SJR

15

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 50 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

flesh-and-blood target. That hesitation gives the attacker time to respond, frequently with more violence than he otherwise would have employed.

*According to U.S. Department of Justice research [says the NRA], 91 percent of active handgun-carrying felons believe they could get their hands on an illegal, black market gun within "a few days" of release from prison.* The idea here is that gun control laws don't keep criminals from buying guns, but they do keep guns away from honest people who wish only to protect themselves. The NRA uses this statistic to argue against waiting periods and background checks for gun buyers, two provisions of a bill now being considered by Congress.

The figure comes from a 1986 Justice Department study in which incarcerated felons were asked where they bought their guns. Again the methodology is dubious. Prison inmates are not reliable survey subjects, and the fact that they believe something, or say they believe it, doesn't make it true. But even if this "belief" is accurate, most guns available on the black market are there precisely because they've been stolen from people who acquired them legally. Handguns in particular are virtually impossible to keep track of. Gun control organizations estimate that there are between 30 million and 40 million handguns in this country. In a recent letter to the *Washington Post*, Senator Daniel Moynihan used a figure of 70 million. In fact, as the FBI admits, no one really knows just how many there are. Waiting periods and background checks would at least give some idea where these guns are going. They would also prevent some spur-of-the-moment killings, such as the one in which a Miami investor bought a gun immediately after the October stock market crash and killed his broker.

*Criminal research confirms that Americans thwart 650,000 at-*

# THE ZEITGEIST CHECKLIST

BY CHARLES PAUL FREUND

| This Week | | Last Week | Weeks on Chart |
|---|---|---|---|
| 1. | PIPE SCREAM | * | 7 |
| 2. | FLATLAND | — | 1 |
| 3. | LIVING ROOM BORE | 3 | 13 |
| 4. | OFFENSIVE LINE | * | 4 |
| 5. | GUIDE TO THE COSMO | * | 28 |
| 6. | BURNING BUSH | 1 | 2 |
| 7. | GRIN AND BAYER IT | 10 | 2 |
| 8. | LOAN STAR | — | 1 |
| 9. | NAKED HUNCH | — | 1 |
| 10. | MY BACK PAGES | — | 1 |

**1. PIPE SCREAM**

*Meese.* Since Gorbachev saved Reagan's elastic political skin last December, Reagan associates have resumed their role of surrogate bogeymen. The Meese pipeline story created bigger headlines than Wedtech ever did, and nobody's even seen the already infamous payoff memo. Meese may have gotten stuck being the administration's "man you love to hate," but what is wonderful is how he strains to fill the role.

**2. FLATLAND**

*Iowa.* You will not hear about Iowa again for four years—not what its overalled breakfasters think, how its economy is doing, how liberal the *Register* is, not about anything save potential disasters. Yet Iowans narrow the field. It is a quadrennial coverage theme, on slow weeks, that the presidential process is absurd. Fix-it suggestions, however, remain low-grade background noise at best.

**3. LIVING ROOM BORE**

*Nicaragua.* Nicaragua's collapsed economy has recently received more attention than the *contras* as a motivation for peace. Although Sandinista mismanagement and corruption have contributed to the hardships, so have U.S. pressures. These stories have occasioned no empathetic response at all. Is the often emotional public willing to accept siege where it rejects war, or is it just the usual indifference to Latins?

**4. OFFENSIVE LINE**

*Sports racism.* Received wisdom is that the Super Bowl outcome proved something about black QBs. But this condescending focus takes the Campanis/Snyder line seriously. It is more insidious—and says more about the pathology of race relations—than many of the overt discrimination cases that have lately crowded the papers.

**5. GUIDE TO THE COSMO**

*AIDS.* AIDS is building as a story again, but confusion still outweighs panic. The controversial *Cosmo* piece arguing that heterosexual sex hardly ever results in AIDS appeared to strike a note already resonating in the culture. Koop's suggestion that no AIDS cure will ever be found raised few eyebrows—as did the discovery in the U.S. of a second AIDS virus. The big AIDS story is giving i.v. drug users new needles, and that's a drug story.

**6. BURNING BUSH**

*Rather-Bush.* The moral of the Rather-Bush story, for Bush, is that the media abhor a type-violation the way nature abhors a vacuum. The line on Bush is that he's still Bertie Wooster, only now striking a false, belligerent pose with his interlocutors. Worse, Bush is now supposed to have a public Jeeves who's getting him through tight spots: Roger Ailes, Nixon's 1968 Svengali. If this takes, Bush won't be able to afford more belligerence.

**7. GRIN AND BAYER IT**

*Health.* Who says there's no good news? The key to reducing heart attack risk is reportedly already in your medicine cabinet, and no drug company stands to make a fortune from a patent. The aspirin story just gets more interesting. Nobody seems to understand why it's good for headaches to begin with, and now this.

**8. LOAN STAR**

*John Connally.* Connally was never popular with the media; he was typed a wheeler-dealer. Failure has transformed him into a courageous figure, protagonist of a Texas tragedy. Would Connally's story have spun this way a decade ago? Or is the bloodied-but-unbowed angle a subliminal extension of a similar theme involving the nation at large?

**9. NAKED HUNCH**

*Drug legalization.* Ubiquitous drug-related crime, murderous turf gang wars, extensive international corruption, and the destruction of entire governments (RIP Colombia) are leading even some social conservatives to ponder the wisdom of drug prohibition. Licensing drugs, many are saying aloud, could exert both legal and social control on their use. Prohibition increasingly appears futile culturally, fatuous politically, and a staggering waste of money.

**10. MY BACK PAGES**

*The new nostalgia. Memories* magazine, PBS's series on TV history, the best-selling *Chronicles of the 20th Century*, and the defunct "Our World" series all point to a new kind of boomer nostalgia. Used to be that nostalgia dripped with sentiment, and was essentially social. This stuff is all recycled news and celebrities, the past's greatest hits. As with old Top 40 songs, the memories it evokes are essentially narcissistic.

*Item resurfaces in the Zeitgeist after at least one week's absence.

*attacks 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

with foreign trade barriers to American sugar, any more than Japan's trouble keeping its rice producers in business has anything to do with foreign trade barriers to Japanese rice. If Gephardt's belief is that sugar producers must be kept in business whether they can compete fairly or not (and of course they can't), he should quit pretending that all he wants is "a level playing field."

POSTCARD IRAQ

# GUNS AND PENCILS

*Basra, Iraq*

Sometimes the roar of exploding shells is so loud that teachers at Basra University halt their classes while they decide whether to run for makeshift shelter in the sandbagged lobby. One day, when a shell slammed into the roof of a nearby dormitory, a lecturer barely paused. "We continued our class," says law student Moaed El Shawi, waiting in front of a wall of sandbags for the next class to begin. "The teacher said, 'This is just shelling.' "

The war along the frontier, just 15 or so miles from here, is in its eighth year. A professor of English who returned here two-and-a-half years ago after studying in the United States points to where shells have landed among small faculty bungalows. The hard cement blocks of the university—built several years ago as the campus retreated from across the Shatt-al-Arab river—face the road to Faw, the port 50 miles to the south that fell to Iran in 1986 and is now held by 30,000 Iranian troops. Shells fall on the road almost daily. A week before my visit, one of them killed eight people at another campus of the university several miles away.

Through it all, students learn to say what's expected, and what many of them appear to believe. Could the Revolutionary Guards of Iran's Ayatollah Khomeini break through the Iraqi lines, storm the shattered downtown, and reach the campus? "Impossible," says El Shawi. "It is further than the stars. They fire shells into the city because they have failed on the front."

In Basra, Iraq's second-largest city and once a thriving oil-rich port, defiance appears more genuine than in Baghdad, 350 miles northwest. Here, where the hulls of ships sunk early in the war wallow in the Shatt-al-Arab before a second line of bunkers manned by Iraqi soldiers, the reality is obvious. President Saddam Hussein, dictatorial, vainglorious, and intolerant, must be preferable to the alternative just a 130mm-cannon's range to the east.

The sight of students crowding the campuses appears to confirm the image of Hussein as an enlightened despot anxious to build up the country through education. The yearning for culture, for class, for a common sense of identity against a highly nationalist foe permeates the campaign to prepare the country's youth for war. "The main aim of Iran is to make Iraq backward, to make Iraq close all schools and universities," says Anwar Mahlud Thiban, president of the National Union of Iraqi Students and Youth, through which the government channels all student activities outside the classrooms. "Our response is to keep them open."

Thiban describes himself as a Ph.D. candidate, but he looks nearly as old as Hussein, who is 51, and admits at the end of our conversation that they have known each other since their childhood. At best the students' organization is an arm for propaganda, churning out magazines, channeling campus activism and running summer camps and workshops. At worst, it's a cover for spying on behalf of Hussein's Ba'athist Party, which dominates it. Indeed, Thiban boasts of the union's founding in 1961 as part of the revolution against the "dictatorial, Communist regime" that overthrew the monarchy in the bloody 1958 coup. Hussein, in self-exile in Syria and Egypt in the early 1960s and a law student in Baghdad after the 1963 coup, saw the union as a device for surrounding himself with dedicated young allies—and for closely watching the nation's youth for signs of dissent. "After the success of the 1968 revolution, the real work of Iraqi students changed from negative resistance to the positive kind," says Thiban.

After a lifetime of student union brainwashing, many young people seem spontaneously supportive of Hussein. Children sing such ditties as "Oh, Father, Take Us to the Front," and profess, on television and radio, in the classroom and at meetings of the Young Pioneers (a socialist Iraqi equivalent of the Boy Scouts), their undying devotion to a man who came to full power only a year before going to war. "We sacrifice our lives for you, for the brave leader we can see at early dawn," says a winsome little girl on television. In high-pitched tones a boy loudly recites one of Hussein's favorite themes: "Iraq, the country of two rivers, the descendant of those great people of Babylon."

Thanks partly to the student union, which monitors primary, elementary, and high schools as well as the weekly "cultural" classes in the university, Iraqis learn the history of a civilization at least 8,000 years old. By the time they are out of grade school they know that society in the region reached its height in Babylon, under Nebuchadnezzar, until defeated by Persian hordes in 500 B.C. And every Iraqi child has heard of Qadissiya, the site of a great Persian defeat at Arab hands in 637 A.D. Hussein refers to the conflict with Iran as "The Qadissiya War." The military newspaper is named *Qadissiya*. The government runs a Center for the Rehabilitation of the Qadissiya War Victims, with special programs for handicapped veterans. History, as promulgated by Hussein, must repeat itself.

Not fooled by its own propaganda, however, the government appears painfully aware of the dangers of dissent. Five years ago casualty figures became unavailable. Trucks and cars bearing bodies from the front do not enter cities and towns by daylight. The government forbids public mourning and orders families to keep funerals brief. The soldiers, often fated to serve for the duration of a war without end, are rewarded with extraordinary privileges. They get a week's leave for every three on the front. Offi-

# Policeman 'just plain scared' of Florida's new gun law

By PETER KIERNAN
Reuter

MIAMI — A new Florida law that will allow virtually anyone to carry a concealed weapon goes into effect Thursday, and one policeman said he is "just plain scared".

The new law was passed by the state legislature in May with support from the National Rifle Association (NRA) and quickly signed by the state's conservative governor, Bob Martinez.

According to state officials, some 130,000 permits will be issued annually under the new state regulations.

Both critics and proponents of handguns agree the law is the most liberal in the country. Under its provisions anyone who does not have a criminal record is entitled to purchase a $125 state permit to carry a concealed weapon after passing a brief course — one to two hours — in gun safety.

"Can you imagine everyone carrying a concealed weapon just because they want to?" asked one Miami police sergeant. "It will be like Dodge City in the old days."

Dodge City, Kansas, was the northern rail terminus for cattle drives from Texas and Oklahoma. Cowboys were paid when the cattle were sold and the town became known for gunfights and killings.

Largely rural state legislators were undeterred by warnings by city lawmakers and police officials, who predicted that accidental shootings, suicides and crimes involving guns would rise dramatically. Florida already has the fourth-highest murder rate in the nation.

Jim Smith, Florida secretary of state, whose office is responsible for issuing the permits, said people must realize that having a license to carry a weapon is not the same thing as having a license to use it.

"I'm concerned that those with the licenses will think that means they can go around being super cops," he told reporters recently.

Marion Hammer, the NRA lobbyist, dismissed such concerns. "The average citizen is very responsible," she said.

"Thousands of crimes have been prevented without a shot being fired just because a criminal realized his intended victim was armed," she said, adding that the legislation was "as much a matter of restoring freedom as it is about guns."

Hammer tried unsuccessfully for several years to get this legislation passed. Previously, the state's democratic governor, Bob Graham, now a U.S. senator, had vetoed the proposed changes in the law.

When Martinez took over this year, however, "the time was ripe," said Barbara Lautman of Handgun Control Inc.

5-0354X
Bradley
5/3/88

Original sponsors: Rodey, Szymanski, Uehling, et al.

IN THE SENATE BY THE JUDICIARY COMMITTEE

HOUSE CS FOR CS FOR SENATE JOINT RESOLUTION NO. 15 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

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

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

* Section 1. Article I, sec. 19, Constitution of the State of Alaska, is 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 the people to keep and bear arms for lawful purposes shall not be infringed. means

* Sec. 2. LEGISLATIVE INTENT. (a) In proposing the amendment to art. I, sec. 19, Constitution of the State of Alaska, in sec. 1 of this resolution, the legislature intends only that the proposed amendment clarify the Alaska Constitution by providing that the right to keep and bear arms is an individual right as well as a collective right. The amendment, if adopted, should not be construed to preclude the regulation of the manner in which arms may be borne, carried, or used. For example, the adoption of this amendment should not be interpreted to repeal or to render unconstitutional statutes or municipal ordinances regarding assault, misconduct involving weapons, or other similar offenses.

(b) In the preparation of its neutral summary under AS 15.58.-020(6)(C), the Legislative Affairs Agency shall consider the statement of legislative intent contained in (a) of this section.

* Sec. 3. The amendment proposed by this resolution shall be placed

before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

5-0354X
Bradley
5/3/88

Original sponsors: Rodey, Szymanski, Uehling, et al.

IN THE SENATE BY THE JUDICIARY COMMITTEE

HOUSE CS FOR CS FOR SENATE JOINT RESOLUTION NO. 15 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

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# STATE OF ALASKA
# THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907·465·3800

## LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

| | | |
|---|---|---|
| H. JUD. | 5-7-88 | 1:30p.m. |
| H. JUD. | 5-4-88 | 1:30p.m. |
| H JUD | 4-20-88 | 1:30p.m. |

# Alaska State Legislature

Please enter into the record my testimony to the House Judiciary
committee name

committee on HCS CSS JR , dated 4-20-88 .
bill/subject

The individual right of each Alaskan to lawfully keep and bear arms is very important. This right must not be infringed upon by any entity of the state, of a city or by a borough. I support SJR 16. I further request that the Resolution be amended to read " Right to Keep and Bear Arms. The right of the people to keep and bear arms for lawful purposes shall not be infringed "

Signed: [signature]
Testifier

Self
Representing (Optional)

1676 Tanaka Drive
Address

479-3412
Phone No.

Subject: S.J.R. 15 Right to Keep and Bear Arms.

It is good to know that this resolution is being processed. I had been advised that progress was stalled as the result of potential enforcement problems.

I am concerned with the unfortunate need for this type of Legislative Statement. The right to keep and bear arms has always seemed to be among those basic rights and responsibilities of citizenship within the limits of reasonable regulation.

Situations such as the "Morton Grove-style" bans, however, demonstrate loopholes in that basic right.

It seems that the main objection to the resolution has come as the result of language that could remove restrictions against illegal (fully automatic) weapons and possession by felons and intoxicated persons.

Whereas we generally consider rights of citizenship to include reasonable regulation and guidelines for responsible behavior, this does not seem to be spelled out in the resolution as written.

Amended language to state that intent can remove the objections while insuring the basic rights. Wording as follows is suggested:

... The right of the people to keep and bear arms shall not be infringed except for reasonable regulation of responsible use and citizenship ... " E. O. Packer

E. O. Packer, 7590 Glacier Hwy., Juneau, AK 99801
(my typist is in Brattle Memorial today)

# Alaska State Legislature
## House

Official Business

COMMITTEE ON STATE AFFAIRS

P.O. BOX V
State Capitol
Juneau, Alaska 99811


March 10, 1988

Jan Still
Box 188
Douglas, AK 99824

Dear Jan:

A few days ago you received a mailing from the Washington, D.C. office of the National Rifle Association requesting you to contact me regarding SJR 15, proposing an amendment to the Constitution of the State of Alaska relating to the right of a person to keep and bear arms. The letter claimed that the resolution had been "bottled up" in my committee and that I "single handedly" was restricting the progress of this resolution. To put it bluntly, that letter was wrong.

The Alaska Peace Officers Association, made up of law enforcement officials all over the state of Alaska asked for clarification in SJR 15 that reasonable regulation of the methods of carrying firearms (convicted felons, concealed weapons, etc.) would not be precluded. Such a clarification was also requested by the Alaska Criminal Justice Working Group which includes the Department of Public Safety, the Attorney General, the Court System, and others. I think they have legitimate concerns and a right to express them and I am not going to preclude their opportunity to testify just because some guy in Washington, D.C. doesn't care how we do things here in Alaska.

For your information, three hearings have been held on this resolution by the State Affairs Committee which I chair. On February 17, we heard from Senator Rodey, the sponsor of SJR 15, and from representatives of the National Rifle Association. On the 29th of February, we heard additional testimony from the NRA and from the Alaska Peace Officers Association. On March 2, we took the remaining testimony on the resolution, this time hearing from the Department of Law and the Department of Public Safety. We have held three hearings in the space of two weeks time, spending 2-1/2 hours of the committee's time on this resolution. The committee has made a serious effort to understand the complex legal issues involved and to hear from all interested parties.

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
1600 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20036

## PRESERVE YOUR RIGHT TO KEEP AND BEAR ARMS IN ALASKA
## SUPPORT S.J.R. 15, THE CONSTITUTIONAL AMENDMENT

Dear NRA Member: February 25, 1988

**Urgent!** The battle to protect your firearms rights is on in Juneau. As a sportsman in State House District 4B, your help is needed **today** to secure passage of S.J.R. 15, the right to keep and bear arms and firearms preemption amendment to your state constitution.

Make no mistake, passage of S.J.R. 15 is absolutely necessary in Alaska to clarify that the Alaska Constitution guarantees the individual right to keep and bear arms and ensure that localities may not pass "Morton Grove-style" handgun bans nor any other restrictive gun rights legislation.

The future of this critical bill rests largely in the hands of **your** State Representative, Fran Ulmer, who is Chairperson of the House State Affairs Committee. Representative Ulmer is currently refusing to allow the Committee to vote on S.J.R. 15, despite the overwhelming support shown for this bill. Representative Ulmer is holding the bill simply because the Alaska Peace Officer's Association (APOA) sent written dissent to the February 17 Committee hearing — but did not even make the effort to attend the hearing.

The opposition of the APOA is based on the mistaken belief that S.J.R. 15 will create a situation where felons are no longer excluded from firearm ownership. Additionally, they mistakenly believe S.J.R. 15 will invalidate some of the laws currently in effect in Alaska such as those regulating concealed weapons and possession of firearms by intoxicated persons.

It has been pointed out to the APOA and to Representative Ulmer that there is an extensive amount of court precedence which clearly shows that S.J.R. 15 will not preclude reasonable regulations on firearms such as those previously mentioned. These are facts -- backed by court decisions -- that cannot be ignored.

There is absolutely no doubt that the important language reforms in S.J.R. 15 are needed in the State of Alaska. Although many of you may feel that your right to keep and bear arms is protected by both the U.S. and your state constitution, this simply is not so! Recent court rulings at the federal level have rejected the Second Amendment to the U.S. Constitution as it relates to the states. What the courts have stated is that the Second Amendment applies only to the federal government; therefore, unless a state has a similar provision in its constitution, the firearms rights of the citizens are in extreme jeopardy!

And unfortunately, in Alaska, your current state constitutional amendment does not protect your right to keep and bear arms for hunting, recreational shooting, self defense or any number of legitimate reasons. Indeed, a recent opinion by the Alaska Attorney General on the meaning of Article I, Section 19, of the Alaska Constitution states: "The modern judicial view has increasingly found that the guaranteed right to keep and bear arms is not an individually protected right, but rather a collective right which allows the people of the various states to serve in a militia."

Original sponsors: Rodey, Abood,
Bennett, et al

IN THE SENATE BY THE JUDICIARY COMMITTEE

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

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

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

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

* Section 1. Article I, sec. 19, Constitution of the State of Alaska, is 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 ~~a person~~ [THE PEOPLE] to keep and bear arms for lawful purposes shall not be infringed.

* Sec. 2. LEGISLATIVE INTENT. The legislature intends that the amendment clarify the Alaska Constitution by providing that the right to keep and bear arms is an individual right rather than a collective right. This amendment does not repeal or render unconstitutional statutes such as assault with a dangerous weapon or being a felon in possession of a firearm or similar laws, ordinances, or regulations of municipalities or instrumentalities of the state.

* Sec. 3. In the preparation of its neutral summary under AS 15.58.020 (6)(C), the Legislative Affairs Agency shall include sec. 2 of this resolution.

* Sec. 4. The amendment proposed by this resolution and sec. 2 of this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

#

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

# CONSTITUTIONAL AMENDMENTS FOR THE RIGHT TO KEEP AND BEAR ARMS

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

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

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

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

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

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

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
1600 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20036

# 1986 NRA-ILA STATE LEGISLATIVE ISSUE BRIEF

**ISSUE:** Constitutional Amendment

**STATUS:** Forty-one states currently have an amendment to their state constitution guaranteeing the right to keep and bear arms.

**1986 UPDATE:** Because amending state constitutions generally require the approval of the state's voters, all action since 1985 has been targeted specifically to 1986, when the November general elections will provide the opportunity for such statewide votes.

West Virginia led the way in 1985 by passing H.J.R. 19, providing for a referendum on a state constitutional guarantee for the right to keep and bear arms on the ballot. State sportsmen organized to generate grassroots support and the measure passed by a record 83% margin on November 4.

Delaware is an exception to the general rule in that a constitutional amendment need not go before the state voters. Instead, it must be approved in consecutive years by two different legislative sessions. The first phase of this process has already been completed -- H.B. 554, providing for a Right to Keep and Bear Arms Constitutional Amendment, was overwhelming approved in the 1986 legislative session. It will be reconsidered in the 1987 session, and considering the impressive showing it made in 1986 and the fact that pro-sportsmen candidates fared very well in the November 4 elections, H.B. 554 could well be written into law by the spring.

**DISCUSSION:**

> "Guarantees of individual liberties under federalism have two components: the federal Constitution and state constitutions. Since the Supreme Court has not specifically held that the second amendment applies to the states, state guarantees on arms serve as an important bulwark against infringement, for it is the state courts at all levels, not the federal courts, that finally determine the overwhelming number of vital issues of life, liberty and property that trouble countless human beings of this Nation every year."*

Today, forty-one states have amendments to their state constitutions which guarantee the right to keep and bear arms. In light of the increasing attention being given to our gun rights at the state level, and because there is a strong indication that sportsmen increasingly will be forced into court to defend this right, it becomes critical to have an unequivocal guarantee in each state constitution to protect sportsmen.

Those states currently without pro-gun constitutional amendments are: California, Delaware, Iowa, Maryland, Minnesota, Nebraska, New Jersey, New York and Wisconsin.

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* from "State Constitutions and the Right to Keep and Bear Arms," by Robert Dowlut and Janet Knoop; Oklahoma City University Law Review (Volume 7, #2 Summer, 1982).

HOUSE JOINT RESOLUTION NO. 18

(By Delegate J. Martin and Delegate Carmichael)

(Introduced February 21, 1985; referred to the Committee on Constitutional Revision.)

Proposing an amendment to the Constitution of the State of West Virginia, amending article three thereof by adding thereto a new section, designated section twenty-two, relating to the right of a person to keep and bear arms; numbering and designating such proposed amendment; and providing a summarized statement of the purpose of such proposed amendment.

Resolved by the Legislature of West Virginia, two thirds of all the members elected to each House agreeing thereto:

That the question of ratification or rejection of an amendment to the Constitution of the State of West Virginia be submitted to the voters of the State at the next general election to be held in the year one thousand nine hundred eighty-six, which proposed amendment is that article three thereof be amended by adding a new section, designated section twenty-two, to read as follows:

ARTICLE III. BILL OF RIGHTS.

§22. Right to keep and bear arms.

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.

Resolved further, That in accordance with the provisions of article eleven, chapter three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, such proposed amendment is hereby numbered "Amendment No. 1" and designated as the "Right to Keep and Bear Arms Amendment" and the purpose of the proposed amendment is summarized as follows: "To allow a person to keep and bear arms for defense of self, family, home and state and for recreation."

NOTE: The purpose of this resolution is to guarantee a person the right to keep and bear arms.

Section twenty-two is new; therefore, strike-throughs and underscoring have been omitted.

# ANALYSIS OF PROPOSED WEST VIRGINIA CONSTITUTIONAL GUARANTEE TO KEEP AND BEAR ARMS

> 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.

This proposal explicitly protects the traditional lawful rights that gun owners assumed were guaranteed in West Virginia.

## A Person

The proposed amendment guarantees an individual right. Nevertheless, a person in a high risk category would not enjoy this right. That, e.g., felons, minors, and the mentally infirm are treated differently has gained such universal acceptance that commentators mention only in passing that such persons do not enjoy the full benefits of this right. Dowlut & Knoop, State Constitutions and the Right to Keep and Bear Arms, 7 Okla. City U.L. Rev. 177, 191 & n. 71 (1982).

The Constitutions of 40* states contain a right to bear arms. These guarantees have not been an obstacle to reasonable regulation. Statutes prohibiting possession of firearms, e.g., by convicted felons have been consistently upheld. Examples of such decisions include Carfield v. State, 649 P. 2d 865 (Wyo. 1982); State v. Fant, 53 Oh. App. 2d 87, 371 N.E.2d 588 (1977); State v. Amos, 343 So. 2d 166 (La. 1977); State v. Cartwright, 246 Ore. 121, 418 P. 2d 822 (1966); Jackson v. State, 68 So. 2d 850 (Ala. App. 1953), cert. denied 68 So. 2d 853 (1953). Over a century ago a court upheld a conviction under a statute forbidding selling, giving, or lending weapons to minors. Coleman v. State, 32 Ala. 581 (1858).

## Keep and Bear Arms

The term "arms" refers only to such arms as are commonly kept by the people. Constitutionally protected arms would include the rifle, shotgun, and pistol. State v. Kessler, 289 Ore. 359, 614 P. 2d 94 (1980); Taylor v. McNeal, 523 S.W. 2d 148, 150 (Mo. App. 1975); Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972); People v. Brown, 253 Mich. 537, 235 N.W. 245 (1931); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921); State v. Shelby, 90 Mo. 302, 2 S.W. 468 (1886); State v. Duke, 42 Tex. 455, 458-59 (1875); State v. Andrews, 50 Tenn. 165, 8 Am. Rep. 8 (1871).

*In the 1984 elections the voters in Utah strengthened their present guarantee and the voters in North Dakota added a right to keep and bear arms to their constitution.

Bombs, cannon, poison gas and the like are arms which do not come under the protection of the constitutional umbrella. State v. Kessler, Rinzler v. Carson, People v. Brown, State v. Kerner, State v. Shelby, supra.

A person may only keep or bear constitutionally protected arms. The right to keep arms includes the following:

> What, then, is involved in this right of keeping arms? It necessarily involves the right to purchase and use them in such a way as is usual, or to keep them for the ordinary purposes to which they are adapted. . . The right to keep arms, necessarily involves the right to purchase them, to keep in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. Andrews v. State, 50 Tenn. 165, 178, 8 Am. Rep. 8, 13 (1871).

The bearing of constitutionally protected arms may be regulated. Concealed carrying statutes, e.g., are routinely upheld. State v. Kessler, 289 Ore. 359, 614 P.2d 94, 99 (1980); Holland v. Commonwealth, 294 S.W. 2d 83, 85 (Ky. 1956); Porello v. State, 121 Oh. St. 280, 168 N.E. 135 (1929); McIntire v. State, 170 Ind. 163, 83 N.E. 1005 (1908); State v. Reid, 1 Ala. 612, 35 Am. Dec. 44 (1840). Even open carrying for an unlawful purpose may be prohibited. State v. Dawson, 272 N.C. 535, 159 S.E. 2d 1 (1968). A license may be required to carry a pistol away from one's home, place of business, or land. Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E. 2d 1339 (Ind. App. 1980). Carrying a gun while drunk is outside the protected boundaries of the right to bear arms. People v. Garcia, 197 Colo. 550, 595 P. 2d 228 (1979)(en banc). One may not be armed in court, church, at elections or concerts. Hill v. State, 53 Ga. 473, 476 (1874). Unauthorized parading with arms may be prohibited. Commonwealth v. Murphy, 166 Mass. 171, 44 N.E. 138 (1896). Discharging a firearm without lawful excuse within the city limits is not constitutionally protected conduct. State v. Johnson, 76 S.C. 39, 56 S.E. 544 (1907).

Defense of self, family, home

The lawful defense of self, family, and home has ancient roots. Halbrook, The Jurisprudence of the Second and Fourteenth Amendment, 4 Geo. Mason L. Rev. 1, 5 (1981); Caplan, The Right of the Individual to Bear Arms: A Recent Judicial Trend, 1982 Detroit Col. L. Rev. 789, 794; Dowlut & Knoop, State Constitutions and the Right to Keep and Bear Arms, 7 Okla. City U.L. Rev. 177, 183 (1982); Malcolm, The Right of the People to Keep and Bear Arms: The Common Law Tradition, 10 Hastings Const. L. Q. 285 (1983).

There is no social interest in preserving the lives and wellbeing of criminal aggressors at the cost of their victims. The only defensible policy society can adopt is one that will operate as a sanction against unlawful aggression. The police have no duty to protect the individual. Warren v. District of Columbia, 444 A.2d 1 (D.C. App. 1981)(en banc). One court reduced this principle of law to the succinct comment that "there is no constitutional right to be protected by the state against being murdered by criminals or madmen." Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

The proposed guarantee is a victims' rights measure. It will guarantee that a person may exercise the choice to have arms to lawfully and effectively resist violent criminal aggression against self, family, or home.

Defense of state

During World War II the National Guard was activated for overseas service. In a number of states the armed citizens were called upon to perform militia duty in an effort to protect the state and fill the void left by the absence of the National Guard. The people served in the militia and used their personally owned firearms to protect the state. See Dowlut and Knoop, State Constitutions and the Right to Keep and Bear Arms, 7 Okla. City U. L. Rev. 177, 196-98, 233-35 (1982).

Lawful hunting and recreational use

The constitutions of New Mexico, Nevada, and North Dakota explicitly guarantee a right to have arms for lawful hunting and recreational use. The seminal idea for this right may be traced to a 1787 Pennsylvania proposal based on experiences with British game laws designed to disarm the people. Dowlut and Knoop, State Constitutions and the Right to Keep and Bear Arms, 7 Okla. City U. L. Rev. 177, 193 & n.72, 73 (1982).

The term "lawful" was inserted as a matter of superabundant caution to indicate that hunting and recreational uses may be regulated by law. Thus possessing a firearm on a game reserve for the purpose of hunting may be proscribed without infringing on the right to bear arms. State v. McKinnon, 153 Me. 15, 133 A.2d 885 (1957).

Conclusion

This legislative history indicates that the legislature is left with the power to deal effectively with criminal misconduct. On the other hand, it would prevent the decent people of this state from being disarmed. State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); City of Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744 (1972); City of Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (Ct. App. 1971); Glasscook v. City of Chattanooga, 157 Tenn. 518, 11 S.W. 2d 678 (1928); People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921).

SPONSOR:Reps. Van Sant & Davis; Reps. Anderson, Barnes, Bennett, Boykin, Brady, Buckworth, Carey, Caulk, Clark, Cordrey, Corrozi, B. Ennis, D. Ennis, Fallon, Gilligan, Hebner, Houghton, Jester, Jonkiert, Mack, Oberle, Outten, Petrilli, Plant, Reynolds, Roy, Spence, Steele, Taylor, West, Wingate; Sens. Adams, Citro, Marshall, McBride, Minner, Sharp, Slatcher, Torbert, Vaughn

HOUSE OF REPRESENTATIVES

133RD GENERAL ASSEMBLY

HOUSE BILL NO. 554 MAY 8 1986

AN ACT PROPOSING AN AMENDMENT TO ARTICLE I OF THE CONSTITUTION OF THE STATE OF DELAWARE RELATING TO THE RIGHT TO KEEP AND BEAR ARMS FOR THE DEFENSE OF SELF, FAMILY, HOME AND STATE, AND FOR HUNTING AND RECREATIONAL USE.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each House thereof concurring therein):

Section 1. Amend Article I of the Delaware Constitution, by adding thereto a "Section 20" to read as follows:

"Section 20. A person has the right to keep and bear arms for the defense of self, family, home and state, and for hunting and recreational use."

SYNOPSIS

This is the first leg of a constitutional amendment that explicitly protects the traditional lawful right to keep and bear arms.



HD:RA:PK

# 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 b

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 militar.y 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.

## 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:

> 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.

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.

Submitted by: Assemblymen Dyson, Baker, Parnell, Wood, Bradley, Barnett, Kubitz, Campbell, and Faulkner
Prepared by: Assemblyman Dyson
For Reading: September 15, 1987

ANCHORAGE, ALASKA

RESOLUTION NO. AR 87-____

A RESOLUTION FOR THE ANCHORAGE MUNICIPAL ASSEMBLY CALLING FOR A STATE CONSTITUTIONAL AMENDMENT CLARIFYING THE INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS

WHEREAS, Article 1, Section 19 of the Alaska Constitution guarantees a broad individual right and explicitly protects the traditional rights that gun owners in Alaska always assumed were guaranteed; and

WHEREAS, Alaska Senate Joint Resolution 15 would remove any ambiguous language and strengthen the State's constitutional protection of the individual's right to own and to lawfully use firearms and thus clarify to local legislative bodies and to the judiciary a clear intent expressed by the people of Alaska through a constitutional amendment.

NOW, THEREFORE, BE IT RESOLVED, that the Anchorage Municipal Assembly does hereby support the passage of SJR 15 and the placing of the clarifying amendment to the constitution before the voters in the next statewide general election.

PASSED AND APPROVED by the Anchorage Municipal Assembly this _____ day of _____, 1987.

_____
Chairman

ATTEST:

_____
Municipal Clerk

FD/lf

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

January 6, 1988

Representative Fran Ulmer
1700 Angus Way
Juneau, AK 99801

Dear Representative Ulmer:

It was a pleasure to meet you on my recent trip to Juneau. I am looking forward to working with Rupe Andrews this session on the attempt to amend Senate Joint Resolution 15 and pass it through the Legislature.

Our two goals with this amendment are to: (1) clarify that the Alaska Constitution guarantees the individual right to keep and bear arms; and (2) ensure that the state guarantee extend to local municipalities by explicitly stating that local municipalities may not deny nor infringe upon the right to keep and bear arms.

There is no doubt that this important language is needed in the State of Alaska. In our meeting, Rupe discussed the April 13, 1983, opinion of Attorney General Norman C. Gorsuch on the meaning of Article I, Section 19, of the Alaska Constitution: "The modern judicial view has increasingly found that the guaranteed right to keep and bear arms is not an individually protected right, but rather a collective right which allows the people of the various states to serve in a militia."

Since the passage of the Morton Grove, Illinois, handgun ban, over 100 communities have attempted to pass similar legislation nationwide. Such places in the northwest include Seattle, Washington; Eugene, Oregon; and Anchorage, Alaska. Clarifying that the state guarantee extends to local municipalities will curtail this movement in Alaska and ensure that state firearm laws will be enforceable throughout the state on an equal basis.

You asked for information discussing the question of individual versus collective rights and expressed concern that individual language would create a situation where certain classes of people (i.e., convicted felons, mentally incompetents, minors) could now own and possess firearms. The municipality of Anchorage also is concerned that this language would invalidate certain laws such as those regulating concealed weapons and proscribing possession of firearms by intoxicated persons.

There is a plethora of court decisions which should allay these concerns. The enclosed Law Review is very informative and will provide you with some specific citations (see pages 186-192). I have also enclosed a copy of the decision handed down in State of Oregon v. Delgado (see page 10, lines 17-21). Other

pertinent cases which you might be interested in reviewing include Holland v. Commonwealth, 294 SW2d 83 (1956), which limits carrying concealed and Eary v. Commonwealth, 659 SW2d 198 (1983), which rules that felons may be prevented from owning firearms. Since both Holland and Eary are from Kentucky, it is important to note that the Kentucky Constitutional Amendment begins: "All men are, by nature, free and equal...." The use of the plural of "man' specifically indicates that what is guaranteed is an individual right.

The most recent decision which is applicable to your questions was handed down by the North Dakota Supreme Court on November 19, 1987. State v. Rice Hill involved a felon who was found to be in possession of a firearm. The court opined that constitutional rights are not absolute and the right to keep and bear arms is subject to reasonable regulation. Specifically, they ruled that felons are not individual citizens and are precluded from the constitutional right of firearm ownership. You will note that North Dakota's constitutional language also specifically refers to an individual right.

The National Rifle Association would like to have SJR 15 amended to read as follows:

> "The [A well-regulated militia being necessary to the security of a free state, the] individual right [of the people] to keep and bear arms shall not be denied or infringed by the state or any subdivision thereof."

We would greatly appreciate it if you would consider offering this amendment in your State Affairs Committee at the very earliest date possible.

Please feel free to contact me at (916) 446-2455 or our Legal Counsel, Bob Dowlut, at (202) 828-6345 should you have any questions or need further information.

Sincerely,

Brian Judy
State Liaison

BJ:bsw

Enclosures

cc: Senator Pat Rodey
Rupe Andrews
Bob Dowlut

terests and decided to secure a right to keep and bear arms in the face of any possible problems such a right might entail. For example, the colonies were not free from crime. In 1630, John Billington was hanged by the pilgrims at Plymouth colony for murdering John Newcomen with a blunderbuss. In 1678, Thomas Hellier was hanged in Westover, Virginia, for hacking three people to death. Thomas Lutherland was hanged February 23, 1691, in New Jersey for murdering John Clark, a boat trader, and stealing his supplies. Alexander White was hanged at Cambridge, Massachusetts, on November 18, 1784, for murder and piracy.[36] The Framers apparently felt that crime must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional right.

The task is to harmonize the tension between the police power and a constitutional guarantee. Accordingly, a textual analysis of the guarantee must focus on to whom the right belongs, what is the purpose or reason of the right, and what arms are protected. The boundaries of the right are established once these issues are defined and delineated. The police power then cannot breach those boundaries, for "constitutions are not made to create rights in the people, but in recognition of, and in order to preserve them, and that if any are specially enumerated and specially guarded, it is only because they are peculiarly important or peculiarly exposed to invasion."[37]

## COLLECTIVE RIGHT VERSUS INDIVIDUAL RIGHT DEBATE

The collective right view claims that while all of the people have a right, the individual person has no right.[38] This essentially means that the right to bear arms protects no one and guarantees nothing, for regardless of how draconian and unconstitutional a law may be, no individual would have standing to challenge such a law.[39]

The true inquiry as to the meaning of a constitutional guarantee concerns its understanding by the voters who, by their vote, have given life to the product of the convention.[40] The voters' understanding of a constitutional provision is determined by the common and ordinary meaning of the words employed.[41] Those words "will be understood in the sense most obvious to the common understanding, without resort to subtle and forced construction for the purpose of limiting or extending their operation."[42] Thus if the term "people" is used in the Bill of Rights to guarantee the individual the equal protection of the law,[43] to assembly and petition,[44] and freedom from unlawful searches,[45] it is incredible that the term "people" is then used strictly in a collective sense in guaranteeing the right to bear arms.[46] Therefore, a word repeatedly used in a constitution will bear the same meaning throughout the instrument.[47]

The seminal case which nullified the right to bear arms by holding that it is solely a collective right is *City of Salina v. Blaksley*.[48] James Blaksley was convicted of carrying a pis-

36. J. NASH, BLOODLETTERS AND BADMEN 55, 255, 345, 606 (1973). "[A]rguments of policy must give way to a constitutional command . . . ." Payton v. N.Y., 445 U.S. 573, 602 (1980). In Maryland, police stopped 2,000 cars over one weekend in a drunk driving campaign. They arrested four drivers. Wash. Post, Dec. 30, 1982, A 1, col. 4, at A 7, col. 1. Rights cannot be swept aside or ignored simply to make it convenient for the state to get at a small criminal element. Such an approach would render nugatory the benefits of a written constitution.

37. 2 J. TUCKER, THE CONSTITUTION OF THE U.S. 688 (1899).

38. City of Salina v. Blaksley, 72 Kan. 230, 83 P. 619, 620 (1905) (In interpreting a provision of the Kansas Constitution, which stated that "The people have the right to bear arms for their defense and security," the Supreme Court of Kansas stated that it "refers to the people as a collective body. . . . Individual rights are not considered in this section.").

39. Standing to sue is lacking where a party has a general interest common to all members of the public. Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).

40. People *ex rel.* Cosentino v. Adams County, 82 Ill. 2d 565, 413 N.E.2d 870, 871 (1980).

41. Burke v. Snively, 208 Ill. 328, 340, 70 N.E. 327, 329 (1904) (Words "shall be given the meaning which they bear in ordinary use among the people").

42. People v. Stevenson, 281 Ill. 17, 25-26, 117 N.E. 747, 750 (1917).

43. KAN. CONST. Bill of Rights, §2.

44. *Id.* §3.

45. *Id.* §15.

46. *Id.* §4.

47. Kirkpatrick v. King, 228 Ind. 236, ___, 91 N.E.2d 785, 789 (1950). "[T]he term 'people,' as used in the [state] constitution, is broad and comprehensive, and comprises generally all of the individual inhabitants of the state." State v. Kofines, 33 R.I. 211, ___, 80 A. 432, 437 (1911).

48. 72 Kan. 230, 83 P. 619 (1905). Restricting the right to bear arms to a collective right has been specifically rejected by other courts. *See, e.g.*, People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (en banc 1936); State v. Dawson, 272 N.C. 535, ___, 159 S.E.2d 1, 9 (1968).

tol within the city "while under the influence of intoxicating liquor."[49] The conviction could have been sustained simply because such conduct is outside the boundaries of the guarantee.[50] The court chose "to treat the question [of bearing arms] as an original one."[51] It misread *In re Brickey*[52] by claiming that the case sanctioned the carrying of concealed weapons on constitutional grounds. *Brickey* struck down a statute which forbade the carrying of a pistol in town in any manner. The *Brickey* court specifically held that forbidding the carrying of concealed weapons would be a valid regulation of the arms right. The court also misread *Commonwealth v. Murphy*[53] by claiming that *Murphy* strongly supported the court's position. *Murphy* upheld a conviction for unauthorized parading by armed men. The *Murphy* court merely cited *Presser v. Illinois*,[54] which involved an unlicensed armed parade, in upholding the conviction.

The *Blaksley* court's claim that a Bill of Rights guarantee merely insures the people collectively a narrow right to bear arms only in the organized militia or any military organization provided by law[55] lacks other jurisprudential support. The Kansas Constitution defines the militia as all able-bodied citizens between twenty-one and forty-five years of age.[56] The Kansas Constitution also authorizes the legislature to organ-

49. Salina v. Blaksley, 72 Kan. 230, ___, 83 P. 619, 620 (1905).

Carrying a gun while drunk is outside the protected boundaries of the right to bear arms. People v. Garcia, 197 Colo. 550, 595 P.2d 228 (1979)(en banc); State v. Shelby, 90 Mo. 302, 2 S.W. 468 (1886). The right to arms is subject to regulations to promote the peace, order and security of society, "provided they do not nullify the constitutional right or materially embarrass its exercise." E. FREUND, THE POLICE POWER 90-91 (1904). "A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional." State v. Reid, 1 Ala. 612, 616 35 Am. Dec. 46 (1840). The prevailing view is that prohibiting concealed carrying of weapons does not infringe the private right to bear arms. "Any one, carrying a weapon for a laudable purpose, will not desire to conceal it." C. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE U.S. 13-14, 503 (1886).

51. Salina v. Blaksley, 72 Kansas. 230, ___, 83 P. 619, 620 (1905).

52. 8 Ida. 597, 70 P. 609 (1902).

53. 166 Mass. 171, 44 N.E. 138 (1896).

54. 116 U.S. 252 (1886).

55. 72 Kan. 230, ___, 83 P. 619, 620-21 (1905).

56. KAN. CONST. art. VIII, §1.



ize, equip and discipline the militia.[57] This demonstrates that any collective right to bear arms in the militia is adequately covered by the militia article of the Kansas Constitution.[58]

Furthermore, the state's power to legislate on militia matters existed prior to the formation of the constitution and remains with the states.[59] The right of a state to maintain and use its militia is a power essential to the existence of a state.[60] The state has the authority to train its able-bodied citizens so that they may perform military duties or constabulary duties when called upon.[61]

The collective right theory suffers from a logical defect. It is conceptually difficult to see how something can exist in a whole without existing in any of its parts. The collectivists essentially claim that there is a nebulous entity that exists somewhere between the individual and the state which is so important that the Framers protected it with a constitutional guarantee. The respected Judge Cooley rejected the collective right view:

> It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment [sic] of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of

57. *Id.* §2.

58. *Id.* §§ 1-4.

59. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 16-17 (1820). This reflects John Marshall's view that the states had retained their powers over the militia. 3 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 419-21 (1836).

60. Luther v. Borden, 48 U.S. (7 How.) 1, 45 (1849).

61. Hamilton v. Regents of Univ. of Cal., 293 U.S. 245, 260 (1934).

> law for the purpose. But this enables the government to have a well regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for volunatry discipline in arms, observing in doing so the laws of public order.[62]

Kansas history of the nineteenth century demonstrates that the people were undoubtedly concerned with personal defense.[63] The guarantee to arms of the 1859 Kansas Constitution[64] is an exact copy of Ohio's 1851 constitutional guarantee,[65] and Ohio courts have interpreted their provision to secure an individual right to self-defense.[66] Thus the independent clause, containing command language, that "[t]he people have a right to bear arms for their defense and security" was undoubtedly intended to include a personal right to bear arms to protect one's person, family, or property against unlawful injury and to secure from unlawful interruption the enjoyment of life, limb, family or property. The autonomy of the right to arms clause is not undermined by the presence in the same section of independent clauses dealing with standing armies and the subordination of the military to the civil power, for arms guarantees in other states have similar clauses and their courts have found an individual right to bear arms for self-defense.[67] Hence, any claim that the arms guarantee is in-

62. T. Cooley, General Principles of Constitutional Law in The United States of America 298-99 (3rd ed. 1898).

63. Parman v. Lemmon, 119 Kan. 323, ___ 244 P. 227, 231 (1925) (Dawson, J., dissenting), *rev'd on rehearing*, 120 Kan. 370, 244 P. 232 (1926). The dissent was, in effect, adopted as the opinion of the majority on rehearing.

64. Kan. Const. Bill of Rights, §4.

65. Ohio Const., art. I, §4.

66. Mosher v. City of Dayton, 48 Ohio St. 2d 243, ___, 358 N.E.2d 540, 543 (1976) ("the right of an individual to bear arms" may be regulated in a "reasonable manner"); City of Akron v. Dixon, 36 Ohio Misc. 133, 303 N.E.2d 923, 924 (Akron Mun. Ct. 1972) ("the right secured by the Constitution . . . speaks of the citizen's self defense and security and to his right to attain those ends by bearing arms."); State v. Hogan, 63 Ohio St. 202, ___, 58 N.E. 572, 575 (1900) (individual right "for defense of self and property").

