122. *Id.*

123. MINUTES OF THE H. FIN. COMM., Apr. 30, 1994, 18th Leg., Tape 94-149, Side 1, at nos. 0–end (Alaska 1994), *available at* http://www.legis.state.ak.us/basis/get_single_minute.asp?house=H&session=18&comm=FIN&date=19940430&time=1350.

124. *Id.* (statement of Portia Babcock).

125. *Id.* at no. 2 (statement of Representative Brian Porter).

126. *Id.* Representative Porter referenced the term "unreasonable" as used in the Fourth Amendment of the U.S. Constitution. He claimed that courts had properly applied protections to the right guaranteed by this Amendment even though it emphasized the term "unreasonable." *Id.* at nos. 2, 7–8.

challenges."[127] Guaneli then noted that rational basis is at the lower end of the scale and that he "thought the firearm laws would fall in the lower end category and that the amendment would increase the level of scrutiny the Courts would apply to gun laws."[128]

At the hearing, Representative Sean Parnell, now the Alaska Governor, "questioned the amendment to SJR 39 which would change the level of judicial scrutiny [pertaining] to laws relating to weapons.'"[129] As a result of a lengthy exchange with Guaneli regarding potential effects on firearm regulations under rational basis review, Representative Parnell voted to support the Senate version of SJR 39.[130] Again, though, this does not signify a mandate to utilize strict scrutiny for all firearm restrictions (including felon-in-possession restrictions) but rather demonstrates legislators' worries about the leniency of rational basis or reasonableness review.

After brief discussion, the committee then approved SJR 39 as it was written in the Senate by a vote of six to two.[131]

7. House Floor

The final stop in the legislative process for SJR 39 was a vote on the House floor. On May 2, 1994, Representative Porter made one last effort to insert the word "unreasonable" into the language of the amendment.[132] The suggested change was again voted down, but this time the vote was a fairly close twenty-four to fifteen.[133] After two unrelated proposals by Representative John Davies were rejected, the House scheduled a vote on SJR 39 for the following day.[134] On May 3, 1994, the full House voted thirty-three to four in favor of passage.[135]

Representative Porter made yet another effort to soften the effect of SJR 39 by submitting a letter of intent for the proposal.[136] The letter of intent explained that the new right would not be guaranteed "when the legislature has determined that such conduct is contrary to the public

127. *Id.* at no. 2 (statement of Dean Guaneli).
128. *Id.*
129. *Id.* at no. 2 (statement of Representative Parnell).
130. *See id.* at nos. 2–3.
131. *Id.* at no. 3.
132. 1994 H.R. JOURNAL 3936–37, 18th Leg., 2d. Sess. (Alaska 1994), *available at* http://www.legis.state.ak.us/basis/get_single_journal.asp?session=18&date=19940502&beg_page=3899&end_page=3945&chamber=H.
133. *Id.* at 3937.
134. *Id.* at 3939–40.
135. *Id.* at 3972–73, *available at* http://www.legis.state.ak.us/basis/get_single_journal.asp?session=18&date=19940503&beg_page=3947&end_page=3985&chamber=H.
136. *Id.* at 3973.

interest."[137] This proposed standard is extraordinarily vague and would create more questions than answers. Fittingly, the House rejected this letter of intent by a vote of twenty-three to fourteen.[138] After voting down the letter of intent, Representative Navarre moved for reconsideration.[139] The last vote on SJR 39 was held on May 4, 1994, and it passed convincingly by a tally of thirty-six to three.[140]