67. N.C. Const. art. I, §30; State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921); Ohio Const. art. I, §4. *See* note 66, *supra*; Or. Const. art. I, §27; State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); Vt. Const. ch. I, art. 16; State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903).



extricably linked and strictly limited to military matters rests on a foundation of quicksand. The *Blaksley* decision disingenuously turns a constitutional guarantee into an intangible abstraction.

No attempt will be made to examine textual differences based solely on whether plural terms, such as people or citizens, or singular terms, such as person or citizen, are used because only one state, Massachusetts, has followed *Blaksley*.[68]

The collectivists' argument should not be followed by the courts because it has no historical support, no case law support prior to the Kansas decision, and is illogical since the very concept of a right is individual. The principle of rigid *stare decisis* has no application to an unconstitutional law or to even a course of action taken by the courts. "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."[69] On one occasion, the U.S. Supreme Court branded a whole line of decisions it had pursued for nearly a century "an unconstitutional assumption of power by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[70]

The term "people" should be interpreted to include individuals. However, all individuals are not guaranteed the right to keep and bear arms. The Framers were mindful that certain groups are not protected because they fall into a traditional high-risk category. Thus it matters not that the Framers used in the arms guarantee the term people, citizens, person or citizen. Felons, persons of tender years, idiots and lunatics are classes that have almost universally been excluded from the arms guarantee.[71]

68. Commonwealth v. Davis, 369 Mass. 886, 343 N.E.2d 847 (1976).

69. Powell v. McCormack, 395 U.S. 486, 546-47 (1969).

70. Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Holmes, J., dissenting in Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 533 (1928)). *See also* Monell v. Department of Social Services, 436 U.S. 658 (1978); *cf.* Brown v. Board of Ed., 347 U.S. 483 (1954) with Plessy v. Ferguson, 163 U.S. 537 (1896).

71. At common law a felony is such crime as occasions a forfeiture of all the offender's lands or goods and often subjects him to capital punishment. 4 W. Blackstone, Commentaries on the Laws of England *94. While at common law usually only the most serious offenses were felonies and the wrongful act had to be accompanied by a guilty mind, the modern trend is to make some felonies a strict liability

## V. Constitutionally Protected Arms

A textual analysis of state constitutions reveals that two separate categories of arms are protected: (A) those suitable (not indispensable) for militia use, and (B) those suitable for personal defense. In addition, two states also protect arms suitable "for hunting and recreational use and for other lawful purposes."[72] Arms suitable for deterrence against oppression are not treated as a separate category because an armed citizenry, regardless of the armament kept, serves as a latent and implicit deterrent to oppression.[73]

A. Colonial militia laws reveal that smoothbore shoulder arms, carbines, rifles, pistols, ammunition, swords, bayonets,

---

offense, even though for the most part such offences are *mala prohibita* and not *mala in se*. For example, the mere possession of an unregistered rifle with a barrel under 16 inches is punishable by 10 years and a $10,000 fine. 26 U.S.C.A. §§ 5845 (a) (3), 5861 (d), 5871 (1980). To prevent the people from being disarmed by the expedient of classifying regulatory offenses as felonies, the disqualification for felons should be restricted to common law felonies and their modern equivalents and to offenses requiring some state of mind above strict liability which are inherently inimical to life and property. The harshness of a felony conviction for a regulatory offense requiring no criminal intent was acknowledged in United States v. Ruisi, 460 F.2d 153, 157 (2nd Cir. 1972) ("application for a Presidential pardon would seem to be justified.") Congress has already recognized a narrow exception to the felony disqualification by exempting antitrust violations, unfair trade practices, restraint of trade, or other similar offenses relating to the regulation of business practices. 18 U.S.C.A. §921 (a) (20) (1976). For a list of disqualifications involving felons *see* Doe v. Webster, 606 F.2d 1226, 1233-34 (D.C. Cir. 1979); State v. Noel, 3 Ariz. App. 313, ___, 414 P.2d 162, 164 (1966).

Persons of tender years lack the experience, understanding, or power of mind to manage their affairs. They normally cannot hold office, vote, marry, enter into a contract, or drink alcohol. Where a parent is lacking, a guardian serves to protect their interests. Even when persons of tender years violate the law, society deals with them in a special court. Idiots and lunatics are so lacking in mental capacity that conservators are appointed to manage their affairs. Often they are institutionalized. Even the common law treated these two groups differently:

> If one that wanteth discretion, killeth himselfe (as an infant, or a man *Non compos mentis*) he shall not forfeit his goods, & c. . . .
>
> If one that is *Non compos mentis*, or an ideot, kill a man, this is no felony; for they have no knowledge of good and evill, nor can have a felonious intent, nor a will or mind to do harme. . . .
>
> So it is, if a lunatike person killeth another during his lunacie; (*Cok.* 4. 125.) for all acts done by him in his lunacie, are as the actes of an Ideot. . . . But an infant of such tender yeares, as that he hath no discretion or intelligence, if he kill a man, this is no felony in him.

M. Dalton, The Countrey Justice 216-17, 223, 224 (London 1622).

That not all people were included in the arms guarantee can be established by viewing early arms laws relating to freed blacks and American Indians. "Free persons of color have never been recognized as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office." Cooper v. Savannah, 4 Ga. 68, 72 (1848). *See also* State v. Newsom, 27 N.C. 203 (1844). The sale of firearms to American Indians was prohibited. 2 Stat. 139 ch. 13 (1802) and 2 Stat. 283 ch. 38 (1804).

Some early constitutional guarantees on arms were restricted to "free white men." Fla. Const. art. 1, §21 (1838); Tenn. Const. art. I, § 26 (1834); La. Const. tit. III, art. 60 (1845). The passage of the thirteenth and fourteenth amendments means that, except felons, the mentally infirm, and person of tender years, all of the people are guaranteed the right to arms. *See also* T. Cooley, A Treatise on Constitutional Limitations 57 (7th ed. 1903).

72. Nev. Const. art. I, § 11, para. 1; N.M. Const. art. II, § 6. In addition, the majority report of the Illinois Bill of Rights Committee indicates an intent to protect under Ill. Const. art. I, § 22 "arms that law-abiding persons commonly employ for purposes of recreation or the protection of person and property." VI 6th *Ill. Const. Convention, Record of Proceedings* (1969-1970) at 87. In adopting the Virginia Bill of Rights, § 13, the interests of "the sportsmen of this State" and the right "to have arms in their homes, and they think that this will give them some protection" were also cited as reasons. *Proceedings & Debates of Virginia Senate Pertaining to Amendment of Constitution* 393 (Apr. 3, 1969) (Sen. Long).

73. Some cases equate arms "effective as a weapon of war" with arms suitable "to resist oppression." Fife v. State, 31 Ark. 455, 458, 461 (1876); Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840). Other cases make no such equation. Arms suitable for militia use or self-defense are included in the term "arms" and both categories serve as a deterrent to oppression because historically "the arms used by the militia and for personal protection were basically the same weapons." State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 99 (1980).

The wellspring for a right to have arms for hunting is the Dec. 12, 1787, minority proposal in the Pennsylvania convention:

> That the people have a right to bear arms for the defence 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 real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power.

Pennsylvania and the Federal Constitution 1787-1788, 422 (1888).

The Pennsylvania minority was the first to propose an extensive Bill of Rights and their seminal ideas found their way into the Bill of Rights and became the first, second, fourth, fifth, sixth, eighth, and tenth amendments of the United States Constitution. E. Dumbauld, The Bill of Rights and What it Means Today 50-56 (1957). The Pennsylvania minority proposal reveals an intent to guarantee the traditional uses of the times: for militia use, for self-defense, and for hunting. The reference to hunting was probably an effort to prevent the enactment of game laws designed to disarm the people. It also demonstrates that the common understanding of "to bear arms" was not restricted solely to militia purposes. In the 18th century "bear" meant "To convey or carry." S. Johnson, A Dictionary of the English Language (unpaginated) (1979 reprint of 1755 ed.) The arms provision in La. Const. tit. III, art. 60 (1845), used the term "carry arms."

NATIONAL RIFLE ASSOCIATION OF AMERICA
INCORPORATED 1871

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## WHY DOES ALASKA NEED A FIREARMS PRE-EMPTION LAW?

The right to keep and bear arms is at the forefront of the various emotional issues that currently confront our society. Legislators, judges and bureaucrats at all levels of government — federal, state and local — are being called upon by citizens who wish to see this right expanded or restricted.

One underlying question is at what level should such legislation occur. The National Rifle Association has traditionally believed that the government most representative of the people is best. The explosion over the past few years of local ordinances that are more restrictive than current state law has, however, created the need for the states to pre-empt these local actions. Such legislation will prevent a hodgepodge of varying gun laws within a state, and thereby protect the law-abiding citizen not only from unwitting violation of the law, but also from arbitrary infringements of his or her rights. Indeed, in enacting pre-emption legislation, thereby expressly preventing local governments from infringing the rights of citizens and effectively eliminating the need for citizens to undertake costly litigation to protect their rights, state legislators fulfill their constitutional duty to protect the rights of citizens.

A state firearms pre-emption law will guarantee to the citizens of your state their right to own and use firearms for legitimate purposes based on state statutes and federal law.

### Federal Law

Many people do not realize the full extent of federal law. Under the Gun Control Act of 1968 and as amended by the McClure-Volkmer Amendments (May 19, 1986), anyone convicted of a felony, adjudicated mentally defective, or addicted to drugs is prohibited from owning, purchasing or receiving or transporting any firearms or ammunition. The Gun Control Act also bans mail order sales of firearms by other than federally licensed dealers and requires that the sale of handguns is restricted to residents of the same state of the purchaser and seller.

Federal law also requires persons engaged in the business of dealing in firearms to be federally licensed. Dealers must

require from all firearms purchasers proof of identity and residence, and buyers must sign, under penalty of perjury, a statement certifying eligibility to purchase. Dealers are required to keep records of all firearms sales and are forbidden from selling handguns to persons under 21 or rifles and shotguns to persons under 18. Additionally, dealers are prohibited from making any sale of firearms or ammunition which would place the buyer in violation of state or local law.

The History of Firearms Pre-Emption Legislation

The first pre-emption firearms law was passed in the late 1960s, when, in response to the assassinations and urban rioting of that time, a number of localities passed "gun control" measures. Recognizing that these ordinances were based on emotional response rather than logical efforts to control crime, citizens of California and Pennsylvania led the way in enacting firearms pre-emption statutes. Today, some 15 states have firearms pre-emption either by statute or by legal precedent including: Alabama, Arizona, California, Indiana, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, South Dakota, Virginia, Washington and West Virginia.

The Problem Behind Local Firearms Laws

The renewed popularity in passing local ordinances effecting gun ownership has triggered a great debate over the benefits of local rule on this issue. Clearly, all legislation — whether federal, state, or local — must be designed to ensure uniform and nondiscriminatory access to the rights and privileges of the citizenry as guaranteed by the U.S. and State Constitutions. Yet, a close look at the passage of the Morton Grove, Illinois, handgun ban, the most infamous of these local ordinances, proves beyond doubt that local firearms legislation does not guarantee this. In passing their ban, the Morton Grove Village Trustees were acting in defiance of a majority of the village citizenry as the opponents of the measure greatly outnumbered supporters at all public hearings on the ban. Morton Grove was acting not to control crime, which was minimal in the village, but rather to gain the attention of national media and to create a situation of harassment for individual firearms owners. Their gimmick worked! Today, Morton Grove is almost a household word and it is estimated that close to a thousand formerly law-abiding citizens are now technically "criminals" for exercising a right guaranteed by both the U.S. and the Illinois Constitutions.

The local intent to harass gun owners and sportsmen, rather than control crime, is even more apparent in the recent actions of the Friendship Heights (Maryland) Township. This tiny

community on the outskirts of Washington, D.C., originally attempted to ban possession of all handguns. The Montgomery County Council refused, however, to consider the proposal because it was a clear violation of the Maryland State Firearms Pre-Emption Statute. Friendship Heights then attempted to subvert state law by passing a complete ban on possession of all ammunition. Possession of ammunition for self-defense would have been outlawed, and anyone passing through Friendship Heights with a single bullet could have been subject to arrest and conviction — a $500 fine for the first offense and up to six months in jail for the second offense.

The attempted F.H. bullet ban was defeated by the county council; Montgomery County, nonetheless, ultimately passed an ordinance which will prohibit the purchase of ammunition unless a firearm registration certificate is produced, although registration is not required in Maryland. While Councilman David Scull claims it is a symbolic step toward gun control at the state and federal level, in reality, this ordinance "is an abysmal waste of governmental energy and corrodes the respect without which law is a husk." (*The Washington Times*, June 20, 1983)

In response to this ban and other similar restrictive ordinances, a number of local jurisdictions have gone in the opposite direction and required all individuals or household heads to own a firearm. The NRA does not condone these mandatory ownership ordinances because we believe it is an individual's choice whether or not to possess a firearm.

How Can Pre-Emption Help?

Local firearms legislation serves only to create a crazy quilt of laws, resulting in gun owners running the risk of arrest, prosecution and confiscation of personal property for unwitting violation of local law by transporting a gun for sporting or other legitimate purposes across city or county lines. Such legislation clearly interferes with the "uniform application of laws" as citizens from one city are treated differently from citizens of another. Such legislation also puts an undue burden on the nation's 28 million hunters and 7 million competitive shooters who would be required to know the firearms laws of each various city and county they may pass through on their way to hunting areas or shooting matches.

We are greatly concerned by this eruption of hostile camps of "pro-gun" and "anti-gun" localities in states who do not have firearms pre-emption legislation. A state firearms pre-emption law will curtail this movement and ensure that state law will be enforced uniformly through the state on an equal basis.

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
1600 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20036

# 1986 NRA-ILA STATE LEGISLATIVE ISSUE BRIEF

**ISSUE:** Firearms Preemption Legislation

**STATUS:** Some thirty states have some form of preemption, either by state statutes or judicial ruling.

**1986 UPDATE:** The NRA continues to recognize preemption as the major legislative safeguard to prevent local anti-gun action and to guarantee all citizens their right to own and use firearms for legitimate purposes. For this reason, enacting firearms preemption in those states without this legislative safeguard remains the top legislative priority of this Division. In the 1986 legislative session, preemption was introduced in some 13 states and was signed into law in Mississippi, Tennessee, South Carolina, Rhode Island, and Delaware (strengthening existing language) and is expected to be approved by the Michigan House of Representatives on December 9. In addition, in New Mexico, voters approved a referendum adding firearms preemption to the state constitution.

**CUSSION:** The right to keep and bear arms is at the forefront of the various emotional issues that currently confront legislators, judges and bureaucrats at all levels of government. While the NRA has traditionally believed that the government most representative of the people is best, the recent popularity of restrictive local ordinances has created the need for the states to preempt such action. Local firearms legislation:

* creates a hodgepodge of varying gun laws within a state and gun owners run the risk of arrest, prosecution and confiscation of personal property for unwitting violation of local law;
* interferes with the "uniform application of laws" as citizens from one city are treated differently from citizens of another;
* puts an undue burden on the nation's 28 million hunters and 7 million competitive shooters who would be required to know the firearms laws of each various city and county they may pass through in their travels.

The first preemption firearms law was passed in the late 1960s, when, in response to the assassinations and urban rioting of that time, a number of localities passed "gun control" measures. Recognizing that these ordinances were based on emotional response rather than logical efforts to control crime, citizens in California and Pennsylvania led the way in enacting firearms preemption statutes.

The renewed popularity in passing local ordinances effecting gun ownership has triggered a great debate over the benefits of local rule on this issue. Clearly, all legislation -- whether federal, state, or local -- must be designed to ensure

uniform and nondiscriminatory access to the rights and privileges of the citizenry as guaranteed by the U.S. and state constitutions. Yet, a close look at the passage of the Morton Grove, Illinois, handgun ban, the most infamous of these local ordinances, proves beyond doubt that local firearms legislation does not guarantee this. In passing their ban, the Morton Grove Village Trustees were acting in defiance of a majority of the village citizenry, not to control crime, which was minimal in the village, but rather to gain the attention of national media and to create a situation of harassment for individual firearms owners.

In response to this ban and other similar restrictive ordinances, a number of local jurisdictions have gone in the opposite direction and required all individuals or household heads to own a firearm. The NRA does not condone these mandatory ownership ordinances because we believe it is an individual's choice whether or not to possess a firearm. Further, we are greatly concerned by this eruption of hostile camps of "pro-gun" and "anti-gun" localities in states who do not have firearms preemption legislation.

Some have raised the question that by vesting sole authority to enact firearms laws with the state, there is greater risk of having restrictive laws passed at the state level. This simply is not the case. States already have the power to pass such restrictions and if the political climate was not favorable to sportsmen, they would do so whether or not preemption was already in place. Fortunately for the gun owner, we have been able to fend off movements toward restrictions in all states over the past several years.

**BENEFITS:**

A state firearms preemption law will curtail this movement and ensure that state law will be enforced uniformly throughout the state on an equal basis. Indeed, in enacting preemption legislation, thereby expressly preventing local governments from infringing upon the rights of citizens and effectively eliminating the need for citizens to undertake costly litigation to protect their rights, state legislators fulfill their constitutional duty to protect the rights of citizens.

NATIONAL RIFLE ASSOCIATION OF AMERICA
1600 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20036

OFFICE OF THE
GENERAL COUNSEL

December 28, 1987

Joe Geldhof
Assistant Attorney General
2579-4 Douglas Highway
Juneau, Alaska 99801

Dear Mr. Geldhof:

Mr. Ross requested that I respond to your inquiry on the decision to amend article I, §16 of the Maine Constitution.

Article I, §16 has been amended to guarantee that "Every citizen has a right to keep and bear arms; and this right shall never be questioned." The language "for the common defense" was deleted.

The people amended the constitution because they were displeased with the language in State v. Friel, 508 A.2d 123 (Me. 1986), holding that the right to bear arms is limited to the common defense under article I, §16. The court could have limited its decision to holding that a convicted felon may be prevented from bearing arms. It chose to ignore favorable case law from Arkansas and Tennessee on the interpretation of "common defense" language and instead cited a Massachusetts case which judicially repealed the right to bear arms. Dowlut & Knoop, "State Constitutions and the Right to Keep and Bear Arms," 7 Okl. City Univ. L. Rev. 177 (1982), discusses the various state constitutional guarantees.

Please feel free to contact this office if you have any questions.

Sincerely,

Robert Dowlut

Robert Dowlut
Deputy General Counsel

RD:sep

STATE of Maine

v.

Dennis Eugene FRIEL.

Supreme Judicial Court of Maine.
Argued March 13, 1986.
Decided April 18, 1986.

Defendant was convicted in the Superior Court, Sagadahoc County, of two counts of possession of firearm by a felon. The Supreme Judicial Court, Glassman, J., held that: (1) statute prohibiting possession of firearms by convicted felon did not violate Federal or State Constitutions; (2) evidence of revolver was admissible as seized in the course of a search pursuant to a valid warrant; (3) defendant's statement after arrest but prior to receiving *Miranda* warnings concerning location of shotgun was not pursuant to custodial questioning and was admissible; and (4) evidence of defendant's prior conviction was properly admitted to establish element of offense.

Affirmed.

1. Weapons ⇐1

Second Amendment of the United States Constitution operates as a restraint solely on the power of the national government and does not restrict the power of the states to regulate firearms. U.S.C.A. Const.Amend. 2.

2. Weapons ⇐1

The right to keep and bear arms declared by the State Constitution is limited by its purpose that arms may be kept and borne for the common defense and does not prevent the legislature from determining that common defense would not be served if a convicted felon possessed firearm in absence of permit. M.R.S.A. Const. Art. 1, § 16.

3. Weapons ⇐1

Statute prohibiting possession of firearm by convicted felon does not violate constitutional right to keep and bear arms for the common defense. 15 M.R.S.A. § 393; M.R.S.A. Const. Art. 1, § 16.

4. Searches and Seizures ⇐193

A defendant who seeks to challenge the legality of a search or seizure conducted under a properly issued and executed warrant has the burden of proving the illegality.

5. Criminal Law ⇐394.6(4)

A defendant who, at suppression hearing, conceded that, in an unrelated case, legality of search was upheld, and who presented no evidence to support challenge of legality of search failed to prove that evidence of revolver found during search should have been suppressed.

6. Searches and Seizures ⇐121

Search warrant based on affidavit stating that information about gun in defendant's possession was acquired during course of previous search of apartment 13 days earlier in an unrelated case by officer who had probable cause to believe that the firearm was still there, was not based on stale information and evidence obtained pursuant to the warrant was not required to be suppressed.

7. Criminal Law ⇐414

Police officer's testimony that, at time of arrest, he handed defendant copy of arrest warrant and warrant for search of defendant's apartment and defendant stated that shotgun belonged to another supported finding that after arrest of defendant, police officer did not actually interrogate defendant or by his conduct engage in functional equivalent of interrogation of defendant, although defendant alleged that after placing defendant under arrest, police officer had questioned him concerning location of shotgun, in response to which defendant answered.

8. Constitutional Law ⇐266(4)

Admission into evidence of certified copy of defendant's judgment and conviction of larceny from the person in defendant's trial for illegal possession of a weap-

on did not deprive defendant of due process, where defendant declined to stipulate to his conviction of a crime punishable by imprisonment of one year or more or failed to suggest another method by which the fact of his conviction could be admitted without indicating nature of offense, as defendant's prior conviction of crime punishable by one year or more of imprisonment was an essential element of the offense and had to be proven by State. 15 M.R.S.A. § 393, subd. 1; U.S.C.A. Const. Amend. 5.

9. Criminal Law ⇐369.2(1)

Where it is an element of the offense, evidence of prior conviction is highly relevant and not excludable under any rule. Rules of Evid., Rules 401, 403.

10. Criminal Law ⇐1172.1(3)

Trial court's instruction defining control in terms borrowed from definition of constructive possession constituted harmless error, if any, where the instruction closely paralleled instruction proposed by defendant and where firearms were proven to be in personal residence of defendant for an extended period of time and the court's instruction directed jurors' attention to whether defendant was aware of presence of firearms and had ability to reduce them to physical possession.

11. Criminal Law ⇐38

Although illegal possession or control of firearm prior to defendant's involvement in fight did not preclude competing harms defense for defendant's conduct following fight, jury's finding that defendant possessed or controlled gun prior to fight rendered competing harms defense inapplicable.

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Geoffrey Rushlau, Asst. Dist. Atty. (orally), Bath, for plaintiff.

Andrews B. Campbell (orally), and Dennis Eugene Friel, pro se (orally), Bowdoinham, for defendant.

Before NICHOLS, ROBERTS, WATHEN and GLASSMAN, JJ.

GLASSMAN, Justice.

Dennis Friel appeals from the judgment of the Superior Court, Sagadahoc County, entered on a jury verdict of guilty on two counts of possession of a firearm by a felon in violation of 15 M.R.S.A. § 393 (1980 & Supp.1985–1986). On appeal, the defendant contends that section 393 on its face and as applied in this case violates the United States Constitution, amendment II and the Maine Constitution, article I, § 16, and that the trial court erred in numerous evidentiary rulings and in its instructions to the jury. For the reasons hereinafter set forth, we affirm the judgment.

I.

In September 1983, the defendant was indicted for the illegal possession of a shotgun on or about July 23, 1983, and of a revolver on or about August 25, 1983.[1] From the evidence submitted at trial the jury rationally could have found the following facts: In 1968 the defendant was convicted of larceny from the person, 17 M.R.S.A. § 2102 (1964) (repealed 1975), and the court imposed a two-year suspended sentence. The defendant has never applied for a permit to possess a firearm.

Patrick Lane owned a 12-gauge shotgun. In May, 1983, Lane borrowed $50 from the defendant and advised the defendant he would deliver the shotgun to the defendant as collateral for the loan although the defendant had not requested that he do so. Lane left the shotgun in a closet at the defendant's home while the defendant was absent. On July 23, 1983, the defendant was involved in a fight with two brothers named Alexander at a store located on the

1. A third count alleging possession of a shotgun on or about August 12, 1983, was dismissed by agreement of the parties.

floor below the defendant's apartment. The defendant suffered an injury to his right eye. The Alexanders threatened to leave and to return with guns. After the Alexanders had departed, the defendant went to his apartment, loaded the shotgun, went outside, and fired a shot into the air. He continued to stand outside holding the gun until the police arrived. Some days after this incident, Lane came to the defendant's apartment, paid his debt and recovered the gun.

On August 12, 1983, Loren Herrick, a deputy in the Sagadahoc County Sheriff's Department, participated in a search of the defendant's apartment and observed a .357 magnum revolver located on a window sill or shelf above the bed in the master bedroom. There were cartridges in the gun. On August 25, 1983, Herrick participated in a second search of the apartment and observed the revolver in the same location. The officer took possession of the revolver and later on the same day obtained possession of the shotgun owned by Lane.

The jury found the defendant guilty on both counts.

II.

The defendant contends that 15 M.R.S.A. § 393 (1980 & Supp.1985–1986) on its face and as applied in this case violates the second amendment of the United States Constitution and article I, § 16 of the Maine Constitution and accordingly the indictments must be dismissed. – We disagree. Section 393 restricts the possession of firearms by a convicted felon. Section 393(1) provides that a person who has been convicted of any crime punishable by one year or more imprisonment shall not "own, have in his possession or under his control any firearm" unless he obtains a permit.[2] Section 393(2)–(6) establishes the conditions and procedures by which a convicted felon may obtain a permit.

[1] The second amendment to the United States Constitution[3] is simply inapplicable to the instant case. This amendment operates as a restraint solely upon the power of the national government and does not restrict the power of the states to regulate firearms. *Miller v. Texas*, 153 U.S. 535, 538, 14 S.Ct. 874, 875, 38 L.Ed. 812 (1894); *Presser v. Illinois*, 116 U.S. 252, 265, 6 S.Ct. 580, 584, 29 L.Ed. 615 (1886); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269–70 (7th Cir.1982), *cert. denied*, 464 U.S. 863, 104 S.Ct. 194, 78 L.Ed.2d 170 (1983); *United States v. Kozerski*, 518 F.Supp. 1082, 1090 (D.N.H.1981), *aff'd mem.*, 740 F.2d 952 (1st Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 147, 83 L.Ed.2d 86 (1985); *State v. Sanne*, 116 N.H. 583, 364 A.2d 630 (1976) (mem.).

[2] We turn then to examine the Maine constitutional provision. Article I, § 16 provides:

> Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned.

The right declared by section 16 is limited by its purpose: the arms may be kept and borne "for the common defense." *Cf. Commonwealth v. Davis*, 369 Mass. 886, 887–88, 343 N.E.2d 847, 848–49 (1976) (interpreting "common defense" as

2. In full, section 393(1) provides:

> No person who has been convicted of any crime, under the laws of the United States, the State of Maine or any other state, which is punishable by one year or more imprisonment or any other crime which was committed with the use of a dangerous weapon or of a firearm against a person, except for a violation of Title 12, chapter 319, subchapter III, shall own, have in his possession or under his control any firearm, unless such a person has obtained a permit under this section. For the purposes of this subsection, a person shall be deemed to have been convicted upon the acceptance of a plea of guilty or nolo contendere or a verdict or finding of guilty by a court of competent jurisdiction.
>
> A violation of this subsection constitutes a Class C crime. § 393(8).

3. U.S. Const., amend. II provides:

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

"point[ing] to service in a broadly based, organized militia"); *State v. McKinnon*, 153 Me. 15, 21–22, 133 A.2d 885, 888–89 (1957) ("common defense" does not include hunting).

The constitution also provides for an express grant to the Legislature of "full power to make and establish *all reasonable laws and regulations for the defense* and benefit *of the people of this State*, not repugnant to this Constitution." Me. Const., art. IV, pt. 3, § 1 (emphasis added). The Legislature, by its enactment of section 393, reasonably determined that the common defense would not be served if a person, who by the commission of a felony had demonstrated a dangerous disregard for the law, possessed a firearm in the absence of a permit. *Cf. State v. Vainio*, 466 A.2d 471, 476 (Me.1983) ("demonstrated their unfitness to be entrusted with dangerous weapons"), *cert. denied*, 467 U.S. 1204, 104 S.Ct. 2385, 81 L.Ed.2d 344 (1984); *State v. Heald*, 382 A.2d 290, 295 (Me.1978) ("obvious legislative purpose of deterrence").

[3] The defendant contends that the Legislature may not make this determination and points to the language in article I, § 16 guaranteeing the right to "[e]very citizen" and providing that "this right shall never be questioned." We note that courts in other states with similar language in their constitutional provisions guaranteeing the right to keep and bear arms have rejected challenges, based on those provisions, to state statutes restricting or denying the possession of firearms by convicted felons.[4] The constitutional guarantee must be interpreted in its entirety and in light of its purpose. We find nothing in the statute itself or in the facts of this case that infringes upon the purpose. We hold therefore that 15 M.R.S.A. § 393 on its face and as applied in the instant case does not violate article I, § 16.[5]

## III.

We next address the defendant's contention that his motion for the suppression of the revolver from evidence was erroneously denied. The police seized the revolver on August 25, 1983, during the course of a search pursuant to a warrant. In his motion the defendant contended that probable cause for the August 25 search was based on information acquired by Deputy Herrick during the course of an allegedly illegal search of his apartment in an unrelated case on August 12, 1983, and further contended that the affidavit on which the warrant was based did not support probable cause because it rested on this "stale" information. At the suppression hearing on his motion, the State offered the August 25 warrant, affidavit and inventory. No evidence was offered by the defendant. After receiving the exhibits and hearing legal

4. *Bristow v. State*, 418 So.2d 927, 930 (Ala.Crim.App.1982) ("every citizen"; statute prohibiting possession of pistol); *People v. Blue*, 190 Colo. 95, 102–103, 544 P.2d 385, 390–91 (1975) ("The right of no person to keep and bear arms ... shall be called into question"; statute prohibits possession of firearm); *State v. Amos*, 343 So.2d 166, 167–68 (La.1977) ("each citizen"; statute prohibits possession of firearm); *Shepperd v. State*, 586 S.W.2d 500 (Tex.Crim.App.1979) ("[e]very citizen"; statute prohibits possession of firearm away from residence); *State v. Tully*, 198 Wash. 605, 89 P. 1 517 (1939) ("the individual citizen"; statute prohibits possession of pistol).

5. In addition to the cases cited in n. 4, courts have rejected challenges based on state constitutional keep-and-bear arms provisions to statutes making illegal a felon's possessing a firearm in the following cases: *Landers v. State*, 250 Ga. 501, 299 S.E.2d 707 (1983); *State v. Cobb*, 428 So.2d 935 (La.App.1983); *State v. Williams*, 358 So.2d 943, 946 (La.1978); *Carfield v. State*, 649 P.2d 865 (Wyo.1982). *See also State v. Noel*, 3 Ariz.App. 313, 414 P.2d 162 (1966) (statute prohibits convicted felon's possessing a pistol); *Eary v. Commonwealth*, 659 S.W.2d 198 (Ky. 1983) (statute prohibits convicted felon's possessing a handgun); *State v. Cartwright*, 246 Or. 120, 418 P.2d 822 (1966), *cert. denied*, 386 U.S. 937, 87 S.Ct. 961, 17 L.Ed.2d 810 (1967) (statute prohibits convicted felon's possessing a concealable firearm). *Cf. State v. Rascon*, 110 Ariz. 338, 519 P.2d 37 (1974) (condition that probationer not have a firearm under his control does not violate state constitutional "right of an individual citizen" to bear arms).

argument, the court denied the motion to suppress.

[4, 5] A defendant who seeks to challenge the legality of a search or seizure conducted under a properly issued and executed warrant, has the burden of proving the illegality. *State v. Rand*, 430 A.2d 808, 817 (Me.1981). In essence, the defendant contends that the August 12, 1983 search was illegal and therefore that the August 25 search resting on Deputy Herrick's observations on August 12 is also illegal. Since the defendant concedes that the Superior Court, acting in the unrelated case, upheld the legality of the August 12 search and since the defendant presented no evidence at the suppression hearing, the defendant failed to meet his burden of proof as to this contention.

[6] Nor is there merit in the defendant's contention that Deputy Herrick's affidavit does not support probable cause because it was based solely on "stale" information. In *State v. Willey*, 363 A.2d 739 (Me.1976), we stated that whether past circumstances disclose a probable cause that is still continuing at the time of the request for a search warrant is not determined merely by the passage of time, but may also depend upon the circumstances of each case. Accordingly, we refrained from prescribing a *per se* rule fixing a mandatory maximum time within which a search warrant must be sought after the occurrence of events relied on to show probable cause. *Id.* at 742. In the instant case, considering the circumstances, including the kind of criminal activity involved, the nature of the property to be seized, and its location, it was not error to conclude that thirteen days after first seen in the defendant's home there was probable cause to believe that the firearm was still there. Accordingly, the court properly denied the defendant's motion to suppress.

IV.

The defendant's next contention raised for the first time on this appeal is that the Superior Court erred in denying his motion to suppress his statement of August 25, 1983, and the evidence obtained by use of that statement because the conduct of the police constituted the functional equivalent of custodial questioning without giving him the warnings provided in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Under *Miranda*, the State may not use statements of a defendant "stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444, 86 S.Ct. at 1612.

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

*Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980). *See State v. Estes*, 418 A.2d 1108, 1111 (Me.1980). When a defendant has given a statement in the absence of *Miranda* warnings, the State bears the burden of proving by a preponderance of the evidence that the warnings were not required. *State v. Longley*, 483 A.2d 725, 730 (Me.1984). The ruling of the trial court on the defendant's motion to suppress will be upheld if the record provides rational support for the court's determination. *Id.*

Contradictory testimony concerning questioning of the defendant was presented at the hearing on the defendant's motion. Deputies Herrick and Ackerly testified that they were the only officers present when Deputy Herrick arrested the defendant on the present charges. At the time of the arrest, Herrick handed the defendant a copy of the arrest warrant and the warrant for the search of the defendant's apartment. After reading the search warrant, the defendant stated that the shotgun belonged to Patrick Lane. The

defendant testified, however, that after placing the defendant under arrest and handing the defendant copies of the warrants, Herrick had questioned the defendant concerning the location of the shotgun, and the defendant had stated it was no longer at the defendant's home because Patrick Lane had picked it up sometime before.

[7] On the evidence before it, the trial court was warranted in concluding that after the arrest of the defendant Deputy Herrick did not actually interrogate the defendant or by his conduct engage in the functional equivalent of interrogation of the defendant.

V.

The defendant next contends that the court erred in admitting into evidence, over the objections of the defendant, a certified copy of the 1968 judgment and conviction of the defendant for larceny from the person. Prior to the submission into evidence the trial court twice suggested that the defendant stipulate to his conviction of a crime punishable by imprisonment of one year or more without indicating the nature of the offense. The defendant declined to stipulate and failed to suggest any other method by which the fact of his conviction could be admitted without indicating the nature of the offense. On appeal the defendant contends that the admission into evidence of the document and in particular of the exact nature of the conviction deprived him of due process. We find no merit in this contention.

[8, 9] The State was required to prove as an essential element of each count that the defendant had been convicted previously of a crime punishable by one year or more of imprisonment. 15 M.R.S.A. § 393(1). As an element of the offense the evidence of the prior conviction was highly relevant and not excludable under any rule. *See* M.R.Evid. 401, 403.

VI.

Finally, we address the defendant's contention that the trial court committed reversible error by its instructions on the definition of "control" and on the competing harms defense. We must read the jury instructions in their entirety to determine if they are adequate. *State v. Perry*, 486 A.2d 154, 156 (Me.1985); *State v. Sapiel*, 432 A.2d 1262, 1270 (Me.1981).

[10] *Definition of control:* 15 M.R.S.A. § 393(1) provides that a convicted felon shall not "own, have in his possession or under his control any firearm." The Maine Criminal Code does not define "control." In the instant case the trial court defined "control" in terms borrowed from the definition of "constructive possession" that we have employed when reviewing sufficiency of the evidence challenges to convictions for possession of contraband. *See State v. Lambert*, 363 A.2d 707, 711 (Me.1976); *State v. Gellers*, 282 A.2d 173, 178–80 (Me. 1971), *cert. denied*, 406 U.S. 949, 92 S.Ct. 2047, 32 L.Ed.2d 337 (1972). We note that the defendant's first proposed instruction defining "control," filed on the second day of trial, closely paralleled the instructions in fact given by the court and differed from it only marginally. Given the fact that both firearms were proven to be in the personal residence of the defendant for an extended period of time, the court's instructions appropriately directed the jurors' attention to whether the defendant was aware the firearms were there and had the ability, without restriction, to reduce them to his physical possession. In the circumstances of this case any shortcoming in the court's instruction on "control" was harmless.

*Competing harms defense:* Over the State's objection the court instructed the jury on the competing harms defense on Count I involving the July 23 incident. *See* 17-A M.R.S.A. § 103(1) (1983). The court further instructed the jury that it should not consider the competing harms defense "if the State has satisfied you that prior to the fight in the store Mr. Friel had already

possessed or controlled the shotgun ..., and that he had previously been convicted of a felony." The defendant objected to th... instruction, contending that possession or control prior to the fight in the store did not preclude the competing harms defense.

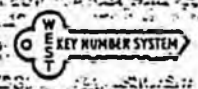
[11] The defendant is correct that possession or control of a firearm prior to the fight in the store does not preclude the competing harms defense for his conduct *following* the fight. The indictment, however, charged the defendant with possession or control *on or about* July 23. If the jury found the defendant did not possess or control the gun prior to the fight in the store, then under the instructions as given it might find his conduct after the fight to be justified. If, however, the jury found the defendant in fact possessed or controlled the gun prior to th... fight, the competing harms defense is inapplicable. *See State v. Kee*, 398 A.2d 384, 386 (Me.1979) (the competing harms defense requires "imminent physical harm" that is shown as a fact to exist).

We have carefully examined the defendant's remaining contentions and find them to be without merit.

The entry is:

Judgment affirmed.

All concurring.



REPRINT

SUBSTITUTE FOR

SENATE BILL NO. 748

(As Passed the Senate June 5, 1986)

A bill to prohibit local units of government from providing for certain restrictions on the ownership, use, and possession of pistols, firearms, and ammunition for pistols or firearms.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. As used in this act:

(a) "Local unit of government" means a city, village, township, or county.

(b) "Pistol" means a pistol as defined in section 222 of Act No. 328 of the Public Acts of 1931, being section 750.222 of the Michigan Compiled Laws.

Sec. 2. A local unit of government shall not impose special taxation on, enact any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation, carrying, or possession of pistols or other firearms, ammunition for pistols or other firearms, or

components of pistols or other firearms, except as otherwise provided in state or federal law.



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GENERAL COUNSEL

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AN ACT

RELATING TO FIREARMS

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 1986

6/25/86
PASSED HOUSE
68 TO 10

# AN ACT

## RELATING TO FIREARMS

Introduced By: Senators Sabatini, Wiesner, Acciardo, Miller and Marciano

Date Introduced: March 4, 1986

Referred To: Senate Committee on Judiciary

It is enacted by the General Assembly as follows:

SECTION 1. Chapter 11-47 of the general laws entitled, "Criminal Offenses" is hereby amended by adding the following section:

11-47-58. Firearms - State Pre-Emption. -- The control of firearms, ammunition or their component parts regarding their ownership, possession, transportation, carrying, transfer, sale, purchase, purchase delay, licensing, registration and taxation shall rest solely with the state, except as otherwise provided in this chapter.

SECTION 2. This act shall take effect upon passage.

## FIREARMS-RELATED ACCIDENTS

According to the National Safety Council (NSC), there were some 1,600 accidental gun-related fatalities in 1985, and firearms accidents ranked seventh among types of accidental deaths, as they have for several years. (Accident Facts, 1986, pp. 6-7.) There is, however, a problem with the NSC ranking, since it is based entirely upon how one combines the various specific subcategories of the types of accidents. The more detailed breakdown supplied by the NSC (p. 12), using the latest official figures -- those for 1983 -- would suggest that unspecified firearms could rank 11th, shotguns 24th, and handguns 27th. In order, the official list of accidental death categories would read: motor vehicle; falls; conflagration; other and unspecified drowning, submersion; inhalation and ingestion of food, other object; poisoning by solids and liquids; complications and misadventures of surgical and medical care; water transport; air and space transport; poisoning by gases and vapors; other and unspecified firearm missile; excessive cold; mechanical suffocation; struck accidentally by falling object; electric current; agricultural machines; railway accidents; other and unspecified fire and flames; hunger, drowning in a bathtub; hunger, thirst, exposure and neglect; ignition of clothing; explosive material; striking against or struck by objects or persons; shotgun; other and unspecified machinery; other road vehicle; hand gun; etc. The NSC has simply made a determination to combine some categories and subcategories and consider them major and to combine others and lump them together as "other."

At any rate, of the 1,600 gun-related accidental fatalities reported for 1985, about 800 occurred in the home, down from 1,300-1,600 reported during most of the late-1960s and early-1970s; and about 700 occurred in public, down from 800-1,000 during the late-1960s and early-1970s. The NSC also estimates just over 300 hunting-related fatal accidents. There are no clear data on handgun involvement in gun-related accidents. The latest estimate, for 1983, is that 209 accidents were classified as involving handguns of a total of 1,695 firearms accidents during that year. But it is unclear how many of the "other and unspecified firearm missile" involved "other" firearms than the three somewhat narrow categories -- "handgun," "shotgun (automatic)," and "hunting rifle" -- and how many involved "unspecified" types of firearms. Handgun involvement would appear to be anywhere between 15 and 45 percent, with no way at this time to determine which. An additional problem, as noted by Professor Gary Kleck of Florida State University, is that some accidents may actually be disguised or misclassified suicides or even criminal homicides.

Roughly three-eighths of these accidents kill persons too young lawfully to acquire a handgun, with over a quarter too young to acquire any firearms lawfully. Most accidents involving adults result from carelessness and frequently from being under the influence of alcohol. There is no indication that they result from ignorance. As a policy matter, the only policy with likely benefits would come from increasing firearms safety instruction of school-age persons too young lawfully to acquire firearms.

The figure for gun-related injuries is much more difficult to calculate. It is based on projections from surveys of hospitals and of the public, rather than statistics collected by various agencies. Additional problems with making estimates are that some of the data overlap, involve minor injuries, or involve gun-related injuries which are not, however, caused by gunshot wounds. For example, the Consumer Product Safety Commission collects survey data on accidental injuries from hospital emergency rooms,

but those injuries include criminal injuries to persons ages 15 and under, and injuries where police are uncertain whether criminally or accidentally inflicted. And it has been estimated that only one-third of injuries from gun-related robberies are due to gunshot wounds (Philip J. Cook, "The Effect of Gun Availabilty on Violent Crime Patterns," 455 Annals, AAPSS 63, 74, May 1981). In addition, many gun-related injuries which require medical care are, nonetheless, minor. Again, in gun-related injuries from robberies, less than one-third of those requiring medical treatment required an overnight stay in the hospital, a figure which the CPSC says is true as well of accidental injuries -- even though gun-wound patients are frequently kept overnight more as a precaution related to concerns about shock than to clear necessity from the nature of the wounds.

The Consumer Product Safety Commission placed the number of gun-related accidental injuries at approximately 26,000 (including crime-related injuries suffered by victims 15 and under, and injuries of uncertain origin) in 1982, the last year they collected such information on firearms-related accidents. The National Safety Council, on the other hand, estimates 15,000 gun-related injuries (J. Sherwood Williams and B. Krishna Singh, "American Attitudes Toward Gun Laws: A Discriminant Analysis," American Society of Criminology, 1981). The most current data -- based on reporting of an unfortunately small proportion of accidental shooting deaths -- from the National Safety Council suggest handgun involvement is at most 45% on gun-related injuries. Projecting those data suggests, at most, 15,000 handgun and at least 20,000 long gun related accidental injuries, with perhaps 5,000 handgun and 7,000 long gun injuries serious enough to require hospitalization at least overnight.

**Home Protection and Home Accidents**

It has frequently been alleged that when a burglar is heard and a shot is fired, "more often than not it's a member of the family who is hit." This statement usually is modified to some statistical form suggesting that guns, or handguns, kept in the home for protection, are six -- or 43, or 118, or some other figure -- times more likely to be used against a loved one than against a criminal.

There are a number of problems with the statement, however it may be worded. For one thing, it assumes that unless someone is killed, a gun hasn't been "used" at all. Surveys -- commissioned by anti-gun organizations, as well as one commissioned by the NRA -- consistently show that well over one-third of a million Americans each year use handguns for protection from criminals; another 100,000+ long guns are used for protection. In contrast, there are a total of approximately 26,000 gun-related injuries of all kinds.

Next, the protective use is limited to "home" in many instances, although two surveys -- a national one by Caddell for an anti-gun organization, and one in California for the state Department of Justice -- indicate that many protective gun uses may occur outside the home. In the home, instead of 26,000 gun-related injuries and 1,600 deaths, the CPSC and NSC data suggest about 10,000 injuries and 800 fatalities from gun-related accidents. One-third of the injuries are serious enough to require hospitalization at least overnight. And handgun involvement in those deaths and injuries is unknown, with estimates in the 15-45% range.

In addition, the "protection" motivation is assumed, although there is no reason to believe that guns owned for protection are more likely to be involved in accidents than the vast majority of guns, and the majority of handguns, which are owned for reasons other than home protection. Indeed, the CPSC data, and a recent study of firearms

fatalities in North Carolina ("Accidental Firearm Fatalities in North Carolina, 1976-80," by P.L. Morrow and P. Hudson, AJPH, Sept. 1986) indicate that accidental injuries and deaths involving firearms, whether they occur in the home or elsewhere, increase in the hunting season. Except to anti-gun fanatics, this is to be expected; guns kept for protection will rarely be needed and hence rarely be handled. For an analogy, one would expect many more home accidents involving step ladders than the more-difficult-to-use but rarely touched rope (or chain, or folding) emergency fire escape ladder.

Moreover, the ratio may be skewed by efforts to distort the numerator (6, 43, 118, whatever) upward while simultaneously and deliberately minimizing the denominator. The denominator -- protective uses -- is most lowered, as mentioned, by ignoring all non-fatal uses of guns. It is further reduced in some of the ratios (6 and 43) by ignoring outside-the-home deaths, and in others (118, e.g.) by discounting all self-defense homicides and all justifiable homicides which involve persons who are family, friends, neighbors, or acquaintances.

With the 118-1 ratio, or with similar statements that there were only 100+ justifiable homicides, the FBI "justifiable homicide" data are used. But (1) those figures miss, in addition to all non-fatal protective uses of guns, at least three-fourths of the self-defense killings from the "justifiable" category. (G. Kleck, "Policy Lessons from Recent Gun Control Research," Law & Contemporary Problems, Winter 1986; P.H. Blackman and R.E. Gardiner, "Flaws in the Current and Proposed UCR Programs Regarding Homicide and Weapons Use in Violent Crime," American Society of Criminology convention, 1986.) (2) Those figures exclude justifiable homicides among all but perfect strangers. When a woman and her daughter, sexually harassed by a neighbor for weeks, finally have to kill him when he breaks in to attempt a rape, that is a justifiable homicide involving neighbors and not counted by the National Coalition to Ban Handguns -- except as one of the "bad" uses of guns, making up the numerator in the ratio. When an ex-wife, having fled a marriage to avoid constant brutality, is still beaten and forced to kill her former spouse, their relationship prevents NCBH from counting it as a justifiable homicide and it is included, again, in the numerator rather than the denominator. The fact that criminals frequently commit their burglaries, robberies, rapes, and assaults in their neighborhoods enhances the likelihood that protective shootings will involve persons in the "neighbor, acquaintance, other known" category of FBI data.