C. 1994 Election Pamphlet

SJR 39 was presented to the voters as Ballot Measure No. 1 in the 1994 general election.[141] The proposal was accompanied by a position statement from supporters of the proposal, a statement by people in opposition to the proposal, and a neutral statement provided by the Legislative Affairs Agency.[142] As Judge Mannheimer appropriately pointed out, none of the three statements contained any mention of strict scrutiny or any discussion of a change to the level of judicial scrutiny to be applied to firearm restrictions.[143] He also noted the statement by the Legislative Affairs Agency, which read: "This measure amends the state constitution by adding a specific reference to the individual right to keep and bear arms."[144] There is nothing to suggest that voters had any idea that the ballot implicated the standard of review, and thus, it is apparent that voters gave their approval only to the specification of the individual right. In short, the neutral position statement provided by the governmental agency informed the voters of the critical issue they were deciding: whether the Alaska Constitution should guarantee an individual right to keep and bear arms. The voters believed it should, and the amendment passed with 72.7% of the vote.[145]

Furthermore, the statement in support of the amendment specifically noted that convicted felons would be excluded from exercising the right.[146] It consistently referred to "law-abiding citizen"

137. *Id.*
138. *Id.* at 3973–74.
139. *Id.* at 3974.
140. *Id.* at 3991–92, *available at* http://www.legis.state.ak.us/basis/get_single_journal.asp?session=18&date=19940504&beg_page=3987&end_page=4013&chamber=H.
141. ALASKA, DIV. OF ELECTIONS, ALASKA 1994 OFFICIAL ELECTION PAMPHLET B-20 (1994).
142. *See id.*
143. Wilson v. State, 207 P.3d 565, 583–84 (Alaska Ct. App. 2009) (Mannheimer, J., dissenting).
144. *Id.* at 584 (quoting ALASKA, DIV. OF ELECTIONS, *supra* note 141).
145. *See 1994 General Election Official Results*, *supra* note 1.
146. ALASKA, DIV. OF ELECTIONS, *supra* note 141. Based on the supporter's statement in the election pamphlet, one could think that voters desired not to

when describing who would be able to benefit from the new right.[147] It also explicitly stated that "YES on #1 will NOT stop or restrict public safety officials from punishing or prohibiting the possession of arms by those who misuse arms, nor does it protect criminals or delinquents who misuse arms. These individuals would be excluded from enjoyment of this right."[148]

D. Case Law Interpreting 1994 Amendment

1. Gibson v. State

The Alaska Court of Appeal's first application of the 1994 amendment came in 1997 in *Gibson v. State*.[149] In *Gibson*, the defendant was seen armed with an AK-47 rifle while intoxicated on his property.[150] He was charged with possessing a firearm while intoxicated under section 11.61.210(a)(1) of the Alaska Statutes.[151] He pled no contest but preserved the right to argue on appeal that the statute was unconstitutional when applied to people intoxicated on their own property.[152] The Alaska Court of Appeals first determined whether section 11.61.210(a)(1) was constitutional under article I, section 19.[153] The court reviewed the legislative history and voter pamphlet associated with the 1994 amendment to determine the contours of the newly created individual right.[154] The court noted that the legislative history was full of statements that indicated the amendment should not affect any current regulations regarding firearms.[155] Additionally, the court relied heavily upon the advocates' statement, which was found in the election pamphlet and favored upholding the law.[156] Taking these

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invalidate firearm restrictions. Judge Mannheimer, though, accurately observed that this is an imperfect assumption since some voters may have wanted to pass the amendment regardless. *See* Wilson v. State, 207 P.3d 565, 589 (Alaska Ct. App. 2009) (Mannheimer, J., dissenting). *But cf.* Hickel v. Halford, 872 P.2d 171, 178 n.12 (Alaska 1994) (holding that the voter "pamphlet is an authoritative source of the voters' common understanding of section 17"). In *Hickel*, the court noted that the statement in support of the amendment resulted in a "clear" understanding of a term in the constitution when viewed in connection with the language in the provision. *Id.* at 178.

147. *Id.*
148. *Id.*
149. 930 P.2d 1300 (Alaska Ct. App. 1997).
150. *Id.* at 1301.
151. ALASKA STAT. § 11.61.210(a)(1) (2010).
152. *See Gibson*, 930 P.2d at 1300–01.
153. *See id.* at 1301.
154. *See id.* at 1301–02.
155. *Id.* at 1301.
156. *Id.* at 1302. According to the court, the advocates' statement announced specifically that "a 'yes' vote would NOT overturn or invalidate state laws

factors into consideration, the court concluded that the amendment was not intended to overturn the law regulating possession of firearms while intoxicated.[157]

The court then considered whether the defendant was entitled to special constitutional protection because he was on his own property when found by the police.[158] The defendant argued that "the individual right to bear arms and the previously adopted state constitutional right to privacy combine to create special constitutional protection for possession of firearms in the home."[159] The court noted that the right to bear arms is not absolute and neither is the right to privacy.[160] Because the right to privacy was implicated, the court applied the sliding scale test it had previously used when addressing article I, section 22.[161] As noted earlier, the Senate's letter of intent concerning SJR 39 had also embraced the idea that courts use the same standard in "right to bear arms" cases as was used in "right to privacy" cases.[162] Here, the court correctly applied the privacy test; thus, the right "may be restricted if the restriction bears a close and substantial relationship to a legitimate governmental interest."[163]

Even though the court did not expressly recognize that there may have been a fundamental right to bear arms in Alaska after 1994, the court used the proper test because that fundamental right should not extend to possessing firearms while intoxicated. It is analogous to the supreme court's rationale in *Ravin v. State*,[164] which held that even though Alaskans enjoy a fundamental right to privacy in their homes, certain activities are not entitled to "fundamental" stature when they may "interfere[] in a serious manner with the health, safety, rights and privileges of others or with the public welfare."[165] The court in *Gibson* concluded that the duty to defend the health and welfare of its citizens is one of the most, if not the most, legitimate governmental interests the state could use.[166] The court then documented several instances of harm

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restricting access or possession of arms by . . . those under the influence of drugs or alcohol." *Id.*

157. *Id.* at 1302–03.

158. *Id.* at 1301–02.

159. *Id.* at 1302. Alaska explicitly guarantees a right to privacy. *See* ALASKA CONST. art. I, § 22.

160. *Gibson*, 930 P.2d at 1302.

161. *Id.*

162. S. JOURNAL, *supra* note 67, at 3032–34.

163. *Gibson*, 930 P.2d at 1302 (citing Ravin v. State, 537 P.2d 494, 511 (Alaska 1975)).

164. 537 P.2d 494.

165. *Id.* at 504.

166. *Gibson*, 930 P.2d at 1302.

caused by intoxicated persons in possession of firearms.[167] Therefore, it upheld the statute because prohibiting the "possession of firearms while intoxicated bears a close and substantial relationship to the state's legitimate interest in protecting the health and safety of its citizens."[168]

However, in *Wilson*, Judge Mannheimer asserted in dissent that the *Gibson* court had erred when it determined that the 1994 amendment allowed the Legislature to enact firearms restrictions subject to a test of reasonableness rather than strict scrutiny.[169] In *Gibson*, though, the court never mentioned a standard of mere reasonableness. The closest that it got to that low standard was noting that the state remained able to pass regulations on firearms when "there is a significant risk" that the people being denied use of firearms would have wielded them in a "criminal or dangerous fashion."[170] This statement resembles the intermediate scrutiny-type approach that tries to determine whether a law bears a close and substantial relationship to a legitimate government interest. The court's main concern in *Ravin* was that behavior inside the home, even though constitutionally fundamentally protected, had to give way to public welfare requirements when the activity was not one that society valued.[171] Here, it is likely that society would not value the right to bear arms as strongly for an intoxicated man (as opposed to a sober one) because as history has demonstrated, the intoxicated man presents a significant risk of using the firearm in a dangerous fashion.[172] This type of analysis mirrors that conducted by the court in *Gibson* while reviewing the defendant's firearm challenge under article 1, section 22. Had it been a test of mere reasonableness, the court would have used terms such as "rationally related" or "reasonably related" to a governmental interest.