The allegations, however, go further. They suggest that a family member would be shot in response to a perceived burglar. Only two efforts to break down the circumstances of accidental shootings have been made, the first in 1964-65 by the Metropolitan Life Insurance Company (Kates, Restricting Handguns, 1979, p. 60.). It found no accidental handgun shootings involved a search for a prowler, and 1.4% of overall accidental shootings. Adding "scuffling for possession" brings total involvement to 4.2%, and to 10% of handgun accidents. It would appear, then, that at most three dozen deaths, and just over 100 injuries requiring hospitalization may involve using a handgun against a suspected burglar. The more recent, but less detailed, North Carolina study reported no accidents related to searching for a burglar, mistaking a child for a prowler, or the like. These compare to Prof. Gary Kleck's estimate of 1,200 criminals killed and 8,500+ injured by gun-wielding civilians. His data further suggested that over 85% of gun use against criminals involves burglary. And national survey and FBI justifiable homicide data suggest that handguns account for three-fourths of the protective use of guns each year.

## Children and Accidents

It is sometimes alleged that guns, or handguns, represent one of the leading causes of death among the young, and that regulations are justified on that basis. Usually, it is asserted that handguns represent about the third or fourth or fifth "leading" cause of death among the young. The statement is inaccurate.

FBI data on suspected criminal homicide with victims 14 years of age and younger indicate that about two-thirds of gun-related homicides involve handguns, for a total of approximately 150 in 1985. The National Safety Council data on accidents among those under 15 indicates 270 firearms-related accidental deaths in 1985; if handguns were involved in half of those (that is, more than in firearms accidents overall, possibly by a substantial margin), then there were 135 accidental handgun deaths involving the young. Handgun abuse, accidental and criminal, thus totals 285 lives lost, representing approximately 1/2 percent of the deaths of children 14 and under. (Most children below the age of 1 who die do so as a result of problems of childbirth and congenital anomalies; deaths among those under age 1 total over twice as many deaths as occur from all causes among those 1-14, almost 40,000 in 1984, the latest year in the Public Health Service reports, compared to fewer than 17,000 deaths among the 1-14 age group.)

In terms of general causes of deaths among the 0-14 age group, handguns (criminal and accidental abuse) rank 16th. (The following table is based on Table 8, Public Health Service's "Advance Report of Final Mortality Statistics, 1984" (Sept. 2[illegible] 1986), the National Safety Council's Accident Facts, 1985, the FBI Uniform Crim[illegible] Report's Crime in the United States, 1984, and supplemental computer printouts from the FBI. All figures are for 1984 -- the latest possible date, and are approximate. They do not vary much from year to year.)

| "Cause" of death, persons 0-14 | Number | Percentage of deaths in the age group |
|---|---|---|
| 1. Conditions of the perinatal period | 18,850 | 33.7 % |
| 2. Congenital anomalies | 9,980 | 17.8 |
| 3. Motor vehicle accidents | 8,100 | 14.5 |
| 4. Heart diseases | 3,275 | 5.8 |
| 5. Cancer | 1,885 | 3.3 |
| 6. Drowning | 1,250 | 2.2 |
| 7. Fires, burns | 1,150 | 2.1 |
| 8. Other accidents | 1,100 | 2.0 |
| 9. Pneumonia | 1,050 | 1.9 |
| 10. Criminal homicide (w/o handguns) | 780 | 1.4 |
| 11. Meningitis | 490 | 0.9 |
| 12. Septicemia | 415 | 0.7 |
| 13. Misc. infectious and parasitic diseases | 390 | 0.7 |
| 14. Suffocation, ingested object | 350 | 0.6 |
| 15. Nephritis (kidney diseases) | 335 | 0.6 |
| 16. Handgun homicide and accident | 280 | 0.5 |

If deaths of children below the age of 1 were subtracted, handgun-related deaths would rank 11th, at 1 1/2%, of deaths, following: Motor vehicle accidents; cancer; congenital anomalies; drowning; other accidents; fires, burns; heart disease; criminal homicide without handguns; pneumonia; and suffocation, ingested object. (It should be noted that some deaths reportedly accidental may actually be due to child abuse but not

correctly classified as criminal homicide.)

If only handgun accidents -- numbering about 135 per year for children under 14 -- are considered, then, in addition to the other "causes" accounting for more deaths, there would be: cerebrovascular diseases, suicides, pulmonary diseases, anemias, meningococcal infection, intestinal infection, and hernia and other intestinal obstructions. Handgun accidents would then rank as the 23rd leading cause of death among children under 15, accounting for approximately 1/4% of the total.

**The Safety of the Shooting Sports**

One issue frequently raised with regard to firearms is that of the safety of shooting sports, including hunting, target shooting, trap and skeet. Governmental bodies and interest groups occasionally argue against opening ranges on the grounds of safety; others claim hunting is a dangerous sport, etc. In point of fact, the shooting sports are among the safest sports around, in addition to being suitable sports not just for the physically fit, but for the physically impaired who might otherwise have few areas of recreational competition open to them.

Perhaps the best demonstration of the safety of competitive shooting is the absence of data on the issue of accidental injuries and deaths. And the data on hunting show it to be one of the safest sports for which injury and death data are published. Studies on injuries in athletic activities--inter- and intramural--at the secondary and collegiate level do not mention target shooting. There are virtually no injuries to report; what few may occur would be classified as "other." Insurance company reports on accidental injuries have no category for sport shooting, so few non-hunting recreational shooting accidents occur.

Most shooting ranges--target, trap, skeet--have virtually no accidents; the few which occur are most often due to defective arms or ammunition (either manufactured or with excessive charges in handloaded ammunition) and do not result in serious injury. Indeed, when the Consumer Product Safety Commission last collected information on firearms accidents -- in three categories, one of which was clearly limited to organized sport shooting, "skeet shooting (activity, apparel, or equipment)" -- the number of accidents in the sample was too small to estimate a national figure on the total number of accidents. The actual number reported in the National Electronic Injury Surveillance System (NEISS) was 3, putting such an activity on a par with accidents from electric blankets, ice cream makers, electric trains, and shuffleboard.

This does not mean that every range is safe, nor that there are not reports of stray rounds fired (which rarely--if ever--ever strike a human being). But, compared to other sports, sport shooting at ranges produces immeasurably small numbers of generally minor accidents. More injuries and deaths occur each year in organized running and swimming competition than in organized shooting competition. In terms of injuries, hunting is 3,000 times safer than football, and other organized sport shooting is probably 100 times safer than hunting.

The National Safety Council (Accident Facts, 1985, p. 75) estimated approximately 340 fatal hunting accidents per year and about 2250 non-fatal hunting accidents, including some not involving firearms. The estimates on injuries (not necessarily deaths) by type range from 59% for shotgun, to 31% for rifle, with the remainder involving handguns, muzzle-loading firearms, and bows-and-arrows. The rate of accidental deaths from hunting is put by the NSC at 1.2 per 100,000 licenses, although millions may

lawfully hunt without licenses. And, as with other activities -- such as driving cars -- those persons unlawfully participating without licenses are more apt to be involved in accidents. Comparable figures for participants in other sports include: 2.1 for boating, 43.3 for hang gliding, 0.4 for football, 82.9 for parachuting, 12.5 for professional boxing, 0.7 for snowmobiling, 2.1 for swimming, 0.3 for water skiing, 4.5 for scuba diving. (Accident Facts, 1986, p. 75.)

In terms of injuries, whether fatal or not, the hunter rate was 9.2 per 100,000 licenses, compared to : 3,498.5 for baseball, 1,804.9 for basketball, 26,801.3 for football, 107.8 for ice skating, 6,374.3 for parachuting, 372.7 for roller skating, 43.2 for scuba diving, 133.7 for snowmobiling, 220.3 for skiing, 133.3 for swimming, 116.0 for tennis, and 164.2 for water skiing.

There are simply no data on accidents in target, trap, and skeet shooting. Most fatal gun-related accidents occur in the home (around 50-60%) and are unrelated to organized sport shooting (10-15%). As a consumer product, guns are involved in 26,000 accidents requiring emergency-room treatment annually (about 40% in the home), one third of which require hospitalization, according to the Consumer Product Safety Commission. Among the sport-related consumer goods which rank ahead of guns are bicycles (574,000 injuries), basketball (458,000), football (433,000), baseball (432,000), skating (183,000), soccer (93,000), volleyball (78,000), fishing (65,000), wrestling (64,000), weight lifting and exercise equipment (58,000), gymnastics (53,000), playground equipment (53,000), skiing (43,000), squash and racquetball (35,000), and tennis (29,000). (CPSC, 1982 data, the last year firearms-related injury data were analyzed.)

Overall, persons are safer hunting than driving to and from the hunt; and they are safer at a properly constructed and supervised shooting range than on any school playground, at home, or at any business establishment.

Anchorage Daily News 2/4/18

p. 2 of 3

# Bill of Rights reaffirmed 2 to 1

By AMY BERMAR
Daily News reporter

Still good after all these years: That's the conclusion of nearly 200 Alaskans who say they want the same basic freedoms the Bill of Rights (the first 10 amendments to the Constitution) provided more than two centuries ago.

Many of Americans' most treasured rights — to bear arms, to receive equal legal treatment, to be tried by an impartial jury and to practice freedom of speech and religion — still are endorsed by a majority of 176 people surveyed last month by The Daily News.

But other constitutional protections fared less well.

The proscription against double jeopardy, or being tried twice for the same crime, was opposed by 42 percent of the respondents overall.

(Groups that voted it down included 33-to-55-year-olds; those who described themselves as "middle of the road" politically; and grade school graduates, those who completed some high school and those who completed some advanced work — indicating that educational experience had little influence here.)

No other amendment encountered as much opposition, but some came close. Amendments on the shakiest ground included:

- **The right not to incriminate oneself** (19 percent disapproval overall; 28 percent disapproval among students with some high school education).
- **Guaranteed protection against unreasonable search and seizure** (23 percent disapproval overall; 32 percent disapproval among students ages 12 to 17).
- **Freedom of the press** (19 percent disapproval overall; 36 percent disapproval among people 55 years or older).

In the past, similar studies have been conducted around the country, with varying results.

Locally, overall approval for each amendment ranged from 80 to 90 percent. But various demographic groups — broken down

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Continued from Page D-1

by age, sex, education and political sympathy — disapproved of different amendments at rates of 15 to 50 percent.

"What makes America unique is the Bill of Rights," says former Attorney General John Havelock, who now directs the University of Alaska's Criminal Justice Center in Anchorage.

"What makes this country unique is your right to criticize without fear of being put in jail, and your right to say outrageous things without being penalized."

But the Bill of Rights might not exist today if it hadn't been for a group of single-minded citizens. The amendments were drafted only as a compromise between legislators who refused to sign the Constitution — which would shape the federal government — unless individual rights were protected.

Written by an aristocratic elite *for* an aristocratic elite, the Constitution didn't begin to benefit the common citizen until the middle of this century, Havelock says.

By the 1950s, when Sen. Joseph McCarthy was conducting his investigations into "un-American activities," the Fifth Amendment, the right to prevent self-incrimination, was at stake. Witnesses who wouldn't talk faced charges of contempt: And the American people didn't protest until later.

"People don't understand the Bill of Rights," says Havlock. "It's a large part of the population of what the American experiment is all about."

If citizens don't know the ideals underlying democracy, says Havelock, they may not defend them, either.

"Then, in times of crisis, it becomes easy, as it did during the McCarthy era, to say that these rights should not be granted."

The forced internment of Japanese-Americans during World War II is another example of "temporarily suspend-

according to Dan Hickey, chief prosecutor for the state. (As district attorney, he must assure that defendants get a trial that's speedy, impartial and, if they desire, decided by a jury of their peers — three protections spelled out in the Bill of Rights.)

Havelock cites the current debate over prayers in schools as another example of public pressure modifying the bill's provisions — in this case, freedom of religion.

Despite this, the Bill of Rights remains intact, and has grown stronger over time.

"The Bill of Rights enjoyed a renaissance in the 1930s," says Havelock. "There's been a tremendous reassertion of the importance of rights — not just as minorities have taken power, but as the country becomes more pluralistic.

"As there's less consensus about what the country's about, and what we're meant to do, in order to make the country work we need more and more laws. We're depending on laws to determine our roles and place in society."

# Questionnaire garnered 176 responses on 18 Constitutional rights

This questionnaire was presented on a confidential basis to learn what randomly selected people in Anchorage think about constitutional issues. Respondents included students, housewives, the unemployed, teachers, salespeople, computer programmers and a commissioner of the State of Alaska.

The survey was conducted on three different days in various locations: downtown by the old city hall, in the Sears Mall and in the Dimond Center. Respondents were informed that The Daily News intended to publish the compiled results in a newspaper article. Dittman Research Corporation was consulted on methodology.

Two hundred people were given surveys; 176 completed them. The questions were as follows: (Results in parentheses.)

1. Do you feel adults should or should not be allowed to own guns and other weapons? (Should: 160 Should not: 16)

2. Do you believe you should or should not be required to let soldiers stay in your home, even if there is no war?
(Should: 18 Should not: 158)

3. If you should be charged and tried for a crime, should or should not you be protected from being charged with the crime again? (Should: 102 Should not: 74)

4. If you are suspected of committing a serious crime, do you feel your accuser should or should not have to show there is enough evidence you have committed the crime before you can be charged with breaking the law?
(Should: 155 Should not: 21)

5. Do you feel bail, fines and treatment in jail should or should not be controlled to prevent cruel conditions?
(Should: 153
Should not: 23)

6. Do you believe the government should or should not be able to take private property for public use without paying the owner a fair price?
(Should: 5 Should not: 171)

7. Do you believe there should or should not be a limit on the time that passes before a person is brought to trial after being charged with a crime?
(Should: 145
Should not: 31)

8. Do you believe everyone should or should not be entitled to the same legal treatment? (Should: 164 Should not: 12)

9. Do you feel you should or should not be forced to testify against yourself? (Should: 33 Should not: 143)

10. Do you believe Congress should or should not pass laws regarding religious practices? (Should: 28 Should not: 148)

11. Should or should not the government oversee petitions people circulate, particularly if the petitions criticize government policies? (Should: 23 Should not: 153)

12. Do you believe people, homes, personal records and property should or should not be subject to search or confiscation whenever authorities think it necessary?
(Should: 42 Should not: 134)

13. Do you feel newspapers, radio and television should or should not be able to publish or broadcast what they want to? (Should: 143 Should not: 33)

14. Do you think people should or should not be allowed to gather in groups of any size? (Should: 158 Should not: 13)

15. Do you feel that anyone accused of a crime should or should not be entitled to a trial by an impartial jury in the state where the crime was committed?
(Should: 164
Should not: 12)

16. Do you feel any areas other than those already delegated to the federal government by the Constitution should or should not be left to individual states to administer? (Should: 146 Should not: 30)

17. Do you feel the government should or should not be allowed to pass laws that contradict rights already granted?
(Should: 28 Should not: 148)

18. Do you feel people involved in lawsuits where more than $300 is at stake should or should not be allowed to request a jury trial? (Should: 148 Should not: 28)

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

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

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

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

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

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

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

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

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

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

RUPE ANDREWS
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THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

Form Approved: OMB No. 1512-0129 (2/29/88)

DEPARTMENT OF THE TREASURY — BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS

# FIREARMS TRANSACTION RECORD
# PART I — INTRA-STATE OVER-THE-COUNTER

TRANSFEROR'S TRANSACTION SERIAL NUMBER

NOTE: Prepare in original only. All entries on this form must be in ink. See Notices and Instructions on back.

**SECTION A — MUST BE COMPLETED PERSONALLY BY TRANSFEREE *(BUYER)* *(See Notices and Instructions on reverse)***

| 1. TRANSFEREE'S *(Buyer's)* NAME *(Last, First, Middle)* ☐ MALE ☐ FEMALE | 2. HEIGHT | 3. WEIGHT | 4. RACE |
|---|---|---|---|
| | | | |

| 5. RESIDENCE ADDRESS *(No., Street, City, State, ZIP Code)* | 6. DATE OF BIRTH | | | 7. PLACE OF BIRTH *(City and State or City and Foreign Country)* |
|---|---|---|---|---|
| | MONTH | DAY | YEAR | |
| | | | | |

8. CERTIFICATION OF TRANSFEREE *(Buyer)* — An untruthful answer may subject you to criminal prosecution. Each question must be answered with a "yes" or a "no" inserted in the box at the right of the question:

| | | | |
|---|---|---|---|
| a. Are you under indictment or information* in any court for a crime punishable by imprisonment for a term exceeding one year? **A formal accusation of a crime made by a prosecuting attorney, as distinguished from an indictment presented by a grand jury.* | | c. Are you a fugitive from justice? | |
| | | d. Are you an unlawful user of, or addicted to, marijuana, or a depressant, stimulant, or narcotic drug? | |
| b. **Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year?** (NOTE: A **"yes"** answer is necessary if the judge could have given a sentence of more than one year. Also, a **"yes"** answer is required if a conviction has been discharged, set aside, or dismissed pursuant to an expungement or rehabilitation statute. However, a "crime punishable by imprisonment exceeding one year" does not include a conviction which has been set aside under the Federal Youth Corrections Act, as evidenced by a copy of the certificate issued under 18 USC 5021.) | | e. Have you ever been adjudicated mentally defective or have you ever been committed to a mental institution? | |
| | | f. Have you been discharged from the Armed Forces under dishonorable conditions? | |
| | | g. Are you an alien illegally in the United States? | |
| | | h. Are you a person who, having been a citizen of the United States, has renounced his citizenship? | |

I hereby certify that the answers to the above are true and correct. I understand that a person who answers "Yes" to any of the above questions is prohibited from purchasing and/or possessing a firearm, except as otherwise provided by Federal law. I also understand that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony.

| TRANSFEREE'S *(Buyer's)* SIGNATURE | DATE |
|---|---|
| | |

**SECTION B — TO BE COMPLETED BY TRANSFEROR (SELLER) *(See Notices and Instructions on reverse)***

THIS PERSON DESCRIBED IN SECTION A: ☐ IS KNOWN TO ME ☐ HAS IDENTIFIED HIMSELF TO ME IN THE FOLLOWING MANNER

| 9. TYPE OF IDENTIFICATION *(Driver's license or identification which shows name, date of birth, place of residence, and signature.)* | 10. NUMBER ON IDENTIFICATION |
|---|---|
| | |

On the basis of (1) the statements in Section A; (2) the verification of identity noted in Section B; and (3) the information in the current list of Published Ordinances, it is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm(s) described below and on the back to the person identified in Section A.

| | 11. TYPE *(Pistol, Revolver, Rifle, Shotgun, etc.)* | 12. MODEL | 13. CALIBER OR GAUGE | 14. SERIAL NO. | 15. MANUFACTURER *(and importer, if any)* |
|---|---|---|---|---|---|
| 1. | | | | | |
| 2. | | | | | |

| 16. TRADE/CORPORATE NAME AND ADDRESS OF TRANSFEROR *(Seller)* *(Hand stamp may be used)* | 17. FEDERAL FIREARMS LICENSE NO. *(Hand stamp may be used)* |
|---|---|
| | |

**THE PERSON MAKING THE ACTUAL FIREARMS SALE MUST COMPLETE ITEMS 18 THROUGH 20**

| 18. TRANSFEROR'S *(Seller's)* SIGNATURE | 19. TRANSFEROR'S TITLE | 20. TRANSACTION DATE |
|---|---|---|
| | | |

| CONTINUATION OF ITEMS 11 THROUGH 15 FOR MULTIPLE PURCHASES OF FIREARMS (See Item 9 below) | | | | |
|---|---|---|---|---|
| 11. TYPE *(Pistol, Revolver, Rifle, Shotgun, etc.)* | 12. MODEL | 13. CALIBER OR GAUGE | 14. SERIAL NO. | 15. MANUFACTURER *(and importer, if any)* |
| 3. | | | | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |
| Complete ATF F 3310.4 for multiple purchases of firearms (See item 10 below) | | | | |

## NOTICES AND INSTRUCTIONS

### PAPERWORK REDUCTION ACT NOTICE

The information required on this form is in accordance with the Paperwork Reduction Act of 1980. The purpose of the information is to determine the eligibility of the buyer (transferee) to receive firearms under Federal law. The information is subject to inspection by ATF officers. The information on this form is required by 18 U.S.C. 922 and 923.

### IMPORTANT NOTICES TO TRANSFEROR (SELLER) AND TRANSFEREE (BUYER)

1. Under 18 U.S.C. 921-928 and 18 U.S.C. Appendix 1201-1203, firearms may not be sold to or received by certain persons. The information and certification on this form are designed so that a person licensed under 18 U.S.C. 921-928 may determine if he may lawfully sell or deliver a firearm to the person identified in Section A, and to alert the transferee (buyer) of certain restrictions on the receipt and possession of firearms. This form should not be used for sales or transfers where neither person is licensed under 18 U.S.C. 921-928.

2. WARNING—The sale or delivery of a firearm by a licensee to an eligible purchaser who is acting as an agent, intermediary or 'straw purchaser' for someone whom the licensee knows or has reasonable cause to believe is ineligible to purchase a firearm directly, may result in a violation of the Federal firearm laws.

3. The transferee (buyer) of a firearm should be familiar with the provisions of law. Generally, 18 U.S.C. 921-928 prohibits the shipment, transportation or receipt in interstate commerce of a firearm by one who is under indictment or information for, or who has been convicted of, a crime punishable by imprisonment for a term exceeding one year, by one who is a fugitive from justice, by one who is an unlawful user of, or addicted to marijuana or a depressant, stimulant or narcotic drug, or by one who has been adjudicated mentally defective or who has been committed to a mental institution. In addition, 18 U.S.C. Appendix 1201-1203 generally makes it unlawful for anyone who has been convicted of a crime punishable by imprisonment for a term exceeding one year, who has been discharged from the Armed Forces under dishonorable conditions, who has been adjudicated mentally incompetent, who, having been a citizen of the United States, has renounced his citizenship, or who is an alien illegally in the United States, to possess a firearm.

KNOW YOUR CUSTOMER—Before a licensee may sell or deliver a firearm to a nonlicensee, the licensee must establish the identity, place of residence, and age of the buyer. Satisfactory identification should verify the buyer's name, date of birth, address, and signature. Thus, a driver's license or an identification card issued by a State in place of a license is particularly appropriate. Social Security cards are not acceptable because no address or date of birth is shown on the card. Also, alien registration receipt cards and military identification cards are not acceptable by themselves because the State of residence is not shown on the cards. However, although a particular document may not be sufficient to meet the statutory requirement for identifying the buyer, any combination of documents which together disclose the required information concerning the buyer is acceptable.

### INSTRUCTIONS TO TRANSFEREE (BUYER)

4. The buyer (transferee) of a firearm will, in every instance, personally complete Section A of the form and certify (sign) that the answers are true and correct. However, if the buyer is unable to read and/or write, the answers may be written by other persons, excluding the dealer. Two persons (other than the dealer) will then sign as witnessess to the buyer's answers and signature.

5. When the transferee (buyer) of a firearm is a corporation, company, association, partnership or other such business entity, an officer authorized to act on behalf of the business will complete and sign Section A of the form and attach a written statement, executed under penalties of perjury, stating

(a) that the firearm is being acquired for the use of and will be the property of that business entity, and

(b) the name and address of that business entity.

### INSTRUCTIONS TO TRANSFEROR (SELLER)

6. Should the buyer's name be illegible the seller shall print the buyer's name above the name printed by the buyer.

7. The transferor (seller) of a firearm will, in every instance, complete Section B of the form.

8. Additional firearms purchases made by the same buyer may not be added to this form after the seller has signed and dated it.

9. If more than six firearms are involved, the identification required by Section B, Items 11 through 15, must be provided for each firearm. The identification of the firearms transferred in a transaction which covers more than six weapons may be on a separate sheet of paper which must be attached to the form covering the transaction.

10. In addition to completing this record, you must report any multiple sale or other disposition of pistols or revolvers on ATF F 3310.4 in accordance with 27 CFR 178.126a.

11. The transferor (seller) of a firearm is responsible for determining the lawfulness of the transaction and for keeping proper records of the transaction. Consequently, the transferor should be familiar with the provisions of 18 U.S.C. 921-928 and 18 U.S.C. Appendix 1201-1203, and the Federal firearms regulations, Title 27, Code of Federal Regulations, Part 178.

12. After you have completed the firearm transaction, you must make the completed, original copy of the ATF F 4473, Part I part of your permanent firearms records including any supporting documents. Filing may be chronological (by date), alphabetical (by name), or numerical (by transaction serial number), so long as all of your completed Forms 4473, Part I are filed in the same manner.

### DEFINITIONS

1. *Intra-State Over-the-Counter Transaction*—The sale or other disposition of a firearm by the transferor (seller) to a transferee (buyer) who is a resident of the State in which the transferor's business is located, occurring on the transferor's business premises.

2. *Published Ordinances*—The publication (ATF P 5300.5) containing State firearms laws and local ordinances which is annually distributed to Federal firearms licensees by the Bureau of Alcohol, Tobacco and Firearms.



GPO : 1987 O - 173-709 (55373)

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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ing in stealth tactics, night rescues and infiltration. "We need to teach these high-school graduates with their football letters from East Cupcake, Neb., a little bit about being streetwise," he barks. From now on, all Marine sentries will carry loaded rifles—one way to possibly avoid a recurrence of the tragic bombing in Beirut where Marines with unloaded weapons watched helplessly as a bomb-loaded car smashed into their compound, killing 241.

Gray has disdain for Marines who jog "in cute little silk shorts." He favors a much tougher approach, conditioning troops by forced marches with backpacks. Training for marathons—which to the host of Washington's annual Marine Corps Marathon has become something of an obsession—is a waste of time, he says. "I'm a hell of a lot more interested in a Marine who can carry a wounded Marine across the battlefield." He is indifferent to spit and polish. "I don't give a shit how you look," he tells enlisted men. "I care how you *are*." Gray himself feels uncomfortable in dress blues and prefers to be photographed in his camouflage fatigues, or "utilities" as Marines call them. Indeed, mottled brown-green is almost a fetish with Gray. In his office, he drinks coffee from a camouflage-painted canteen cup. His troops gave him a camouflaged spittoon for his chaw, and at dedication ceremonies for new facilities Marines now use camouflage ribbon.

**Painted baseball bat:** Wielding a camouflage-painted baseball bat—inscribed "Big Stick"—Gray roams Marine headquarters in Washington armed for combat with the "little old ladies in tennis shoes who stand in the way of progress." He means Pentagon bureaucrats who resist his reforms. To his shock and anger, Marine Corps officials have disregarded some of his orders because they were delivered verbally—not written in quintuplicate.

Just how willing Gray is to bypass the bureaucrats could be seen after his pep talk at Cherry Point. A hulking sergeant beseeched Gray for a waiver of weight restrictions—usually a matter for the bureaucrats—that threatened to force the sergeant from the corps. The commandant promptly dropped to the floor in three-point stance. "You play football?" he demanded. "Gimme a stance." The startled sergeant just gaped. Gray stood up: "You play backfield or line?" he asked. "Backfield," the sergeant replied, recovering his composure. "I can run over a guy your size," he boasted. Gray shot back: "Do it." Discretion prevailed. "No, sir," said the sergeant. Gray asked him how fast he could run a hundred yards. "Ten seconds," claimed the sergeant. "Tell you what," Gray ruled. "You do the hundred in 10.1 and I'll keep you around."

RICHARD SANDZA *at Cherry Point, N.C.*



MARTY KATZ

**Deadly symbol of status and power:** *A 15-year-old from Baltimore and his Beretta*

# Kids: Deadly Force

## Gunfights are replacing fistfights as firearms become a major problem in the nation's schools

*Two weeks before Christmas Day, 17-year-old Kendall Merriweather was shot and killed a few blocks from his high school in southeast Washington, D.C. Police arrested two teenage students who they believe killed Merriweather while trying to steal his "boom box" radio.*

*A few days earlier in Pasadena, Texas, a 14-year-old eighth grader at Deepwater Junior High School whipped a snub-nosed .38 out of his jacket and held the assistant principal hostage for two hours. Police said the boy was distraught over his parents' recent separation.*

*Last week late-evening commuters found the bullet-ridden body of 13-year-old Rolando Mattie at an Oakland, Calif., bus stop. Police believe the seventh-grade dropout was a crack dealer and are looking for five suspects—most of them Mattie's age—in connection with the murder.*

These were not isolated incidents. All across America, the number of kids using—and being harmed by—guns is rising at an alarming rate. According to the U.S. Department of Justice, more than 27,000 youths between 12 and 15 were handgun victims in 1985 (the most recent figures), up from an average of 16,500 for each of the three previous years. But officials admit that as grim as those statistics are, they grossly understate the extent of the problem. In recent years, city streets have become flooded with unregistered and untraceable handguns, available to anyone of any age with a bit of cash. In New York, revolvers can be bought on street corners for as little as $25. Some dealers are even willing to "rent" a gun for an evening, deferring payment until the teen can raise money through muggings and robberies. Youth gangs in Los Angeles protect their turf with black-market Uzi submachine guns and Russian-made AK-47 assault rifles, easily financed by the crack trade. Children who live outside urban areas have an even cheaper source of firearms: dad's closet. In California, 38 percent of all households contain a gun. Often, parents don't realize that their .357 magnum or shotgun is missing. "Guns seem to be enjoying a new chic," says handgun expert Garen Wintemute, a Sacramento physician. "The increased prevalence of gun carrying among students is reflective of an increased general interest in guns in this country."

Nowhere is the proliferation of firearms among youths more startling than in city high schools. In Baltimore last spring, newly appointed Circuit Judge Ellen Heller was so shocked at the number of minors charged with gun crimes that she ordered a survey of weapon use among students. The results were even worse than she expected. Of 390 city high schoolers polled, 64 percent said they knew someone who had carried a handgun within the preceding six months; 60 percent knew someone who had been shot, threatened or robbed at gunpoint in their school; almost half of the male respondents admitted to having carried a handgun at least once.

Cities with far fewer gun incidents than



MARK RICHARDS—PICTURE GROUP



MARK RICHARDS—PICTURE GROUP

**More than enough guns to go around:** *Los Angeles gang members show their stuff*




**Trying to teach a lesson:** *Baltimore poster*

Baltimore still have plenty to worry about. Twenty years ago, the baddest kid in school carried a switch-blade. But today packing a pistol is a symbol of status and power that others quickly emulate. This snowball effect is reinforced by the climate of fear that a single firearm in the classroom generates. As with adults, many students who say they have no criminal intent start carrying guns to protect themselves from gun-toting class bullies. The child who thinks he's protecting himself, however, is actually putting himself in more danger. Statistics show that kids (and adults) with guns are more likely to be shot than those without guns. "A gun can give someone a sense of power and a security blanket," says Houston psychologist Rion Hart. "They haven't really thought out what they're going to do with it until something happens. But then it's too late." Suddenly, "he said, she said" hallway disputes that were once settled with fists or the flashing of a knife blade end in a burst of firepower and a bloody corpse.

**Quick on the trigger:** That was how 15-year-old Dartagnan Young died. A freshman at DuSable High School on Chicago's South Side, Young accused a 16-year-old schoolmate of slapping his girlfriend. The schoolmate pulled out a .32 revolver and started shooting. As students looked on in horror, Young staggered through the crowded hallway, blood pouring from his chest. He died at the hospital. Often, even less provocation is needed before the bullets begin to fly. "You gotta be prepared—people shoot you for your coat, your rings, chains, anything," says a 15-year-old junior-high-school student in Baltimore, proudly displaying his .25-caliber Beretta.

Much of the increase in gun use stems from urban crack trade. "These [crack] gangs have more firearms than a small police department," says William Newberry, a Bureau of Alcohol, Tobacco and Firearms agent based in Los Angeles. Police say it's typical for street crime to spill over into schools. In ghettos more profound forces may be at work. Children who grow up in broken homes and in the grip of poverty can come to see guns as their only available ticket to prosperity and self-esteem. At the same time, constant exposure to violence on TV and on the streets can inure them to the reality of what a bullet can do. "Kids don't care, and they feel life has little value," says Clementine Barfield, whose son Derick was among the 77 youths 16 and under shot dead in Detroit over the past two years. Barfield started SOSAD (Save Our Sons And Daughters) to help other parents overcome their grief and raise awareness of the problem. "We've got to fight for social change, just like we did in the '60s," she says. "We're losing a whole generation of children."

**'Make my day':** Smaller cities and towns are not immune. Last August a 12-year-old boy in Corpus Christi, Texas, wounded a stockbroker on a crowded downtown street. What most shocked the victim was the way the kid blew the smoke out of his barrel, Clint Eastwood style, then got on his bike and rode away. In De Kalb, Mo., 12-year-old Nathan Faris brought his father's .45 semi-automatic to school one day, seeking revenge on a classmate who had taunted him for being fat. Faris accidently shot a 13-year-old who tried to protect the intended victim, then shot himself in the head. Dr. Deborah Prothrow-Stith, commissioner of the Massachusetts Department of Public Health, attributes outbursts like these to a society too tolerant of violence. "We show that fighting is glamorous on TV"—it is rewarded and chosen by the hero as the first solution to a problem," she says. "There's no sorrow, no lamenting when the 'make my day' attitude is put into action."

Whatever the cause, authorities are finding the use of guns by youngsters an extremely difficult trend to stop. Metal detectors, spot searches and increased security have failed to keep guns out of the classroom. Police say it is even harder to keep handguns away from kids on the street. The city of Boston recently launched a TV ad campaign with shocker tag lines such as, "When you tell a friend to fight, you might as well be killing him yourself." But it will take more than commercials to keep schools from becoming modern-day Dodge Cities. As long as pistols are almost as easy to get as candy from a vending machine, people of all ages will continue to end up on both ends of the barrel.

GEORGE HACKETT *with* RICHARD SANDZA *in Washington,* FRANK GIBNEY JR. *in Houston,* ROBIN GAREISS *in Chicago and bureau reports*

# HOUSE COMMITTEE REPORT

(7)

Date referred: 5/16/87 FURTHER REFERRALS: Judiciary

DATE: 3-2-88

The State Affairs Committee has considered CSSJR 15(Jud)

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

**RECOMMENDS:**

[ ] replace with HCS CS STR 18 (SA) [X] the same title
[ ] attached amendment(s) [ ] a new title

[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

**ADOPTS:** [ ] _____ letter of intent

**ATTACHES NEW FISCAL NOTE(s):**

[X] fiscal impact
[ ] zero fiscal note
[ ] zero with analysis
[ ] same as previous fiscal note published _____
[ ] same as previous zero fiscal note published _____

**SIGNING DO PASS:**

Cliff Davidson
D/B Porcha (without amendment)
Terry Martin ( " " )
Mort Ulmer
David Donley (without amendment)

**SIGNING OTHER RECOMMENDATIONS:**

Lyman Hoffman Don Bailey
~~David Donley do not pass~~ unless

Jan Ulmer
Chairman's signature

r. I 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.

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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 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
1988 LEGISLATIVE SESSION

BILL VERSION: SJR 15
PUBLISH DATE: 2/12/87

# FISCAL NOTE

REQUEST:

Revision Date: 1/22/88
Title: Constitutional amendments relating to the right of a citizen to keep and bear firearms.
Sponsor: RODEY
Requestor: House State Affairs

Agency Affected: Office of the Governor
BRU: Division of Elections

Components: II - Primary & General Elections

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING | FY 88 | FY 89 | FY 90 | FY 91 | FY 92 | FY 93 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | 0 | 2.2* | 0 | 0 | 0 | 0 |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | 0 | 2.2* | 0 | 0 | 0 | 0 |
| CAPITAL | | | | | | |
| REVENUE | | | | | | |

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| GENERAL FUND | 0 | 2.2* | 0 | 0 | 0 | 0 |
| FEDERAL FUNDS | | | | | | |
| OTHER | | | | | | |
| TOTAL | | | | | | |

POSITIONS:

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | | | | | | |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

ANALYSIS: (Attach a separate page if necessary)

* Costs included cover 2 to 3 additional pages in each Official Election Pamphlet, for printing and typesetting, and costs estimated to cover computer programming requirements for vote (cont.)

Prepared by: Linda Edgeworth
Phone: 465-4611
Division: Elections
Date: 1/22/88

Approved by Commissioner:
Date: 2/1/88
Agency: Office of the Governor, Division of Elections

Distribution (by preparer): 2/1/88
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

counting purposes. However, these costs are based on the assumption that all candidates and issues will fit on three ballot cards, which is the norm. It should be noted, however that should the inclusion of this issue require a 4th ballot to be printed, the cost increase would have to be calculated at 16 cents per ballot x approximately 320,000 voters. The total cost of printing the additional ballot card would be $51.2.

Under these circumstances the fiscal note would be:

53.4

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
Attorney General

Arthur Snowden
Administrative Director
Alaska Court System

Arthur English
Commissioner
Department of Public Safety

Dana Fabe
Public Defender

Myra Munson
Commissioner
Department of Health &
Social Services

Susan Humphrey-Barnett
Commissioner
Department of Corrections

Del Smith
President
Alaska Association of Chiefs
of Police

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

# ALASKA PEACE OFFICERS ASSOCIATION

State APOA Office • P.O. Box 240106 • Anchorage, AK 99524-0106 • (907)786-1807

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February 15, 1988

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

Dear Fran:

I am writing concerning Senate Joint Resolution 15 which proposes an amendment to the Constitution of the State of Alaska. The resolution has been referred to the House State Affairs Committee.

On January 14, 1988, the Alaska Peace Officers Association Board of Directors formally received the proposed resolution. At the conclusion of the review a motion was unanimously passed opposing Senate Joint Resolution 15.

Our concern with this amendment change is that the door could be conceivably left open to eliminate other laws currently on the books. Laws such as felon in possession of a handgun, possession of weapons by intoxicated persons, carrying concealed weapons, etc. We feel these are fair and justifiable laws that are obviously needed.

As you are probably aware, a majority of our members are gun enthusiast. We are engaged in many activities such as hunting, target shooting, trap shooting and almost any sporting activity relating to guns and weapons. We do not feel our current constitution prohibits or dampens any legitimate activity in relation to these activities.

Therefore, if the machine is not broken, why fix it. We do not feel the current constitution infringes upon any person or group, the right to bear arms. It does, however, allow the state to control the possession of weapons by certain people such as felons and people under the influence. It also allows the state to control certain classes of weapons, such as bombs, silencers, sawed-off shotguns, switchblade knives and the like.

ANCHORAGE POLICE DEPARTMENT EMPLOYEES ASSOCIATION
3111 C Street, Suite 325
Anchorage, Alaska 99503

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

Dear Representative Ulmer,

I am writing concerning Senate Joint Resolution 15 which proposes as amendment to the Constitution of the State of Alaska.

We oppose this amendement. We feel our current constitution does not restrict the lawful purchase, possession or use of weapons. As it is now written it also allows for controls on dangerous and illegal weapons and weapons related activities. We find these laws to be reasonable and necessary. Our concern with the proposed resolution is that its "legislative intent" could be broadly and loosley interpreted resulting in the elimination of some of the laws vital to public safety.

Since the current constitution has worked so well for so long why change it now?

Sincerely,

A. Kraft

Alan Kraft
A.P.D.E.A. President

JY:lgd

# Alaska Association Chiefs of Police

MAR 24 1988

March 16, 1988

Interesting point of view.

Representative John Sund
Chairman
House Judiciary Committee
Alaska State Legislature
P.O. Box V (M.S. 3100)
Juneau, Alaska 99811

Dear Representative Sund,

It is my understanding that CS for CSSJR 15 has been assigned to your committee for consideration. Various representatives of the Alaska Peace Officers Association and the Alaska Chiefs of Police Association have expressed concern in the past regarding this particular piece of legislation. The current wording of CS for CSSJR 15 allays some of those concerns that we previously held. I understand, however, that at least three members of House State Affairs attached a note to the bill stating their preference for the original language of the SJR 15. I want to assure you that neither the Alaska Chiefs of Police Association nor the Alaska Peace Officers Association are opposed to the individual right to keep and bear arms. We are, however, concerned that this particular piece of legislation could open a "Pandora's box" that may lead to court challenges to municipal and state statutes and ordinances regarding the carrying and/or use of firearms. We have testified that we felt that amendments were needed in the original submission of SJR 15 that would preclude court interpretations that would prohibit the enforcement of firearms statutes or ordinances. I do not believe that SJR 15 in any form is needed at this point in time because I do not perceive the threat that representatives of the National Rifle Association see. However, if some form of SJR 15 is going to be on the ballot, I would prefer the wording currently utilized in CS for CSSJR 15.

Thank you for your attention in this matter. If I can be of any assistance in your deliberations regarding this, please do not hesitate to contact me.

Sincerely,

Del Smith

Del Smith, President
Alaska Chiefs of Police Association

NRA

# ANALYSIS OF SJR 15

Claim: SJR 15 not needed; Second Amendment provides protection to gun owners.

Consider the opinion handed down in State v. Friel, 508 A.2d 123 (Me. 1986):

> "The Second Amendment is inapplicable to this case; it operates as a restraint solely upon the power of the national government and does not restrict the power of the states to regulate firearms."

Other cases culminating with the same decision:

Miller v. Texas, 153 U.S. 535 (1894)
Presser v. Illinois, 116 U.S. 252 (1886)
Quilici v. Village of Morton Grove, 695 F.2d 261 (1983)
U.S. v. Kozerski, 740 F.2d 952 (1st Cir. 1984)
State v. Sanne, 116 N.H. 583 (1976)
State v. Skinner, 189 Neb.57 (1973)

Additionally, in State v. Skinner, the Nebraska Supreme Court ruled that the Second Amendment to the U.S. Constitution guarantees the right to keep and bear arms to an organized militia, not individuals.

This aspect of the Skinner decision is quite similar to the April 13, 1983, opinion of Alaska Attorney General Norman C. Gorsuch on the meaning of Article I, Section 19, of the Alaska Constitution, stating: "The modern judicial view has increasingly found that the guaranteed right to keep and bear arms is not an individually protected right, but rather a collective right which allows the people of the various states to serve in a militia."

Claim: Individual language in SJR 15 will allow felons to own/possess firearms.

Courts in states with "individual" constitutional guarantees have consistently rejected challenges to state statutes restricting or denying the possession of firearms by convicted felons:

(State: Citation; Constitutional Language; Proscription By Felons.)

North Dakota: State v. Ricehill, 415 N.W.2d 481 (1987); "All individuals...."; ownership or possession of firearms.

Maine: State v. Friel, 508 A.2d 123 (1986); "Every citizen...."; possession of firearm.

Kentucky: Eary v. Commonwealth, 659 S.W.2d 198 (1983); "All men...."; possession of handgun.

Alabama: Bristow v. State, 418 So.2d 927 (1982); "Every citizen...."; possession of pistol.

Wyoming: Carfield v. State, 649 P.2d 865 (1982); "The right of citizens...."; possession of any firearm.

Texas: Shepperd v. State, 586 S.W.2d 500 (1979); "Every citizen...."; possession of firearm away from residence.

Louisiana: State v. Amos, 343 So.2d 166 (1977); "Each citizen...."; possession of firearms.

Colorado: People v. Blue, 544 P.2d 385 (1975); "The right of no person to keep and bear arms...."; possession of firearms.

Washington: State v. Tully, 89 P.2d 517 (1939); "The individual citizen...."; possession of pistol.

In addition to the cases cited above, courts in Georgia, Oregon, and Arizona have also rejected challenges based on state constitutional keep-and-bear-arms provisions to statutes making illegal a felon's possessing a firearm.

Claim: SJR 15 will invalidate reasonable laws currently on the books

Specifically mentioned have been laws regulating the carrying of concealed weapons and proscribing possession of firearms by intoxicated persons. As above, numerous citations can be offered indicating that courts regularly and routinely rule that the right to bear arms is subject to reasonable regulation:

(State: Citation; Decision.)

Wyoming: State v. McAdams, 71 P.2d 1236 (1986); concealed carrying of arms subject to regulation.

Oregon: State v. Delgado, 692 P.2d 610 (1984); legislature may regulate possession and use of arms.

Indiana: Schubert v. DeBard, 398 N.E.2d 1339 (1980); license may be required to carry a pistol concealed.

Oregon: State v. Kessler, 614 P.2d 94 (1980); concealed weapon carrying regulations permissible.

Colorado: People v. Garcia, 595 P.2d 228 (1979); carrying a gun while drunk is outside the protected boundaries of the right to bear arms.

North Carolina: State v. Dawson, 159 S.E.2d 1 (1968); open carrying for unlawful purposes may be prohibited.

Kentucky: Holland v. Commonwealth, 294 S.W.2d 83 (1956); limits carrying of concealed weapons.

Idaho: State v. Hart, 157 P.2d 72 (1945); upholds statutes prohibiting the carrying of concealed weapons.

NRA

# CONSTITUTIONAL LANGUAGE
# FROM STATES WHOSE COURTS HAVE UPHELD
# REASONABLE REGULATIONS ON THE RIGHT TO KEEP AND BEAR ARMS

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

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. Article I, Section 27.

INDIANA: The people shall have a right to bear arms, for the defense of themselves and the State. Article I, Section 32.

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.

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.

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.

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, recreational, and other lawful purposes, which shall not be infringed. Article I, Section 1.

MAINE: Every citizen has a right to keep and bear arms and this right shall never be questioned. Article I, Section 16.

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

# Alaska State Legislature
## House

Official Business

COMMITTEE ON STATE AFFAIRS

P.O. BOX V
State Capitol
Juneau, Alaska 99811

March 15, 1988

Dear NRA Member:

A few days ago you received a mailing from the Washington, D.C. office of the National Rifle Association requesting you to contact me regarding SJR 15, proposing an amendment to the Constitution of the State of Alaska relating to the right of a person to keep and bear arms. The letter claimed that the resolution had been "bottled up" in my committee and that I "single handedly" was restricting the progress of this resolution. To put it bluntly, that letter was wrong.

The Alaska Peace Officers Association, made up of law enforcement officials all over the state of Alaska asked for clarification in SJR 15 that reasonable regulation of the methods of carrying firearms (convicted felons, concealed weapons, etc.) would not be precluded. Such a clarification was also requested by the Alaska Criminal Justice Working Group which includes the Department of Public Safety, the Attorney General, the Court System, and others. I think they have legitimate concerns and a right to express them and I am not going to preclude their opportunity to testify just because some guy in Washington, D.C. doesn't care how we do things here in Alaska.

For your information, three hearings have been held on this resolution by the State Affairs Committee which I chair. On February 17, we heard from Senator Rodey, the sponsor of SJR 15, and from representatives of the National Rifle Association. On the 29th of February, we heard additional testimony from the NRA and from the Alaska Peace Officers Association. On March 2, we took the remaining testimony on the resolution, this time hearing from the Department of Law and the Department of Public Safety. We have held three hearings in the space of two weeks time, spending 2-1/2 hours of the committee's time on this resolution. The committee has made a serious effort to understand the complex legal issues involved and to hear from all interested parties. This does not constitute "bottling up" a resolution in committee. On the contrary, it should demonstrate to you my sincere interest in being fair to all those who would like to testify.

At the conclusion of the last hearing, I assured the sponsor I would bring the resolution back before the committee as soon as I could obtain some compromise language. We worked out an amendment and on Wednesday, March 9, the State Affairs Committee

passed out a House Committee Substitute for CS SJR 15 which accommodates the concerns of law enforcement officials. I have enclosed a copy for your information, along with the letter from the Alaska Criminal Justice Working Group.

If you have any doubts about the record on this resolution or my good faith efforts to produce a constitutionally viable amendment, I hope that you will contact your local NRA representative, Rupe Andrews, for verification of my efforts on behalf of developing a good compromise. Sometimes communication between Juneau and Washington, D.C. is less than perfect. I'm afraid in this instance it was misleading and needs to be corrected. As an owner of three firearms and as an individual who was raised pheasant hunting with her father, I very much resent the suggestion that I am somehow "anti-gun" or that I am restricting the passage of legislation.

I have never had an organization accuse me of this before and I must say I am surprised that the NRA sent out a mailing of this sort based on the record that I have. It has always been my policy to be fair to fellow legislators and organizations who are interested in holding a hearing on bills. That includes Senator Rodey, SJR 15, and the NRA.

If you have any additional questions about this issue or would like any other information, please call.

Sincerely,

Fran Ulmer
Representative

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
1600 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20036

## PRESERVE YOUR RIGHT TO KEEP AND BEAR ARMS IN ALASKA
## SUPPORT S.J.R. 15, THE CONSTITUTIONAL AMENDMENT

Dear NRA Member: February 25, 1988

**Urgent!** The battle to protect your firearms rights is on in Juneau. As a sportsman in State House District 4B, your help is needed **today** to secure passage of S.J.R. 15, the right to keep and bear arms and firearms preemption amendment to your state constitution.

Make no mistake, passage of S.J.R. 15 is absolutely necessary in Alaska to clarify that the Alaska Constitution guarantees the individual right to keep and bear arms and ensure that localities may not pass "Morton Grove-style" handgun bans nor any other restrictive gun rights legislation.

The future of this critical bill rests largely in the hands of your State Representative, Fran Ulmer, who is Chairperson of the House State Affairs Committee. Representative Ulmer is currently refusing to allow the Committee to vote on S.J.R. 15, despite the overwhelming support shown for this bill. Representative Ulmer is holding the bill simply because the Alaska Peace Officer's Association (APOA) sent written dissent to the February 17 Committee hearing — but did not even make the effort to attend the hearing.

The opposition of the APOA is based on the mistaken belief that S.J.R. 15 will create a situation where felons are no longer excluded from firearm ownership. Additionally, they mistakenly believe S.J.R. 15 will invalidate some of the laws currently in effect in Alaska such as those regulating concealed weapons and possession of firearms by intoxicated persons.

It has been pointed out to the APOA and to Representative Ulmer that there is an extensive amount of court precedence which clearly shows that S.J.R. 15 will not preclude reasonable regulations on firearms such as those previously mentioned. These are facts -- backed by court decisions -- that cannot be ignored.

There is absolutely no doubt that the important language reforms in S.J.R. 15 are needed in the State of Alaska. Although many of you may feel that your right to keep and bear arms is protected by both the U.S. and your state constitution, this simply is not so! Recent court rulings at the federal level have rejected the Second Amendment to the U.S. Constitution as it relates to the states. What the courts have stated is that the Second Amendment applies only to the federal government; therefore, unless a state has a similar provision in its constitution, the firearms rights of the citizens are in extreme jeopardy!

And unfortunately, in Alaska, your current state constitutional amendment does not protect your right to keep and bear arms for hunting, recreational shooting, self defense or any number of legitimate reasons. Indeed, a recent opinion by the Alaska Attorney General on the meaning of Article I, Section 19, of the Alaska Constitution states: "The modern judicial view has increasingly found that the guaranteed right to keep and bear arms is not an individually protected right, but rather a collective right which allows the people of the various states to serve in a militia."


MORIN ©MB The Miami Herald
Suspect last seen exercising his lawful, Constitutional right to own a handgun...
POLICE

5-0354N
Bradley
5/8/88

Original sponsors: Rodey, Szymanski,
Uehling, et al.

IN THE SENATE BY THE JUDICIARY COMMITTEE

HOUSE CS FOR CS FOR SENATE JOINT RESOLUTION NO. 15 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

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

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

* Section 1. Article I, sec. 19, Constitution of the State of Alaska, is 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 the people to keep and bear arms for lawful purposes shall not be infringed, except that the manner of keeping and bearing arms may be regulated by law.

* Sec. 2. LEGISLATIVE INTENT. (a) In proposing the amendment to art. I, sec. 19, Constitution of the State of Alaska, in sec. 1 of this resolution, the legislature intends only that the proposed amendment clarify the Alaska Constitution by providing that the right to keep and bear arms is an individual right as well as a collective right. The amendment, if adopted, should not be construed to preclude the regulation of the manner in which arms may be borne, carried, or used. For example, the adoption of this amendment should not be interpreted to repeal or to render unconstitutional statutes or municipal ordinances regarding assault, misconduct involving weapons, or other similar offenses.

(b) In the preparation of its neutral summary under AS 15.58.020(6)-(C), the Legislative Affairs Agency shall consider the statement of legislative intent contained in (a) of this section.

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

f/e w/ f/e sad. f/e mw

# ANALYSIS OF SJR 15

Claim: SJR 15 not needed; Second Amendment provides protection to gun owners.

Consider the opinion handed down in State v. Friel, 508 A.2d 123 (Me. 1986):

> "The Second Amendment is inapplicable to this case; it operates as a restraint solely upon the power of the national government and does not restrict the power of the states to regulate firearms."

Other cases culminating with the same decision:

Miller v. Texas, 153 U.S. 535 (1894)
Presser v. Illinois, 116 U.S. 252 (1886)
Quilici v. Village of Morton Grove, 695 F.2d 261 (1983)
U.S. v. Kozerski, 740 F.2d 952 (1st Cir. 1984)
State v. Sanne, 116 N.H. 583 (1976)
State v. Skinner, 189 Neb.57 (1973)

Additionally, in State v. Skinner, the Nebraska Supreme Court ruled that the Second Amendment to the U.S. Constitution guarantees the right to keep and bear arms to an organized militia, not individuals.

This aspect of the Skinner decision is quite similar to the April 13, 1983, opinion of Alaska Attorney General Norman C. Gorsuch on the meaning of Article I, Section 19, of the Alaska Constitution, stating: "The modern judicial view has increasingly found that the guaranteed right to keep and bear arms is not an individually protected right, but rather a collective right which allows the people of the various states to serve in a militia."

Claim: Individual language in SJR 15 will allow felons to own/possess firearms.

Courts in states with "individual" constitutional guarantees have consistently rejected challenges to state statutes restricting or denying the possession of firearms by convicted felons:

(State: Citation; Constitutional Language; Proscription By Felons.)

North Dakota: State v. Ricehill, 415 N.W.2d 481 (1987); "All individuals...."; ownership or possession of firearms.

Maine: State v. Friel, 508 A.2d 123 (1986); "Every citizen...."; possession of firearm.

Kentucky: Eary v. Commonwealth, 659 S.W.2d 198 (1983); "All men...."; possession of handgun.

Alabama: Bristow v. State, 418 So.2d 927 (1982); "Every citizen...."; possession of pistol.

Wyoming: Carfield v. State, 649 P.2d 865 (1982); "The right of citizens...."; possession of any firearm.

Texas. Shepperd v. State, 586 S.W.2d 500 (1979); "Every citizen...."; possession of firearm away from residence.

Louisiana: State v. Amos, 343 So.2d 166 (1977); "Each citizen...."; possession of firearms.

Colorado: People v. Blue, 544 P.2d 385 (1975); "The right of no person to keep and bear arms...."; possession of firearms.

Washington: State v. Tully, 89 P.2d 517 (1939); "The individual citizen...."; possession of pistol.

In addition to the cases cited above, courts in Georgia, Oregon, and Arizona have also rejected challenges based on state constitutional keep-and-bear-arms provisions to statutes making illegal a felon's possessing a firearm.

Claim: SJR 15 will invalidate reasonable laws currently on the books

Specifically mentioned have been laws regulating the carrying of concealed weapons and proscribing possession of firearms by intoxicated persons. As above, numerous citations can be offered indicating that courts regularly and routinely rule that the right to bear arms is subject to reasonable regulation:

(State: Citation; Decision.)

Wyoming: State v. McAdams, 71 P.2d 1236 (1986); concealed carrying of arms subject to regulation.

Oregon: State v. Delgado, 692 P.2d 610 (1984); legislature may regulate possession and use of arms.

Indiana: Schubert v. DeBard, 398 N.E.2d 1339 (1980); license may be required to carry a pistol concealed.

Oregon: State v. Kessler, 614 P.2d 94 (1980); concealed weapon carrying regulations permissible.

Colorado: People v. Garcia, 595 P.2d 228 (1979); carrying a gun while drunk is outside the protected boundaries of the right to bear arms.

North Carolina: State v. Dawson, 159 S.E.2d 1 (1968); open carrying for unlawful purposes may be prohibited.

Kentucky: Holland v. Commonwealth, 294 S.W.2d 83 (1956); limits carrying of concealed weapons.

Idaho: State v. Hart, 157 P.2d 72 (1945); upholds statutes prohibiting the carrying of concealed weapons.

# Anchorage Police Department Employees Assoc.

P.O. Box 1539
Anchorage, Alaska 99510
786-8787

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

SJR 15


# Municipality of Anchorage

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

TONY KNOWLES
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY


May 6, 1986

Members of the House Judiciary Committee

Re: SJR 39

The Municipality does not oppose a constitutional amendment that redefines the "right to bear arms" as a personal right vested in each citizen of the state. We are very concerned however with the way in which the measure is now drafted. Our concerns are based on the fact that the present language, quite arguably, would not permit the state or a municipality to regulate either the type of arms possessed or the manner and circumstances of possession.

While the version passed by the Senate clearly allows regulation of the use of arms, many existing laws do not relate to the simple use of a weapon, but rather to its function and to the manner and circumstances in which it is possessed. Public safety concerns demand that the state legislature and local assemblies be permitted to ban certain types of arms such as bombs, hand grenades, machine guns, silencers, sawed-off shotguns and bullets designed to pierce protective devices worn by law enforcement officials. We believe likewise that the constitution should permit the Legislature to bar the possession of arms by certain classes of convicted criminals, intoxicated or mentally disturbed persons. Finally we feel it is essential to control the circumstances in which otherwise lawful weapons are possessed by limiting the carrying of concealed weapons, the possession of loaded firearms on licensed premises, the possession of a firearm by a minor without parental consent, et cetera. We reiterate the position taken by Attorney General Harold Brown in his March 26, 1986 letter regarding SJR 39:

> These statutes [that would be invalidated by SJR 39] 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 legislatures intent to continue to allow a reasonable regulation by law should be made clear.

The clarity of intent referred to by the Attorney General must be embodied in the measure itself. Otherwise both State and Municipal prosecutors will face a flurry of legal challenges by those charged with weapons-related offenses.

In conclusion, we urge that if the committee does not intend to invalidate existing statutes and ordinances regulating the type of arms that may be possessed, and the circumstances of possession, then it must embody this intent clearly within the amendment that is offered to the voters for ratification.

Jerry Wertzbaugher
Municipal Attorney

Brian Porter, Chief
Anchorage Police Department

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:ml

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

CITY OF SEWARD

P.O. BOX 167
SEWARD, ALASKA 99664

- Main Office (907) 224-3331
- Police (907) 224-3338
- Harbor (907) 224-3138
- Fire (907) 224-3445
- Telecopier (907) 224-3248

APR 21 1988

April 14, 1988

The Honorable John Sund, Chairman, Judiciary Committee
House of Representatives
P.O. Box V, Mail Stop 3100
Juneau, Alaska 99811

Dear Sir:

I am writing to express my opinion on Senate Joint Resolution No. 15.

I feel that the bill is unnecessary, because the rights of the individual are already addressed in the constitution.

But more importantly, it would appear that this bill is an effort to extend those rights by muddying the water. I am sure that the intent is not to allow those individuals who would use weapons criminally more freedom. However, there is the distinct possibility that this would be a spin off effect of the passage of this resolution.

Surely it is apparent that legislative direction, which many times affects public attitudes, must remain in an area of restraint when it comes to the use of weapons that may easily be turned against the public. Our personal freedoms currently are not being infringed. Telling the public that their rights extend past the current level will only cause trouble for all of us.

How many of the public will read this to mean that Saturday night specials, automatic weapons, and others are okay to own and use? I doubt that many of the citizens of this State will. However, those who do see fit to break the laws and endanger the lives of others will use this to their advantage.

I ask that you take these matters into consideration as you deliberate on the passage of this resolution.

Sincerely,

Louis A. Bencardino
Chief of Police
Seward Police Department

LAB/dra

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

APR 8 1988

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

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 Hallett
Research - find the different versions of the bill that were reviewed in 1986 legislature

# ALASKA PEACE OFFICERS ASSOCIATION

State APOA Office • P.O. Box 240106 • Anchorage, AK 99524-0106 • (907) 786-1807

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February 15, 1988

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

Dear Fran:

I am writing concerning Senate Joint Resolution 15 which proposes an amendment to the Constitution of the State of Alaska. The resolution has been referred to the House State Affairs Committee.

On January 14, 1988, the Alaska Peace Officers Association Board of Directors formally received the proposed resolution. At the conclusion of the review a motion was unanimously passed opposing Senate Joint Resolution 15.

Our concern with this amendment change is that the door could be conceivably left open to eliminate other laws currently on the books. Laws such as felon in possession of a handgun, possession of weapons by intoxicated persons, carrying concealed weapons, etc. We feel these are fair and justifiable laws that are obviously needed.

As you are probably aware, a majority of our members are gun enthusiast. We are engaged in many activities such as hunting, target shooting, trap shooting and almost any sporting activity relating to guns and weapons. We do not feel our current constitution prohibits or dampens any legitimate activity in relation to these activities.

Therefore, if the machine is not broken, why fix it. We do not feel the current constitution infringes upon any person or group, the right to bear arms. It does, however, allow the state to control the possession of weapons by certain people such as felons and people under the influence. It also allows the state to control certain classes of weapons, such as bombs, silencers, sawed-off shotguns, switchblade knives and the like.

If you have any further questions, please contact me.

Sincerely,

Ed Kalwara

Ed Kalwara
State President
Alaska Peace Officers Association
2760 Sherwood Lane
Juneau, AK 99801
789-2165 (work)
789-0036 (home)

cc: Governors Criminal Justice Working Group
John Sund, Chair, House Judiciary Committee ✓
All Members of the House State Affairs Committee



# Oklahoma City University Law Review


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Volume 7 Number 2 Summer 1982

OKLAHOMA CITY UNIVERSITY
LAW REVIEW

VOLUME 7 SUMMER 1982 NUMBER 2

## ARTICLE

# STATE CONSTITUTIONS AND THE RIGHT TO KEEP AND BEAR ARMS

Robert Dowlut*
Janet A. Knoop**

### I. INTRODUCTION

Guarantees of individual liberties under federalism have two components: the federal Constitution and state constitutions. The constitutions of thirty-nine (39) states guarantee a right to arms.[1] By comparison to the second amendment of the United States Constitution the textual content of most

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1. *See* the Appendix. California, Delaware, Iowa, Maryland, Minnesota, Nebraska, New Jersey, New York, North Dakota, West Virginia, and Wisconsin do not have a specific guarantee to arms in their constitutions. However, six of those states guarantee to all persons the natural or inalienable right to self-defense. CAL. CONST. art. I, §1; DEL. CONST. preamble; IOWA CONST. art. I, §1; N.J. CONST. art. I, §1; N.D. CONST. art. I, §1; W. VA. CONST. art. III, §1. Two other states consider the right to life an inherent right. NEB. CONST. art. I, §1; WIS. CONST. art. I, §1. The natural right to defend one's life is usually not effectively exercised with bare hands. This right can only be given force and effect if its guarantee includes a right to own arms commonly possessed for defensive purposes. In Commonwealth v. Ray, 218 Pa. Super. 72, —, 272 A.2d 275, 278-79 (1970), *vacated on other grounds*, 448 Pa. 307, 292 A.2d 410 (1972), the court held that, under the Pennsylvania Constitution, the right to self-defense and the right to bear arms each serves as an independent guarantee for a right to bear arms. However, the court acknowledged that such right is not unlimited.

state constitutions effects broader rights. Presently only five states track the language of the second amendment.[2] Since the Supreme Court has not specifically held that the second amendment applies to the states,[3] state guarantees on arms serve as an important bulwark against infringement,[4] for "it is the state courts at all levels, not the federal courts, that finally determine the overwhelming number of the vital issues of life, liberty and property that trouble countless human beings of

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2. ALASKA CONST. art. I, §19; HAWAII CONST. art. I, §15; N.C. CONST. art. I, §30; S.C. CONST. art. I, §20; and VA. CONST. art. I, §13.

3. *See* Miller v. Texas, 153 U.S. 535 (1894) (The second and fourth amendments only protect against infringement by national government); and Presser v. Illinois, 116 U.S. 252 (1886) (The second amendment restricts only the national government). *But see* State v. Anonymous, 179 Conn. 516, 519, 427 A.2d 403, 405 (1980); Watson v. Stone, 4 So. 2d 700, 703 (Fla. 1941) (en banc) (Buford, J., concurring); Nunn v. State, 1 Ga. (1 Kelly) 243 (1846); *In re* Brickley, 8 Idaho 597, 70 P. 609 (1902); People v. Liss, 406 Ill. 419, 94 N.E.2d 320, 323 (1950); State v. Chandler, 5 La. Ann. 489, 490 (1850); McKeller v. Mason, 159 So. 2d 700, 702 (La. Ct. App. 1964), *aff'd*, 245 La. 1075, 162 So. 2d 571 (1964); State v. Nickerson, 126 Mont. 157, 247 P.2d 188, 192 (1952). The second amendment has generated considerable commentary: Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960); Sprecher, *The Lost Amendment*, (pts. 1 & 2) 51 A. B. A. J. 554 (1965), 51 A. B. A. J. 665 (1965); Olds, *The Second Amendment and the Right to Keep and Bear Arms*, 46 MICH. ST. B.J., Oct. 1967, at 15, Comment, *The Right to Keep and Bear Arms: A Necessary Constitutional Guarantee or an Outmoded Provision of the Bill of Rights?*, 31 ALB. L. REV. 74 (1967); Levine & Saxe, *The Second Amendment: The Right to Bear Arms*, 7 HOUS. L. REV. 1 (1969); McClure, *Firearms and Federalism*, 7 IDAHO L. REV. 197 (1970); Hardy & Stompoly, *Of Arms and the Law*, 51 CHI. [-]KENT L. REV. 62 (1974); Weiss, *A Reply to Advocates of Gun-Control Law*, 52 J. URB LAW 557 (1974); Whisker, *Historical Development and Subsequent Erosion of the Right to Keep and Bear Arms*, 78 W. VA. L. REV. 171 (1976); Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976); Caplan, *Handgun Control: Constitutional or Unconstitutional?* 10 N.C. CENT. L.J. 53 (1978); Cantrell, *The Right to Bear Arms: A Reply*, 53 WIS. B. BULL. Oct. 1980, at 21; Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON L. REV. 1 (1981); Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment*, 1787-1791, 10 N. KY. L. REV. 13 (1982); Gardiner, *To Preserve Liberty: A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982); Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 DET. C. L. REV. 789; Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982); Dowlut, *The Right To Arms: Does The Constitution or the Predilection of Judges Reign?* 36 OKLA. L. REV. 65 (1983), Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition* (1983) (to be published in 10 HASTINGS CONST. L.Q.).

4. Since the second amendment protects against federal infringement, "the absence of such a guarantee in the state Constitution leaves the Legislature entirely free to deal with the subject." *Ex Parte* Rameriz, 193 Cal. 633, ___, 226 P. 914, 922 (1924).

this Nation every year."[5]

Recently state constitutions have generated considerable commentary.[6] While it is well known that gun control is a vehemently debated political issue, and that voters have rejected efforts to ban handguns in Massachusetts[7] or to register and freeze their number at the current level in California,[8] recent commentary on state constitutions has not produced an analysis of state constitutional guarantees on arms. This article seeks to satisfy this need.

In our constitutional system, governments derive their powers from the people. As John Marshall stated: "The state governments did not derive their powers from the general government; but each government derived its powers from the people, and each was to act according to the powers given it."[9] A state constitution is adopted by the people in order to harmonize the need to guarantee individual rights with the need for effective state government with plenary authority.[10] Thus the purpose of a state constitutional guarantee "is to place the life, liberty and property of the citizen beyond the control of legislation, and to prevent either legislators or courts from any interference with, or deprivation of, the rights therein declared and guaranteed . . . ."[11] To fulfill this purpose, "a constitutional guaranty should be interpreted in a broad and lib-

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5. Brennan, *Introduction: Chief Justice Hughes and Justice Mountain*, 10 SETON HALL xii (1979).

6. *See, e.g.*, Note, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Kelman, *Forward: Rediscovering the State Constitutional Bill of Rights*, 27 WAYNE L. REV. 413 (1981); Note, *Private Abridgment of Speech and State Constitutions*, 90 YALE L.J. 165 (1980); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

7. N.Y. Times, Nov. 4, 1976, at 23, col. 3.

8. Wash. Post, Nov. 9, 1982, . . A6, col. 1.

9. 3 J. ELLIOT'S *Debates on the Federal Constitution* 419 (1836).

10. One court stated: "The constitution is not a grant of power but a limitation on the exercise thereof. While generally the legislature may exercise all those powers inherent in the people which are not delegated to another branch of gov't it cannot enact laws which will supersede constitutional provisions adopted by the people." Kirkpatrick v. Superior Court, 105 Ariz. 413, ___, 466 P.2d 18, 20-21 (1970). *Cf.* Lemons v. Noller, 144 Kan. 813, ___, 63 P.2d 177, 180 (1936) (constitution limits rather than confers power on legislature).

11. People *ex rel.* Decatur & S.L. Ry. Co. v. McRoberts, 62 Ill. 38, 41 (1871).

eral spirit."[12]

This article uses the interpretivist approach[13] to determine the meaning of a constitutional guarantee. Under interpretivism, judges deciding constitutional issues should confine themselves to enforcing norms that are stated clearly or implicitly in the written constitution.

This article will examine (1) the historical reasons for a right to arms in this nation; (2) the police power as a limit on the right to bear arms; (3) the view of individual right to bear arms versus that right of the people to collectively bear arms; (4) the meaning of the term "arms," and (5) the textual differences of the state constitutions affording citizens the right to bear arms. The article will conclude with a suggested interpretation based on the textual differences.

## II. Historical Reasons For A Right To Arms

The historical reasons for a right to arms are (A) the preference for a militia over a standing army, (B) the deterrence of governmental oppression, and (C) the right of personal defense.[14]

A. The link between the creation of standing armies and the rise of absolutist governments has ancient roots in English history. The citizen militia is associated with liberty. Blackstone notes "that king Alfred first settled a national militia in this kingdom, and by his prudent discipline made all the subjects of his dominion soldiers. . . ."[15] In a land of liberty to

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12. Wolfson v. Avery, 6 Ill. 2d 78, 94, 126 N.E.2d 701, 710 (1955). A constitutional right should not be impaired by any narrow or technical construction of the language used. People v. Spain, 307 Ill. 283, 289-90, 138 N.E. 614, 617 (1923). All provisions of the Constitution designed to safeguard the liberty and security of the citizen should be liberally construed. *See*, Randle v. Winona Coal Co., 206 Ala. 254, ___, 89 So. 790, 792 (1921); Salter v. State, 2 Okla. Cr. 464, ___, 102 P. 719, 725 (1909).

13. *See generally* J. Ely, Democracy and Distrust 1 (1980). Noninterpretivism is the approach in which courts go beyond that set of references in the written constitution and enforce norms that cannot be discovered within the four corners of the document.

14. State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 97 (1980). The people are guaranteed the right "to possess arms for their own personal defense, for the defense of their states and nation, and for the purpose of keeping their rulers sensitive to the rights of the people." Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. Am. Hist. 599 (1982).

15. 1 W. Blackstone, Commentaries On The Laws of England *409-10.

make the military a distinct order and to maintain a standing army are dangers to liberty. "In absolute monarchies this is necessary for the safety of the prince, and arises from the main principle of their constitution, which is that of governing by fear. . . ."[16]

Until the English Civil War (1642) the right to bear arms was taken for granted; until the Restoration (1660) it had never been challenged. Charles II, however, disarmed his enemies by enacting a game act designed to rob the vast majority of Englishmen of their right to own arms,[17] establishing a standing army, and ordering persons with suspect loyalties to be disarmed and, in some cases, to be imprisoned. After the flight of James II, William and Mary were invited to ascend to the throne after assenting to a Declaration of Rights, enacted in 1689, containing a list of "undoubted rights and privileges," including "that the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law."[18]

The Declaration of Independence criticizes the king and Parliament for keeping "in times of peace, Standing Armies without the Consent of our Legislature," rendering "the Military independent of and superior to the Civil Power," and "transporting large armies of foreign mercenaries to compleat

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16. Id. at *408.

17. "For prevention of popular insurrections and resistance to the government, by disarming the bulk of the people" game laws were enacted. 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *412.

18. A discussion of this period of English history is found in Aymette v. State, 21 Tenn. (2 Hum.) 154, 156-58 (1840). The *Aymette* court erred in stating that "private defence" was not protected by the English Declaration of Rights. The Recorder of London in 1780 wrote: "The right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. . . . The lawful purposes, for which arms may be used, (besides immediate self-defence) are, the suppression of violent and felonious breaches of the peace, the assistance of the civil magistrate in the execution of the laws, and the defence of the kingdom against foreign invaders." W. BLIZARD, DESULTORY REFLECTIONS ON POLICE: WITH AN ESSAY ON THE MEANS OF PREVENTING CRIMES & AMENDING CRIMINALS 59, 63 (London 1785). A detailed discussion of the right to arms and the English Civil War, the Interregnum, and the Restoration is found in MALCOLM, DISARMED: THE LOSS OF THE RIGHT TO BEAR ARMS IN RESTORATION ENGLAND (Bunting Institute of Radcliffe College 1980) (Reprinted by National Rifle Ass'n., Wash., D.C.); *See also* Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, (1983) (to be published in 10 HASTINGS CONST. L.Q.).

the works of death, desolution and tyranny. . . ."[19]

B. The foundation of an Englishman's security, "the security without which every other would have been insufficient," was neither Magna Charta nor Parliament but "the power of the sword."[20]

James Madison believed that "the advantage of being armed" was a condition "the Americans possess over the people of almost every nation." The despotisms of Europe were charged with being "afraid to trust the people with arms."[21] An armed citizenry serves as a deterrent to governmental oppression because the people have the latent and implicit power to "rise up to defend their just rights, and compel their rulers to respect the laws."[22] Totalitarian governments of the left and right in the twentieth century consider an armed people a threat and seek to disarm them.[23]

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19. The Declaration of Independence para. 1 (U.S. 1776).

20. 1 T. MACAULAY, CRITICAL AND HISTORICAL ESSAYS, CONTRIBUTED TO THE EDINBURGH REVIEW 163 (London 1885).

21. THE FEDERALIST No. 46, at 299 (J. Madison)(C. Rossiter ed. 1961). Noah Webster thought that "[b]efore 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 pretence raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people perceive to be just and constitutional; for they will possess the *power*, and jealousy will instantly inspire the *inclination* to resist the execution of a law which appears to them unjust and oppressive." PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES at 51, 56 (P. Ford ed. 1888) (emphasis in original). In our system of checks and balances, the people are also a factor. Freedoms of speech, press, petition, and the private keeping and bearing of arms have a common purpose, namely a safeguard against abuse of powers by government.

Richard Henry Lee thought 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. . . ." LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 124 (W. Bennett ed. 1978).

22. Aymette v. State, 21 Tenn. (2 Hum.) 154, 157 (1840).

23. "The surrender of guns and other implements of war has been ordered by special proclamation." R. LEMKIN, AXIS RULE IN OCCUPIED EUROPE 591 (1944).

"Anybody posting a placard the Germans didn't like would be liable to immediate execution, and a similar penalty was provided for those who failed to turn in firearms or radio sets within twenty-four hours." W. SHIRER, THE RISE AND FALL OF THE THIRD REICH 1027 (1959).

The Nazis seized Albert Einstein's bank account for a weapons violation: the possession of a common knife in his home. 1 J. TOLAND, ADOLPH HITLER 325 (1976). "The repression continued with issuance of a series of harsh edicts . . . such as the one to

C. Self-defense is a natural right recognized at common law. Sir Michael Foster, judge of the Court of King's Bench and Recorder of Bristol, wrote the following:

> The right of self-defence in these cases is founded in the law of nature, and is not, nor can be, superseded by any law of society. For before societies were formed, (one may conceive of such a state of things though it is difficult to fix the period when civil societies were formed,) I say before societies were formed for mutual defence and preservation, the right of self-defence resided in individuals; it could not reside elsewhere, and since in cases of necessity, individuals incorporated into society cannot resort for protection to the law of the society, that law with great propriety and strict justice considereth them, as still, in that instance, under the protection of the law of nature.[24]

This English tradition is reflected in early state constitutions[25] and American commentaries.[26] American case law echoes these sentiments.[27] Furthermore, there is no social interest

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surrender all arms immediately or be shot." Hitler, however, during the early stages of his climb to power, got a pistol permit from the sympathetic police. *Id.* at 86-87, 120.

"Owning a pistol meant an obligatory conviction for terrorism. . . ." 1 A. SOLZHENITZYN, THE GULAG ARCHIPELAGO 195 (1974). The right to have firearms or other weapons is forbidden and self-defense is also curtailed. 2 A. SOLZHENITZYN, THE GULAG ARCHIPELAGO 431-32.

George Orwell, author of *1984*, noted that the Russian revolution and the Irish civil war were political factors which prompted the passage of restrictive gun laws. B. Bruce-Briggs, *The Great American Gun War*, 45 THE PUB. INTEREST 37, 61 (1976). Today, draconian gun laws are an ugly form of repression often cloaked in "liberal" trappings.

24. M. FOSTER, CROWN CASES 273-74 (London 1776). Cases of justifiable self-defense include "[w]here a known felony is attempted upon the person, be it to rob or murder . . ., [a] woman in defence of her chastity . . ., [and] arson or buglary in the habitation." *Id.* at 274. Other English commentators also supported self-defense, including Blackstone. 3 W. BLACKSTONE, COMMENTARIES *4.

25. "That the people have a right to bear arms for the defence of themselves and the State . . . ." PA. DECLARATION OF RIGHTS art. XIII (1776) and VT. CONST. ch. I, art. XV (1777). In America, "the requirements for self-defense and food-gathering had put firearms in the hands of nearly everyone." D. BOORSTIN, THE AMERICANS—THE COLONIAL EXPERIENCE 352-53 (1958).

26. "The right of self-defence in these cases is found in the law of nature, and is not, and cannot be superseded by the law of society." 2 J. KENT, COMMENTARIES ON AMERICAN LAW 12 (N.Y. 1827). "The right of self defence is the first law of nature." 1 *St. Geo. Tucker's* BLACKSTONE COMMENTARIES 300 app. (Phil. 1803).

27. *See* Parrish v. Commonwealth, 81 Va. 1, 12 (1884); *see also* State v. Hardy,

in preserving the lives and well-being of criminal aggressors at the cost of those of their victims. The only defensible policy society can adopt is one that will operate as a sanction against unlawful aggression.

The police have no duty to protect the individual citizen,[28] and the same applies to the state. One court stated that "there is no constitutional right to be protected by the state against being murdered by criminals or madmen."[29]

## III. The Police Power

Limitations on the right to keep and bear arms stem from a state's police power[30] and, in eighteen (18) states, from per-

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60 Ohio App. 2d 325, 397 N.E.2d 773 (1978).

28. Warren v. District of Columbia, 444 A.2d 1 (D.C. App. 1981); Weiner v. Metro Transp. Auth., 55 N.Y.2d 175, 448 N.Y.S.2d 141 (1982). *Contra* Yingst v. Pratt, 139 Ind. App. 695, ___, 220 N.E.2d 276, 280 (1966)(en banc). "It is the right and duty of a private person to apprehend one who has committed a felony in his presence, either at the time of its commission or upon immediate pursuit" (quoting 5 Am. Jur. 2d, *Arrest* § 35). Other cases in accord include Suell v. Derricott, 161 Ala. 259, ___, 49 So. 895, 900 (1909); Pond v. People, 8 Mich. 149, 178 (1860). In 1981, police in California justifiably killed sixty-eight persons; civilians justifiably killed 126 persons. Homicide in Cal., 1981, at 74 (Cal. Dept. of Justice). Chief Justice Cardozo noted that, under the controlling law, not only did a citizen have a duty to aid a commanding policeman in specific circumstances, but this duty to prevent crime may even extend to the use of "whatever implements and facilities are convenient and at hand." Babington v. Yellow Taxi Corp., 250 N.Y. 14, 16-17, 164 N.E. 726, 727 (1928) (implies state can compel people to own arms).

"Private citizens inevitably play an important role in controlling crime. By limiting their exposure to risk, investing in locks and guns, . . . private citizens affect the overall level of crime, and the distribution of the benefits and burdens of policing." We should not "forget that private policing was the only form of policing for centuries . . . ." Those who think of private enforcement as evidence of "dangerous vigilantes forget the value of private crime-control efforts, and the crucial difference between vigilantes and responsible citizens playing their traditional role in crime control." The legitimate role of private citizens is to "limit their functions to deterrence and, occasionally, apprehension; they neither judge guilt nor mete out punishment." Moore & Kelling, *"To Serve and Protect": Learning From Police History*, 70 The Public Interest 49, 59 (1983).

The state has the authority to train its able-bodied men so that they may perform military or constabulary duties when called upon. Hamilton v. Regents of Univ. of Cal., 293 U.S. 245, 260 (1934), *reh'g denied*, 293 U.S. 633 (1935).

29. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

30. "The conflicting rights involved here are the individual's rights 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. . . .

missive language enunciated in the constitutional guarantee,[31] although the permissive language does not preclude the enactment of regulations outside the scope of the permissive language.[32] On the other hand, the constitution is not a grant of power but a limitation on the exercise of power. While generally the legislature may exercise all those powers inherent in the people which are not delegated to another branch of government, the legislature cannot enact laws which will supersede constitutional provisions adopted by the people.[33] The police power cannot "violate some positive mandate of the constitution."[34] In other words a "governmental body . . . cannot under the guise of the police power enact unreasonable and oppressive legislation or that which is in violation of the fundamental law."[35]

The framers of the arms guarantee may be assumed to have been aware of crime. Nevertheless, they balanced the in-

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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." People v. Blue, 190 Colo. 95, ___, 544 P.2d 385, 390-91 (1975) (upholding a felon in possession statute) (citations omitted).

31. Proscribing organizing, maintaining, or employing an armed body of men: ARIZ. CONST. art. 2, § 26; WASH. CONST. art. I, § 24. Proscribing concealed carry: COLO. CONST. art. II, § 13; IDAHO CONST. art. I, § 11; KY. CONST. Bill of Rights, § 1, para. 7; LA. CONST. art. I, § 11; MISS. CONST. art. 3, § 12; MO. CONST. art. I, § 23, MONT. CONST. art. II, § 12; N.M. CONST. art. II, § 6; N.C. CONST. art. I, § 30. Manner of bearing arms may be regulated: FLA. CONST. art. I, § 8; GA. CONST. art. I, § 1 para. 5; OKLA. CONST. art. 2, § 26; TENN. CONST. art. I, § 26; TEX. CONST. art. I, § 23. The right may be regulated: UTAH CONST. art. I § 6. The right is subject to the police power: ILL. CONST. art. I, § 22. Besides proscribing concealed carrying, the Idaho guarantee also allows minimum sentences for crimes committed while in possession of a firearm, and allows punishment for misuse of arms and possession by convicted felons.

32. State v. Dawson, 272 N.C. 535, ___, 159 S.E.2d 1, 10-11 (1968) (permissive language inserted as a matter of "superabundant caution").

33. Kilpatrick v. Super Ct. of Maricopa County, 105 Ariz. 413, 466 P.2d 18, 20-21 (1970).

34. "The only limitations upon the legislature in the exercise of its police power is that the statute must reasonably tend to correct some evil or promote some interest of the State and not violate some positive mandate of the constitution." People v. Warren, 11 Ill. 2d 420, 424, 143 N.E.2d 28, 31 (1957).

35. Junction City v. Mevis, 226 Kan. 526, 535, 601 P.2d 1145, 1152 (1979) (quoting Delight Wholesale Co. v. City of Overland Park, 203 Kan. 99, 453 P.2d 82 (1969)) (gun ordinance in *Mevis* voided as being overly broad).

terests and decided to secure a right to keep and bear arms in the face of any possible problems such a right might entail. For example, the colonies were not free from crime. In 1630, John Billington was hanged by the pilgrims at Plymouth colony for murdering John Newcomen with a blunderbuss. In 1678, Thomas Hellier was hanged in Westover, Virginia, for hacking three people to death. Thomas Lutherland was hanged February 23, 1691, in New Jersey for murdering John Clark, a boat trader, and stealing his supplies. Alexander White was hanged at Cambridge, Massachusetts, on November 18, 1784, for murder and piracy.[36] The Framers apparently felt that crime must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional right.

The task is to harmonize the tension between the police power and a constitutional guarantee. Accordingly, a textual analysis of the guarantee must focus on to whom the right belongs, what is the purpose or reason of the right, and what arms are protected. The boundaries of the right are established once these issues are defined and delineated. The police power then cannot breach those boundaries, for "constitutions are not made to create rights in the people, but in recognition of, and in order to preserve them, and that if any are specially enumerated and specially guarded, it is only because they are peculiarly important or peculiarly exposed to invasion."[37]

## IV. Collective Right Versus Individual Right Debate

The collective right view claims that while all of the people have a right, the individual person has no right.[38] This es-

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36. J. Nash, Bloodletters and Badmen 55, 255, 345, 606 (1973). "[A]rguments of policy must give way to a constitutional command . . . ." Payton v. N.Y., 445 U.S. 573, 602 (1980). In Maryland, police stopped 2,000 cars over one weekend in a drunk driving campaign. They arrested four drivers. Wash. Post, Dec. 30, 1982, A 1, col. 4, at A 7, col. 1. Rights cannot be swept aside or ignored simply to make it convenient for the state to get at a small criminal element. Such an approach would render nugatory the benefits of a written constitution.

37. 2 J. Tucker, The Constitution of the U.S. 688 (1899).

38. City of Salina v. Blaksley, 72 Kan. 230, 83 P. 619, 620 (1905) (In interpreting a provision of the Kansas Constitution, which stated that "The people have the right to bear arms for their defense and security," the Supreme Court of Kansas stated that it "refers to the people as a collective body. . . . Individual rights are not con-

sentially means that the right to bear arms protects no one and guarantees nothing, for regardless of how draconian and unconstitutional a law may be, no individual would have standing to challenge such a law.[39]

The true inquiry as to the meaning of a constitutional guarantee concerns its understanding by the voters who, by their vote, have given life to the product of the convention.[40] The voters' understanding of a constitutional provision is determined by the common and ordinary meaning of the words employed.[41] Those words "will be understood in the sense most obvious to the common understanding, without resort to subtle and forced construction for the purpose of limiting or extending their operation."[42] Thus if the term "people" is used in the Bill of Rights to guarantee the individual the equal protection of the law,[43] to assembly and petition,[44] and freedom from unlawful searches,[45] it is incredible that the term "people" is then used strictly in a collective sense in guaranteeing the right to bear arms.[46] Therefore, a word repeatedly used in a constitution will bear the same meaning throughout the instrument.[47]

The seminal case which nullified the right to bear arms by holding that it is solely a collective right is *City of Salina v. Blaksley*.[48] James Blaksley was convicted of carrying a pis-

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sidered in this section.").

39. Standing to sue is lacking where a party has a general interest common to all members of the public. Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).

40. People *ex rel.* Cosentino v. Adams County, 82 Ill. 2d 565, 413 N.E.2d 870, 871 (1980).

41. Burke v. Snively, 208 Ill. 328, 340, 70 N.E. 327, 329 (1904) (Words "shall be given the meaning which they bear in ordinary use among the people").

42. People v. Stevenson, 281 Ill. 17, 25-26, 117 N.E. 747, 750 (1917).

43. KAN. CONST. Bill of Rights, §2.

44. *Id.* §3.

45. *Id.* §15.

46. *Id.* §4.

47. Kirkpatrick v. King, 228 Ind. 236, ___, 91 N.E.2d 785, 789 (1950). "[T]he term 'people,' as used in the [state] constitution, is broad and comprehensive, and comprises generally all of the individual inhabitants of the state." State v. Kofines, 33 R.I. 211, ___, 80 A. 432, 437 (1911).

48. 72 Kan. 230, 83 P. 619 (1905). Restricting the right to bear arms to a collective right has been specifically rejected by other courts. *See, e.g.*, People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (en banc 1936); State v. Dawson, 272 N.C. 535, ___, 159 S.E.2d 1, 9 (1968).

tol within the city "while under the influence of intoxicating liquor."[49] The conviction could have been sustained simply because such conduct is outside the boundaries of the guarantee.[50] The court chose "to treat the question [of bearing arms] as an original one."[51] It misread *In re Brickey*[52] by claiming that the case sanctioned the carrying of concealed weapons on constitutional grounds. *Brickey* struck down a statute which forbade the carrying of a pistol in town in any manner. The *Brickey* court specifically held that forbidding the carrying of concealed weapons would be a valid regulation of the arms right. The court also misread *Commonwealth v. Murphy*[53] by claiming that *Murphy* strongly supported the court's position. *Murphy* upheld a conviction for unauthorized parading by armed men. The *Murphy* court merely cited *Presser v. Illinois*,[54] which involved an unlicensed armed parade, in upholding the conviction.

The *Blaksley* court's claim that a Bill of Rights guarantee merely insures the people collectively a narrow right to bear arms only in the organized militia or any military organization provided by law[55] lacks other jurisprudential support. The Kansas Constitution defines the militia as all able-bodied citizens between twenty-one and forty-five years of age.[56] The Kansas Constitution also authorizes the legislature to organ-

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49. Salina v. Blaksley, 72 Kan. 230, ___, 83 P. 619, 620 (1905).

50. Carrying a gun while drunk is outside the protected boundaries of the right to bear arms. People v. Garcia, 197 Colo. 550, 595 P.2d 228 (1979)(en banc); State v. Shelby, 90 Mo. 302, 2 S.W. 468 (1886). The right to arms is subject to regulations to promote the peace, order and security of society, "provided they do not nullify the constitutional right or materially embarrass its exercise." E. FREUND, THE POLICE POWER 90-91 (1904). "A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional." State v. Reid, 1 Ala. 612, 616 35 Am. Dec. 46 (1840). The prevailing view is that prohibiting concealed carrying of weapons does not infringe the private right to bear arms. "Any one, carrying a weapon for a laudable purpose, will not desire to conceal it." C. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE U.S. 13-14, 503 (1886).

51. Salina v. Blaksley, 72 Kansas. 230, ___, 83 P. 619, 620 (1905).

52. 8 Ida. 597, 70 P. 609 (1902).

53. 166 Mass. 171, 44 N.E. 138 (1896).

54. 116 U.S. 252 (1886).

55. 72 Kan. 230, ___, 83 P. 619, 620-21 (1905).

56. KAN. CONST. art. VIII, §1.

ize, equip and discipline the militia.[57] This demonstrates that any collective right to bear arms in the militia is adequately covered by the militia article of the Kansas Constitution.[58]

Furthermore, the state's power to legislate on militia matters existed prior to the formation of the constitution and remains with the states.[59] The right of a state to maintain and use its militia is a power essential to the existence of a state.[60] The state has the authority to train its able-bodied citizens so that they may perform military duties or constabulary duties when called upon.[61]

The collective right theory suffers from a logical defect. It is conceptually difficult to see how something can exist in a whole without existing in any of its parts. The collectivists essentially claim that there is a nebulous entity that exists somewhere between the individual and the state which is so important that the Framers protected it with a constitutional guarantee. The respected Judge Cooley rejected the collective right view:

> It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment [sic] of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of

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57. *Id.* §2.

58. *Id.* §§ 1-4.

59. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 16-17 (1820). This reflects John Marshall's view that the states had retained their powers over the militia. 3 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 419-21 (1836).

60. Luther v. Borden, 48 U.S. (7 How.) 1, 45 (1849).

61. Hamilton v. Regents of Univ. of Cal., 293 U.S. 245, 260 (1934).

> law for the purpose. But this enables the government to have a well regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for volunatry discipline in arms, observing in doing so the laws of public order.[62]

Kansas history of the nineteenth century demonstrates that the people were undoubtedly concerned with personal defense.[63] The guarantee to arms of the 1859 Kansas Constitution[64] is an exact copy of Ohio's 1851 constitutional guarantee,[65] and Ohio courts have interpreted their provision to secure an individual right to self-defense.[66] Thus the independent clause, containing command language, that "[t]he people have a right to bear arms for their defense and security" was undoubtedly intended to include a personal right to bear arms to protect one's person, family, or property against unlawful injury and to secure from unlawful interruption the enjoyment of life, limb, family or property. The autonomy of the right to arms clause is not undermined by the presence in the same section of independent clauses dealing with standing armies and the subordination of the military to the civil power, for arms guarantees in other states have similar clauses and their courts have found an individual right to bear arms for self-defense.[67] Hence, any claim that the arms guarantee is in-

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62. T. Cooley, General Principles of Constitutional Law in The United States of America 298-99 (3rd ed. 1898).

63. Parman v. Lemmon, 119 Kan. 323, ___, 244 P. 227, 231 (1925) (Dawson, J., dissenting), *rev'd on rehearing*, 120 Kan. 370, 244 P. 232 (1926). The dissent was, in effect, adopted as the opinion of the majority on rehearing.

64. Kan. Const. Bill of Rights, §4.

65. Ohio Const., art. I, §4.

66. Mosher v. City of Dayton, 48 Ohio St. 2d 243, ___, 358 N.E.2d 540, 543 (1976) ("the right of an individual to bear arms" may be regulated in a "reasonable manner"); City of Akron v. Dixon, 36 Ohio Misc. 133, 303 N.E.2d 923, 924 (Akron Mun. Ct. 1972) ("the right secured by the Constitution . . . speaks of the citizen's self defense and security and to his right to attain those ends by bearing arms."); State v. Hogan, 63 Ohio St. 202, ___, 58 N.E. 572, 575 (1900) (individual right "for defense of self and property").

67. N.C. Const. art. I, §30; State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921); Ohio Const. art. I, §4. *See* note 66, *supra*; Or. Const. art. I, §27; State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); Vt. Const. ch. I, art. 16; State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903).

extricably linked and strictly limited to military matters rests on a foundation of quicksand. The *Blaksley* decision disingenuously turns a constitutional guarantee into an intangible abstraction.

No attempt will be made to examine textual differences based solely on whether plural terms, such as people or citizens, or singular terms, such as person or citizen, are used because only one state, Massachusetts, has followed *Blaksley*.[68]

The collectivists' argument should not be followed by the courts because it has no historical support, no case law support prior to the Kansas decision, and is illogical since the very concept of a right is individual. The principle of rigid *stare decisis* has no application to an unconstitutional law or to even a course of action taken by the courts. "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."[69] On one occasion, the U.S. Supreme Court branded a whole line of decisions it had pursued for nearly a century "an unconstitutional assumption of power by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[70]

The term "people" should be interpreted to include individuals. However, all individuals are not guaranteed the right to keep and bear arms. The Framers were mindful that certain groups are not protected because they fall into a traditional high-risk category. Thus it matters not that the Framers used in the arms guarantee the term people, citizens, person or citizen. Felons, persons of tender years, idiots and lunatics are classes that have almost universally been excluded from the arms guarantee.[71]

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68. Commonwealth v. Davis, 369 Mass. 886, 343 N.E.2d 847 (1976).

69. Powell v. McCormack, 395 U.S. 486, 546-47 (1969).

70. Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Holmes, J., dissenting in Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 533 (1928)). *See also* Monell v. Department of Social Services, 436 U.S. 658 (1978); *cf.* Brown v. Board of Ed., 347 U.S. 483 (1954) with Plessy v. Ferguson, 163 U.S. 537 (1896).