As Judge Mannheimer points out in his dissent in *Wilson*, the court in *Gibson* was incorrect when it stated "the history of the proposed amendment contains no indications" of intent to apply strict scrutiny.[173] As discussed above, there was evidence in the legislative history revealing a desire to implement a heightened level of scrutiny to firearm

167. *Id.* (giving examples that included situations where an intoxicated man used a firearm inside his house and killed his sister who was outside the front door and where a man shot and killed his "drinking companion after an argument" in his home).

168. *Id.*

169. Wilson v. State, 207 P.3d 565, 570–71 (Alaska Ct. App. 2009) (Mannheimer, J., dissenting).

170. *Gibson*, 930 P.2d at 1301.

171. *Ravin*, 537 P.2d at 504.

172. *See supra* note 167 and accompanying text.

173. *See Wilson*, 207 P.3d at 586 (Mannheimer, J., dissenting); *Gibson*, 930 P.2d at 1302.

regulations. Those examples, though, demonstrated both the Legislature's general aversion to the basic reasonableness test and its aversion to strict scrutiny for felon-in-possession statutes. As seen throughout the legislative history—including the Senate's letter of intent—the legislators who consistently utilized the term "compelling state interest" made sure to include a statement that supported the continued legitimacy of felon-in-possession laws.[174] Therefore, it is likely the legislators intended to institute an intermediate level of scrutiny rather than strict scrutiny for certain dangerous classes of citizens. In short, the *Gibson* court ultimately set good precedent in upholding the constitutionality of a restriction barring intoxicated people from possessing firearms.

The court in *Gibson* did not specifically announce a standard of review for evaluating firearm restrictions after the 1994 amendment, but it did lay the foundation for future decisions to rely on the "close and substantial" relationship test when reviewing challenges to such restrictions. As will be seen in the following cases, however, the court elected to forego this route.

2. Morgan v. State

Six months after *Gibson* was decided, the court heard *Morgan v. State*,[175] an appeal questioning the constitutionality of section 11.61.200(a)(10) of the Alaska Statutes.[176] This section prohibits a person from "resid[ing] in a dwelling knowing that there is a firearm capable of being concealed on one's person or a prohibited weapon in the dwelling if the person has been convicted of a felony."[177] In *Morgan*, the defendant challenged his conviction on multiple grounds, including whether section 11.61.200(a)(10) of the Alaska Statutes was invalidated after the passage of the 1994 amendment to article I, section 19.[178] In an opinion authored by Judge Mannheimer, the court quickly dismissed the

174. *See, e.g.*, S. JOURNAL, *supra* note 67, at 3032–34. While the Legislature cannot ratify its own laws as constitutional, it is important for courts to view the Legislature's statements in order to apply its independent judgment. Hickel v. Halford, 872 P.2d 171, 176–77 (Alaska 1994) (internal quotation marks omitted) ("Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense. The court should look to the plain meaning and purpose of the provision and the intent of the framers. . . . [T]he court must look to the meaning that the voters would have placed on its provisions.").

175. 943 P.2d 1208 (Alaska Ct. App. 1997).

176. *See id.* at 1209.

177. ALASKA STAT. § 11.61.200(a)(10) (2010).

178. *Morgan*, 943 P.2d at 1209.

defendant's claim based on the analysis in *Gibson*.[179] But instead of entrenching the "close and substantial relationship" standard used in *Gibson*, the court continued to use an ambiguous test that looks to determine when "there is a significant risk that [convicted felons] will use those firearms in a criminal or dangerous fashion."[180]

3. Demars v. State[181]

In 1987, DeMars was convicted of a felony for leaving the scene of an accident.[182] Nine years later, he was visiting another person's home when the police were alerted that he possessed a handgun.[183] DeMars was charged with being a felon in possession of a concealable firearm.[184] In 1999, DeMars appealed his conviction based on his claim that the 1994 amendment created doubt as to the constitutionality of section 11.61.200(a)(1) of the Alaska Statutes.[185] The court relied upon the analysis in *Gibson* but also emphasized that the legislative history and election pamphlet clearly exemplified a consensus that the 1994 amendment would not affect laws regulating felons in possession of concealable firearms.[186] Once again, the court employed the test looking for a "significant risk" that the firearms will be used "in a criminal or dangerous fashion." Based on these findings, the court rejected DeMars' challenge based on the 1994 amendment.[187]

II. STARE DECISIS

In his concurrence in *Wilson v. State*, Judge Stewart applied the principle of stare decisis to bolster the court's conclusions.[188] In Alaska, stare decisis mandates that a court "should overrule a prior decision only when 'clearly convinced [that] the rule was originally erroneous or is no longer sound because of changed conditions, and that more good

179. *Id.* at 1212.
180. *Id.* (quoting Gibson v. State, 930 P.2d 1300, 1301 (Alaska Ct. App. 1997)).
181. Nos. A-7002, 4100, 1999 WL 652444 (Alaska Ct. App. Aug. 18, 1999). Although this is an unpublished decision that is not legally binding, it is being used to fully articulate the history of the court's interpretation of the 1994 amendment, especially since it regards the same law at issue in *Wilson*.
182. *Id.* at *1.
183. *Id.*
184. *Id.*
185. *Id.* at *2. DeMars also challenged his conviction on equal protection grounds, mistake-of-law defense, and the prohibition on ex post facto laws. None of these other defenses were applicable to the 1994 amendment. *Id.* at *2–3.
186. *Id.* at *2.
187. *Id.*
188. *See* Wilson v. State, 207 P.3d 565, 569–70 (Alaska Ct. App. 2009) (Stewart, J., concurring).

than harm would result from a departure from precedent.'"[189] Judge Stewart issued conclusory statements that each prong was satisfied, but they should be elaborated upon to resolve any doubts.

First, the original ruling in *Gibson* is not erroneous. While the court could have further developed its analysis by including more legislative history, its ultimate ruling was correct.[190] Throughout the legislative history, there are instances in which legislators specifically state that certain restrictions on firearms would not be invalidated if the 1994 amendment passed.[191] Furthermore, the court's reliance on the election pamphlet was not clearly erroneous,[192] and the election pamphlet mirrored the legislative history in stating that the amendment would not invalidate current firearm regulations regarding felons.[193] Moreover, Judge Stewart was correct in focusing on the intent of the voters. The Alaska Supreme Court has noted, "A constitutional provision, however, must be ratified by the voters, and it is therefore also necessary to look to the meaning that the voters would have placed on its provisions."[194] As an example, in *State v. Lewis*, the court had observed that "voters were probably not privy to the comments of the delegates."[195] However, the court then noted that the voters were clearly informed of the provision's purpose by the "unambiguous language" of a widely distributed report.[196] Here, on the other hand, the voters were in the dark on the Legislature's debates regarding the proposed constitutional amendment. All they received was a voter pamphlet with a supporting statement, opposition statement, and the neutral statement of the

189. *Id.* at 570 (alteration in original) (quoting State v. Dunlop, 721 P.2d 604, 610 (Alaska 1986)).

190. Additionally, *Gibson* gave future courts the opportunity to apply heightened scrutiny, but in their independent judgment, the court chose to carry forward with the murkier standard looking for "significant risks" of use in a "criminal and dangerous fashion."

191. *See supra* Part I.B.

192. Before the Senate Finance Committee, Dean Guaneli testified that "[t]he courts look largely at *language used in voter pamphlets* and the history behind the legislation" when trying to determine the intent of an amendment. MINUTES OF THE S. FIN. COMM., *supra* note 42 (emphasis added) (statement of Dean J. Guaneli). This demonstrates that legislators were on notice that the election pamphlet was important. Therefore, if the standard of review was important, they would have made sure it got in the pamphlet, or at least prevented such bold statements like the advocates' from appearing on the ballot. *See* Hickel v. Halford, 872 P.2d 171, 176–77 (Alaska 1994) (internal quotation marks omitted) ("[T]he court must look to the meaning that the voters would have placed on [the constitutional] provisions.").