71. At common law a felony is such crime as occasions a forfeiture of all the offender's lands or goods and often subjects him to capital punishment. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *94. While at common law usually only the most serious offenses were felonies and the wrongful act had to be accompanied by a guilty mind, the modern trend is to make some felonies a strict liability

## V. Constitutionally Protected Arms

A textual analysis of state constitutions reveals that two separate categories of arms are protected: (A) those suitable

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offense, even though for the most part such offences are *mala prohibita* and not *mala in se*. For example, the mere possession of an unregistered rifle with a barrel under 16 inches is punishable by 10 years and a $10,000 fine. 26 U.S.C.A. §§ 5845 (a) (3), 5861 (d), 5871 (1980). To prevent the people from being disarmed by the expedient of classifying regulatory offenses as felonies, the disqualification for felons should be restricted to common law felonies and their modern equivalents and to offenses requiring some state of mind above strict liability which are inherently inimical to life and property. The harshness of a felony conviction for a regulatory offense requiring no criminal intent was acknowledged in United States v. Ruisi, 460 F.2d 153, 157 (2nd Cir. 1972) ("application for a Presidential pardon would seem to be justified.") Congress has already recognized a narrow exception to the felony disqualification by exempting antitrust violations, unfair trade practices, restraint of trade, or other similar offenses relating to the regulation of business practices. 18 U.S.C.A. §921 (a) (20) (1976). For a list of disqualifications involving felons *see* Doe v. Webster, 606 F.2d 1226, 1233-34 (D.C. Cir. 1979); State v. Noel, 3 Ariz. App. 313, ___, 414 P.2d 162, 164 (1966).

Persons of tender years lack the experience, understanding, or power of mind to manage their affairs. They normally cannot hold office, vote, marry, enter into a contract, or drink alcohol. Where a parent is lacking, a guardian serves to protect their interests. Even when persons of tender years violate the law, society deals with them in a special court. Idiots and lunatics are so lacking in mental capacity that conservators are appointed to manage their affairs. Often they are institutionalized. Even the common law treated these two groups differently:

> If one that wanteth discretion, killeth himselfe (as an infant, or a man *Non compos mentis*) he shall not forfeit his goods, & c. . . .
>
> If one that is *Non compos mentis*, or an ideot, kill a man, this is no felony; for they have no knowledge of good and evill, nor can have a felonious intent, nor a will or mind to do harme. . . .
>
> So it is, if a lunatike person killeth another during his lunacie; (*Cok.* 4. 125.) for all acts done by him in his lunacie, are as the actes of an Ideot. . . . But an infant of such tender yeares, as that he hath no discretion or intelligence, if he kill a man, this is no felony in him.

M. Dalton, The Countrey Justice 216-17, 223, 224 (London 1622).

That not all people were included in the arms guarantee can be established by viewing early arms laws relating to freed blacks and American Indians. "Free persons of color have never been recognized as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office." Cooper v. Savannah, 4 Ga. 68, 72 (1848). *See also* State v. Newsom, 27 N.C. 203 (1844). The sale of firearms to American Indians was prohibited. 2 Stat. 139 ch. 13 (1802) and 2 Stat. 283 ch. 38 (1804).

Some early constitutional guarantees on arms were restricted to "free white men." Fla. Const. art. I, §21 (1838); Tenn. Const. art. I, § 26 (1834); La. Const. tit. III, art. 60 (1845). The passage of the thirteenth and fourteenth amendments means that, except felons, the mentally infirm, and person of tender years, all of the people are guaranteed the right to arms. *See also* T. Cooley, A Treatise on Constitutional Limitations 57 (7th ed. 1903).

(not indispensable) for militia use, and (B) those suitable for personal defense. In addition, two states also protect arms suitable "for hunting and recreational use and for other lawful purposes."[72] Arms suitable for deterrence against oppression are not treated as a separate category because an armed citizenry, regardless of the armament kept, serves as a latent and implicit deterrent to oppression.[73]

A. Colonial militia laws reveal that smoothbore shoulder arms, carbines, rifles, pistols, ammunition, swords, bayonets,

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72. NEV. CONST. art. I, § 11, para. 1; N.M. CONST. art. II, § 6. In addition, the majority report of the Illinois Bill of Rights Committee indicates an intent to protect under ILL. CONST. art. I, § 22 "arms that law-abiding persons commonly employ for purposes of recreation or the protection of person and property." VI 6th *Ill. Const. Convention, Record of Proceedings* (1969-1970) at 87. In adopting the Virginia Bill of Rights, § 13, the interests of "the sportsmen of this State" and the right "to have arms in their homes, and they think that this will give them some protection" were also cited as reasons. *Proceedings & Debates of Virginia Senate Pertaining to Amendment of Constitution* 393 (Apr. 3, 1969) (Sen. Long).

73. Some cases equate arms "effective as a weapon of war" with arms suitable "to resist oppression." Fife v. State, 31 Ark. 455, 458, 461 (1876); Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840). Other cases make no such equation. Arms suitable for militia use or self-defense are included in the term "arms" and both categories serve as a deterrent to oppression because historically "the arms used by the militia and for personal protection were basically the same weapons." State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 99 (1980).

The wellspring for a right to have arms for hunting is the Dec. 12, 1787, minority proposal in the Pennsylvania convention:

> That the people have a right to bear arms for the defence 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 real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power.

PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, 422 (1888).

The Pennsylvania minority was the first to propose an extensive Bill of Rights and their seminal ideas found their way into the Bill of Rights and became the first, second, fourth, fifth, sixth, eighth, and tenth amendments of the United States Constitution. E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 50-56 (1957). The Pennsylvania minority proposal reveals an intent to guarantee the traditional uses of the times: for militia use, for self-defense, and for hunting. The reference to hunting was probably an effort to prevent the enactment of game laws designed to disarm the people. It also demonstrates that the common understanding of "to bear arms" was not restricted solely to militia purposes. In the 18th century "bear" meant "To convey or carry." S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (UNPAGINATED) (1979 reprint of 1755 ed.) The arms provision in LA. CONST. tit. III, art. 60 (1845), used the term "carry arms."

pikes, and lances are arms suitable for militia use.[74] To this list may also be added the shotgun.[75] Since all those weapons are constitutionally protected arms, all stand on an equal footing. A constitutionally protected arm cannot be singled out for abridgement, for no authority exists for the proposition that one form of constitutionally protected conduct may be prohibited because alternative forms of constitutionally protected conduct are available.[76]

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74. The arms and equipment a New York militiaman was required to furnish himself included a "muskett or fuzee . . . pike . . . Sword . . . Lance . . . pistoll . . . case of good pistolls . . . rapier . . . carabine . . . poweder . . . bulletts . . . ." 1 THE COLONIAL LAWS OF NEW YORK FROM 1664 TO THE REVOLUTION 232 (1894).

In Virginia the list included "a firelock, muskett or fusee well fixed, a good sword and cartouch box, and six charges of powder . . . at his place of abode two pounds of powder and eight pounds of shott . . . holsters . . . a case of pistolls well fixed, sword . . . carabine . . . ." 3 LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEG. in 1619 at 338 (W. Hening ed. 1823). Virginia also required "that every man be provided with a good Rifle if to be had, or otherwise with a common firelock . . . [and] that every horseman be provided with a good horse, bridle, saddle with pistols and Holsters, a carbine or other short firelock . . . ." 1 THE PAPERS OF THOMAS JEFFERSON 160-61 (J. Boyd ed. 1950).

In Connecticut the arms included "sword, case of pistolls and holsters . . . ." "Our horsemen are armed with pistolls and carbines." 3 THE PUBLIC RECORDS OF THE COLONY OF CONN. 12 & 295 (H. Trumbull ed. 1859). In Rhode Island the arms included "carbine and pistol . . . ." 3 RECORDS OF THE COLONY OF R.I. & PROVIDENCE PLANTATIONS IN NEW ENGLAND 433 (J. Bartlett ed. 1856). In New Jersey the arms included "musket or Fusee, well fixed, and a Bayonet fitted to it, a cutting Sword or Cutlace, . . . Holsters, a Case of Pistols . . . ." 6 DOCUMENTS RELATING TO COLONIAL HISTORY OF N.J. 192-93 (W. Whitehead ed. 1888).

75. In the New World the shotgun was used for hunting, self-defense, and military purposes. T. SWEARENGEN, THE WORLD'S FIGHTING SHOTGUNS 1-3 (1978). "In 1621, Plymouth colony advised prospective newcomers to bring fowlers with them for use in obtaining food and for defense against possible Indian attacks." *Id.* at 2. "British General Sir John Burgoyne, of American Revolutionary War fame, raised a Light Dragoon Regiment in 1781, and caused it to be equipped with the blunderbuss." *Id.* at 2. "During the Revolution, General Washington took cognizance of shotgun effectiveness. He encouraged troops to load their [smoothbore] muskets with buck and ball, or with plain buckshot to compensate for the poor long range accuracy of the single musket ball. There is evidence that Americans found such multiple-projectile ammunition quite effective against the British. Its use became widespread, except in rifled arms. General Washington referred to the shot as 'swan drops'." *Id.* at 3. The shotgun is still used by the military. SMALL ARMS MATERIAL AND ASSOCIATED EQUIPMENT 29-31 (U.S. Army Technical Manual 9-2200; Oct. 1956).

76. "We have not been cited to any authority nor are we aware of any that would permit the total abridgement of one form of constitutionally protected communication simply because there are alternative means of communication possibly available." N.Y. Public Interest Research Group, Inc. v. Roslyn Estates, 498 F.Supp. 922, 932 (E.D.N.Y. 1979).

Protected arms under the militia category are "the modern day equivalents of the weapons used by colonial militiamen . . . even if a particular weapon is unlikely to be used as a militia weapon."[77] Weapons such as "cannon or other heavy ordnance not kept by militiamen or private citizens" and "[m]odern weapons used exclusively by the military" are outside the protected boundary because they are not "commonly possessed by individuals."[78]

A distillation of case law indicates that arms suitable for militia use are those which are commonly possessed and which make up the usual arms of the people, those within the people's means, those historically used for such purposes and

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77. State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 99 (1980). Older cases have held that only large pistols are constitutionally protected arms. *See* Fife v. State, 31 Ark. 455, 460-61 (1876) (not pocket pistols but only "repeaters, which, in recent warfare, have generally superseded the old-fashioned holster, used as a weapon in the battles of our forefathers"); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 187 (1871) ("We know there is a pistol of that name which is not adapted to the equipment of the soldier, yet we also know that the pistol known as the repeater is a soldier's weapon—skill in the use of which will add to the efficiency of the soldier"). Modern metallurgy and smokeless powder have reduced the size of pistols suitable for militia use. A survey of military pistols from Argentina to Yugoslavia reveals that most have a barrel length of about four inches. W. SMITH, SMALL ARMS OF THE WORLD passim (11th ed. 1977). However, a significant number have barrel lengths over three inches but under four inches. *Id.* at 215, 318, 382, 407, 433. While all of these pistols are centerfire, both the U.S. and U.S.S.R. employ .22 caliber rimfire pistols for training purposes. *Id.* at 476, 528.

The U.S. military's arsenal of self-loading pistols and revolvers includes the .38 caliber revolver with a 2-inch barrel. It is usually carried in a holster. PISTOLS AND REVOLVERS 99-106 (U.S. Army Field Manual 23-35; Feb. 1953); SMALL ARMS MATERIAL AND ASSOCIATED EQUIPMENT 7-13 (U.S. ARMY TECHNICAL MANUAL 9-2200; Oct. 1956); PISTOLS AND REVOLVERS 109 (U.S. Army Field Manual 23-35; July 1960). The U.S. military also purchased "a few thousand" Colt .25 caliber self-loading pocket pistols. R. SUTHERLAND & R. WILSON, THE BOOK OF COLT FIREARMS 425 (1971).

The various weaponry used by the Patriots during the Revolutionary War has led writers to comment that as a practical matter the people carried whatever weapons they had into battle. C. COLBY, REVOLUTIONARY WAR WEAPONS 12 (1963); Nunn v. State, 1 Ga. 243 (1846) (the right belongs to the individual and is not restricted to militia arms). As a practical matter many of the arms commonly possessed by the people (rifles, shotguns, and pistols) and suitable for militia use are also employed by the organized military.

78. State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 98-99 (1980). "To him the rifle, the musket, the shotgun, and the pistol are about the only arms which he would be expected to 'bear,' and his right to do this is that which is guaranteed by the Constitution." To suggest "the Constitution intended" that deadly gases, cannon, submarines, and bombs are arms "would be mockery." State v. Kerner, 181 N.C. 574, ___, 107 S.E. 222, 224 (1921).

their modern equivalents, or those in ordinary use and effective as weapons of war.[79]

To make the right to arms effective, "[t]he right to keep arms necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair."[80] This would also apply to arms suitable for personal defense.

The term "militia" has been defined as all citizens or all males capable of bearing arms.[81] The militia is thus more than the National Guard.[82] The sophisticated organization, equip-

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79. Fife v. State, 31 Ark. 455, 460-61 (1876); State v. Kerner, 181 N.C. 574, ___, 107 S.E. 222, 224-25 (1921); State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 98-99 (1980); Andrews v. State, 50 Tenn. (3 Heisk) 165, 179 (1871).

80. Andrews v. State, 50 Tenn. (3 Heisk) 165, 178 (1871). *See also* Halbrook *infra* note 167. Of the thirty nine states with a guarantee to arms, fourteen guarantee only the right to bear arms, as opposed to the right to keep and bear arms. ALA. CONST. art. I, § 26; ARIZ. CONST. art. II, § 26; CONN. CONST. art. I, § 15; IND. CONST. art. I, § 32; KAN. CONST. Bill of Rights, § 4; KY. CONST. Bill of Rights, § I para. 7; OHIO CONST. art. I, § 4; OR. CONST. art. I, § 27; PA. CONST. art. I, § 21; S.D. CONST. art. VI, § 24; UTAH CONST. art. I, § 6; VT. CONST. ch. I, art. 16; WASH. CONST. art. I, § 24; and WYO. CONST. art. I, § 24. This distinction is of no significance because courts and commentators agree that a guarantee to bear arms includes the guarantee to keep arms. *See, e.g.*, State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980) (keeping of a club in one's home); Photos v. City of Toledo, 19 Ohio Misc. 147, ___, 250 N.E.2d 916, 927 (1969) ("No law abiding citizen, free from the city's disqualifications, has been or will be precluded from purchasing, keeping or bearing arms."). "[T]o bear arms implies something more than the mere keeping." COOLEY, *supra* note 62.

81. Burroughs v. Peyton, 57 Va. 470, 482 (1864) ("the militia embraces the whole arms bearing population . . ."); *Ex Parte* McCants, 39 Ala. 107, 113 (1863). Numerous state constitutions reflect this view. *E.g.*, "A militia shall be provided and shall consist of all persons over the age of seventeen . . ." IND. CONST. art. XII, § 1; "The State militia consists of all able-bodied persons residing in the State . . ." Ill. Const. art. XII, § 1. "[A]ll able-bodied citizens of the state . . ." are the militia. MONT. CONST. art. VI, § 13 (2). The antifederalist view was that "A militia, when properly formed, are in fact the people themselves . . ." and that "the constitution ought to secure a genuine and guard against a select militia . . ." by having the militia include "all men capable of bearing arms . . . ." 2 THE COMPLETE ANTI-FEDERALIST 341 (H.J. Storing ed. 1981). The U.S. Supreme Court has also defined the militia in this broad manner. United States v. Miller, 307 U.S. 174, 179 (1939).

82. The terms "militia" or "militiamen" comprehend every citizen-soldier who in time of war or emergency forsakes his civilian pursuits for temporary military duty and are not restricted to the National Guard. State *ex rel.* McGaughey v. Grayton, 349 Mo. 700, ___, 163 S.W.2d 335, 337 (en banc 1943). The militia is classified into the organized militia and the reserve militia. *Id.* at ___, 163 S.W.2d at 340. *See also* People *ex rel.* Leo v. Hill, 126 N.Y. 497, 504, 27 N.E. 789, 790 (1891).

Numerous statutes make the distinction between the militia and the National

ment, and training of the National Guard would indicate that it has undergone a metamorphosis from being an inclusive militia comprised of the people to being almost exclusively troops, and the states may be prevented in times of peace from keeping troops.[83]

Where the purpose of the guarantee is to secure a militia, the people are guaranteed the right to keep and bear arms because they serve as the pool from which the militia is drawn. If a person is disarmed he obviously could not function as a militiaman should the need arise.[84]

The importance of guaranteeing to the people the right to keep and bear arms having militia utility was demonstrated during this century. In the Second World War the militia proved a successful substitute for the National Guard, which was federalized and activated for overseas duty.[85] Members of the militia, many of whom belonged to gun clubs and whose ages varied from sixteen to sixty-five, served without pay and provided their own arms.[86] Their mission was to serve as a local early warning and intelligence source for regular troops and as a delaying force. Their training stressed guerilla tactics, patrolling, demolitions, and roadblock techniques. The firepower of some units was impressive.[87]

The Maryland National Guard, for example, was activated for overseas service. Governor Herbert R. O'Conor then called on men "of all ages and stations in life" to volunteer for the manning of home guard stations for the task of "repelling invasion forays, parachute raids and sabotage uprisings in the state." Before the end of 1943, 15,000 Maryland Minute Men, as these men were designated, manned home guard stations. These men were expected to bring their own arms—rifles, shotguns, pistols—for training and used those arms on guard

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Guard. *See, e.g.*, 10 U.S.C.A. § 311 (1975); 46 West's Cal. Mil. Code § 121 (1955); CONN. GEN. STAT. ANN. § 27-2 (West 1975); and R.I. GEN. LAWS § 30-1-4 (1969).

83. U.S. CONST. art. 1, § 10, cl. 3.

84. State v. Dawson, 272 N.C. 535, ___, 159 S.E.2d 1, 9 (1968). Disarmed people could not serve as a deterrent to oppression. State v. Kerner, 181 N.C. 574, ___, 107 S.E. 222, 225 (1921).

85. U.S. HOME DEFENSE FORCES STUDY at 32, 34 (Office of Sec. of Defense, Mar. 1981).

86. *Id.* at 58, 62-63.

87. *Id.* at 58, 60.

duty. At a time when Nazi submarines were sinking American ships off the Atlantic coast, apprehension was very real.[88]

In Virginia, the National Guard was also activated for overseas duty. It thus became necessary to call upon the local armed citizenry to perform militia duties. They were called the Minute Men, the home guard, or the reserve militia. The shortage of arms prompted members of the militia to borrow twenty-two caliber guns from youngsters. Sportsmen were especially sought after for recruitment in the militia. "Since its personnel would have to furnish its own weapons and ammunition, its membership campaign leaned heavily on sportsmen of the state."[89]

All over the country individuals armed themselves in anticipation of threatened invasion.[90] A manual distributed *en masse* by the War Department recommended the keeping of "weapons which a guerilla in civilian clothes can carry without attracting attention. They must be easily portable and easily concealed. First among these is the pistol."[91]

Historically, militia formations were most effective when responding to obvious threats close to home. They were to harass and impede the enemy wherever possible and to support friendly formations. Consisting of small tactical formations armed with a wide variety of weapons, the militia had actually taken the field against the soldiers of George III and defeated them. The lessons of Vietnam, Nicaragua, Africa, and the Soviet intervention into Afghanistan illustrate the limitations of push-button warfare against dispersed small units fighting in their own territory. The militia's critics tend to ignore this strength and concentrate only on the militia's weakness.[92]

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88. BAKER, *I Remember—The "Army" With Men From 16 to 79* [Baltimore] Sun Magazine, Nov. 16, 1975, at 46; 3 STATE PAPERS & ADDRESSES OF GOV. O'CONOR 616-20 (Mar. 10, 1942). On file with the law review is a copy of an honorable discharge certificate from the World War II Maryland Minute Men and an affidavit from a former member swearing that he performed militia duties armed with his own rifle and pistol.

89. M. SCHLEGEL, VIRGINIA ON GUARD—CIVILIAN DEFENSE AND THE STATE MILITIA IN THE SECOND WORLD WAR 45, 131 (1949).

90. *To Arms*, TIME, Mar. 30, 1942, at 1.

91. B. LEVY, GUERRILA WARFARE 55 (Penguin Books & Infantry Jour. 1942); B. LEVY, GUERRILA WARFARE 56 (Panther Publications 1964).

92. LANE, *The Militia of the U.S.*, MILITARY REVIEW 13, 16 (Mar. 1982). One

B. Arms guaranteed for personal defense are those weapons commonly kept by the people today, and those commonly kept at the time the constitution was adopted and their modern equivalents.[93] The protected arms would include "hand-carried weapons commonly used by individuals for personal defense."[94] Examples of such arms would be "hunting muskets or rifles, hatchets, swords, and knives . . . [and] billy club;"[95] modern firearms "such as semi-automatic shotguns, semi-automatic pistols and rifles,"[96] and "ordinary guns, swords, revolvers, or other weapons usually relied upon by good citizens for defense or pleasure."[97]

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British officer mistakenly described the Patriots as "a mob without order or discipline, and very awkward at handling their arms." THE SPIRIT OF SEVENTY-SIX 150 (H. Commager & R.B. Morris eds. 1967). The Patriots were also described as "skillful enough in the use of musket or rifle . . . [and] . . . better suited to frontier warfare against the Indians than to the discipline of an army camp." *Id.* at 151-52.

Therefore, a well-regulated militia means one that has had some training or at least is composed of people who have had some training. This is to prevent the militia from becoming a disorderly mob, dangerous not to the enemy but to its own state and country. In its obsolete form pertaining to troops, *regulated* is defined as "properly disciplined." 7 THE OXFORD ENGLISH DICTIONARY 380 (1933). Moreover, *discipline* in relation to arms is defined as "training in the practice of arms." 3 THE OXFORD ENGLISH DICTIONARY 416 (1933). The framers intended that this "training in the practice of arms" for potential militia duty would be advanced, if not ensured, by the right of the people to keep and bear their own arms.

93. State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 98-99 (1980); Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972); People v. Brown, 253 Mich. 537, ___, 235 N.W. 245, 246-47 (1931).

94. State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 100 (1980).

95. *Id.* at ___, 614 P.2d at 98,100.

96. Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972).

97. People v. Brown, 253 Mich. 537, ___, 235 N.W. 245, 247 (1931). There is an effort to ban pistols. However, the people understand the term "arms" to include the pistol because of its presence in our culture. In Shakespeare's *Twelfth Night* (circa 1601), Act. II, scene V, line 34, the "pistol" is mentioned. Thus both old cases, State v. Shelby, 90 Mo. 302, 2 S.W. 468, 469 (1886) ("a revolving pistol comes within the description of such arms as one may carry for the purposes designated in the constitution. . . ."), and new cases, Schubert v. DeBard, 398 N.E.2d 1339 (Ind. App. 1980) ("handgun"), recognize the pistol as a constitutionally protected arm. This understanding prompted a court to state: "We are of the opinion, however, that 'pistol' *ex vi termini* is properly included within the word 'arms,' and that the right to bear such arms cannot be infringed. The historical use of pistols as 'arms' of offense and defense is beyond controversy." State v. Kerner, 181 N.C. 574, ___, 107 S.E. 222, 224, (1921) (law requiring obtaining permit and posting bond to carry pistol unconcealed voided). A pistol is an arm which serves many lawful purposes. Commonwealth v. McHarris, 246 Pa. Super. 488, 371 A.2d 941 (1977).

## VI. Textual Differences

### *Militia Purpose*

Five state constitutions guarantee that "the right of the people to keep and bear arms shall not be infringed"[98] and assign a well regulated militia as a purpose for this right. Arms suitable for militia use are protected under these guarantees.[99] These guarantees protect a right to arms for militia use, for self-defense, and as a deterrent to oppression. Courts have held that the militia purpose does not restrict the traditional uses for which arms may be kept and borne:

> The constitutional provision which forbids any prohibition upon the people to bear arms and use them effectively by being accustomed to their use should be strictly and stoutly maintained, for we know not when the occasion may again require the assertion of that doctrine which was once familiar throughout this country that "resistance to tyranny is obedience to God," or for the defense of person and property against mobs and violence.[100]

The arms must be carried openly, and the object is "the right to acquire and retain a practical knowledge of the use of fire arms."[101] That end would not be frustrated by a prohibition of carrying deadly weapons while drunk, or to a church, polling place, court, or public assembly, or in a manner calculated to inspire terror.[102] Echoing this view is an early case

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98. Alaska Const. art. I, § 19; Hawaii Const. art. I, § 15; N.C. Const. art. I, § 30; S.C. Const. art. I, § 20; Va. Const. art. I, § 13. These guarantees track the language of the U.S. Const. amend. II.

99. *See* notes 74, 75, 77, 79 *supra*. Va. Const. art. I, § 1 guarantees a right to self-defense. Thus in Virginia arms for personal defense are also guaranteed. *See* notes 93-97 *supra*.

100. State v. Kerner, 181 N.C. 574, ___, 107 S.E. 222, 225 (1921). The right to self-defense was assumed by the Framers. State v. Dawson, 272 N.C. 535, ___, 159 S.E.2d 1, 9 (1968). *See also* Nunn v. State, 1 Ga. 243 (1846).

101. State v. Kerner, 181 N.C. 574, ___, 107 S.E. 222, 225 (1921). La. Const. Bill of Rights, art. 3 (1879) tracked the language of the second amendment. "When we see a man with a musket to shoulder, carbine slung on back, or pistol belted to his side, or such like, he is bearing arms in the constitutional sense." State v. Bias, 37 La. Ann. 259, 260 (1885).

102. State v. Dawson, 272 N.C. 535, ___, 159 S.E.2d 1, 10 (1968); State v. Kerner, 181 N.C. 574, ___, 107 S.E. 222, 225 (1921); Hill v. State, 53 Ga. 473 (1874) (Ga. Const. art. I, § 1, para. 14 tracked the second amendment.). In Rex v. Dewhurst, 1 State Trials, New Series 529, 601 (1820), the trial judge instructed the jury: "A man

from Georgia upholding a conviction for being armed in court, which stated:

> But it is obvious that the right to bear or carry arms about the person at all times and places and under all circumstances, is not a necessity for the declared object of the guarantee; nay, that it does not even tend to secure the great purpose sought for, to-wit: that the people shall be familiar with the use of arms and capable from their habits of life, of becoming efficient militiamen. If the general right to carry and to use them exist; if they may at pleasure be borne and used in the fields, and in the woods, on the highways and byeways, at home and abroad, the whole declared purpose of the provision is fulfilled. The right to keep and to bear arms so that the state may be secured in the existence of a well regulated militia, is fully attained. The people have, or may have the arms the public exigencies require, and being unrestricted in the bearing and using of them, except under special and peculiar circumstances, there is no infringement of the constitutional guarantee. The right to bear arms in order that the state may, when its exigencies demand, have at call a body of men, having arms at their command, belonging to themselves and habituated to the use of them, is in no fair sense a guarantee that the owners of these arms may bear them at concerts, and prayer-meetings, and elections. At such places, the bearing of arms of any sort, is an eye-sore to good citizens, offensive to peaceable people, an indication of a want of proper respect for the majesty of the laws, and a marked breach of good manners. If borne at all under the law, they must be borne openly and plainly exposed to view, and under the circumstances we allude to, the very act is not only a provocation to a breach of the peace, but dangerous to human life.[103]

The boundaries of this right are such that the possession and carrying in one's home may be either open or concealed, for

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has a clear right to arms to protect himself in his house. A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business. But I have no difficulties in saying you have no right to carry arms to a public meeting, if the number of arms which are so carried are calculated to produce terror and alarm . . . ."

103. Hill v. State, 53 Ga. 473, 476 (1874). *See also* State v. Browder, 486 P.2d 925 (Alaska 1971) (defendant held in contempt for bringing unloaded shotgun into court).

one's home is a castle.[104] The open peaceful carrying in one's business place, vehicle, or on a public street in the ordinary course of one's travels also cannot be prohibited.[105]

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104. In a civilized society, a person must be allowed a feeling of absolute safety and security from criminally violent intrusions into his home. The right to keep and bear arms in the home is a right founded upon the inviolability and sanctity of the house. Open carrying was for militia use and private security while preventing violence and suprise and hence terror on the streets. The "castle doctrine" has a special place in American jurisprudence. Even "possession of obscene matter" in the home cannot be made a crime. Stanley v. Georgia, 394 U.S. 557 (1969). Under the Alaska Constitution's right to privacy, mere possession of marijuana in the home is not unlawful. Ravin v. State, 537 P.2d 494 (Alaska 1975). Unlike possession of obscene matter or marijuana, bearing arms is constitutionally protected. The "castle doctrine" evolved from the use of arms to defend one's home. McKeller v. Mason, 159 So. 2d 700, 704, *aff'd* 245 La. 1075, 162 So. 2d 571 (1964): "A man's home has traditionally been his castle, and he who enters therein with felonious intent does so at his peril."

Furthermore, keeping a gun in the home is a "liberty which was allowed by the common law." Rex v. Gardiner, 95 Eng. Rep. 386, 388 (K.B. 1738). "[T]he mere having a gun was no offense . . . for a man may keep a gun for the defense of his house and family . . ." Mallock v. Eastley, 87 Eng. Rep. 1370, 1374 (K.B. 1744). "[A] gun may be kept for the defense of a man's house." Wingfield v. Stratford, 96 Eng. Rep. 787 (K.B. 1752). How could a subsequent parliament erode these traditional common law rights? Early American decisions noted that "in England the authority of the parliament runs without limits, and rises above control. . . . [I]n England there is no written constitution. . . . In America the case is widely different: Every state in the union has its constitution reduced to written exactitude and precision. . . . [T]he constitution is the sun of the political system, around which all legislative, executive and judicial bodies must revolve." Vanhorne's Lessees v. Dorrance, 2 Dall. (2 U.S.) 304, 308 (1795).

105. At common law the mere public carrying of arms was no offense under the Statute of Northhampton, 2 Edw. III, c.3 (1328); Judy v. Lashley, 50 W. Va. 628, 41 S.E. 191, 200 (1902). To sustain a conviction proof was required that the accused had gone armed "malo animo" (with evil intent) or "to terrify the King's subjects." Rex v. Knight, 87 Eng. Rep. 75, 90 Eng. Rep. 330 (K.B. 1686) (the accused was acquitted).

Commentators of that period were in agreement. The person had to be armed offensively in affray of the king's people.

> If any person shall ride, or go Armed offensively, before the Justices, or any other the kings officers, Or in Faires, Markets, or elsewhere (by night or by day) in Affray of the kings people (the Sherife, and other the Kings officers, and) every Justice of Peace (upon his owne view, or upon complaint thereof,) may cause them to be stayed and arrested, & may bind all such to the peace, or good behaviour (or, for want of sureties, may commit them to the Gaole:) And the said Justice of P. (as also every Constable) may seise and take away their Armour, and other weapons, and shall cause them to be praised, and answered to the king as forfeited: and the Justice of P. may do by the First Assignanimus in the commission.

M. DALTON, THE COUNTREY JUSTICE 31 (London 1622).

> Note, that it is properly no Affray, unlesse there be some weapons drawn, or some stroke given, or offered to be given, or other attempt to such purpose: for if men shall contend only in hote words, this is no affray, neither

### *Common Defense Purpose*

The constitutions of four states guarantee the right to keep and bear arms for "common defense."[106] Protected arms under this guarantee are those suitable for militia use.[107] In interpreting this guarantee, the objective for which the right to keep and bear arms is secured, that is, for the common defense, figures prominently in a court's analysis.[108] Because the

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> may the Constable for words only lay hands upon them, unlesse they shall threaten to kill, beat, or hurt one another; & then may the Constable arrest such persons (to go before some Justice of peace, to find sureties for the keeping of the peace) and yet such threatening is no affray.

*Id.* at 29.

The simple carrying of a "loaded revolver . . . on the public road" is no offense because the indictment failed to "negative lawful occasion, and conclude *in terrorem populi* [to the terror of the populace]." Rex v. Smith, 2 Ir. R. 190, 201, 204 (1914). Thus in Simpson v. State, 13 Tenn. (5 Yer.) 356, 357 (1833), it was held that merely being armed "in a certain public street and highway" is not an indictable offense. Furthermore, "our constitution has completely abrogated . . ." the Statute of Northampton. *Id.* at 359-60. Regarding any claim that the simple carrying of arms might be unlawful because it may alarm some overly sensitive person, the court concluded that "after so solumn an instrument hath said the people may carry arms, can we be permitted to impute to the acts thus licensed, such a necessarily consequent operation as terror to the people to be incurred thereby; we must attribute to the framers of it, the absence of such a view." *Id.* at 360. "Under Oregon law, the possession of a billy club in a public place is protected." State v. Blocker, 291 Or. 255, ___, 630 P.2d 824, 825 (1981).

106. ARK. CONST., art. II, § 5; ME. CONST. art. I, § 16; MASS. DECL. OF RIGHTS, part I, art XVII; TENN. CONST. art I, § 26.

107. *See* notes 74, 75, 77, 79 *supra*. Maine and Massachusetts guarantee a right to self-defense. ME. CONST. art. I, § 1; MASS. DECL. OF RIGHTS, part I, art. I. Thus in Maine and Massachusetts arms for personal defense are also guaranteed. *See* notes 93-97 *supra*.

108. Fife v. State, 31 Ark. 455, 461, 25 Am. Rep. 556 (1876); Commonwealth v. Davis, 369 Mass. 886, ___, 343 N.E.2d 847, 848-49 (1976); Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840). Claims are made that a guarantee for the "common defense" and the guarantee of the second amendment are essentially the same. *Fife*, 31 Ark. at 458; *Aymette*, 21 Tenn. at 157. These claims overlook the United States Senate's rejection of an attempt to limit the right to bear arms by adding the term "common defense" to the second amendment. 1 HISTORY OF THE SUPREME COURT OF THE U.S. 450 (J. Goebel, Jr. ed. 1971); 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1153-54 (1971). This rejection was an apparent response to fears in Massachusetts that a guarantee for the common defense might be too restrictive."[T]hat the people have a right to keep and bear Arms for their Own and the Common defence" was urged as a better choice. THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASS. CONVENTION OF 1780, at 624 (O. & M. Handlin eds. 1966). Thus state courts in interpreting their constitutions with second amendment type language have not given their guarantees a restrictive interpretation. *See* notes 100, 101, 103 *supra*.

right is secured only in terms of common defense, a court is then able to reason that only arms recognized as those "useful either in warfare or in preparing the citizens for their use in warfare, by training him as a citizen to their use in times of peace"[109] are worthy of constitutional protection.

The people "have the unqualified right to keep" arms suitable for militia use. "But the right to bear arms is not of that unqualified character."[110] It is permissible to "regulate the mode of wearing war arms, and no doubt the occasions of wearing such arms . . . ."[111] In maintaining the validity of legislative restrictions on the mode of carrying war arms, courts have held that the right is not infringed by a statute requiring the carrying of a pistol, uncovered and in the hand, when not upon one's own premises or upon a journey, as "the habitual carrying does not seem essential to 'common defense,' [and as the "essential objects" of the right are pre-

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109. Fife v. State, 31 Ark. 455, 460-61, 25 Am. Rep. 556 (1876); Andrews v. State, 50 Tenn. (1 Heisk) 165, 182, 8 Am. Rep. 8, 16 (1871) (protected arms are those usually employed in "civilized warfare" and "are adapted to the ends indicated above, that is, the efficiency of the citizen as a soldier"); Aymette v. State, 21 Tenn. (2 Hum.) 154, 159 (1840) ("right to prohibit the wearing, or keeping" of arms "which are not usual in civilized warfare, or would not contribute to the common defense"). Allowable is a statute prohibiting the sale of any pistol *except such as are used in the army or navy* "for it in no wise restrains the use or sale of such as are useful in warfare." Dabbs v. State, 39 Ark. 353, 357 (1882). *See also* State v. Burgoyne, 75 Tenn. 173 (1881).

110. Aymette v. State, 21 Tenn. (2 Hum.) 154, 160 (1840).

111. Wilson v. State, 33 Ark. 557, 559, 34 Am. Rep. 52, 54 (1878). An act proscribing concealed carrying is "consistent with the right of the citizen to bear arms." State v. Johnson, 16 S.C. 187, 191 (1881) (S.C. CONST. art. I, § 28 (1868) guaranteed arms for common defense). Parading with an unauthorized body of armed men may be prohibited. Commonwealth v. Murphy, 166 Mass. 171, 44 N.E. 138 (1896). As early as 1780 the Recorder of London, in response to a question "would it be lawful for a vast multitude [to gather], to the amount of many thousand armed men, without any visible occasion or apparent lawful object, unauthorized by government or any magistrate," stated "I should certainly answer in the negative; because, in my opinion, an affirmative answer would amount to a dissolution of all government and subversion of all law." Although he agreed later that "the lawful purposes, for which arms may be used, (besides immediate self-defence) are, the suppression of violent and felonious breaches of the peace, the assistance of the civil magistrates in the execution of the laws, and the defence of the kingdom against foreign invaders." W. BLIZARD, DESULTORY REFLECTIONS ON POLICE: WITH AN ESSAY ON THE MEANS OF PREVENTING CRIMES & AMENDING CRIMINALS 61, 63 (London 1785). "The power to regulate does not fairly mean the power to prohibit; on the contrary, to regulate necessarily involves the existence of the thing or act to be regulated." Andrews v. State, 50 Tenn. (3 Heisk) 165, 181, 8 Am. Rep. 8, 15 (1871).

served] . . . if every citizen may keep arms in readiness upon his place, may render himself skillful in their use by practice, and carry them upon a journey without let or hindrance. . . ."[112] Similarly, a landowner charged with unlawful hunting and possession of a shotgun on a game preserve "could not possibly come within the constitutional rights of the respondent in bearing arms for the common defense while, on the other hand, if possession was not a part of the act of hunting, the constitutional rights of the respondent could be involved."[113] However, a prohibition against a citizen "wearing or carrying a war arm, except upon his own premises or when on a journey travelling through the country with baggage, or when acting as or in aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms."[114] The court noted that crime "must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege."[115] The case involved the carrying of an army pistol to kill wild hogs. Likewise, a city ordinance absolutely forbidding the carrying of "any sort of pistol in any sort of manner" is void,[116] and any attempt "to disarm

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112. Haile v. State, 38 Ark. 564, 566-67, 42 Am. Rep. 3, 4-5 (1882).

113. State v. McKinnon, 153 Me. 15, ___, 133 A.2d 885, 889 (1957). Since ME. CONST. art. I, § 1 guarantees that "All men . . . have certain natural, inherent and unalienable rights, among which are . . . defending life . . . and protecting property, . . . and obtaining safety and happiness," this right when coupled with the guarantee to bear arms indicates bearing arms for personal defense is protected.

114. Wilson v. State, 33 Ark. 557, 560, 34 Am. Rep. 52, 54-55 (1878). *Wilson*, Fife v. State, 31 Ark. 455, 25 Am. Rep. 556 (1876), and Haile v. State, 38 Ark. 564, 43 Am. Rep. 3 (1882), plainly indicate that any implication made in State v. Buzzard, 4 Ark. 18 (1842), that the right to arms belongs only to the militia and not to the people has been rejected. Judge Lacy's erudite dissent was heeded:

> I deem the right to be valueless, and not worth preserving; for the State unquestionably possesses the power, without the grant, to arm the militia, and direct how they shall be employed in cases of invasion or domestic insurrection. If this be the meaning of the Constitution, why give that which is no right in itself, and guaranties a privilege that is useless? This construction, according to the views I entertain, takes the arms out of the hands of the people, and places them in the hands of the Legislature, with no restraint or limitation whatever upon their power, except their own free will and sovereign pleasure.

*Buzzard*, at 35-36. In the final analysis, Buzzard simply allows a ban on concealed carrying.

115. Wilson v. State, 33 Ark. 557, 560, 34 Am. Rep. 52, 54-55 (1878).

116. Glasscock v. City of Chattanooga, 157 Tenn. 518, 520, 11 S.W.2d 678 (1928).

the people by legislation" would be void under the arms guarantee.[117]

The right to bear arms for the common defense is given a conditional reading, while the right to keep arms for the common defense is given a liberal reading:

> [T]he right to *keep* them, with all that is implied fairly as an incident to this right, is a private individual right guaranteed to the citizen not the soldier. . . . [T]his right was intended, as we have maintained in this opinion, and was guaranteed to, and to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights.[118]

The right to keep arms "necessarily involves the right to purchase and use them in such a way as is usual, or to keep them for the ordinary purposes to which they are adapted,"[119] and thus arms may be used "for his proper defense . . . . He has a right also to protect his own house and family . . . ."[120]

The problems encountered by a narrow interpretation of the right to bear arms for the common defense are best illustrated by an analysis of *Commonwealth v. Davis*.[121] The Massachusetts Supreme Court reasons that the right guaranteed is related only to the common defense, which in turn points to the broadly-based militia. Therefore, a law forbidding the keeping of arms by individuals might interfere with the effectiveness of the militia, thereby infringing on the constitutional guarantee. The court goes on to say, however, that this situation can no longer exist as the militia "is now equipped and

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117. Smith v. Ishenhour, 43 Tenn. (3 Cold.) 214, 217 (1866).

118. Andrews v. State, 50 Tenn. (3 Heisk.) 165, 182-84 (1871). Although the court felt the militia "has, as an organization, passed away in almost every State of the Union, and only remains to us as a memory of the past, probably never to be revived," the court still found "the prohibition of the statute is too broad to be allowed to stand consistently with the views herein expressed." *Id.* at 184, 187. This indicates that the court honored its duty to carry out the intent of the framers rather than judicially repeal a constitutional right, as the court did in Commonwealth v. Davis, 369 Mass. 886, ___, 343 N.E.2d 847, 849 (1976). However, the experiences of World War II indicate that the militia is still a viable institution. *See supra* notes 85-91.

119. Andrews v. State, 50 Tenn. (3 Heisk.) 165, 178 (1871).

120. State v. Foutch, 96 Tenn. 242, 247, 34 S.W. 1, 2 (1896); *cf.* Carroll v. State, 28 Ark. 99, 101 (1872) (right to bear arms in defense of person and property).

121. 369 Mass. 886, 343 N.E.2d 847 (1976).

supported by public funds."[122] In effect the court judicially repeals a constitutional guarantee found in the people's declaration of rights. What is left is a purposeless hollow shell. In achieving this end the court ignored or overlooked well-established principles of law. The *Davis* opinion cannot be aligned with the intent of the Framers.

All decisions from sister states interpret the arms guarantee for the common defense as an individual right guaranteed to the citizen and not the soldier.[123] Current English arms statutes serve as no support because the British lack a written constitution,[124] and Parliament may abrogate all rights.[125] Americans adopted a written constitution in response to abuses under the English system.[126] The purpose of a written guarantee to keep and bear arms is to place that right beyond the reach of the legislature.[127] When the 1780 Massachusetts Constitution was adopted concern was voiced that the arms guarantee mentioned common defense but failed to mention self-defense.[128] In an apparent effort to satisfy this concern an

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122. *Id.* at ___, 343 N.E. 2d at 849. Salina v. Blaksley, 72 Kan. 230, 83 P. 619 (1905), was also cited in *Davis* for the claim that the Massachusetts arms guarantee is "not directed to guaranteeing individual ownership or possession of weapons." For criticism of *Blaskley's* collective right holding, *see supra* notes 38-71 and accompanying text. Furthermore, the militia is more than just the National Guard. *See supra* notes 81, 82.

123. *See e.g.*, Wilson v. State, 33 Ark. 557, 34 Am. Rep. 52 (1878); State v. McKinnon, 153 Me. 15, 133 A.2d 885 (1957); State v. Johnson, 16 S.C. 187, 191 (1881); S.C. CONST. art. I, § 28 (1868) (guaranteed the right for the common defense); Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928).

124. Powell v. McCormack, 395 U.S. 486, 523 n.46 (1969).

125. United States v. Brewster, 408 U.S. 501, 508 (1972); C. REMBAR, THE LAW OF THE LAND 24, 287 (1980).

126. Bridges v. California, 314 U.S. 252, 264 n.7 (1941); Grosjean v. American Press Co., 297 U.S. 233, 248-49 (1936). The British Press was subject to licensing. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND.* 152.

127. People v. Zerillo, 219 Mich, 635 ___, 189 N.W. 927, 928 (1922); Commonwealth v. Ray, 214 Pa. Super. 72, ___, 272 A.2d 275, 278-79 (1970) (right to bear arms pre-existed constitution, and cannot be diminished by the legislature), *vacated on other grounds*, 448 Pa. 307, 292 A.2d 410 (1972); Simpson v. State, 13 Tenn. (5 Yer.) 356, 359-60 (1833); Cockrum v. State, 24 Tex. 394, 401-02 (1859).

128. THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASS. CONVENTION OF 1780, *Supra* note 108, at 624. Based on custom and need, the people probably took possession of private arms for all normal purposes, including personal defense, for granted. Since guns were an integral part of their culture, the assignment of a reason for the right was probably not viewed as a restriction on the right. A newspaper article, describing the then-to-be-adopted second amendment, underscores

individual guarantee to self-defense was adopted.[129] This demonstrates that the Framers also intended that arms be kept for self-defense. Thus a right enjoyed since colonial days and placed in a written declaration of rights cannot be destroyed by the passage of a mere statute or be judicially repealed.[130]

The boundaries of the right dictate that the *keeping* of arms suitable for militia use in one's home, place of business or premises cannot be infringed. The purpose of such keeping is to have arms available for possible militia use, for deter-

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the view that private arms and their keeping and bearing was to guaranteed:

> As civil rulers, not having their duty to the people duly b[illegible] them, may attempt to tyrannize and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, *the people are confirmed by the next article in their right to keep and bear their private arms.*

(emphasis added). The Federal Gazette, and Philadelphia Evening Post, June 18, 1789, No. 68 Vol. II, at 2, col. 1. Tench Coxe in a letter to Madison admitted being the author. 12 PAPERS OF JAMES MADISON 241 n.1 (1979).

129. MASS. CONST. DECL. OF RIGHTS, part I, art. I. The constitution should be construed as a whole. Kilpatrick v. Superior Ct. of Maricopa County, 105 Ariz. 413, ___, 466 P.2d 18, 24 (1970).

130. In Boston, British General Gage ordered his troops to seize the inhabitants' arms: 1,778 muskets, 634 pistols, and thirty-eight blunderbusses were surrendered by Bostonians. R. FROTHINGHAM, HISTORY OF THE SEIGE OF BOSTON 95 (6th Ed. 1903). Boston's population of 17,000 declined to 7,000 civilians by July 1775. THE SPIRIT OF 'SEVENTY-SIX 146 (H. Commager & R.B. Morris, eds. 1967). The disarmament of Bostonians would later be listed as one of the grievances justifying the Revolutionary War. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF AMERICAN STATES, H.R. Doc. No. 398, 69th Cong., 1st Sess. 14 (1927). The short-barreled shotgun is the modern equivalent of the ancient blunderbuss. It was not uncommon for a blunderbuss to have a barrel under eighteen inches. F. WILKINSON, ANTIQUE FIREARMS 99 (1969). *Cf.* Burks v. State, 162 Tenn. 406, 36 S.W.2d 892 (1931) (miniature shotgun is constitutionally an arm). T. SWEARENGEN, THE WORLD'S FIGHTING SHOTGUNS (1978) observes the following:

> The modern fighting shotgun is a direct descendent of two of the world's most famous smoothbore firearms. One is the Birding Piece or Long Fowler, which was the father of modern sporting shotguns. The other is the Blunderbuss, accepted as the first true fighting shotgun; and the weapon credited with establishing the basic missions and configurations for shotguns still being used after some 400 years. . . . *Id.* at 2.
>
> [I]n the American West . . . sawed-off shotguns were substituted for the blunderbuss. *Id.* at 2.
>
> The modern short-barrel riot-type shotgun still possesses the same basic characteristics and performs the same missions that occupied the blunderbuss *Id.* at 3.