193. ALASKA, DIV. OF ELECTIONS, *supra* note 141.

194. State v. Lewis, 559 P.2d 630, 637 (Alaska 1977).

195. *Id.* at 638.

196. *Id.*

Legislative Affairs Agency.[197] Since none of these statements mentioned anything about the standard of review, it would be difficult to ascribe any intent to the voters other than the clarification of an individual right.[198]

Changed circumstances are the other reason why a prior case can be overturned. But there have been no significant events since 1994 that would qualify as changed circumstances to support overturning *Gibson*. The United States Supreme Court's rulings in *Heller* and *McDonald* would be the only significant developments that could be considered to have changed circumstances, but those decisions favor upholding *Gibson*. When acknowledging an individual right to bear arms for the first time, the majority opinion in *Heller* specifically asserted that special classifications could still be made to prohibit certain people from possessing firearms.[199] Included in this list was the ability to proscribe convicted felons from possessing firearms.[200] Indeed, the Court's language in *Heller* mirrors that seen in the legislative history of SJR 39, where legislators consistently avowed that the 1994 amendment would not apply to felon-in-possession statutes.[201]

Lastly, even if one of the two preceding conditions had been met, there is simply no legitimate argument that "more good than harm" would come from overturning *Gibson*. Overturning *Gibson* would only create a rash of challenges to the very laws that the Legislature specifically noted it did not want to invalidate. By opening these floodgates, the court would then be able to utilize strict scrutiny in a manner directly adverse to the intent of both the Legislature and the general public. This option simply cannot be viewed as a possibility that would create "more good than harm."

CONCLUSION

It would have been easier for the courts if the Alaska Legislature had adopted a proposal that clearly stated the intended level of judicial review and any categorical exceptions to article I, section 19. This way,

197. ALASKA, DIV. OF ELECTIONS, *supra* note 141.

198. *See supra* note 146.

199. District of Columbia v. Heller, 554 U.S. 570, 625–27 (2008); *see also id.* at 627 n.26 (stating "our list does not purport to be exhaustive"); *cf.* Brannon P. Denning & Glenn H. Reynolds, Heller, *High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L. J. 1245, 1248 (2009) (explaining the "Heller safe harbor" and the categories the Court specifically mentioned as unaffected by their decision).

200. *Heller*, 554 U.S. at 626.

201. *See, e.g.*, S. JOURNAL, *supra* note 67, at 3034.

the courts would have been assured that the general public was voting based on both the individual right and the standard of review. However, the main concern of Alaskans—and accordingly the main concern of the Alaska Legislature—in 1994 was to enact an amendment quickly that would cement article I, section 19 as guaranteeing an individual right to keep and bear arms. After weighing all of their options, legislators made a decision that the most likely way to achieve this end was to add one sentence clearly and specifically stating that there was an individual right for the citizens of Alaska to bear arms. Legislators drafted their language accordingly, and the amendment passed.

The recurring theme throughout the legislative history concerning the amendment was the need to clarify that article I, section 19 protected an individual right. The secondary issue regarding standard of review has also now come to an appropriate result. The legislators who commented on SJR 39 consistently noted that felon-in-possession statutes should not be affected by the amendment. This straightforward intent could not reliably be effected if strict scrutiny applied to challenges under section 11.61.200(a)(1) of the Alaska Statutes. The judicial and legislative branches do not always take the same path in their decision-making. And indeed, they often have disagreements over multiple aspects of the other's performance.[202] In *Wilson*, though, the majority reached a conclusion that matched the legislative history by refusing to apply strict scrutiny to Alaska's felon-in-possession statutes.

202. *See, e.g.*, MINUTES OF THE H. JUDICIARY COMM., *supra* note 116, at no. 129 (statement of Representative Phillips) (expressing distrust of the judicial branch and incredulity at some of its rulings).