At one time shotgun pistols were also manufactured. *Id.* at 45-48 & 80-93.

rence against oppression, and for personal defense. The object of the purpose is that the people "shall become familiar with their use in times of peace, that they may the more efficiently use them in times of war; then the right to keep arms for this purpose involves the right to practice their use in order to attain this efficiency."[131] To achieve this end, the boundaries of the right to *bear* arms dictate that arms may be carried openly to and from activities where the constitutional goal is carried out. These activities include lawful target shooting and hunting, moving one's goods to a new home or place of business, going upon a journey, and going to a place of arms purchase or repair.[132] While "habitual carrying does not seem essential to 'common defense,' " the requirement that a pistol "be carried uncovered in the hand" is not only "a very inconvenient mode of carrying them habitually"[133] but is only marginally safe. The more prudent approach would be carrying in a pistol case or holster. Since the home is one's castle, carrying in one's home may be either open or concealed.[134]

### *Self-Defense and Defense of State Purpose*

The right to keep and bear arms for personal defense and defense of the state is guaranteed in fourteen state constitutions.[135] This guarantee protects arms that are (1) suitable for militia use,[136] and (2) also protects arms suitable for personal defense.[137] The plain meaning of the text leads courts to conclude that two separate and distinct categories of arms are

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131. Andrews v. State, 50 Tenn. (3 Heisk.) 165, 178 (1871).

132. Haile v. State, 38 Ark. 564 (1882); Wilson v. State, 33 Ark. 557, 34 Am. Rep. 52 (1878); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 8 Am. Rep. 8 (1871).

133. Haile v. State, 38 Ark. 564, 566, 43 Am. Rep. 3 (1882). In Maine and Massachusetts the bearing of arms is also for personal security because the right to self-defense is guaranteed. ME. CONST. art. I, § 1; MASS. CONST. DECL. OF RIGHTS, part I art. I.

134. *See* note 104 *supra*.

135. ALA. CONST. art. I, § 26; ARIZ. CONST. art. II, § 26; CONN. CONST. art. I, § 15; FLA. CONST. art. I, § 8; IND. CONST. art. I, § 32; KY. CONST. BILL OF RIGHTS § I, para. 7; MICH. CONST. art. I, § 6; ORE. CONST. art. I, § 27; PA. CONST. art. I, § 21; S.D. CONST. art. VI, § 24; TEX. CONST. art. I, § 23; VT. CONST. ch.I, art. 16; WASH. CONST. art. I, § 24; and WYO. CONST. art. I, § 24.

136. *See supra* notes 74, 75, 77, 79.

137. *See supra* notes 93-97; *see infra* notes 180, 204.

protected.[138] Some courts, however, have overlooked or ignored this distinction.[139]

These guarantees protect a right to keep and bear arms for militia use,[140] as a deterrent against oppression,[141] and for defense of self, home and property.[142] Some courts delving

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138. State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); People v. Brown, 253 Mich. 537, 235 N.W. 245 (1931). "Moreover, the constitutional debate over this section [IND. CONST. art. I, § 32] underscores the framers' intent that two purposes, rather than one, were served by the section." Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339, 1341 (Ind. App. 1980).

139. State v. Swanton, 129 Ariz. 131, ___, 629 P.2d 98, 99 (Ariz. App. 1981) ("such arms as are recognized in civilized warfare"). It is highly doubtful that the Framers felt the rules on war arms, formulated in international conventions, have any application to a man or woman using a weapon commonly kept by the people against an armed robber who is undergoing drug withdrawal symptoms.

In State v. Duke, 42 Tex. 455, 458 (1875), the court reviewed the text of the constitutional guarantee, and its earlier decision in English v. State, 35 Tex. 473 (1872), that only arms suitable for militia use are protected, and concluded we "do not adopt the opinion expressed that the word 'arms', in the Bill of Rights, refers only to the arms of a militiaman or soldier. Similar clauses in the Constitutions of other States have generally been construed by the courts as using the word *arms* in a more comprehensive sense."

140. Rabbitt v. Leonard, 36 Conn. Super. 108, ___, 413 A.2d 489, 491 (1979); People v. Brown, 253 Mich. 537, 539, 235 N.W. 245, 246 (1931) ("attachment to a militia composed of all able-bodied men"); State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 99 (1980). The posse and the militia are both comprised of able-bodied men and both perform the similar functions of maintaining the public order, with the militia being used exclusively for disorders which traditional civil authorities are unable to prevent. Despite the existence of a large body of professional law enforcement officers, the posse is still called on occasion to apprehend criminals. On June 6, 1977, a posse was sent to search for mass-murderer Theodore Robert Bundy following his escape from the courthouse in Aspen, Colorado R. LARSEN, BUNDY: THE DELIBERATE STRANGER 179-82 (1980). Recently a California posse apprehended two robbers. *The Armed Citizen*, AM. RIFLEMAN at 6 (July 1982).

141. Carlton v. State, 63 Fla. 1, ___, 58 So. 486, 488 (1912) ("protecting themselves against oppression and public outrage"); State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 97 (1980).

142. Rabbitt v. Leonard, 36 Conn. Super. 108, ___, 413 A.2d 489, 491 (1979) ("has a fundamental right to bear arms in self-defense, a liberty interest"); Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972) ("for hunting purposes or for the protection of their persons and property"); Davis v. State, 146 So. 2d 892, 893-94 (Fla. 1962) ("to secure to the people the right to carry weapons for their protection"); Watson v. Stone, 4 So. 2d 700, 701, 702-3 (Fla. 1941) ("sense of security afforded by the knowledge of the existence of a pistol in the pocket of an automobile in which they are traveling"); Motley v. Kellogg, 78 Ind. Dec. 316, 409 N.E.2d 1207, 1210 (Ind. App. 1980) ("not making applications available at the chief's office effectively denied members of the community the opportunity to obtain a gun permit and bear arms for their self-defense"); Schubert v. Debard, 398 N.E.2d 1339, 1341 (Ind. App. 1980) ("our constitution provides our citizenry the right to bear arms for their self-de-

into the historical reasoning behind the inclusion of the guarantee were searching for precedent to be used in allowing the legislature to regulate what was textually an unconditional right.[143] The conclusion that the constitution "has neither expressly nor by implication, denied to the Legislature, the right to enact laws in regard to the manner in which arms shall be borne"[144] was reached by focusing on the qualifying language in the English Bill of Rights "that the subjects which are Protestants may have arms for their Defence, suitable to their Conditions and as allowed by law. . . . We have taken this brief notice of the English statute, as it may serve to aid us in the construction of our constitutional provision."[145] In upholding a concealed carrying statute, one court nevertheless recognized that in this country the Constitution and not the legislature is supreme:

> We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretense of regulating, amounts to

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fense"); People v. Zerillo, 219 Mich. 635, ___, 189 N.W. 927, 929 (1922) ("to possess a revolver for the legitimate defense of their person and property"); State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 100 (1980) ("includes a right to possess certain arms for defense of person and property"); Commonwealth v. Ray, 218 Pa. Super. 72, ___, 272 A.2d 275, 278-79 (1970), *vac. on other grounds* 448 Pa. 307, 292 A.2d 410 (1972) ("to bear arms in defense of themselves; their property and the State"); State v. Duke, 42 Tex. 455, 458 (1875) ("such arms as are commonly kept . . . and are appropriate for open and manly use in self-defense"); State v. Rosenthal, 75 Vt. 295, 297, 55 A. 610 (1903) ("The people of the State have a right to bear arms for the defense of themselves"); Carfield v. State, 649 P.2d 865, 871 (Wyo. 1982) (the right extends to "defending the State or himself").

In People v. Zerillo, 219 Mich. 635, ___, 189 N.W. 927, 928 (1922), the court summarized the defense of self and state guarantee as follows:

> The true meaning of this provision is well stated in the Constitution of the state of Colorado: "That 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 lawfully summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons. Article 2, § 13."

143. State v. Reid, 1 Ala. 612, 35 Am. Dec. 44 (1840).

144. *Id.* at 616.

145. *Id.* at 615. The term "as allowed by Law" means the common law. Rex v. Meade, 19 The Times Law Reports 540 (1903). The common law did not prevent the peaceful keeping or bearing of arms. Rex v. Knight, 87 Eng. Rep. 75, 90 Eng. Rep., 330 (K.B. 1686); Rex v. Dewhurst, 1 State Trials, New Series 529, 601 (1820); Rex v. Smith, 2 Ir. R. 190 (1914).

> a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional.[146]

The delving into the historical reasoning and the intent of the Framers has also led to the conclusion that the right to bear arms, like any constitutional right, is an important guarantee requiring liberal construction.[147] The Constitution is the supreme law, and courts are not to substitute their judgment for that of the Framers and the people who adopted it as to what the guarantee should protect or to indulge in constitution-making under the guise of interpretation.[148]

In searching for guidelines to set the margins for conduct protected by the right to bear arms in defense of self and state the focus has been on the literal interpretation of the guarantee. If the conduct can be characterized as essential for defense of self or defense of the state, it will be protected.[149] This analysis cuts both ways. The purpose of defense of self and defense of state is also used to limit the rights guaranteed.[150] Under this analysis, a statute against concealed carry-

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146. State v. Reid, 1 Ala. at 616-17, 35 Am. Dec. 47 (1840).

147. "[C]onstitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." Boyd v. United States, 116 U.S. 616, 635 (1886). "The maintenance of the right to bear arms is a most essential one to every free people and should not be whittled down by technical constructions." State v. Kerner, 181 N.C. 574, ___, 107 S.E. 222, 224 (1921).

148. *See, e.g.*, Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 13 Am. Dec. 251 (1822); State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980).

149. Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980) (where "self-defense" is asserted as a reason for desiring a license to carry a pistol the license cannot be withheld); Watson v. Stone, 4 So. 2d 700, 703 (1941). In narrowly construing a statute the right to bear arms was kept in mind. "It cannot be said that it [the pistol] is placed in the car or automobile for unlawful purposes, but on the other hand it was placed therein exclusively for defensive or protective purposes. These people, in the opinion of the writer, should not be branded as criminals in their effort of self preservation and protection, but should be recognized and accorded the full rights of free and independent American citizens."

150. Carfield v. State, 649 P.2d 865, 871 (Wyo. 1982) (felon possessing gun offense affirmed because no evidence existed he was "defending the State or himself"). In a murder case involving the killing of two deputy sheriffs trying to arrest men who were drunk, carried a pistol concealed, and breached the peace by shooting it off, the court brushed aside a right to bear arms claim with a terse comment that the right

ing would have no connection with the right to bear arms, the rationale being that a regulation of the manner or place where arms may be borne does not destroy the right when viewed in terms of the purpose. Protection of self or state can be maintained by the open wearing of arms.[151]

This guarantee has on the whole been more effective in safeguarding the individual's right to bear arms because the inclusion of the words "defense of themselves" or "defense of self" has compelled courts to reaffirm the fundamental right to bear arms in self-defense,[152] a right subject to being swept away under a less specific provision.[153] Thus courts have not hesitated in striking down weapons possession laws,[154] laws on carrying weapons,[155] and a law requiring the forfeiture of a pistol for violating a misdemeanor carrying statute.[156]

As with each constitutional guarantee, a balance must be struck between the individual's right to exercise that guarantee and society's right to enact laws that will insure some semblance of order. As these interests will necessarily conflict, the question then becomes which party should accept the encroachment on his right. Courts have allowed the encroachment on an individual's right on several theories. The permissive language in the constitutional guarantee has been used to sanction the requirement of a license to carry repeating rifles

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was not designed to protect a man "who is prone to load his stomach with liquor and his pockets with revolvers or dynamite, and make of himself a dangerous nuisance to society." Carlton v. State, 63 Fla. 1, ___, 58 So. 486, 488 (1912). This dictum, however, was unnecessary because the Florida guarantee provides "the manner of bearing arms may be regulated by law." FLA. CONST. art. I, § 8.

151. State v. Reid, 1 Ala. 612, 619, 35 Am. Dec. 47 (1840) ("[w]e incline to the opinion that the Legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence").

152. State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980); Rabbitt v. Leonard, 36 Conn. Super. 108, 413 A.2d 489 (1979).

153. Commonwealth v. Davis, 369 Mass. 886, 343 N.E.2d 847 (1976).

154. State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); People v. Zerillo, 219 Mich. 635, 189 N.W. 729 (1922).

155. State v. Blocker, 291 Or. 255, 630 P.2d 824 (1981); State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 13 Am. Dec. 251 (1822).

156. Jennings v. State, 5 Tex. Crim. 298 (Tex. Crim. App. 1878).

or pistols even openly[157] and to restrict the carrying of a pistol to one's premises or place of business, unless the person is traveling with baggage or is confronted with immediate and pressing danger "as to alarm a person of ordinary courage."[158] Other courts label a law as not a prohibition but a mere regulation of the right to bear arms. Thus, laws against concealed carrying[159] or carrying an unconcealed pistol upon premises not his own or under his control have been upheld.[160] Most courts merely invoke the term "police power" in upholding a law. The police power often appears to exist and operate at the will of the legislature and courts with no recognition of constitutional limits. Thus laws proscribing the unlicensed carrying of a pistol in any manner away from the home or fixed place of business,[161] or carrying a loaded rifle or shotgun in a vehicle on a public highway have been upheld.[162] Likewise, a sharply divided court upheld a conviction for possessing "a firearm in a public place or within public view under circumstances tending to provoke a breach of the peace," over a right to bear arms claim, where the defendant was peacefully carrying a shotgun in a truck, in the afternoon, in an area where two weeks before a police shooting incident with racial overtones had occured.[163] An opinion which epitomizes

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157. Davis v. State, 146 So. 2d 892 (Fla. 1962) ("carried a pistol in an unconcealed holder").

158. State v. Duke, 42 Tex. 455 (1875).

159. State v. Reid, 1 Ala. 612 (1840).

160. Isaiah v. State, 176 Ala. 27, 58 So. 53 (1911). In areas of elementary rights, "the constitution is to be liberally construed in favor of the citizen." Randle v. Winona Coal Co., 206 Ala. 254, ___, 89 So. 790, 792 (1921).

161. Matthews v. State, 237 Ind. 677, 148 N.E.2d 334 (1958). The dissenting opinion of Chief Justice Emmert goes into a lengthy historical and constitutional discussion to explain why unconcealed carrying should require no license. *Id.* at ___, 148 N.E.2d at 338. It has been cited with approval by the majority in State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 98 (1980), and the concurring opinion in Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980).

162. State v. Duranleau, 128 Vt. 206, 260 A.2d 383 (1969). VT. CONST., ch. I, art. 1 also guarantees the right of "defending life . . . and protecting property, and . . . obtaining . . . safety . . . ." This guarantee and the right to bear arms guarantee appear to make it abundantly clear that effective security in a vehicle is protected.

163. Hyde v. City of Birmingham, 392 So. 2d 1226 (Ala. Crim. App. 1980), *cert. denied* 392 So. 2d 1229 (1981) (5 to 4 decision). *Cf.* State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971). Conviction affirmed for possessing a shotgun and shells off his premises in an area declared a state of emergency and for violating emergency curfew. Although the right to bear arms was not properly raised procedurally, the court

the lack of careful reflection in the use of the term "police power" is *Caswell & Smith v. State*,[164] where the court upheld a confiscatory tax on the sales of pistols, although earlier case law had established that pistols are constitutionally protected arms[165] and cannot even be forfeited for a misdemeanor carrying conviction.[166] The court failed to grasp that the right to purchase arms is included in the right to keep and bear arms guarantee.[167]

The object of this guarantee, to maintain a militia, would not be frustrated by a requirement that arms be carried openly. Arms carried for the purpose of self-defense can likewise be carried openly. However, the traditions of a state and the intent of the Framers may be such that concealed carrying is also protected conduct.[168] At common law the mere carrying of a concealed weapon was no offense. In America, it was considered normal for eighteenth century civilians to carry pocket pistols for protection while traveling.[169] Thomas Jefferson owned a pair of screw-barreled pocket pistols.[170] The following excerpt from a letter written from Falmouth, Virginia, on July 29, 1764, by William Allason, a merchant, to Messrs. Boyle and Scott, merchants in Glasgow, is instructive on the defensive pistol-carrying habits of civilians:

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hinted that the right was not infringed. *Id.* at ___, 178 S.E.2d at 461-62.

164. 148 S.W. 1159 (Tex. Civ. App. 1912). Until the law was repealed dealers simply leased pistols for 99 years. A tax may not be imposed to suppress or destroy a constitutional right. Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, ___ U.S. ___,103 S. Ct. 1365 (1983).

165. State v. Duke, 42 Tex. 455 (1875).

166. Jennings v. State, 5 Tex. Crim. App. 298 (1878).

167. City of Lakewood v. Pillow, 180 Colo. 20, ___, 501 P.2d 744, 745 (en banc 1972); Andrews v. State, 50 Tenn. 165, 178, 8 Am. Rep. 8, 13 (1871).

168. Since the people had the right to carry arms concealed when the constitution was adopted that right cannot be infringed under the guise of mere regulation. Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822). The constitution was subsequently changed to allow a ban on concealed carrying. KY. CONST. BILL OF RIGHTS § 1, para. 7. Concealed carrying without a license was sanctioned in State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903), and concealed carrying with a license was sanctioned in Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980), based on the intent of the Framers. In Pennsylvania an effort by some Framers to protect only open carrying (it would have read "openly to bear arms") was rejected by a 54 to 23 vote. 7 DEBATES OF THE CONVENTION TO AMEND THE CONST. OF PENN. 258-61 (1873).

169. G. NEUMANN, THE HISTORY OF WEAPONS OF THE AM. REVOLUTION 150-51 (1967).

170. HALSEY, *Jefferson's Beloved Guns*, AM. RIFLEMAN, Nov. 1969, at 17.

> As it is sometimes dangerous in traveling through our wooden Country Particularly at this time when the Planters are pressed for old Ballances, we find it necessary to carry with us some defense Weapons, for that purpose, you'll be pleased to send us by some of the first Ships for this River a pair of Pistols about 30/[shillings] Price. Let them be small, for the convenience of carrying in a side Pockett, and as neat as the Price will admit of.[171]

The boundaries of this right are such that the possession and carrying in one's home may be either open or concealed, keeping the castle doctrine in mind.[172] The open peaceful carrying in one's business place, vehicle, or on a public street in the ordinary course of one's travels also cannot be prohibited.[173] A measure which prevents a person from carrying a constitutionally protected arm in his vehicle, for example, is a measure which prevents a person from bearing an arm for self-defense. To claim that such a prohibitory measure is a mere regulation or a mere exercise of the police power is to admit that ordinary words and ordinary understanding have been replaced by judicial "newspeak."

Keeping in mind that a law requiring a license to carry a gun is in derogation of the common law,[174] that the purpose of a written constitution is to place rights beyond the reach of the police power,[175] and that licensing officials can be very creative in frustrating applicants,[176] to carry an arm openly

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171. ALLASON LETTER BOOK 1757-1770, f. 134 (Va. State Library).

172. *See* note 104 *supra*.

173. *See* note 105 *supra*.

174. State v. Beauton, 170 Conn. 234, ___, 365 A.2d 1105, 1108 (1976).

175. "The provision in the Constitution granting the right to all persons to bear arms is a limitation upon the power of the Legislature to enact any law to the contrary." People v. Zerillo, 219 Mich. 635, ___, 189 N.W. 927, 928 (1922).

176. "[N]ot making applications available at the chief's office effectively denied members of the community the opportunity to obtain a gun permit and bear arms for their self-defense." Motley v. Kellogg, 78 Ind. Dec. 316, ____, 409 N.E.2d 1207, 1210 (Ind. App. 1980). A Silver Spring, Maryland man was murdered after being denied a license to carry a pistol because the state police felt there was a lack of sufficient evidence presented to justify fear. Ahlers, *Years of Feuding Set Scene for Murder*, THE MONTGOMERY JOURNAL, May 29, 1981, A1, at col. 1. In ordering the police to issue a carrying license one court brushed aside arguments that the applicant "has not yet been the victim of crime" with the comment that "one such incident may render moot forever his application." Matter of Magliocco, 184 N.Y.L.J. 4 (N.Y. Co. Sup. Ct. Aug. 14, 1980).

should not require a license. "The exercise of a right guaranteed by the Constitution cannot be made subject to the will of the sheriff."[177] The constitutional purpose would not be frustrated by a prohibition of carrying arms while drunk, or to a church, polling place, court, or public assembly, or in a manner calculated to inspire terror.[178]

*Defense of Self, Home, Property and State Purpose*

The framers of constitutions in six states carefully chose explicit wording so that a broad guarantee would be secured and so that the boundaries of the guarantee would be self-evident.[179] They did not restrict the guarantee to a militia purpose or to a common defense purpose but rather included a guarantee for personal defense and security purposes—defense of "home, person, or property." The textual context dictates that two separate and distinct categories of arms are guaranteed: those suitable for personal defense[180] and those suitable for militia use.[181] The constitutions protect the right of people to use arms for defense of home, person, and property,[182] for militia use,[183] and as a deterrent against

177. People v. Zerillo, 219 Mich. 635, ___, 189 N.W. 927, 928 (1922).

178. *See supra* notes 50, 101.

179. COLO. CONST. art. II, § 13; MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; N.H. CONST. part I, art. 2 a; OKLA. CONST., art. II, § 26. For purposes of textual clarity, the New Hampshire guarantee omits mention of the home but mentions family, while Colorado, Mississippi, Missouri, Montana, and Oklahoma mention home but omit family. In New Hampshire protection of the home is implied in the specific guarantee of protection of family or property, and in Colorado, Mississippi, Missouri, Montana, and Oklahoma protection of the family is implied in the specific guarantee of protection of the home. Therefore, this minor textual difference in this group is insignificant.

This group is a more explicit pronouncement of the true meaning of the defense of self and state guarantee. People v. Zerillo, 219 Mich. 635, ___, 189 N.W. 927, 928 (1922).

180. *See supra* notes 93-97. *See also* People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (1936) (shotgun); State v. Keet, 269 Mo. 206, ___, 190 S.W. 573, 576 (1916) ("rifle on his shoulder, his hunting knife on his belt"); State v. Shelby, 90 Mo. 302, ___, 2 S.W. 468, 469 (1886) ("a revolving pistol comes within the description of such arms as one may carry for the purposes designated in the constitution . . ."). Taylor v. McNeal, 523 S.W.2d 148 (Mo. Ct. App. 1975) (pistols and ammunition clips); State v. Nickerson, 126 Mont. 151, 247 P.2d 188 (1952) (revolver).

181. *See supra* notes 74, 75, 77, 79.

182. City of Lakewood v. Pillow, 180 Colo. 20, ___, 501 P.2d 744, 745 (1972)(en banc) ("possess a firearm in a vehicle or in a place of business for the purpose of self-

oppression.[184]

Despite the clear purposes enunciated in these guarantees, the Oklahoma Supreme Court almost immediately after the passage of the Oklahoma Constitution, in *Ex parte Thomas*,[185] a case involving the concealed carrying of a pistol, disregarded the carefully chosen words of the Framers and held that only arms suitable for militia use are protected and that the purpose behind the guarantee is the "maintenance of an armed militia." The opinion demonstrates inattentiveness to the Framers' precise language and a lack of deliberative precision. The court claimed inability to find a state with a like guarantee, overlooking like guarantees already adopted in Colorado, Mississippi, Missouri, and Montana, as well as a Missouri opinion explaining the right and holding that "a revolving pistol" is constitutionally an arm.[186] The *Thomas* court relied heavily on cases from Arkansas, Tennessee and Georgia, in which the state constitutions, unlike that of Oklahoma, reveal a common defense or militia purpose.[187] In

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defense"); People v. Nakamura, 99 Colo. 262, 264, 62 P.2d 246, 247 (1936) ("cannot disarm any class of persons or deprive them of the right guaranteed under section 13, article 2 of the Constitution, to bear arms in defense of home, person and property"); Taylor v. McNeal, 523 S.W.2d 148, 150 (Mo. Ct. App. 1975) ("every citizen has the right to keep and bear arms in defense of his home, person and property . . ."); State v. Nickerson, 126 Mont. 151, 247 P.2d 188 (1952) (defense of home, person, or property).

183. *Ex parte* Thomas, 1 Okla. Crim. 210, ___, 97 P. 260, 264-65 (1908) (the court limited the right to a militia purpose).

184. *See supra* note 141.

185. 1 Okla. Crim. 210, 97 P. 260 (1908).

186. *Id.* at ___, 97 P. at 262. In State v. Shelby, 90 Mo. 302, 2 S.W. 468, 469 (1886), the court conceded, "[t]he constitution secures to the citizen the right to bear arms in the defense of his home, person, and property . . . [and] . . . that a revolving pistol comes within the description of such arms as one may carry for the purposes designated in the constitution."

187. *See supra* note 183 at 262-63. Despite the Oklahoma court's apparent attempt to hold that a pistol is not a constitutionally protected arm, the *Andrews*, *Fife*, *English*, and *Hill* cases it cites all hold that larger pistols or horse pistols are militia arms and are thus constitutionally protected. The court's citation of *Blaksley* is puzzling, for that case held that the people collectively have a narrow right to bear arms only in the organized militia or any military organization provided by law. *See supra* notes 38-71 for a criticism of *Blaksley*. In any event, the Oklahoma guarantee, adopted subsequent to *Blaksley*, uses the singular term *citizen*, thus preventing a collective right interpretation. A case interpreting constitutional language similar to that in *Blaksley* and implicitly holding that a pistol is a protected arm was overlooked: *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902) (statute prohibiting carrying

its citation of a Texas case to support a narrow view of the term *arms*, the court failed to mention that the cited case had been overruled.[188]

There was no need to disregard the text of the Oklahoma guarantee on defense of self, home or property to uphold a conviction for the concealed carrying of a pistol because the Oklahoma guarantee specifically provides that "nothing herein contained shall prevent the Legislature from regulating the carrying of weapons."[189] The court also failed to heed its own principles on constitutional interpretation that all provisions designed to safeguard the liberty and security of the citizen should be liberally construed and that the courts cannot refuse obedience to constitutional mandates:

> We have a Constitution in which the utmost pains have been taken to preserve all the securities of individual liberty, and the courts cannot refuse obedience to its mandates. The Legislature cannot alter, annul, or avoid the constitutional safeguards of person and property set forth in the Bill of Rights. They are beyond the reach of any legislative enactment.[190]

Except for Oklahoma, in attempts to interpret this guarantee reliance has been placed on the actual words used in the guarantee. It was used as a justification for holding that the right to bear arms allowed the exhibition of arms "in a rude, angry, or threatening manner without fear of successful prosecution when his home or possessions are invaded or his per-

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pistol in town in any manner voided).

188. *See supra* note 183, at 262. State v. Duke, 42 Tex. 455, 458 (1875) (overruling *English*'s holding that only militia arms are guaranteed).

189. OKLA. CONST. art. II, § 26.

190. Salter v. State, 2 Okla. Crim. 464, ___, 102 P. 719, 725 (1909). Nevertheless, in Pierce v. State, 42 Okla. Crim. 272, ___, 275 P. 393, 395 (1929), the court not only upheld a conviction for the peaceful unconcealed carrying of a .38 caliber Colt pistol within the curtilage of defendant's own premises but went so far as to say the legislature "also has the power to even prohibit the ownership or possession of such arms" as are not "used for purposes of war." This means that by ignoring the "defense of his home, person, or property" purposes in the constitution, a good portion of the arms commonly possessed by Oklahomans are not constitutionally protected. One hopes that an Oklahoma court in the future will pay attention to the mandate of the clear language in the constitution, and in light of this reexamination and opinions from states with similar guarantees, will put to rest the present unwarranted and restrictive interpretation.

sonal safety threatened. . . ."[191] However, "[t]he moment the citizen ceases to act in protection of his home, his person, or his property . . . he steps out from under the protection of the Constitution. . . ."[192] He has no right to be an unlawful aggressor. The text has also been characterized as "limiting language" and thus it is not "an absolute right to bear arms under all situations."[193] This analysis and the exercise of the police power have allowed courts to uphold reasonable regulations, such as prohibiting the possession of a firearm while under the influence of intoxicating liquor or narcotic drugs.[194]

Courts have been mindful that "the state legislature cannot, in the name of the police power, enact laws which render nugatory our Bill of Rights and other constitutional protections."[195] Game laws which prohibit possession of a firearm,[196] or firearms ordinances "which sweep unnecessarily broadly and thereby invade the area of protected freedoms"[197] have been struck down because they conflicted with the right to bear arms. Furthermore, cases must be construed with the constitutionally guaranteed right in mind.[198]

The specific boundaries of this right indicate that the open peaceful carrying in one's business place, vehicle, or on a public street in the ordinary course of one's travels cannot be prohibited.[199] The concealed carrying of arms in the home should be protected, especially since the home is specifically mentioned in the guarantees.[200] Obviously the ends to be

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191. State v. White, 299 Mo. 599, ___, 253 S.W. 724, 727 (1923). *See also* State v. Nickerson, 126 Mont. 151, 247 P.2d 188 (1952) (right to bear arms permits defendant to forcibly evict trespasser who refused to quietly and peacefully leave his home).

192. State v. White, 299 Mo. 599, ___, 253 S.W. 724, 727 (1923).

193. People v. Blue, 190 Colo. 95, ___, 544 P.2d 385, 391 (1975)(en banc) (convicted felon can be prevented from owning a gun).

194. People v. Garcia, 197 Colo. 550, 595 P.2d 228 (1979).

195. *See supra* note 193.

196. People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (1936)(en banc).

197. City of Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744, 745 (en banc 1972) (ordinance would have proscribed carrying in vehicle or place of business or conducting gunsmithing).

198. Patterson v. State, 251 Miss. 565, ___, 170 So. 2d 635, 639 (1965) (art. III § 12 cited in reversing conviction).

199. *See supra* note 105.

200. *See supra* note 104. Although Wilson v. State, 81 Miss. 404, 33 So. 171 (1903), held that concealed carrying even in the home may be prohibited, it did so without a full airing of all relevant issues.

served by the guarantee would not be defeated or called in question by a prohibition against carrying arms while drunk, or to a polling place, court, church, or public assembly, or in a manner calculated to inspire terror.[201]

### *Security and Defense Purpose*

Security and defense is listed as a purpose for the right of the individual to keep and bear arms in five state constitutions.[202] This guarantee protects arms that are suitable for militia use;[203] likewise arms suitable for personal defense are protected.[204] These guarantees protect a right to keep and

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While the Colorado, Mississippi, Missouri, Montana, and Oklahoma guarantees have specific language authorizing a proscription against concealed carrying, the 1982 New Hampshire guarantee contains no limiting language. A previously proposed guarantee in New Hampshire containing such limiting language was defeated by the voters in 1978; question 1 read: "All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state, but the legislature may prescribe the manner in which they may be borne and may prohibit convicted felons from carrying or possessing them." This seems to be an indication that a proscription against concealed carrying was rejected by the voters and that forms of concealed carrying are constitutionally guaranteed. *See also supra* note 168.

201. *See supra* notes 50, 102.

202. KAN. CONST. BILL OF RIGHTS, § 4; NEV. CONST. art. I. § 11, para. 1; N.M. CONST. art. II, § 6; OHIO CONST. art. I, § 4; UTAH CONST. art. I, § 6. This guarantee is similar to the defense of self and state guarantees. State v. Vlacil, 645 P.2d 677, 682 (Utah 1982) (Oaks, J., concurring). The view of Kansas courts that only a collective right to serve in the militia and bear arms in the militia is protected has been criticized in notes 38-71 *supra* and accompanying text. Whether the Kansas court has obliquely retreated from this position is raised by Junction City v. Mevis, 226 Kan. 526, 601 P.2d 1145 (1979), where the court found a gun control ordinance too broad. It cited City of Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744 (en banc 1972), where a gun ordinance was struck down because it was too broad and reached beyond permissible limits to impinge on the Colorado guarantee to bear arms.

Ohio and Utah also have a separate guarantee on defense of self and property. OHIO CONST. art. I, § 1; UTAH CONST. art. I, § 1; *see* State v. Hardy, 60 Ohio App. 2d 325, 397 N.E.2d 773 (1978) (even a felon has a right to self-defense). The "lawful hunting and recreational use and for other lawful purposes" of the Nevada and New Mexico guarantees indicate that activities such as gun collecting, competitive and informal target shooting, and exhibiting guns at a gun show are also protected; however, as a practical matter all guns could have as incidental use lawful hunting, lawful recreational use, and lawful exhibition of guns at a gun show.

203. *See supra* notes 74, 75, 77, 79.

204. *See supra* notes 93-97, 180. *See also* Las Vegas v. Moberg, 82 N.M. 626, ___, 485 P.2d 737, 738 (N.M. App. 1971) ("a pistol in a holster"); *In re* Brickey, 8 Idaho 597,598, 70 P. 609 (1902) ("loaded revolver") (the guarantee then was for "security and defense").

bear arms for protection of the person, family, property, and home,[205] for militia use,[206] and for deterrence against oppression.[207]

The dimensions of this right have been summarized as follows:

> The constitutional right to bear arms is intended to guaranty to the people, in support of just government, such right, and to afford the citizen means for defense of self and property. While this secures to him a right of which he cannot be deprived, it enjoins a duty in execution of which that right is to be exercised. If he employs those arms which he ought to wield for the safety and protection of his country, his person, and his property, to the annoyance and terror and danger of its citizens, his acts find no vindication in the bill of rights. That guaranty was never intended as a warrant for vicious persons to carry weapons with which to terrorize others. Going armed with unusual and dangerous weapons, to the terror of the people, is an offense at common law. A man may carry a gun for any lawful purpose, for business or amusement, but he cannot go about with that or any other dangerous weapon to terrify and alarm a peaceful people.[208]

Keeping these dimensions in mind, the constitutional purpose would not be frustrated by a prohibition of carrying arms while drunk, or to a court, polling place, church, or public assembly, or in a manner calculated to inspire terror.[209]

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205. Lopez v. Chewiwie, 51 N.M. 421, 186 P.2d 512 (1947) (protection of home); State v. Hogan, 63 Ohio St. 202, ___, 58 N.E. 572, 575 (1900) ("to afford the citizen means for defense of self and property"). When the Idaho guarantee was for "security and defense" it was construed to protect personal self-defense. Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971) (self-defense); State v. Hart, 66 Idaho 217, ___, 157 P.2d 72, 73 (1945); City of Akron v. Dixon, 36 Ohio Misc. 133, ___, 303 N.E.2d 923, 925 (Mun. Ct. 1972) ("if engaged in the defense of his security or that of his family [one] is entitled to possess them [pistols]").

206. State v. Hogan, 63 Ohio St. 202, ___, 58 N.E. 572, 575. (1900) ("protection of his country").

207. *See supra* notes 20, 21, & 141.

208. State v. Hogan, 63 Ohio St. 202, ___, 58 N.E. 572, 575 (1900) (tramp law upheld where tramp threatened an injury).

209. *See supra* notes 50 & 102. In State v. Montoya, 91 N.M. 262, ___, 572 P.2d 1270, 1273 (N.M. App. 1977), the court hinted that it would uphold a law proscribing carrying a gun into a licensed liquor establishment, a fourth degree felony, where the right to bear arms was raised by "[i]nnuendo in defendant's brief." *See supra* note

The boundaries of this right would sanction the carrying of arms in the home either openly or concealed.[210] The open peaceful carrying in one's business place, vehicle, or on a public street in the ordinary course of one's travels is also constitutionally sanctioned.[211]

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71, for criticism of making a regulatory offense a felony.

210. *See supra* note 104. In State v. Nieto, 101 Ohio St. 409, ___, 130 N.E. 663, 664 (1920), the court held that a jury instruction in a case where a "Mexican" was acquitted of carrying concealed a pistol in a bunkhouse was erroneous in that it carved out a home exception to a concealed carrying statute. The court reasoned that concealed carrying even in the home could be proscribed because "[t]he statute does not operate as a prohibition against carrying weapons, but as a regulation of the manner of carrying them." The dissenting opinion noted "Southern States have very largely furnished the precedents. It is only necessary to observe that the race issue there has extremely intensified a decisive purpose to entirely disarm the negro, and this policy is evident upon reading the opinions." *Id.* at ___, 130 N.E. at 669 (Wanamaker, J., dissenting). The correctness of the dissent is exemplified in Watson v. Stone, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring):

> I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and sawmill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied. We have no statistics available, but it is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute. It is also a safe guess to say that not more than 5% of the men in Florida who own pistols and repeating rifles have ever applied to the Board of County Commissioners for a permit to have the same in their possession and there has never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested.

211. *See supra* note 105. An ordinance prohibiting the unconcealed carrying of arms was voided in Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971). *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902), struck down a statute prohibiting the carrying of firearms in town. At the time, the Idaho guarantee was for "security and defense." On the other hand, in State v. Vlacil, 645 P.2d 677 (Utah 1982), a conviction for possession of a firearm by a non-citizen of the U.S. was upheld. The court noted the arms guarantee stated "The Legislature may regulate the exercise of this right by law." Three separate opinions were written to affirm the conviction. In view of cases where such alien in possession statutes were voided on right to bear arms grounds, People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (en banc 1936), and People v. Zerillo, 219 Mich. 635, 189 N.W. 729 (1922), it appears that the majority was swayed by the fact that the arm involved was "fully automatic" and that it was used for the aggressive purpose of wounding a man rather than for self-defense. Mo-

*No Specific Purpose Assigned.*

Five state constitutions guarantee the right to keep and bear arms without assignment of a specific purpose. Their guarantees are generally worded as the right "to keep and bear arms shall not be infringed" or "abridged."[212] As this guarantee is without assignment of a purpose, it must be assumed the Framers intended at a minimum to protect the basic historical reasons for a right to arms: (a) the right of personal defense;[213] (b) preference for a militia over a standing army;[214] and (c) the deterrence of governmental oppression.[215] One court simply capsulized the reasons for having arms as follows: "The Constitutions of the United States and Louisiana give us the right to keep and bear arms. It follows, logically, that to keep and bear arms gives us the right to use the arms for the intended purpose for which they were manufactured."[216] It can also be inferred that the Framers were aware of the guiding principles of interpretation "*Inclusio Unis Est Exclusio Alterius*" (the inclusion of one is the exclusion of another) and feared that by including or assigning only one of the historical reasons, e.g., militia, the courts would, given their penchant for a restrictive interpretation of the right,[217]

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sher v. Dayton, 48 Ohio St. 243, 358 N.E.2d 540 (1976), invoked the police power to uphold an ordinance mandating obtaining an identification card to demonstrate lack of disabilities, such as being a convicted felon, and to show entitlement to possess a pistol. The dissent argued legislation must be reasonable and necessary which seeks to restrain "one of the fundamental civil rights." *Id.* at ___, 358 N.E.2d at 544 (Celebrezze, J., dissenting). An ordinance forbidding the employment of special guards during a strike was voided on grounds of right to bear arms for "defense and security" (art. I, § 4) and "defending life and protecting property" (art. I, § 1). *In re* Reilly, 31 Ohio Dec. 364, 367-68 (1919).

212. GA. CONST. art. I, § 1, para. V; IDAHO CONST. art. I, § 11; ILL. CONST. art. I, § 22; LA. CONST. art. I, § 11; R.I. CONST. art. I, § 22. Idaho's present constitutional provision was ratified in the general election of November 7, 1978. As originally adopted in 1890, the provision secured to the people the right to bear arms for their security and defense. Under this provision a statute that prohibited a citizen from bearing arms in any manner within the confines of a city, town or village was held void. *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902).

213. *See supra* notes 14, 24-27.

214. *See supra* notes 14, 81-92.

215. *See supra* notes, 14, 19-22.

216. McKellar v. Mason, 159 So. 2d 700, 702 (La. App. 1964), *aff'd* 245 La. 1075, 162 So. 2d 571 (1964). This was when the Louisiana Constitution tracked the second amendment. In 1974 it was amended to the present guarantee.

217. Commonwealth v. Davis, 369 Mass. 886, 343 N.E.2d 847 (1976); Pierce v.

limit the guaranteed right only to the purpose stated.

Since the text is not restricted to a purpose, both arms suitable for militia use[218] and for personal defense[219] are guaranteed. Since the right cannot be infringed or abridged, to give this right effect the open peaceful carrying in one's business place, vehicle, or on a public street in the ordinary course of one's travels must be allowed.[220] The mandate guarantees the carrying of arms in the home openly or concealed.[221]

A reading of cases under this heading reveals that the fears of the Framers were justified, and in spite of the precautions taken by the exclusion of a specific purpose for the right to keep and bear arms so as not to restrict that right, some courts tend to limit the guarantee as though only the militia reason were assigned.[222]

Historically, Louisiana courts have interpreted their state constitutional provisions to include defense of self,[223] even

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State, 42 Okla. Cr. 272, 275 P. 393 (1929); City of Salina v. Blaksley, 72 Kan. 230, 83 P. 619 (1905).

218. *See supra* notes 74, 75, 77, 79.

219. *See supra* notes 93-97, 180, 204.

220. *See supra* notes 105, 197, 211. Strickland v. State, 137 Ga. 1, 72 S.E. 260 (1911) (upheld statute requiring license to carry pistol away from home or place of business) People v. Williams, 60 Ill. App. 3d 726, 377 N.E.2d 285 (1978) (upheld statute forbidding carrying of loaded gun in vehicle or in city, unless at home, place of business, or upon own land); State v. Storms, 112 R.I. 121, 308 A.2d 463 (1973) (upheld statute prohibiting carrying a pistol without a license except in home, place of business, or upon possessed land). A constitution should not be read with the prolixity of a civil code. However, the hostile treatment that the right to bear arms has been given by some courts prompted the 1978 amendment to IDA. CONST. art. I, § 11 to specifically forbid licensing, registration, or special taxation, or confiscation, except for commission of a felony.

221. *See supra* note 104.

222. In Strickland v. State, 137 Ga. 1, 72 S.E. 260 (1911), the court relied on previous Georgia constitutions, with a militia reason, to assign a militia purpose to the present one and to imply that only pistols suitable for militia use are constitutionally protected. The court trivialized the decision of the Framers to omit reference to the militia in the arms guarantee by stating that reference to the militia was already made in article 10, the militia article, "and it was doubtless deemed unnecessary to reiterate them in both connections." *Id.* at ___, 72 S.E. at 263. In Carson v. State, 241 Ga. 622, ___, 247 S.E.2d 68, 73 (1978), the court seems to recognize the absence of the militia reason. Other courts have paid careful attention to the language of the text. For example, the Indiana Constitution covers bearing arms in Art. I, § 32 and the militia in art. 12, § 1, but the court held the right to arms was not restricted to militia arms or purposes. Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980).

223. McKellar v. Mason, 159 So. 2d 700, 702 (La. App. 1964), *aff'd* 245 La. 1075,

though the guarantee before the 1974 Amendment was couched only in terms of a well-regulated militia.

With the exception of Rhode Island, each guarantee under this heading contains permissive language allowing the right to be regulated in some manner.[224] Although this express declaration of intent is not necessary for the courts to infer reasonable police power regulations,[225] some courts have relied on these phrases in their determinations.[226]

A recent Illinois case demonstrates that regardless of how careful the Framers were in spelling out what arms are constitutionally protected,[227] and regardless of the pains they took to spell out permissable exercises of the police power[228] so as to harmonize the police power with the right to keep and bear

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162 So. 2d 571 (1964); State v. Bias, 37 La. Ann. 259, 260 (1885) ("musket to shoulder, or carbine slung on back, or pistol belted to his side . . . is bearing arms"); State v. Chandler, 5 La. Ann. 489, 490, 52 Am. Dec. 599, ___, (1850). Under the present guarantee the police power can be exercised to limit the possession of firearms by convicted felons. State v. Amos, 343 So. 2d 166 (La. 1977). The dissent noted that except for concealed carrying, the constitution sets out "an individual right in absolute terms." *Id.* at 170 (Calogero, J., dissenting).

224. *See supra* notes 31 & 212.

225. Carson v. State, 241 Ga. 622, 247 S.E.2d 68 (1978); State v. Storms, 112 R.I. 121, 308 A.2d 463 (1973).

226. Strickland v. State, 137 Ga. 1, ___, 72 S.E. 260, 262 (1911); People v. Williams, 60 Ill. App. 3d 726, 377 N.E.2d 285 (1978); Rawlings v. Department of Law Enforcement, 73 Ill. App. 3d 267, 391 N.E.2d 758 (1979) (applicant for gun license was mental patient within statutory five years of application).

227. The majority report of the Committee on Bill of Rights reported "the 'arms' involved are not limited by the armaments or needs of the state militia or other military body. The substance of the right is that a citizen has the right to possess and make reasonable use of arms that law-abiding persons commonly employ for purposes of recreation or the protection of person and property. Laws that attempted to ban all possession or use of such arms, or laws that subjected possession or use of such arms to regulations or taxes so onerous that all possession or use was effectively banned, would be invalid." 6 SIXTH ILL. CONST. CONVENTION, RECORD OF PROCEEDINGS 87 (1969-1970) (hereinafter referred to as ILL. PROCEEDINGS). The committee cited People v. Brown, 253 Mich. 537, 235 N.W. 245 (1931) and State v. Duke, 42 Tex. 455 (1875), to demonstrate that arms include rifles, shotguns and pistols. *Id.* at 87 n.7. It also cited *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902); People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921), for examples of invalid regulation. *Id.* at 87 n.8.

228. A valid exercise of the police power would be to ban weapons not commonly and peacefully used by individuals, such as machine guns; to proscribe possesion by minors or by persons in high-risk groups, such as felons; to require a license to possess a gun; to regulate carrying and to implement this power by licensing; to regulate the purchase and sale of arms. Nowhere was the handgun singled out for a ban. 6 ILL. PROCEEDINGS 88-90.

arms and prevent the police power from turning the right into a hollow shell or an intangible abstraction, a court is willing to ignore the intent of the framers and the understanding of the people. In *Quilici v. Village of Morton Grove*[229] a divided court brushed aside arguments, that included the Illinois guarantee on arms, and upheld an ordinance which in effect banned the possession of handguns, even in the home.[230] The court concluded that although the handgun was intended to be included within the class of constitutionally protected arms, the ban did not violate the state constitution. To support this incongruous conclusion, the court relies chiefly on statements made by a delegate during the floor debates that handguns could be banned. A closer reading of the convention debates reveals that the court's reliance on isolated statements was misplaced.[231]

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229. Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982). The village removed the action from state to federal court because federal as well as state questions were involved. This article will confine itself to the Illinois guarantee to keep arms.

230. With the exception of British efforts to disarm Patriots and an effort to disarm people in Tennessee during the Civil War (See *supra* notes 117 & 130) no one has made an attempt to disarm the populace and no court has ever sustained such an attempt.

> 231. Every member of such a convention acts upon such motives and reasons as influence him personally, and the motions and debates do not necessarily indicate the purpose of a majority of a convention in adopting a particular clause. It is quite possible for a clause to appear so clear and unambiguous to the members of a convention as to require neither discussion nor illustration; and the few remarks made concerning it in the convention might have a plain tendency to lead directly away from the meaning in the minds of the majority. It is equally possible for a part of the members to accept a clause in one sense and part in another. And even if we were certain we had attained to the meaning of the convention, it is by no means to be allowed a controlling force, especially if that meaning appears not to be the one which the words would most naturally and obviously convey. For as the constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruce meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.
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> T. Cooley, Constitutional Limitations 101-102 (7th ed. 1903).

The contrasting views expressed during the debates in the convention on the right to keep and bear arms give credence to Judge Cooley's admonition that debates generally should not be considered.

The first floor debate occurred on June 10, 1970, and focused on the majority report, which favored a right to bear arms and included the handgun as a protected arm.[232] The right to bear arms was considered "controversial," and delegates were "all a little punchy at this stage," there were "empty seats," and concern was expressed that "I am not sure that we would get a full and reflective view of this body if we voted on anything at this point."[233]

The final debate occured on June 11, 1970, and focused on the minority report, which opposed the inclusion of a right to bear arms in the constitution,[234] although it was noted that there were several members who wanted to be heard when they adjourned the last evening.[235] A spokesman for the minority argued against a right to bear arms because the majority report revealed it "would prevent a complete ban of hand guns . . . ."[236] One delegate cited the right to keep arms as a deterrent against governmental oppression.[237] Another cited a case from the majority report, in support of the right to arms.[238] The delegate on whom the court relied so heavily went so far as to claim that not only could handguns be forbidden but in Cook County (Chicago) "all firearms whatsoever" could be banned.[239] There is also evidence that attention to the debates was less than complete,[240] and that they

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232. *See supra* note 227.

233. 3 ILL. PROCEEDINGS 1686 (Mr. Lennon).

234. 6 ILL. PROCEEDINGS 165.

235. 3 ILL. PROCEEDINGS 1691-92 (President Witwer).

236. *Id.* at 1692-93 (Mr. Gertz). Mr. Foster, on whose statements the court relied, stated that Mr. Gertz was incorrect because "there could be a ban on certain categories." *Id.* at 1693.

237. *Id.* at 1699-1700 (Mr. Arrigo).

238. *Id.* at 1707 (Mr. Hutmacher). He cited People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922), which held that even an alien could not be deprived of possessing a pistol. That case was cited in the majority report and reveals that delegates were cognizant of the report and its views. 6 ILL. PROCEEDINGS 87 n.8. One delegate who admitted owning "two shotguns and a pistol" supported the right to bear arms for protection and sporting purposes. He felt that everybody should not be punished for the misconduct of a few, and that the proposed guarantee would prevent confiscation. *Id.* at 1712-13 (Mr. Hendren).

239. 3 ILL. PROCEEDINGS 1718. (Mr. Foster). Such a broad statement could not be taken seriously. It was made probably in an effort to play down the scope of the right and to secure undecided votes for its passage. Regarding the arms guarantee, he also stated "I wish I'd never seen this thing." *Id.* at 1721.

240. *Id.* at 1701: "Let's pay attention to the debates, please. People that have to

were sparsely attended.[241] The majority report spelled the right out, and all efforts to specifically isolate the handgun as a weapon which should be given no constitutional protection were rejected.[242] Thus statements during the debates can hardly be taken as demonstrating consensus. A court rightly observed:

> Rather, I view the language of the debates as acknowledging that this subject was a controversial issue which the delegates were reluctant to face . . .*** It was the vote of the People which was required to bring this constitution into existence. I am therefore concerned only with what the voters intended when they voted for adoption of the constitution, and that intent must be gathered from the clear and specific language of the instrument. I am not concerned with the intent of the delegates to the convention, because I fear that their intention was to evade this controversial issue and to be less than candid with the electorate.[243]

These debates presented the court with a plethora of statements and to choose one as the consensus over others violates principles of constitutional interpretation and demonstrates intellectual shortcomings. The court's approach that a municipality may exercise its police power to prohibit a constitutionally protected arm contravenes the essential nature of the constitutional guarantee. It supplants a constitutional right with a mere statutory privilege which might be withheld simply on the basis that a firearm commonly possessed by the people, such as a rifle, shotgun, or pistol is perceived to be

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have conversations, will you kindly take them outside?" (President Witwer). *Id.* at 1704: "May we have quiet in the room so that we can hear what Father Lawlor has to say?" (President Witwer). *Id.* at 1705: "I think if we are going to be in session, we ought to be in session and listen to the debate. And it's a simple matter for those who do not want to hear it to go out in the hall." (President Witwer).

241. *Id.* at 1703: "We have a lot of absentees now. I hope the people in the lounge will come up and share the load." (President Witwer). At one point Witwer had the sergeant-at-arms bring in at least one more delegate to have a quorum. *Id.* at 1712.

242. 7 ILL. PROCEEDINGS 2901 (Proposal 131); Legal and Research Advisor's Memorandum No. 25 (Feb. 18, 1970). The Bill of Rights Committee rejected an attempt to amend the present arms guarantee by adding the phrase "except handguns" following the word "arms." *Minutes of the Committee on Bill of Rights*, Mar. 12, 1970.

243. Board of Education v. Bakalis, 54 Ill. 2d 448, ___, 299 N.E.2d 737, 751-52 (1973) (Ryan, J., concurring).

troublesome. Constitutional guarantees, including the right to possess arms, apply equally to the entire state.[244]

The people understand the police power to be "the inherent power of a government to exercise reasonable control over persons and property within its jurisdiction in the interest of the general security, health, safety, morals, and welfare *except where legally prohibited.*"[245] The people also believe they have a constitutional right to own a gun and oppose a ban on the private ownership of handguns.[246] It is apparent that the voters in Illinois felt that they were adopting a constitutional guarantee, which was subject only to reasonable regulation, and not a hollow promise which could be granted or revoked whenever it suited a legislative body. From a policy consideration, the vast majority of handgun owners present no threat to society and most gun owners will not obey a law banning handguns.[247]

The ends to be secured by guarantees under this heading would not be infringed or abridged by a prohibition against carrying arms while drunk, or to a polling place, court, church, or public assembly, or in a manner calculated to inspire

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244. State v. Blocker, 291 Or. 255, 630 P.2d 824 (1981).

245. WEBSTER'S NEW COLLEGIATE DICTIONARY 889 (1977) (emphasis added).

246. "Equally large majorities *oppose* an outright ban on private handgun ownership, although there is a majority sentiment favoring a ban on the manufacture and sale of cheap, low-quality handguns. Majorities approaching 90 percent believe they have a constitutional right to own a gun." WRIGHT & ROSSI, WEAPONS, CRIME AND VIOLENCE IN AMERICA (Executive Summary) 17 (U.S. Justice Dept., Nov. 1981). *See also* WRIGHT, PUBLIC OPINION AND GUN CONTROL, 455 THE ANNALS OF THE AM. ACADEMY OF POL. & SOCIAL SCIENCE 24 (May 1981).

247. Fifty percent or more of gun owners will defy a confiscation law. Furthermore, the rate of defiance of Chicago's registration law is estimated at over two-thirds. In Cleveland the rate of compliance with their handgun registration law is estimated at less than 12 percent. RESTRICTING HANDGUNS—THE LIBERAL SKEPTICS SPEAK OUT 201 (D. Kates, Jr. ed. 1979). Another study indicated that both gun owners and nonowners felt half or fewer of gun owners would comply with a gun ban. D. BORDUA, GUN CONTROL AND OPINION MEASUREMENT: ADVERSARY POLLING AND THE CONSTRUCTION OF SOCIAL MEANING 6 (Paper Presented at Annual Meeting of Am. Sociological Assn., N.Y., Aug. 27-31, 1980). Also wide-spread violation of the law would place upon us unacceptable societal costs of enforcement. KAPLAN, THE WISDOM OF GUN PROHIBITION, 455 THE ANNALS OF THE AM. ACADEMY OF POL. & SOCIAL SCIENCE 11 (May 1981). "It is commonly hypothesized that much criminal violence, especially homicide, occurs simply because the means of lethal violence (firearms) are readily at hand, and thus, that much homicide would not occur were firearms generally less available. There is no persuasive evidence that supports this view." WRIGHT & ROSSI, *supra* note 246 at 2.

terror.[248]

## Conclusion

It is well settled that courts are to presume that constitutional language was carefully chosen, and the words used are to be taken in their general and ordinary sense. Furthermore, courts are to presume that the people do not go through the effort of passing a constitutional guarantee as an idle exercise to protect nugatory rights or nebulous entitlements, or to secure an intangible abstraction. Accordingly, judges deciding the meaning of the right to keep and bear arms should confine themselves to enforcing norms that are stated clearly or implicitly in the written guarantee.

The six classifications of constitutional text discussed in this article should be viewed as a pyramid, the base representing the text which protects the broadest individual rights and the apex representing the text which protects a more conditional right. The base of this pyramid would be represented by the *No Specific Purpose Assigned* text. Moving upwards, the next level would be represented by the *Defense of Self, Home, Property and State Purpose* text, followed by the *Security and Defense Purpose* text on a par with the *Self-Defense and Defense of State Purpose* text. The final levels would be the *Militia Purpose* text, concluding with the *Common Defense Purpose* text.

While principles of law indicate the *No Specific Purpose Assigned* text should serve as the best protection against infringement, case law experiences suggest that the strongest guarantee of individual liberty would be one which reads with the prolixity of a civil code.

The right to keep and bear arms is at the forefront of the emotional issues which confront society, especially the legal community. Nevertheless, judges have an obligation to interpret the Constitution so as to carry out the intent of the Framers, regardless of the human sentiments in their hearts. If this obligation is abandoned, the courts will appear to be political institutions, their decisions less rooted in the law than in the personalities and politics of the individual judges,

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248. *See supra* notes 50 & 102.

and will contribute to the growing perception that courts are not expounding the law, but are handing down social policy in judicial dress to suit the perceived needs of the moment. A recent decision echoes this view:

> We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.[249]

There should be no hesitancy in striking down a law which encroaches on the protected boundaries of the right to keep and bear arms, for on at least seventeen reported occasions courts have struck down laws which encroached on that right.[250]

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249. State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 95 (1980).

250. Wilson v. State, 33 Ark. 557, 34 Am. Rep. 52 (1878); City of Lakewood v. Pillow, 180 Colo. 20, 23, 501 P.2d 744, 745 (en banc 1972); People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (en banc 1936); Nunn v. State, 1 Ga. (1 Kelly) 243 (1846); *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 13 Am. Dec. 251 (1822); People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921); *In re* Reilly, 31 Ohio Dec. 361 (C.P. 1919); State v. Blocker, 291 Or. 255, 630 P.2d 824 (1981); State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); Andrews v. State, 50 Tenn. (3 Heisk) 165, 8 Am. Rep. 8 (1871); Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928); Smith v. Ishenhour, 43 Tenn. (3 Cold) 214, 217 (1866); State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903); City of Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971); Jennings v. State, 5 Tex. Crim. App. 298 (1878).

# THE STATE OF MARYLAND

EXECUTIVE DEPARTMENT

ANNAPOLIS

## *Certificate of Appreciation and Honorable Discharge*

TO [illegible]

1815 Fleetwood Place, Baltimore, Maryland

This certificate is issued in grateful recognition of the service rendered by you in the RESERVE MILITIA OF MARYLAND (MARYLAND MINUTE MEN) and of your HONORABLE DISCHARGE therefrom.

As Governor of the State of Maryland and Commander-in-Chief of the military forces of the State, I extend you the sincere appreciation of the people of the State for your unselfish and patriotic service rendered as a member of this reserve force in time of emergency.

It will be gratifying to you to know that your name will be listed permanently among the names of those Maryland men who volunteered their services and who generously gave their time and energies to assure the safety of their fellow citizens in World War II.

HERBERT R. O'CONOR,
*Governor of Maryland.*

District of Columbia )
) ss:
City of Washington )

Affidavit

Comes now Charles Raymond Gray, and after being duly sworn, deposes and states:

1. That during World War II affiant was a resident of Maryland.

2. That during said war the Maryland National Guard was sent overseas.

3. That the Governor of Maryland therefore called upon men of all ages and stations in life to volunteer for the manning of home guard stations for the task of repelling invasion forays, parachute raids, and sabotage uprisings in the state.

4. That these volunteers served in the Reserve Militia of Maryland and were officially designated Maryland Minute Men.

5. That affiant was a member of the Maryland Minute men during World War II.

6. That members of the Maryland Minute Men were required to supply their own arms, which included rifles, shotguns, pistols, and hunting knives, for training and used those personally owned arms on guard duty.

7. That while serving as a private with the Maryland Minute Men affiant was armed with a personally owned .32 caliber handgun and .22 caliber rifle while training and performing guard duty.

8. That affiant was honorably discharged from the Reserve Militia of Maryland (Maryland Minute Men) by Governor Herbert R. O'Connor, and that a true copy of his discharge certificate is attached to this affadavit.

Further affiant saith not.

_____
Charles Raymond Gray

Subscribed and sworn to before me this 2nd day of November, 1981.

_____
Notary Public

My commission expires:November 30, 1983

## APPENDIX

## STATE CONSTITUTIONAL PROVISIONS ON THE RIGHT TO KEEP AND BEAR ARMS

Thirty-nine (39) states have constitutional provisions 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." 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 the power to prescribe the manner in which arms may be borne." GA. CONST. art. I, § 1, para. 5.

*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 or ammunition. Nor shall any law permit the confiscation 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: . . . Seventh: 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. § 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." LA. CONST. art. I, § 11.

*Maine*: "Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned." ME. CONST. art. I, § 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." MASS. CONST. pt. I, art. XVII.

*Michigan*: "Every person has a right to keep or 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 in 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.

*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." NEV. CONST. art. I, § 11(1).

*New Hampshire*: "All persons have the right to keep and bear arms in defense of themselves, their families, their property, and the State." N.H. CONST. pt. I, art. 2a.

*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." N.M. CONST. art. II, § 6.

*North Carolina*: "A well regulated militia being necessary to be 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 weap-

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, recreational, and other lawful purposes, which shall not be infringed. Article I, Section 1.

Delaware

A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use. Article I, Section 20.

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.

ons, 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 defence 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, § 21.

*Rhode Island*: "The right of the people to keep and bear arms shall not be infringed." R.I. 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 nor 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 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.

Utah voters in the 1984 elections will decide whether to amend Art. I § 6 to read as follows: The individual right of the people to keep and bear arms for defense of themselves, their families, their property, and the state, and for lawful hunting, recreational use and all other lawful purposes, shall not be infringed; but this provision shall not prevent passage of laws to govern the carrying of concealed weapons; nor prevent legislation providing penalties for the possession of firearms by convicted felons, minors, mental incompetents or illegal aliens; nor shall any law permit the confiscation of firearms, except those used in the commission of a felony.

*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." VT. CONST. Ch. I, 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 in 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.

STATES WITHOUT CONSTITUTIONAL PROVISIONS:

Eleven (11) states do not have a constitutional provision on arms: California, Delaware, Iowa, Maryland, Minnesota, Nebraska, New Jersey, New York, North Dakota, West Virginia, and Wisconsin.

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# Alaska State Legislature

Please enter into the record my testimony to the House Judiciary
committee name

committee on SJR 15 , dated 4-20-88 .
bill/subject

The Alaska Association of Chiefs of Police has been opposed to this resolution since it's introduction. Our position on the committee substitute at this time is that we haven't had enough time to poll our membership on the new version, it's late in the session and we don't feel there is enough time left to resolve the issues to everyone's satisfaction. At the present time there are no attempts to infringe on individual rights to keep and bear arms, therefore we don't see any need for urgency in passage right now.

Signed: Don Rushing
Testifier

KETCHIKAN P.D. & A.A.C.O.P.
Representing (Optional)

361 MAIN ST KETCHIKAN
Address

225-6631
Phone No.

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: SHIRLEY KARNER/APOA
TITLE: VICE PRESIDENT
ADDRESS: 7800 LOTUS DRIVE
CITY: ANCHORGE, ALASKA ZIP: 99502
PHONE: 786-8851
BILL NO: SJR 15
SUBJECT: RIGHT TO KEEP AND BEAR ARMS
MESSAGE: THE APOA STRONGLY OPPOSES THIS BILL. THE ALASKA CONSTITUTION AS IT IS WRITTEN WORKS WELL FOR LAW ENFORCEMENT. THERE ARE SOME POTENTIAL PROBLEMS WITH WHAT THE NRA WANTS. IF IT WORKS FINE IT SHOULD BE LEFT ALONE. PLEASE REMEMBER GUNS IN BARS AND ON SCHOOLGROUNDS. KEEP IN MIND RHEA VEGA.

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GRUENBERG
BARNES
COTTEN
NAVARRE
TAYLOR
ULMER

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: ROBERTA ROGERS
TITLE:
ADDRESS: 7310 MARCH COURT #2
CITY: ANCHORAGE, ALASKA ZIP: 99504
PHONE: 333-9485
BILL NO: HB 348
SUBJECT: MEMBERSHIP OF MEDICAID RATE COMMISSION
MESSAGE: I VOTE FOR YOU NOT TO TAKE CHIROPRACTIC OFF MEDICAID.

POMID: 03172411
DATE: 05/03/88
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BARNES
COTTEN
GRUENBERG
NAVARRE
TAYLOR
ULMER

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: JIM WEIDNER
TITLE: PRES. ASSOC. FOR PROTECTTION OF PF
ADDRESS: 5479 CHEAN HOT SPRINGS ROAD
CITY: FAIRBANKS ZIP: 99701
PHONE: 488-6366
BILL NO: SJR 25
SUBJECT: USE OF INCOME FROM PERMANENT FUND
MESSAGE: THIS ALSO PERTAINS TO HJR48. LET US NOT FORGET THESE IMPORTANT BALLOT PROPOSITIONS. URGE THAT THE CONCEPTS OUTLINED IN THESE RESOLUTIONS BE PLACED ON THE BALLOT. HJR 48'S TEXT SEEMS MOST REASONABLE, BUT SJR 25 IS ALL RIGHT TOO. EOM-FZ

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TIME: 09:16:32
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| DONLEY | ELLIS |
| FRANK | FURNACE |
| GOLL | GRUENBERG |
| GRUSSENDORF | HANLEY |
| HERRMANN | HOFFMAN |
| HUDSON | KOPONEN |
| LARSON | MARTIN |
| MENARD | MILLER |
| NAVARRE | PEARCE |
| PETTYJOHN | PHILLIPS |
| POURCHOT | RIEGER |
| SHULTZ | SPRINGER |
| SWACKHAMMER | TAYLOR |
| ULMER | WALLIS |
| ZAWACKI | |

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: DUANE UDLAND
TITLE: PRES.ALASKA CHIEFS OF POLICE
ADDRESS: BOX 2499
CITY: SOLDOTNA ZIP: 99669
PHONE: 262-4455
BILL NO: SJR 15
SUBJECT: RIGHT TO KEEP AND BEAR ARMS
MESSAGE: THE CHIEFS OF POLICE HAVE NOT CHANGED THEIR POSITION ON SJR15. WE DO NOT BELIEVE A CONSTITUTIONAL AMMENDMENT IS NECESSARY. THE RIGHTS OF ALASKANS ARE ALREADY WELL PROTECTED UNDER OUR PRESENT CONSTITUTION. IF LEGISLATION MUST BE PASSED WE PREFER THE VERSION AS WRITTEN BY REP. ULMER'S COMMITTEE.

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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
Attorney General

Arthur Snowden
Administrative Director
Alaska Court System

Arthur English
Commissioner
Department of Public Safety

Dana Fabe
Public Defender

Myra Munson
Commissioner
Department of Health &
Social Services

Susan Humphrey-Barnett
Commissioner
Department of Corrections

Del Smith
President
Alaska Association of Chiefs
of Police

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

The CITY OF LAKEWOOD, a municipal corporation of the State of Colorado, Petitioner,

v.

Charles Edward PILLOW, Respondent.

No. C-164.

Supreme Court of Colorado, En Banc.

Oct. 10, 1972.

Defendant was convicted in Municipal Court of violation of city ordinance making it unlawful to possess dangerous or deadly weapon, and he appealed. The District Court, Jefferson County, Christian D. Stoner, J., reversed and declared ordinance invalid, and certiorari was granted. The Supreme Court, Hodges, J., held that the ordinance was unconstitutionally overbroad, where it would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on substantial part of their business, it appeared to prohibit individuals from transporting guns to and from such places of business, it made it unlawful for person to possess firearms in vehicle or in place of business for purpose of self-defense, and several of such activities were constitutionally protected and, depending upon circumstances, might be entirely free of criminal culpability.

Affirmed.

1. Weapons ⇐3

City ordinance prohibiting possession of dangerous or deadly weapon was unconstitutionally overbroad, where it would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on substantial part of their business, it appeared to prohibit individuals from transporting guns to and from such places of business, it made it unlawful for person to possess firearm in vehicle or in place of business for purpose of self-defense, and several of such activities were constitutionally protected and, depending upon circumstances, might be entirely free of criminal culpability. 1965 Perm.Supp., C.R.S., section 40-11-1; Const. art. 2, § 13.

2. Constitutional Law ⇐81

Governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under police power, may not be achieved by means which sweep unnecessarily broad and thereby invade area of protected freedoms.

3. Constitutional Law ⇐83(1)

Even though governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

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Raymond C. Johnson, Lakewood, for petitioner.

Theodore P. Koeberle, Boulder, for respondent.

HODGES, Justice.

On petition of the City of Lakewood, we granted certiorari to review the district court's declaration that a Lakewood ordinance is invalid.

The respondent Pillow was convicted in municipal court of a violation of this ordinance which makes it unlawful to possess a dangerous or deadly weapon. He appealed to the district court which reversed the conviction on the basis of a finding that there was a failure of proof before the municipal court and on the further ground that the ordinance was invalid. The district court's declaration of invalidity was premised on its finding that the subject matter of the ordinance is a matter of statewide concern and is therefore preempted by a state statute pertaining to the carrying of a concealed weapon. This state statute is 1965 Perm.Supp., C.R.S. 1963, 40-11-1.

We affirm the district court's reversal of the respondent's conviction but do so on the ground that the Lakewood ordinance is

D's conv. reversed on overbreadth grounds, not 1st & bear arms.

unconstitutionally overbroad. It is therefore unnecessary to discuss the failure of proof issue; moreover, this case is not a suitable vehicle for a consideration of the preemption issue. Our decision to resolve this case in this manner was prompted to some degree by statements made by counsel for the City of Lakewood during oral argument. He conceded that the ordinance lacked specificity in certain respects and that a replacing ordinance was in the process of preparation.

The subject Lakewood ordinance is numbered 0-70-47, Sec. 3-9 and is set forth in full as follows:

> *"Unlawful to Possess, Carry or Use Dangerous or Deadly Weapons.* (a) It shall be unlawful for any person to have in his possession, except within his own domicile, or to carry or use, a revolver or pistol, shotgun or rifle of any description, which may be used for the explosion of cartridges, or any air gun, gas operated gun or spring gun, or any bow made for the purpose of throwing or projecting missiles of any kind by any means whatsoever; provided that nothing in this section shall prevent use of any such instruments in shooting galleries or ranges under circumstances when such instruments can be fired, discharged or operated in such manner as not to endanger persons or property and also in such manner as to prevent the projectile from traversing any grounds or space outside the limits of such gallery or range; and provided further, that nothing herein contained shall be construed to prevent the carrying of any type of gun, when unloaded, or any bow, to or from any range, gallery or hunting areas. (b) Nothing in this section shall prevent the possession or use of any of said instruments by persons duly licensed for such purpose by the City of Lakewood. (c) Nothing in this section shall prevent the use of or possession of any said instrument by law enforcement personnel."

[1] An analysis of the foregoing ordinance reveals that it is so general in its scope that it includes within its prohibitions the right to carry on certain businesses and to engage in certain activities which cannot under the police powers be reasonably classified as unlawful and thus, subject to criminal sanctions. As an example, we note that this ordinance would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on a substantial part of their business. Also, the ordinance appears to prohibit individuals from transporting guns to and from such places of business. Furthermore, it makes it unlawful for a person to possess a firearm in a vehicle or in a place of business for the purpose of self-defense. Several of these activities are constitutionally protected. Colo.Const. art. II, § 13. Depending upon the circumstances, all of these activities and others may be entirely free of any criminal culpability yet the ordinance in question effectively includes them within its prohibitions and is therefore invalid. Shuttlesworth v. Birmingham, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965); Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948); People of the City of Detroit v. Sanchez, 18 Mich.App. 399, 171 N.W.2d 452 (1969).

[2,3] A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1963); NAACP v. Alabama, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964). Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Aptheker v. Sec-

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).

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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

ichard E. O'Toole of Valentine, ›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- its 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 ev1880Stat. § 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 listrict court is hereby reversed, and se is remanded for further proceed-

ISED AND REMANDED FOR FURTHER INGS.




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



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

e subpoena, denying Ricehill the testi- of a crucial witness.

I

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e guarantee of the right to keep and arms was only recently added to the h Dakota Constitution. The empha- l language above was added by means n initiated amendment in November of . This case presents the first occasion his court to interpret this provision of North Dakota Constitution.[3]

[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 r 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."

n *State v. Swanson*, 407 N.W.2d 204 (N.D. 7), 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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In the present case, had Publishers made a reasonable inquiry and informed Stevens that the inquiry was in preparation for its purchase of the timberland from Fernandez, then Stevens would have informed Publishers that plaintiffs held a mortgage on the timberland and had a "standard timber restriction" clause covering the land. The discovery of these facts would have immediately informed both parties that Fernandez was defrauding plaintiffs. Publishers is therefore charged with knowledge of the fraud because it would have learned of the fraud had it made a reasonable inquiry. *Murray v. Wiley, supra* at 407.

We therefore conclude that Publishers failed to sustain its burden of proving its affirmative defense. Publishers was not entitled to the status of a bona fide purchaser without notice.

Affirmed.





IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
*Respondent,*
*v.*
RANDY KESSLER,
*Petitioner.*

(TC DA 160004-7811, CA 14296, SC 26705)

On review from the Court of Appeals.*

Argued and submitted March 4, 1980.

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

W. Benny Won, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief was James A. Redden, Attorney General, and Walter L. Barrie, Solicitor General, Salem.

Before Denecke, Chief Justice, and Tongue, Howell, Lent and Peterson, Justices.

LENT, J.

Affirmed in part, reversed in part.

*Appeal from Circuit Court, Multnomah County Phillip T. Abraham, Judge 43 Or App 303, 602 P2d 1096 (1979).

STATE v. KESSLER, 289 OR. 359 (1980)

614 P.2d 94

LENT, J.

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

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

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

(a) To whom does the right belong?

(b) What is the meaning of "defense of themselves"?

(c) What is the meaning of "arms," and what, if any, weapons of current usage are included in this term?

The scope of Article I, section 27, has not previously been analyzed by Oregon courts.[3] The decisions construing the second amendment to the United

[1] ORS 166.510(1) provides:

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

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

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

[3] In *State v. Robinson*, 217 Or 612, 619, 343 P2d 886 (1959) this court held that ORS 166.270 which prohibits ex-convicts from possessing concealed weapons did not violate Article I, section 27, of the Oregon Constitution. Accord, *State v. Carturight*, 246 Or 120, 134-137, 418 P2d 822 (1967).

States Constitution are not particularly helpful because the wording of the second amendment differs substantially from our state provision. The second amendment has not yet been held to apply to state limitations on the bearing of arms.[4] The wording of Oregon's right to bear arms provision also differs from many other state constitutional provisions.[5]

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

[4] The second amendment to the United States Constitution provides:

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

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

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





I. *The historical background*

The first article of Oregon's constitution of 1859 contains the state's bill of rights. Article I, section 27, regarding the right to bear arms was taken verbatim from sections 32 and 33 of the Indiana Constitution of 1851. C. Carey, *A History of the Oregon Constitution* 469 (1926); Palmer, *The Sources of the Oregon Constitution*, 5 Or L Rev 200, 202 (1926).

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

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

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

James II, a Catholic king, ascended the English throne in 1685 amidst domestic religious controversy between the Catholics and Protestants. James II established a strong standing army which he

[6] *See generally*, B. Schwartz, *The Great Rights of Mankind* 1-38 (1977), Feller and Gotting, *The Second Amendment: A Second Look*, 61 Northwestern U L Rev 46, 47-56 (1966).

quartered in private homes. He sought to repeal certain laws of Parliament which barred Catholics from public offices. The Protestants revolted in the "Glorious Revolution" of 1688 and succeeded in deposing James II and bringing to power the king's Protestant daughter, Mary, and her husband, William of Orange. William and Mary were offered the crown in 1689 on condition that they sign the Declaration of Rights. The Declaration was later enacted as a statute, which was divided into two parts, first listing the allegedly illegal actions of James II, then declaring the rights of the people. The first part stated that James II:

> "* * * did endeavor to subvert and extirpate the Protestant Religion and the Laws and Liberties of this Kingdom * * *.
>
> "6. By raising and keeping a Standing army within this Kingdom in Time of Peace without Consent of Parliament and quartering Soldiers contrary to Law.
>
> "6. By causing several good Subjects, being Protestants, to be disarmed at the same Time when Papists were both armed and employed contrary to Law."

The parallel provisions of the declaration of rights provided:

> "* * * 5. That the raising or keeping a Standing Army within the Kingdom unless it be with the Consent of Parliament is against Law.
>
> "6. That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law."[7]

Historians have noted that the early colonial legislatures perceived themselves as descendants of the House of Commons who shared many of the same political experiences of their 17th century English counterparts. See B. Schwartz, *The Great Rights of Mankind* 15, 31-32 (1977). The French and Indian War ending in 1763 brought large numbers of British

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





soldiers to the colonies. King George III maintained and increased these standing armies following that war, and ordered the troops to be quartered in private homes. The colonists who were accustomed to relying on their own citizen militias viewed the standing armies as an unlawful instrument of oppression. *See* Weatherup, *Standing Armies and Armed Citizens; An Historical Analysis of the Second Amendment*, 2 Hastings Const L Q 961, 975-978 (1975). The state constitutions drafted in the revolutionary war era therefore included provisions guaranteeing the right to bear arms and prohibiting standing armies in time of peace. The relevant provisions of the English Bill of Rights of 1689 provided a useful model for the colonial drafters.

II. *The Oregon right to bear arms*

A. *"Defense of themselves and the state"*3We have noted that Oregon's constitutional right to bear arms provision, Or Const. Art I, § 27, was taken verbatim from the Indiana constitutional provision drafted in 1816. The phrase "for defense of themselves and the state" in Indiana's provision was most likely taken from the Kentucky provision in its 1799 constitution, or the Ohio provision in its 1802 constitution.[8] The phrase "for defense of themselves and the

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

"Sec. 23. That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned. "Sec. 24. That no standing army shall, in time of peace, be kept up, without the consent of the legislature; and the military shall, in all cases and at all times, be in strict subordination to the civil power."

W. Swindler, *Sources and Documents of U. S. Constitutions*, Vol 4, p 183 (1975).

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

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

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

*(Continued on following page)*

state" appears in the present day constitutions of Oregon, Indiana, and six other states.[9] The language is subject to varying interpretations. It has been suggested that the language includes three separate justifications for a state constitutional right to bear arms: (a) The preference for a militia over a standing army; (b) the deterrence of governmental oppression; and (c) the right of personal defense.[10]

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

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

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

*(Continued from previous page)*

"That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power."

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

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

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

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





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

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

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

"Defense of themselves" has also been said to include an individual's right to bear arms to protect his person and home. *Schubert v. DeBard*, Ind , 398 NE2d 1339, 1341 (1980) (Indiana constitution provides citizenry the right to bear arms for their personal self-defense). Self-defense has been recognized as a privilege in both civil and criminal law since about 1400 in England and at all times in the United States.[13] Although the right to bear arms for self protection does not appear to have been an important

[12] *See* text accompanying note 7 *supra*.

[13]

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

development in England, the justification for a right to bear arms in defense of person and home probably reflects the exigencies of the rural American experience. *See People v. Brown, supra. Cf., Matthews v. State,* 237 Ind 677, 689-692, 148 NE2d 334, 339-341 (1958) (Emmert, C. J., dissenting) (constitutional guarantee based on historical necessity for personal defense.)[14]

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

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

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

[14] *Compare* the provisions in several state constitutions which guarantee that a person has the right to bear arms "in defense of his home, person and property." Colo Const, Art II, § 13; Miss Const, Art III, § 12; Mo Const, Art I, § 23; Mont Const, Art III, § 13; Okla Const, Art II, § 26; *State v. Nickerson,* 126 Mont 157, 247 P2d 188 (1952) (defendant cannot be convicted of assault if he pointed a loaded gun at a trespasser in his home); *accord, State v. Hassard,* 355 Mo 90, 195 SW2d 495 (1946).





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

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

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

The constitutional guarantee that persons have the right to "bear arms" does not mean that all individuals have an unrestricted right to carry or use personal weapons in all circumstances. For example,

the danger of firearms was recognized shortly after the development of gunpowder. The English Statute of Northampton in 1327 forbade persons to ride at night carrying a firearm for the purpose of terrifying the people.[15] A 1678 Massachusetts law forbade shooting near any house, barn, garden, or highway in any town where a person may be "killed, wounded, or otherwise damaged."[16] The courts of many states have upheld statutes which restrict the possession or manner of carrying personal weapons. The reasoning of the courts is generally that a regulation is valid if the aim of public safety does not frustrate the guarantees of the state constitution. For example, many courts have upheld statutes prohibiting the carrying of concealed weapons, *see, e.g., State v. Hart*, 66 Idaho 217, 157 P2d 72 (1945); and statutes prohibiting possession of firearms by felons, *see, e.g., State v. Carturight*, 246 Or 121, 418 P2d 822 (1966).

III. *The present case*

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

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

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

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





The defendant appealed to the Court of Appeals, contending first that his acts did not amount to the crime of disorderly conduct, and second that the statute prohibiting possession of billy clubs, ORS 166.510(1), violates Article I, section 27, of the Oregon Constitution. The Court of Appeals did not consider defendant's first contention because it was not raised at trial.[17] The Court of Appeals held that ORS 166.510(1) was within the reasonable exercise of the "police power" of the state to curb crime. 43 Or App 303, 307, 602 P2d 1096 (1979).

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

The club is considered the first personal weapon fashioned by humans. O. Hogg, *Clubs to Cannon* 19 (1968). The club is still used today as a personal

[17] The general rule in both civil and criminal cases is that a question not raised and preserved in the trial court will not be considered on appeal. *State v. Abel*, 241 Or 465, 467, 406 P2d 902 (1965). Failure to raise an objection in trial court does not automatically preclude appellate review. The defendant's contention that his acts did not constitute the crime of disorderly conduct, however, does not present the exceptional circumstance or manifest error which justifies this court's consideration of such a claim. It follows that defendant's conviction of disorderly conduct is affirmed. Note that this case is not concerned with that aspect of the statute prohibiting disorderly conduct which we held to be unconstitutional in *State v. Spencer*, 289 Or 225, __ P2d __ (1980).

weapon, commonly carried by the police. ORS 166.510 prohibits possession of a "billy;" however, ORS 166.520 states that peace officers are not prohibited from carrying or possessing a weapon commonly known as a "blackjack"[18] or "billy."

The statute in this case, ORS 166.510, prohibits the mere possession of a club. The defendant concedes that the legislature could prohibit carrying a club in a public place in a concealed manner, but the defendant maintains that the legislature cannot prohibit all persons from possessing a club in the home. The defendant argued that a person may prefer to keep in his home a billy club rather than a firearm to defend against intruders.

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

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

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



Vol. 80 August 4, 1980 No. 24

# COURT OF APPEALS REPORTS

## 47 OR APP 1 — 108

CASES DECIDED
by the
COURT OF APPEALS

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.

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

Jean 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).

# 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*

"We are definitely ready for anything 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.

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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# 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.

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
# THE LEGISLATURE

## LEGISLATIVE AFFAIRS AGENCY

POUCH V STATE CAPITOL
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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 postrevolutionary 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

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907-465-3808

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
096/mf

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. Kassler, 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:GAR:gb-13

SJR 15

# STATE OF ALASKA

**DEPARTMENT OF LAW**

*OFFICE OF THE ATTORNEY GENERAL*

*Bill Sheffield, Governor*

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

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.

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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

97th Congress
2d Session

COMMITTEE PRINT

# THE RIGHT TO KEEP AND BEAR ARMS

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## REPORT

OF THE

## SUBCOMMITTEE ON THE CONSTITUTION

OF THE

## COMMITTEE ON THE JUDICIARY

## UNITED STATES SENATE

## NINETY-SEVENTH CONGRESS

SECOND SESSION



FEBRUARY 1982

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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 the republic", 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 [illegible]ordinate 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:

> It would give to persons of the negro race, who are recognized as citizens in any one state of the Union, the right to enter every other state, whenever they pleased. . . . and it would give them full liberty of speech in public and in private upon all subjects upon which its own citizens might meet; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.[53]

Following the Civil War, the legislative efforts which gave us three amendments to the Constitution and our earliest civil rights acts likewise recognized the right to keep and bear arms as an existing constitutional right of the individual citizen and as a right specifically singled out as one protected by the civil rights acts and by the Fourteenth Amendment to the Constitution, against infringement by state authorities. Much of the reconstruction effort in the South had been hinged upon the creation of "black militias" composed of the armed and newly freed blacks, officered largely by black veterans of the Union Army. In the months after the Civil War, the existing southern governments struck at these units with the enactment of "black codes" which either outlawed gun ownership by blacks entirely, or imposed permit systems for them, and permitted the confiscation of firearms owned by blacks. When the Civil Rights Act of 1866 was debated members both of the Senate and the House referred to the disarmament of blacks as a major consideration.[54] Senator Trumbull cited provisions outlawing ownership of arms by blacks as among those which the Civil Rights Act would prevent;[55] Senator Sulsbury complained on the other hand that if the act were to be passed it would prevent his own state from enforcing a law banning gun ownership by individual free blacks.[56] Similar arguments were advanced during the debates over the "anti-KKK act"; its sponsor at one point explained that a section making it a federal crime to deprive a person of "arms or weapons he may have in his house or possession for the defense of his person, family or property" was "intended to enforce the well-known constitutional provisions guaranteeing the right in the citizen to 'keep and bear arms'."[57] Likewise, the debates over the Fourteenth Amendment Congress frequently referred to the Second Amendment as one of the rights which it intended to guarantee against state action.[58]

Following adoption of the Fourteenth Amendment, however, the Supreme Court held that that Amendment's prohibition against states depriving any persons of their federal "privileges and immunities" was to be given a narrow construction. In particular, the "privileges and immunities" under the Constitution would refer only to those rights which were not felt to exist as a process of natural right, but which were created solely by the Constitution. These might refer to rights such as voting in federal elections and of interstate travel, which would clearly not exist except by virtue of the existence of a federal government and which could not be said to be "natural rights".[59] This paradoxically meant that the rights which most persons would accept as the most important—those flowing from concepts of natural justice—were devalued at the expense of more technical rights. Thus when individuals were charged with having deprived black citizens of their right to free-

dom of assembly and to keep and bear arms, by violently breaking up a peaceable assembly of black citizens, the Supreme Court in *United States* v. *Cruikshank* [60] held that no indictment could be properly brought since the right "of bearing arms for a lawful purpose" is "not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." Nor, in the view of the Court, was the right to peacefully assemble a right protected by the Fourteenth Amendment: "The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is and has always been one of the attributes of citizenship under a free government. . . . It was not, therefore, a right granted to the people by the Constitution." Thus the very importance of the rights protected by the First and Second Amendment was used as the basis for the argument that they did not apply to the states under the Fourteenth Amendment. In later opinions, chiefly *Presser* v. *Illinois* [61] and *Miller* v. *Texas*, [62] the Supreme Court adhered to the view. *Cruikshank* has clearly been superseded by twentieth century opinions which hold that portions of the Bill of Rights—and in particular the right to assembly with which *Cruikshank* dealt in addition to the Second Amendment—are binding upon the state governments. Given the legislative history of the Civil Rights Acts and the Fourteenth Amendment, and the more expanded views of incorporation which have become accepted in our own century, it is clear that the right to keep and bear arms was meant to be and should be protected under the civil rights statutes and the Fourteenth Amendment against infringement by officials acting under color of state law.

Within our own century, the only occasion upon which the Second Amendment has reached the Supreme Court came in *United States* v. *Miller*. [63] There, a prosecution for carrying a sawed off shotgun was dismissed before trial on Second Amendment grounds. In doing so, the court took no evidence as to the nature of the firearm or indeed any other factual matter. The Supreme Court reversed on procedural grounds, holding that the trial court could not take judicial notice of the relationship between a firearm and the Second Amendment, but must receive some manner of evidence. It did not formulate a test nor state precisely what relationship might be required. The court's statement that the amendment was adopted "to assure the continuation and render possible the effectiveness of such [militia] forces" and "must be interpreted and applied with that end in view", when combined with the court's statement that all constitutional sources "show plainly enough that the militia comprised all males physically capable of acting in concert for the common defense. . . . these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time," [64] suggests that at the very least private ownership by a person capable of self defense and using an ordinary privately owned firearm must be protected by the Second Amendment. What the Court did not do in Miller is even more striking: It did not suggest that the lower court take evidence on whether Miller belonged to the National Guard or a similar group. The hearing was to be on the nature of the

firearm, not on the nature of its use; nor is there a single suggestion that National Guard status is relevant to the case.

The Second Amendment right to keep and bear arms therefore, is a right of the individual citizen to privately possess and carry in a peaceful manner firearms and similar arms. Such an "individual rights" interpretation is in full accord with the history of the right to keep and bear arms, as previously discussed. It is moreover in accord with contemporaneous statements and formulations of the right by such founders of this nation as Thomas Jefferson and Samuel Adams, and accurately reflects the majority of the proposals which led up to the Bill of Rights itself. A number of state constitutions, adopted prior to or contemporaneously with the federal Constitution and Bill of Rights, similarly provided for a right of the people to keep and bear arms. If in fact this language creates a right protecting the states only, there might be a reason for it to be inserted in the federal Constitution but no reason for it to be inserted in state constitutions. State bills of rights necessarily protect only against action by the state, and by definition a state cannot infringe its own rights; to attempt to protect a right belonging to the state by inserting it in a limitation of the state's own powers would create an absurdity. The fact that the contemporaries of the framers did insert these words into several state constitutions would indicate clearly that they viewed the right as belonging to the individual citizen, thereby making it a right which could be infringed either by state or federal government and which must be protected against infringement by both.

Finally, the individual rights interpretation gives full meaning to the words chosen by the first Congress to reflect the right to keep and bear arms. The framers of the Bill of Rights consistently used the words "right of the people" to reflect individual rights—as when these words were used to recognize the "right of the people" to peaceably assemble, and the "right of the people" against unreasonable searches and seizures. They distinguished between the rights of the people and of the state in the Tenth Amendment. As discussed earlier, the "militia" itself referred to a concept of a universally armed people, not to any specifically organized unit. When the framers referred to the equivalent of our National Guard, they uniformly used the term "select militia" and distinguished this from "militia". Indeed, the debates over the Constitution constantly referred to organized militia units as a threat to freedom comparable to that of a standing army, and stressed that such organized units did not constitute, and indeed were philosophically opposed to, the concept of a militia.

That the National Guard is not the "Militia" referred to in the second amendment is even clearer today. Congress has organized the National Guard under its power to "raise and support armies" and not its power to "Provide for organizing, arming and disciplining the Militia".[65] This Congress chose to do in the interests of organizing reserve military units which were not limited in deployment by the strictures of our power over the constitutional militia, which can be called forth only "to execute the laws of the Union, suppress insurrections and repel invasions." The modern National Guard was specifically intended to avoid status as the constitutional militia, a distinction recognized by 10 U.S.C. §311(a).

The conclusion is thus inescapable that the history, concept, and wording of the second amendment to the Constitution of the United States, as well as its interpretation by every major commentator and court in the first half-century after its ratification, indicates that what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner.

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## APPENDIX

### CASE LAW

The United States Supreme Court has only three times commented upon the meaning of the second amendment to our constitution. The first comment, in *Dred Scott*, indicated strongly that the right to keep and bear arms was an individual right; the Court noted that, were it to hold free blacks to be entitled to equality of citizenship, they would be entitled to keep and carry arms wherever they went. The second, in *Miller*, indicated that a court cannot take judicial notice that a short-barrelled shotgun is covered by the second amendment—but the Court did not indicate that National Guard status is in any way required for protection by that amendment, and indeed defined "militia" to include all citizens able to bear arms. The third, a footnote in *Lewis* v. *United States*, indicated only that "these legislative restrictions on the use of firearms"—a ban on possession by felons—were permissable. But since felons may constitutionally be deprived of many of the rights of citizens, including that of voting, this dicta reveals little. These three comments constitute all significant explanations of the scope of the second amendment advanced by our Supreme Court. The case of *Adam* v. *Williams* has been cited as contrary to the principle that the second amendment is an individual right. In fact, that reading of the opinion comes only in Justice Douglas's dissent from the majority ruling of the Court.

The appendix which follows represents a listing of twenty-one American decisions, spanning the period from 1822 to 1981, which have analysed right to keep and bear arms provisions in the light of statutes ranging from complete bans on handgun sales to bans on carrying of weapons to regulation of carrying by permit systems. Those decisions not only explained the nature of such a right, but also struck down legislative restrictions as violative of it, are designated by asterisks.

*20th century cases*

1. * *State* v. *Blocker*, 291 Or. 255, ——— P.2d ——— (1981).

"The statute is written as a total proscription of the mere possession of certain weapons, and that mere possession, insofar as a billy is concerned, is constitutionally protected."

"In these circumstances, we conclude that it is proper for us to consider defendant's 'overbreadth' attack to mean that the statute swept so broadly as to infringe rights that it could not reach, which in this setting means the right to possess arms guaranteed by § 27."

2. * *State* v. *Kessler*, 289 Or. 359, 614 P.2d 94, at 95, at 98 (1980).

"We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as

a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment."

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

3. *Motley* v. *Kellogg*, 409 N.E.2d 1207, at 1210 (Ind. App. 1980) (motion to transfer denied 1-27-1981).

"[N]ot making applications available at the chief's office effectively denied members of the community the opportunity to obtain a gun permit and bear arms for their self-defense."

4. *Schubert* v. *DeBard*, 398 N.E.2d 1339, at 1341 (Ind. App. 1980) (motion to transfer denied 8-28-1980).

"We think it clear that our constitution provides our citizenry the right to bear arms for their self-defense."

5. *Taylor* v. *McNeal*, 523 S.W.2d 148, at 150 (Mo. App. 1975).

"The pistols in question are not contraband. * * * Under Art. I, § 23, Mo. Const. 1945, V.A.M.S., every citizen has the right to keep and bear arms in defense of his home, person and property, with the limitation that this section shall not justify the wearing of concealed arms."

6. * *City of Lakewood* v. *Pillow*, 180 Colo. 20, 501 P.2d 744, at 745 (en banc 1972).

"As an example, we note that this ordinance would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on a substantial part of their business. Also, the ordinance appears to prohibit individuals from transporting guns to and from such places of business. Furthermore, it makes it unlawful for a person to possess a firearm in a vehicle or in a place of business for the purpose of self-defense. Several of these activities are constitutionally protected. Colo. Const. art. II, § 13."

7. * *City of Las Vegas* v. *Moberg*, 82 N.M. 626, 485 P.2d 737, at 738 (N.M. App. 1971).

"It is our opinion that an ordinance may not deny the people the constitutionally guaranteed right to bear arms, and to that extent the ordinance under consideration is void."

8. *State* v. *Nickerson*, 126 Mt. 157, 247 P.2d 188, at 192 (1952).

"The law of this jurisdiction accords to the defendant the right to keep and bear arms and to use same in defense of his own home, his person and property."

9. *People* v. *Liss*, 406 Ill. 419, 94 N.E. 2d 320, at 323 (1950).

"The second amendment to the constitution of the United States provides the right of the people to keep and bear arms shall not be infringed. This, of course, does not prevent the enactment of a law against carrying concealed weapons, but it does indicate it should be kept in mind, in the construction of a statute of such character, that it is aimed at persons of criminal instincts, and for the prevention of crime, and not against use in the protection of person or property."

10. **People* v. *Nakamura*, 99 Colo. 262, at 264, 62 P.2d 246 (en banc 1936).

"It is equally clear that the act wholly disarms aliens for all purposes. The state . . . cannot disarm any class of persons or deprive them of the right guaranteed under section 13, article II of the Constitution, to bear arms in defense of home, person and property. The guaranty thus extended is meaningless if any person is denied the right to posses arms for such protection."

11. **Glasscock* v. *City of Chattanooga*, 157 Tenn. 518, at 520, 11 S.W. 2d 678 (1928).

"There is no qualifications of the prohibition against the carrying of a pistol in the city ordinance before us but it is made unlawful 'to carry on or about the person any pistol,' that is, any sort of pistol in any sort of manner. *** [W]e must accordingly hold the provision of this ordinance as to the carrying of a pistol invalid."

12. **People* v. *Zerillo*, 219 Mich. 635, 189 N.W. 927, at 928 (1922).

"The provision in the Constitution granting the right to all persons to bear arms is a limitation upon the power of the Legislature to enact any law to the contrary. The exercise of a right guaranteed by the Constitution cannot be made subject to the will of the sheriff."

13. **State* v. *Kerner*, 181 N.C. 574, 107 S.E. 222, at 224 (1921).

"We are of the opinion, however, that 'pistol' ex vi termini is properly included within the word 'arms,' and that the right to bear such arms cannot be infringed. The historical use of pistols as 'arms' of offense and defense is beyond controversy."

"The maintenance of the right to bear arms is a most essential one to every free people and should not be whittled down by technical constructions."

14. **State* v. *Rosenthal*, 75 VT. 295, 55 A. 610, at 611 (1903).

"The people of the state have a right to bear arms for the defense of themselves and the state. *** The result is that Ordinance No. 10, so far as it relates to the carrying of a pistol, is inconsistent with and repugnant to the Constitution and the laws of the state, and it is therefore to that extent, void."

15. *In re *Brickey*, 8 Ida. 597, at 598–99, 70 p. 609 (1902).

"The second amendment to the federal constitution is in the following language: '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 language of section 11, article I of the constitution of Idaho, is 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.' Under these constitutional provisions, the legislature has no power to prohibit a citizen from bearing arms in any portion of the state of Idaho, whether within or without the corporate limits of cities, towns, and villages."

*19th century cases*

16. **Wilson* v. *State*, 33 Ark. 557, at 560, 34 Am. Rep. 52, at 54 (1878).

"If cowardly and dishonorable men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the

penitentiary and gallows, and not by a general deprivation of constitutional privilege."

17. *Jennings* v. *State*, 5 Tex. Crim. App. 298, at 300-01 (1878).

"We believe that portion of the act which provides that, in case of conviction, the defendant shall forfeit to the county the weapon or weapons so found on or about his person is not within the scope of legislative authority. * * * One of his most sacred rights is that of having arms for his own defence and that of the State. This right is one of the surest safeguards of liberty and self-preservation."

18. *Andrews* v. *State*, 50 Tenn. 165, 8 Am. Rep. 8, at 17 (1871).

"The passage from Story shows clearly that this right was intended, as we have maintained in this opinion, and was guaranteed to and to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights."

19. *Nunn* v. *State*, 1 Ga. (1 Kel.) 243, at 251 (1846).

" 'The right of the people to bear arms shall not be infringed.' 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 such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State."

20. *Simpson* v. *State*, 13 Tenn. 356, at 359-60 (1833).

"But suppose it to be assumed on any ground, that our ancestors adopted and brought over with them this English statute, [the statute of Northampton,] or portion of the common law, our constitution has completely abrogated it; it says, 'that the freemen of this State have a right to keep and bear arms for their common defence.' Article II, sec. 26. * * * By this clause of the constitution, an express power is given and secured to all the free citizens of the State to keep and bear arms for their defence, without any qualification whatever as to their kind or nature; and it is conceived, that it would be going much too far, to impair by construction or abridgement a constitutional privilege, which is so declared; neither, after so solumn an instrument hath said the people may carry arms, can we be permitted to impute to the acts thus licensed, such a necessarily consequent operation as terror to the people to be incurred thereby; we must attribute to the framers of it, the absence of such a view."

21. *Bliss* v. *Commonwealth*, 12 Ky. (2 Litt.) 90, at 92, and 93, 13 Am. Dec. 251 (1822).

"For, in principle, there is no difference between a law prohibiting the wearing concealed arms, and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise."

"But it should not be forgotten, that it is not only a part of the right that is secured by the constitution; it is the right entire and complete, as it existed at the adoption of the constitution; and if any portion of that right be impaired, immaterial how small the part may be, and immaterial the order of time at which it be done, it is equally forbidden by the constitution."

The following represents a list of twelve scholarly articles which have dealt with the subject of the right to keep and bear arms as reflected in the second amendment to the Constitution of the United States. The scholars who have undertaken this research range from professors of law, history and philosophy to a United States Senator. All have concluded that the second amendment is an individual right protecting American citizens in their peaceful use of firearms.

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## Enforcement of Federal Firearms Laws From the Perspective of the Second Amendment

Federal involvement in firearms possession and transfer was not significant prior to 1934, when the National Firearms Act was adopted. The National Firearms Act as adopted covered only fully automatic weapons (machine guns and submachine guns) and rifles and shotguns whose barrel length or overall length fell below certain limits. Since the Act was adopted under the revenue power, sale of these firearms was not made subject to a ban or permit system. Instead, each transfer was made subject to a $200 excise tax, which must be paid prior to transfer; the identification of the parties to the transfer indirectly accomplished a registration purpose.

The 1934 Act was followed by the Federal Firearms Act of 1938, which placed some limitations upon sale of ordinary firearms. Persons engaged in the business of selling those firearms in interstate commerce were required to obtain a Federal Firearms License, at an annual cost of $1, and to maintain records of the name and address of persons to whom they sold firearms. Sales to persons convicted of violent felonies were prohibited, as were interstate shipments to persons who lacked the permit required by the law of their state.

Thirty years after adoption of the Federal Firearms Act, the Gun Control Act of 1968 worked a major revision of federal law. The Gun Control Act was actually a composite of two statutes. The first of these, adopted as portions of the Omnibus Crime and Safe Streets Act, imposed limitations upon imported firearms, expanded the requirement of dealer licensing to cover anyone "engaged in the business of dealing" in firearms, whether in interstate or local commerce, and expanded the recordkeeping obligations for dealers. It also imposed a variety of direct limitations upon sales of handguns. No transfers were to be permitted between residents of different states (unless the recipient was a federally licensed dealer), even where the transfer was by gift rather than sale and even where the recipient was subject to no state law which could have been evaded. The category of persons to whom dealers could not sell was expanded to cover persons convicted of any felony (other than certain business-related felonies such as antitrust violations), persons subject to a mental commitment order or finding of mental incompetence, persons who were users of marijuana and other drugs, and a number of other categories. Another title of the Act defined persons who were banned from possessing firearms. Paradoxically, these classes were not identical with the list of classes prohibited from purchasing or receiving firearms.

The Omnibus Crime and Safe Streets Act was passed on June 5, 1968, and set to take effect in December of that year. Barely two weeks after its passage, Senator Robert F. Kennedy was assassinated while campaigning for the presidency. Less than a week after

his death, the second bill which would form part of the Gun Control Act of 1968 was introduced in the House. It was reported out of Judiciary ten days later, out of Rules Committee two weeks after that, and was on the floor barely a month after its introduction. The second bill worked a variety of changes upon the original Gun Control Act. Most significantly, it extended to rifles and shotguns the controls which had been imposed solely on handguns, extended the class of persons prohibited from possessing firearms to include those who were users of marijuana and certain other drugs, expanded judicial review of dealer license revocations by mandating a de novo hearing once an appeal was taken, and permitted interstate sales of rifles and shotguns only where the parties resided in contiguous states, both of which had enacted legislation permitting such sales. Similar legislation was passed by the Senate and a conference of the Houses produced a bill which was essentially a modification of the House statute. This became law before the Omnibus Crime Control and Safe Streets Act, and was therefore set for the same effective date.

Enforcement of the 1968 Act was delegated to the Department of the Treasury, which had been responsible for enforcing the earlier gun legislation. This responsibility was in turn given to the Alcohol and Tobacco Tax Division of the Internal Revenue Service. This division had traditionally devoted itself to the pursuit of illegal producers of alcohol; at the time of enactment of the Gun Control Act, only 8.3 percent of its arrests were for firearms violations. Following enactment of the Gun Control Act the Alcohol and Tobacco Tax Division was retitled the Alcohol, Tobacco and Firearms Division of the IRS. By July, 1972 it had nearly doubled in size and became a complete Treasury bureau under the name of Bureau of Alcohol, Tobacco and Firearms.

The mid-1970's saw rapid increases in sugar prices, and these in turn drove the bulk of the "moonshiners" out of business. Over 15,000 illegal distilleries had been raided in 1956; but by 1976 this had fallen to a mere 609. The BATF thus began to devote the bulk of its efforts to the area of firearms law enforcement.

Complaints regarding the techniques used by the Bureau in an effort to generate firearm cases led to hearings before the Subcommittee on Treasury, Post Office, and General Appropriations of the Senate Appropriations Committee in July 1979 and April 1980, and before the Subcommittee on the Constitution of the Senate Judiciary Committee in October 1980. At these hearings evidence was received from various citizens who had been charged by BATF, from experts who had studied the BATF, and from officials of the Bureau itself.

Based upon these hearings it is apparent that enforcement tactics made possible by current federal firearms laws are constitutionally, legally, and practically reprehensible. Although Congress adopted the Gun Control Act with the primary object of limiting access of felons and high-risk groups to firearms, the overbreadth of the law has led to neglect of precisely this area of enforcement. For example the Subcommittee on the Constitution received correspondence from two members of the Illinois Judiciary, dated in 1980, indicating that they had been totally unable to persuade BATF to accept cases against felons who were in possession of

firearms including sawed-off shotguns. The Bureau's own figures demonstrate that in recent years the percentage of its arrests devoted to felons in possession and persons knowingly selling to them have dropped from 14 percent down to 10 percent of their firearms cases. To be sure, genuine criminals are sometimes prosecuted under other sections of the law. Yet, subsequent to these hearings, BATF stated that 55 percent of its gun law prosecutions overall involve persons with no record of a felony conviction, and a third involve citizens with no prior police contact at all.

The Subcommittee received evidence that BATF has primarily devoted its firearms enforcement efforts to the apprehension, upon technical malum prohibitum charges, of individuals who lack all criminal intent and knowledge. Agents anxious to generate an impressive arrest and gun confiscation quota have repeatedly enticed gun collectors into making a small number of sales—often as few as four—from their personal collections. Although each of the sales was completely legal under state and federal law, the agents then charged the collector with having "engaged in the business" of dealing in guns without the required license. Since existing law permits a felony conviction upon these charges even where the individual has no criminal knowledge or intent numerous collectors have been ruined by a felony record carrying a potential sentence of five years in federal prison. Even in cases where the collectors secured acquittal, or grand juries failed to indict, or prosecutors refused to file criminal charges, agents of the Bureau have generally confiscated the entire collection of the potential defendant upon the ground that he intended to use it in that violation of the law. In several cases, the agents have refused to return the collection even after acquittal by jury.

The defendant, under existing law is not entitled to an award of attorney's fees, therefore, should he secure return of his collection, an individual who has already spent thousands of dollars establishing his innocence of the criminal charges is required to spend thousands more to civilly prove his innocence of the same acts, without hope of securing any redress. This, of course, has given the enforcing agency enormous bargaining power in refusing to return confiscated firearms. Evidence received by the Subcommittee on the Constitution demonstrated that Bureau agents have tended to concentrate upon collector's items rather than "criminal street guns". One witness appearing before the Subcommittee related the confiscation of a shotgun valued at $7,000. Even the Bureau's own valuations indicate that the value of firearms confiscated by their agents is over twice the value which the Bureau has claimed is typical of "street guns" used in crime. In recent months, the average value has increased rather than decreased, indicating that the reforms announced by the Bureau have not in fact redirected their agents away from collector's items and toward guns used in crime.

The Subcommittee on the Constitution has also obtained evidence of a variety of other misdirected conduct by agents and supervisors of the Bureau. In several cases, the Bureau has sought conviction for supposed technical violations based upon policies and interpretations of law which the Bureau had not published in the Federal Register, as required by 5 U.S.C. § 552. For instance, beginning in 1975, Bureau officials apparently reached a judgment that

a dealer who sells to a legitimate purchaser may nonetheless be subject to prosecution or license revocation if he knows that that individual intends to transfer the firearm to a nonresident or other unqualified purchaser. This position was never published in the Federal Register and is indeed contrary to indications which Bureau officials had given Congress, that such sales were not in violation of existing law. Moreover, BATF had informed dealers that an adult purchaser could legally buy for a minor, barred by his age from purchasing a gun on his own. BATF made no effort to suggest that this was applicable only where the barrier was one of age. Rather than informing the dealers of this distinction, Bureau agents set out to produce mass arrests upon these "straw man" sale charges, sending out undercover agents to entice dealers into transfers of this type. The first major use of these charges, in South Carolina in 1975, led to 37 dealers being driven from business, many convicted on felony charges. When one of the judges informed Bureau officials that he felt dealers had not been fairly treated and given information of the policies they were expected to follow, and refused to permit further prosecutions until they were informed, Bureau officials were careful to inform only the dealers in that one state and even then complained in internal memoranda that this was interfering with the creation of the cases. When BATF was later requested to place a warning to dealers on the front of the Form 4473, which each dealer executes when a sale is made, it instead chose to place the warning in fine print upon the back of the form, thus further concealing it from the dealer's sight.

The Constitution Subcommittee also received evidence that the Bureau has formulated a requirement, of which dealers were not informed that requires a dealer to keep official records of sales even from his private collection. BATF has gone farther than merely failing to publish this requirement. At one point, even as it was prosecuting a dealer on this charge (admitting that he had no criminal intent), the Director of the Bureau wrote Senator S. I. Hayakawa to indicate that there was no such legal requirement and it was completely lawful for a dealer to sell from his collection without recording it. Since that date, the Director of the Bureau has stated that that is not the Bureau's position and that such sales are completely illegal; after making that statement, however, he was quoted in an interview for a magazine read primarily by licensed firearms dealers as stating that such sales were in fact legal and permitted by the Bureau. In these and similar areas, the Bureau has violated not only the dictates of common sense, but of 5 U.S.C. § 552, which was intended to prevent "secret lawmaking" by administrative bodies.

These practices, amply documented in hearings before this Subcommittee, leave little doubt that the Bureau has disregarded rights guaranteed by the constitution and laws of the United States.

It has trampled upon the second amendment by chilling exercise of the right to keep and bear arms by law-abiding citizens.

It has offended the fourth amendment by unreasonably searching and seizing private property.

It has ignored the Fifth Amendment by taking private property without just compensation and by entrapping honest citizens without regard for their right to due process of law.

The rebuttal presented to the Subcommittee by the Bureau was utterly unconvincing. Richard Davis, speaking on behalf of the Treasury Department, asserted vaguely that the Bureau's priorities were aimed at prosecuting willful violators, particularly felons illegally in possession, and at confiscating only guns actually likely to be used in crime. He also asserted that the Bureau has recently made great strides toward achieving these priorities. No documentation was offered for either of these assertions. In hearings before BATF's Appropriations Subcommittee, however, expert evidence was submitted establishing that approximately 75 percent of BATF gun prosecutions were aimed at ordinary citizens who had neither criminal intent nor knowledge, but were enticed by agents into unknowing technical violations. (In one case, in fact, the individual was being prosecuted for an act which the Bureau's acting director had stated was perfectly lawful.) In those hearings, moreover, BATF conceded that in fact (1) only 9.8 percent of their firearm arrests were brought on felons in illicit possession charges; (2) the average value of guns seized was $116, whereas BATF had claimed that "crime guns" were priced at less than half that figure; (3) in the months following the announcement of their new "priorities", the percentage of gun prosecutions aimed at felons had in fact fallen by a third, and the value of confiscated guns had risen. All this indicates that the Bureau's vague claims, both of focus upon gun-using criminals and of recent reforms, are empty words.

In light of this evidence, reform of federal firearm laws is necessary to protect the most vital rights of American citizens. Such legislation is embodied in S. 1030. That legislation would require proof of a willful violation as an element of a federal gun prosecution, forcing enforcing agencies to ignore the easier technical cases and aim solely at the intentional breaches. It would restrict confiscation of firearms to those actually used in an offense, and require their return should the owner be acquitted of the charges. By providing for award of attorney's fees in confiscation cases, or in other cases if the judge finds charges were brought without just basis or from improper motives, this proposal would be largely self-enforcing. S. 1030 would enhance vital protection of constitutional and civil liberties of those Americans who choose to exercise their Second Amendment right to keep and bear arms.

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# OTHER VIEWS OF THE SECOND AMENDMENT

## Does the Second Amendment Mean What It Says?

by DAVID J. STEINBERG
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*National Council for a Responsible Firearms Policy*

"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, the U.S. Constitution

The "right of the people to keep and bear arms" is part of the Bill of Rights. It stands alongside the First Amendment's rights of freedom of speech, press, religion, and assembly. Opponents of strict or any regulation of private possession of firearms regard the Second Amendment as no less important than the First, indeed as a defense against a tyrannical government that would deprive the people of the basic rights for which a revolution was fought and an independent nation founded. Regardless of the degree of gun control any of us may prefer, it is essential that the meaning and intent of the Second Amendment be clearly understood, and its mandate carried out.

### 106 Years of Court Decisions

Although a lively debate has raged over the purpose of the Second Amendment, the nation's courts—federal and state alike—have been in basic agreement on this subject for as long as judicial judgments have been made on contentions that the Second Amendment establishes a personal right to have firearms, free from government regulation. Such decisions go back more than 100 years. The



Supreme Court's first decision in this field was in 1875 in *United States v. Cruikshank*. Here the Court found that the right to keep and bear arms was not a right granted by the Constitution, was not dependent on the Constitution for its existence, was protected only against infringement by the federal government, and in any case its application to personal rights was only in the context of the freedom of the states to have their own militias. That is, the right of the individual to have firearms was given constitutional protection only to the extent that the right of the particular individual to have a gun was essential to the ability of the state to have an effective militia.

The significance of this relationship of the individual to the organized militia is better understood when one recalls the nature of the armed forces

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(i.e., the land forces) in the early years of the nation's history.

### Bone and Muscle of the Infantry

There was no national standing army at the time the Second Amendment became law (1791) and there would be none of any consequence for over 100 years. The state militias were the bone and muscle of the nation's infantry both during and after the Revolution. Fear of a national standing army with any real strength permeated attention to the military powers of the national government and the various state governments. The basic Constitution, in Article I, Section 8, empowered Congress to provide for "calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions," and for "organizing, arming, and disciplining the militia." The state militias were by no means regarded as the sole instrument of national defense. They were, however, regarded, not only as a vital national resource, but as the sole defense of the states against national encroachment.

At that time, and for about another hundred years, the firearms used in the state militias were mostly those brought into such service by the citizen soldiers themselves. If these men didn't have guns, the militias could hardly be effective. Thus, the "right of the people to keep and bear arms" was essential to the viability of the "well-regulated militia," which in turn was "necessary to the security of a free state."

Those who interpret the Second Amendment as providing only for a state's right to have a militia see only half the picture, omitting the Amendment's implication that private possession of guns is basic to the existence of such militias (at the time the Amendment was adopted and for many years thereafter). Those who interpret the Second Amendment as providing or protecting the individual's personal right to have firearms see only the other half of the picture,



omitting the component that the individual's right to have a gun must be shown to be essential to the formation of an effective militia.

If, as now and indeed ever since Congress in 1903 established state militias known as the National Guard, the arms used by the state militias are entirely provided by the government, the right of the people to keep and bear arms appears to lose whatever meaning it once had as an individual right protected by the Constitution. The 1903 act also provided for a reserve militia consisting of all able-bodied men between 18 and 45 who were not members of the organized militia. But no firearms were issued to t..em in this reserve status. Nor are reservists expected or required to have and bring their own.

### Title 10, Section 311

Many opponents of gun control make much, in fact too much, of Title 10, Section 311 of the United States

Code in their attempt to prove that the militia is not limited to the National Guard—namely, that there is an "unorganized militia" and that under the Second Amendment every member of it has a constitutional right to have firearms. Title 10, Section 311, states that "the militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States."

Those who cite that regulation in the debate on gun control interpret it to mean that every such person, in fact every adult citizen, has a Second Amendment right to a gun to protect himself or herself against violent harm to themselves, their families and their communities. The police, they contend, are not always available. When widespread violence occurs, the National Guard and other military forces may be preoccupied elsewhere. In this light, the National Rifle Association sees the armed citizen as "a potential community stabilizer" whether as a civilian member of an organized posse or simply as a member of the "unorganized militia." In some renditions of the right to keep and bear arms, the armed citizen is seen as "a vital last line of defense against crime, federal tyranny, and foreign invasion"—the people's "ultimate check against abuses by their government," including abuse of power by a militia.

**"Well Regulated" Militia**

Whatever the merits of such notions about personal and national security (they are, to say the least, highly questionable in this day and age), it is important to note that the only kind of militia the Second Amendment expressly regards as consistent with security is a "well-regulated" militia. One may rationally and reasonably conclude that this applies both to an organized militia and an unorganized one. Otherwise, an armed citizenry consisting of men and women using guns for presumed high purpose according to their respective dictates of personal whim and political fancy is the stuff from which anarchy could result, and in turn the tyranny against which the private possession of guns is supposed to protect Americans.

The right to keep and bear arms (a term that connotes a military purpose) stems from the English common law right of self-defense. However, the possession of guns in the mother country of the common law was never an absolute right. Various conditions were imposed. Britain today has one of the strictest gun laws in the world.

There is nothing absolute about the freedoms in our own Bill of Rights. Freedom of speech is not freedom to shout "fire" in a crowded theater. Freedom of religion is not freedom to have multiple spouses, or sacrifice a lamb in the local park, as religiously sanctioned practices. Similarly, whatever right the Second Amendment protects regarding the private possession of guns, for whatever definition of "militia," is not an absolute right. It must serve the overall public interest, including (from the preamble of the US Constitution) the need to "insure domestic tranquility, provide for the common defense and promote the general welfare." Whatever right there is to possess firearms is no less important than the right of every American, gun owners included, to protection against the possession of guns by persons who by any reasonable standard lack the crucial credentials for responsible gun ownership. ■

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national coalition to ban handguns

JUNE 26, 1981

NATIONAL COALITION TO BAN HANDGUNS

STATEMENT

ON THE

SECOND AMENDMENT

By: Michael K. Beard,
Executive Director

and

Samuel S. Fields,
Legal Affairs
Coordinator

American Civil Liberties Union
American Ethical Union
Americans for Democratic Action
American Jewish Congress
American Psychiatric Association
American Public Health Association
Black Women's Community Development Foundation
B'nai B'rith Women
Board of Church & Society, United Methodist Church
Career for Social Action, United Church of Christ
Church of the Brethren Washington Office
Disarm Educational Fund
Friends Committee on National Legislation
International Ladies' Garment Workers Union
Jesuit Conference—Office of Social Ministries
National Alliance for Safer Cities
National Association of Social Workers
National Council of Jewish Women, Inc.
National Council of Negro Women
National Jewish Welfare Board
Political Action Committee Women's Political Democratic Club
The Program Agency, United Presbyterian Church in the U.S.A.
Union of American Hebrew Congregations
Unitarian Universalist Association
United States Conference of Mayors
United States National Student Association
United Synagogue of America
Women's Division, Board of Global Ministries, United Methodist Church
Women's League for Conservative Judaism
Young Women's Christian Association of the U.S.A. National Board
(partial listing)

John Levin. "The Right to Bear Arms: The Development of the American Experience." Chicago - Kent Law Review. Fall-Winter 1971.

1975 American Bar Association Gun Control Policy

Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment

Gun Control Legislation
By The Committee on Federal Legislation

N.C.B.H. STATEMENT

There is probably less agreement, more misinformation, and less understanding of the right to keep and bear arms than any other current controversial constitutional issue. The crux of the controversy is the construction of the Second Amendment to the Constitution, which reads: "A well-regulated militia, being necessary to the security of a free State, the right to keep and bear arms shall not be infringed." In addition to the five decisions in which the Supreme Court has construed the Amendment, every Federal court decision involving the Amendment has given the Amendment a collective, militia interpretation and/or held that firearms control laws enacted under a state's police power are constitutional. Thus arguments premised upon the Federal Second Amendment, or the similar provisions in the thirty-seven state constitutions, have never prevented regulation of firearms.

--American Bar Association
Background Report on
Firearms Control

The Union agrees with the Supreme Court's long-standing interpretation of the Second Amendment that the individual's right to keep and bear arms applies only to the preservation or efficiency of a "well-regulated militia." Except for lawful police and military purposes, the possession of weapons by individuals is not constiutionally protected.

--American Civil Liberties
Union
Policy 143

N.C.B.H. STATEMENT

The Second Amendment to the United States Constitution says: "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." While NRA takes the firm stand that law-abiding Americans are constitutionally entitled to the legal ownership and use of firearms, the Second Amendment has not prevented firearms regulation on national and state levels. Also, the few federal court decisions involving the Second Amendment have largely given the Amendment a collective, militia interpretation and have limited the application of the Amendment to the Federal Government.

--National Rifle Association
"NRA Fact Book on Firearms Control"

N.C.B.H. STATEMENT

YOU DO NOT HAVE A CONSTITUTIONAL RIGHT TO OWN A HANDGUN.

Tha Second Amendment to the U.S. Constitution 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." Some people claim that this amendment prohibits the federal government from interfering with their private "right to bear arms." However, in every instance where the Supreme Court has ruled on the Second Amendment or discussed it in a footnote or dicta their position has been uniformly in favor of interpreting the Second Amendment as a collective right of the several states and not as an individual right.

While the American "right to bear arms" developed at the time of the revolution, it grew out of the duty imposed on the early colonists to keep arms for the defense of their isolated and endangered communities. This duty was limited, however, by the colonial governments in order to prevent the use of fire rms for harmful purposes. To prevent civil disturbances the colonial governments were careful to keep arms from falling into the "wrong hands" and passed regulations concerning the conditions under which arms could be used.

Following the revolution the founders of the nation lacked confidence in the newly formed federation. Having just waged a revolution against an oppressive colonial ruler, they felt the need to protect their collective right to rise up and defend themselves against the new federal government. The founding fathers wanted to be sure than a people's militia could

continue to exist in case the states needed to protect themselves from abuses by the new federal government.

Records of the debates over the passage of the Second Amendment clearly show that the intent of Congress was to prevent the federal government from destroying the state militias. The "right to bear arms" was a corporate right used to insure that a balance between liberty and authority within the union would be maintained. Personal self-protection was not the issue. While some attempts were made to include a personal right to have arms in the Bill of Rights, these provisions were never adopted.

Many court decisions and virtually every leading legal scholar and constitutional expert in the country agree that the intent, wording and meaning of the Second Amendment in its full context, refer only to the people's collective right to bear arms as members of a well-regulated and authorized militia. Moreover, no serious student of law believes that the amendment prevents the reasonable regulation of firearms. This is evidenced by the many unchallenged laws on the books which require licenses and permits or prohibit the carrying of concealed weapons.

While the Second Amendment does not guarantee an individual a right to bear arms, the rights and responsibilities of self-protection are implicit in much of the constitution and in the vast body of law that rules our political and social life. Members of the pro-handgun lobby sometimes cite common

law to support their arguments against handgun control. According to these arguments the individual has a Common Law right to keep and bear arms for self-defense and to defend one's country. It should be noted, however, that England, the country which is the source of all U.S. Common Law, has enacted some of the most stringent handgun control laws in the world and thus does not feel that they are in violation of Common Law rights.

Attached to this submission are four scholarly articles on the origins and meaning of the Second Amendment. An analysis by the U.S. Federal Courts follows immediately.

What the Courts Say

The "right to bear arms" question has been brought into the courts many times since the Constitution was written. The courts have consistently ruled that the Second Amendment does not guarantee a personal right to own firearms.

Supreme Court decisions on the "right to bear arms" have repeatedly stated that the Second Amendment was conceived of as a restraint on the power of the federal government over the state militias. In U.S. v. Cruickshank, 95 U.S. 542 (1874), the Court held that, while there may be an individual right to possess arms, it existed independently of the Second Amendment.

Subsequent decisions elaborated on the scope of the Second Amendment's guarantee. In Presser v. Illinois, 116 U.S. 252 (1886), the Court upheld an Illinois statute forbidding bodies of men to associate in military organizations or to drill or parade with arms in cities or towns. The court also ruled

that the states had the power to regulated firearms as was necessary for the common good.

The third and least important of the Second Amendment cases was Miller v. Texas, 153 U.S. 535 (1894), in which a con icted murderer asserted that the state had violated his Second and Fourth Amendment rights. The Supreme Court unanimously dismissed the claim saying that the Second Amendment did not apply to the states citing, Cruickshank and other cases.

The most frequently discussed case on the issue of the Second Amendment is U.S. v. Miller 307 U.S. 174, 59 S. Ct. 816, 83 L.Ed. 1206 (1939). At issue is the so-called "ordinary military equipment" question. Proponents of the Second Amendment as an individual right insist that the Miller Court was attempting to dichotomize "militia" and "non-militia" weapons, the latter being subject to legislative control while the former is not. The argument then goes on to state that the court was unaware that Miller's weapon, a sawed-off shotgun, had in fact been used in World War I. Therefore, the argument continues, if the Court had only been made aware of this historical fact it would have overturned Miller's conviction and ruled the 1934 National Firearm Act unconstitutional.

The problem with this argument is twofold. First, the Court was not creating the "militia" versus "non-militia" dichotomy for the purposes of identifying individual right versus collective right weapons. Second, and probably more important, the Court was probably not attempting to formulate

a rule at all. See: Cases v. U.S. 131 F.2d 916 (1 CCA, 1942) cert. denied 319 U.S. 770, 63 S. Ct. 1431, 87 L.Ed. 1718 (1942). [Note: in the certerori denial the defendant is referred to as Velazquez v. U.S. His full name was Jose Cases Velazquez, hence, this has been a source of some confusion.]

In rejecting the military character of the shotgun the Miller court wrote:

> In the absence of any evidence tending show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees for the right to keep and bear such an instrument [emphasis added].

What we have then is two tiered test: first for the weapon and second for the weapon holder. Even assuming that clear convincing proof had shown that sawed-off shotguns were not merely part of the military arsenal but in fact were standard issue as common as K-rations and helmets and furthermore it was a court martial offense to be found without it, it still would not have done Mr. Miller a whit of good. Mr. Miller fails miserably in the weapon holder test. He was not acting in the role of the member of "militia," much less a regulated militia," and least of all the "well regulated militia," described by the Court and the Second Amendment.

The most that can be said for whose right emerged in Miller is that of the state militia's and their own arsenals. But even here common sense tells us there are clear parameters on state militia arsenals. If not, it would logically follow

that the several states could, at will, establish independent nuclear strike forces. If nothing else, such a development would certainly enliven the annual Governor's conference.

But, of course, shortly after the Miller court ruled, the idea of a "militia/non-militia" test was put to a well needed rest. In Cases [a.k.a. Velazquez] the Court of Appeals not only rejected the idea that individuals were part of the militia/non-militia weapons dichotomy but insisted that no such dichotomy was intended:

> we do not feel that the Supreme Court in this case was attempting to formulate a general rule applicable to all cases. The rule which it laid down was adequate to dispose of the case before it and that we think was as far as the Supreme Court intended to go.

Since Miller the Supreme Court has on at least two occasions spoken on the subject of the Second Amendment. In E. Adams v. Williams 407 U.S. 143, 92 S. Ct. 1921, 322 Ed. 612 (1972) Justice Douglas discussing search and seizure problems wrote:

> A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment, which reads, "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."
>
> There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols

should not be barred to everyone except the police.

The leading case is United States v. Miller, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206, upholding a federal law making criminal the shipment in interstate commerce of a sawed-off shotgun. The law was upheld, there being no evidence that a sawed-off shotgun had "some reasonable relationship to the preservation or efficiency of a well regulated militia." Id., at 178, 59 S.Ct. at 818. The Second Amendment, it was held, "must be interpreted and applied" with the view of maintaining a "militia."

"The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies: the common view was that adequate defense of country and laws could be secured through the Militia--civilians primarily, soldiers on occasion." Id., at 178-179, 59 S.Ct., at 818.

Critics say that proposals like this water down the Second Amendment. Our decisions belie that argument, for the Second Amendment, as noted, was designed to keep alive the militia.

Douglas and Marshall's opinion on the Second Amendment is unequivocably clear: the Amendment is a collective right of the state.

Most recently in Lewis v. United States 445 U.S. 95, 100 S. Ct. 915 __ L.Ed. _____ (1980) Justice Blackmun, writing for the majority, upheld the 1968 Gun Control Act and noted in a critical footnote:

8. These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See Unites States v. Miller, 307 U.S 174, 178, 59 S. Ct. 816, 818, 83 L.Ed. 1206 (1939) (the Second Amendment guarantees no right to keep and bear a firearm that does

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> not have "some reasonable relationship to the preservation or efficiency of a well regulated militia"); United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F.2d 1288, 1290, n. 5 (CA7 1975); United States v. Johnson, 497 F.2d 548 (CA4 1974); Cody v. United States, 460 F.2d 34 (CA8), cert. denied, 490 U.S. 1010, 93 S.Ct. 454, 34 L.Ed.2d 303 (1972) (the latter three cases holding, respectively, that Sec. 1202(a)(1), Sec. 922(g), and Sec. 922(a)(6) do not violate the Second Amendment).

The Miller standard has once again been vindicated to be a collective right of "a well regulated militia."

The Courts of Appeals on Various Aspects of the Second Amendment

U.S. v. Wilbur 545 F.2d 7641 (1st 1976)

In prosecution for violation of the Gun Control Act of 1968, trial court action in curtailing defense counsel's argument on Second Amendment was proper as preventing confusion lest jury believe that United States Constitution provided defendants with legal defense.

Eckert v. City of Philadelphia 477 F.2d 610 (3rd 1973)

Appellant's theory in the district court which he now repeats is that by the Second Amendment to the United States Constitution he is entitled to bear arms. Appellant is completely wrong about that.

U.S. v. King 532 F.2d 505 (3rd 1976)

We firmly disagree with the argument that the statute violates appellant's right to keep and bear arms. He was

neither charged with nor convicted of keeping and bearing arms. He was charged with and convicted of engaging without a license in the business of dealing in firearms and of conspiring with others so to do.

U.S. v. Graves 554 F.2d 65 (3rd 1977)

The courts consistently have found no conflict between federal gun laws and the Second Amendment, narrowly construing the latter to guarantee the right to bear arms as a member of a militia. Graves has not attempted to invoke the Second Amendment as a defense in the present prosecution. Even if he had, we would deem controlling the interpretation adopted in Miller and the cases following it.

U.S. v. Johnson 497 F.2d 548 (4th 1974)

The statute prohibiting the transportation of a firearm in interstate commerce after having been convicted of a felony is not unconstitutional as violative of defendant's Second Amendment right to keep and bear arms since the Second Amendment only confers a collective right of keeping and bearing arms which must bear a reasonable relationship to the presentation or efficiency of a well-regulated militia.

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U.S. v. Snider 502 F.2d 645 (4th 1974)

Dissent (not in conflict with the majority view on this issue):

Although thousand of perfectly well intentioned persons doubtless believe with all sincerity that the Second Amendment protection of the right to bear arms is violated by the Gun Law e.g. 18 U.S.C. Appendix (201 et seq.), such a contention would be frivolous.

U.S. v. Johnson 441 F.2d 1134 (5th 1971)

Appellant's remaining contention, that his constitutional right to bear arms has been infringed by the Act, misconstrues the Second Amendment. The Supreme Court dealt with such a constitutional attack directed against the National Firearms Act of 1934 in U.S. v. Miller.

U.S. v. Williams 446 F.2d 486 (5th 1971)

Statutes proscribing offense of and penalty for possession of an unregistered firearm are not violative of the right to bear arms as guaranteed by Second Amendment.

McKnight v. U.S. 507 F.2d 1034 (5th 1975)

Appeals Court upholds lower court's rejection of defendant's motion for relief on the basis that the firearms charge under which he was convicted violated his Second Amendment rights.

N.C.B.H. STATEMENT

U.S. v. Forgett 349 F.2d 501 (6th 1965)

Upholds Miller ruling regarding the National Firearms Act as not violating the Second Amendment.

Stevens v. U.S. 440 F.2d 144 (6th 1971)

Constitutional right to keep and bear arms applies only to the right of the state to maintain militia and not to individuals' rights to bear arms. Congress had authority under commerce clause to prohibit possession of firearms by convicted felons, based upon congressional finding that such possession passes threat to interstate commerce.

U.S. v. Day 476 F.2d 562 (6th 1973)

As to the alleged right to bear arms, Day's claim is meritless. There is no absolute constitutional right of an individual to possess a firearm.

U.S. v. Birmley 529 F.2d 103 (6th 1976)

Statute under which defendants were convicted of possession of unregistered firearms did not violate defendants' right to bear arms.

U.S. v. Warin 530 F.2d 103 (6th 1976)

It is clear that the Second Amendment guarantees a collective rather than an individual right. The fact that the defendant Warin, in common with all adult residents and citizens

of Ohio, is subject to enrollment in the militia of the state confers on him no right to possess the submachine gun in question.

U.S. v. Pruner 606 F.2d 871 (6th 1979)

Upholds Justice Douglas' concurring and dissenting discussion on the proposition that the purchase of guns is a constitutional right protected by the Second Amendment in Adams v. Williams.

Witherspoon v. U.S. 633 F.2d 1247 (6th 1980)

Appellant contended that the Second Amendment afforded him protection from the federal firearms statutes because he was on his own business premises. There is, of course, no such specific proviso in the Second Amendment nor is there any Supreme Court interpretation to that effect.

U.S. v. Lauchli 444 F.2d 1037 (7th 1971)

We reject defendant's argument that the Gun Control Act of 1968 is violative of the Second Amendment guarantee of the right to bear arms.

U.S. v. McCutcheon 446 F.2d 133 (7th 1971)

Statute requiring one who makes firearm to file with Secretary of Treasury or his delegate written application to make and register firearm and pay any applicable tax thereon and

statute requiring registration of such firearm by maker thereof did not infringe Second Amendment right to keeep and bear arms.

U.S. v. Three Winchester 30-30 Caliber Lever Action Carbines 504 F.2d 1288 (7th 1974)

Statute prohibiting possession of firearms by previously convicted felon does not infringe on Second Amendment's protection of right to bear arms.

U.S. v. Synnes 438 F.2d 764 (8th 1971)

While the Court in Miller dealt with the prohibited possession of a sawed-off shotgun, the reasoning and conclusion of that case has carried forward to other federal gun legislation. We think it is also applicable here. Although Sec. 1202(a) is the broadest federal gun legislation to date, we see no conflict between it and the Second Amendment since there is no showing that prohibiting possession of firearms by felons the maintenance of a "well regulated militia."

U.S. v. Decker 446 F.2d 164 (8th 1971)

The record-keeping requirements at issue here bear an even more tenuous relationship to the Second Amendment than did the statute involved in Miller. Thus, in light of the defendants failure to present any evidence indicating a conflict between the requirements of Secs. 922(m) and 923(g) and the maintenance of a well-regulated militia. We decline to hold that the statute violates the Second Amendment.

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Cody v. U.S. 460 F.2d 34 (8th 1972)

Second Amendment right to bear arms is not an absolute bar to Congressional regulation of the use or possession of firearms and its guarantee extends only to use or possession which has some reasonable relationship to the presentation or efficiency of a well-regulated militia.

U.S. v. Turcotte 558 F.2d 893 (8th 1977)

We find no reason to reconsider the decision in Cody that the prohibition of section 922 does not obstruct the maintenance of a well-regulated militia, and therefore is not violative of the Second Amendment.

U.S. v. Wynde 579 F.2d 1088 (8th 1978)

Upholds U.S. v. Turcotte, which declared that Sec. 922(h) does not violate the Second Amendment right to bear arms.

U.S. v. Tomlin 454 F.2d 176 (9th 1972)

Statutes requiring registration of firearms and making it unlawful for any person to receive or possess unregistered firearms are not unconstitutional as infringing on right to bear arms under Second Amendment.

U.S. v. Oakes 564 F.2d 384 (10th 1977)

Purpose of the Second Amendment guaranteeing the right of the people to keep and bear arms, was to preserve the

effectiveness and assure the continuation of the state militia. To apply the Second Amendment so as to guarantee defendant's right to keep an unregistered firearm which was not shown to have any connection to the militia, merely because defendant was technically a member of the Kansas militia, would be unjustified in terms of either logic or policy; and his membership in "Posse Comitatus," an apparently non-governmental organization.

## Historical Bases of the Right To Keep and Bear Arms

by David T. Hardy, Partner in the Law Firm Sando & Hardy

In analysing the right to keep and bear arms, we must constantly keep in mind that it is one of the few rights in the Constitution which can claim any considerable antiquity. Freedom of the press, for instance, had little ancestry at common law: statutes requiring a government license to publish any works on political or religious matters were in effect in England until 1695, when they were allowed to expire for economic, not libertarian, reasons.[1] Long after that date, prosecutions after-the-fact for seditious libel were common. In the Colonies, these and similar statutes were likewise enforced and offending religious material was burned in Massachusetts as late as 1723.[2] Protests against general search warrants did not become common until after 1760, and the invalidity of such warrants at common law was not recognized until the eve of the American Revolution.[3]

In contrast to these rights, the right to keep and bear arms can claim an ancestry stretching for well over a millenium. The antiquity of the right is so great that it is all but impossible to document its actual beginning. It is fairly clear that its origin lay in the customs of Germanic tribes, under which arms bearing was a right and a duty of free men; in fact, the ceremony for giving freedom to a slave required that the former slave be presented with the armament of a free man.[4] He then acquired the duty to serve in an equivalent of a citizen army. These customs were brought into England by the earliest Saxons. The first mention of the citizen army, or the "fyrd" is found in documents dating to 690 A.D., but scholars have concluded that the duty to serve in such with personal armament "is older than our oldest records." (Not knowing of the earlier records, 18th century legal historians including the great Blackstone attributed the origin of the English system to Alfred the Great, who ruled in the late 9th century A.D.)[5]

This viewpoint of individual armament and duty differed greatly from the feudal system which were coming into existence in Europe. The feudal system presupposed that the vast bulk of fighting duties would fall to a small warrior caste, composed primarily of the mounted knight. These individuals held the primary political and military power. Thus peasant armament was a threat to the political status quo. In England, on the other hand, a system evolved whereby peasant armament became the great underpinning of the status quo and individual armament became viewed as a right rather than a threat.

This in turn significantly changed the evolution of political systems in Britain. Since so much military power lay with the private citizen, the traditional monarchy was necessarily much more a limited monarchy than an absolute one. Even after the Norman

Conquest of 1066, which brought feudal systems into Britain, kings regularly appealed to the people for assistance. William Rufus, second Norman king of England, was driven to appeal to the citizenry to put down a rebellion of feudal barons. To obtain the assistance of the individual armed citizen, he promised the people of England to provide better laws then had ever been made, to rescind all new taxes instituted during his reign, and to annul the hated forest laws which imposed draconian punishments; inspired by his promises, the citizenry rose with their arms and defended his government against the rebels.[6] After his death, his brother, Henry I, often drilled the citizen units in person, seeking to appeal to the individual members. In short, kingship in Britain became a far more democratic affair than it would ever become on the Continent, due in major part to the individual armament of the British citizen.

The Angevin monarchs expanded this still farther. Henry II, who is considered the father of the common law, promulgated the Assize of Arms in 1181. This required all British citizens between 15 and 40 to purchase and keep arms. The type of arms required varied with wealth; the wealthiest had to provide themselves with full armor, sword, dagger, and war horse, while even the poorest citizens, "the whole community of freemen", must have leather armor, helmet, and a lance.[7] Twice a year all citizens were to be inspected by the king's officials to insure that they possessed the necessary arms. Conversely, the English made it quite clear that the king was to be expected to depend exclusively upon his armed freemen. When rebellious barons forced John I to sign the Magna Carta in 1215, they inserted in its prohibitions a requirement that he "expel from the kingdom all foreign knights, crossbowmen, sergeants, and mercenaries, who have come with horses and weapons to the harm of the realm."

Henry III continued this tradition. In his 1253 Assize of Arms he expanded the age categories to include everyone between 15 and 60 years of age, and made a further modification which bordered on the revolutionary. Now, not only were freemen to be armed, but even villeins, who were little more than serfs and were bound to the land. Now all "citizens, burgesses, free tenants, villeins and others from 15 to 60 years of age" were legally required to be armed.[8] Even the poorest classes of these were required to have a halberd (a pole arm with an axe and spike head) and a knife, plus a bow if they owned lands worth over two pounds sterling.

The role of the armed citizen expanded under the rule of the four Edwards. During civil wars in Wales, Edward I discovered the utility of the Welsh longbow, an extremely potent bow (its pull was estimated to have been between 100-200 pounds, whereas today a 60-pound bow is considered extremely powerful) which could penetrate the heaviest armor. Unlike the crossbow (and to an even greater extent, the armor and horse of the mounted knight) the longbow could be made cheaply enough and maintained easily enough to become the universal armament of all citizens. While on the Continent so deadly a weapon was considered a threat to the rule of the armored knight, in Britain its use was encouraged by the monarch. At Crecy, Poitiers and Agincourt, the longbow in the hands of British commoners decimated the French armored

knights. By 1369 Edward III was ordering the sheriffs of London to require "everyone of said city stronge in body, at leisure time on holidays" to "use in their recreation bowes and arrows."[9] He hardly needed the encouragement; the archery ranges outside London were so constantly swamped with arrows that no grass would grow upon them. Edward IV continued this policy, commanding that "every Englishman or Irishman dwelling in England must have a bow of his own height", and commanding that each town build and maintain an archery range upon which every citizen must practice on feast days.[10] In 1470 he banned games of dice, horseshoes, and tennis in order to force citizens to use nothing but the bow for sport.[11] He imposed price controls on bows in order to ensure that bows would be inexpensive enough for even the poorest citizen to purchase them.[12]

While the common law sought to force all commoners to possess what was then the most deadly military weapon, it also imposed only the most minimal restraints upon use of that weapon. These focused purely upon criminal misuse of the weapon or its transportation into certain highly protected areas. In 1279, for instance, those coming before the royal courts were required to "come without all force and armor".[13] The Statute of Arms, whose date of enactment is uncertain, required that spectators at tournaments attend without armament and that those participating in the tournament carry swords without points.[14] The 1328 Statute of Northampton prohibited anyone, other than the king's servants or citizens attempting to keep the peace, from coming before the king's ministers "with force and arms", or acting "in affray of the peace", and from going or riding "armed by night or by day in fairs, markets, nor in the presence of the justices or other ministers nor in no part elsewhere...."[15] In light of the common law preference for individual armament, however, English courts construed this to mean that only carrying of arms in a threatening or terrifying manner was prohibited. In the words of William Hawkins in his "Pleas of the Crown", "no wearing of arms is within the meaning of the statute, unless it be accompanied with such circumstances as are apt to terrify the people; from which it seems to follow, that persons of quality are in no danger of offending against the statute by wearing common weapons...."[16] Thus the sole common law restraints upon use of armament in this period focused either upon carrying into specially protected areas or upon what today would be considered assault with a deadly weapon.

While firearms had been invented sometime before, only in the 16th century did they become truly portable with the invention of the wheellock. This breakthrough inspired a number of attempts in Europe and England to control weaponry. The Emperor Maxmilian attempted to impose bans upon wheellock manufacture throughout his empire on the Continent; the French imposed strict controls both upon manufacture and sale of firearms and upon assembly of ammunition and making of powder.[17] The English briefly experimented with such but found them repugnant to their institutions. Henry VII had in 1503 banned the shooting of crossbows upon an extremely limited basis.[18] First, only shooting and not possession was outlawed, and that only without a license or "placarde" from the king. Secondly, an exception was made for those who shot in

defense of a residence ("but if he shote aw of a howse for the lawefull defen of the same") and for lords who owned land worth 200 marks per year. Third, as might be surmised from the ban upon shooting rather than upon ownership, the purpose was to force citizens to use the longbow, which was considered a much deadlier weapon.

His successor Henry VIII was a great devotee of the longbow and early in his reign attempted to push its use by still more vigorous means. In 1511 he enacted "an act concerning shooting in longe bowes" which banned games, required fathers to purchase bows for sons between the ages of 7 and 14 and to "lern theym and bryng theym up in shootyng". From age 14 until 40 each non-disabled citizen was obliged to practice longbow shooting and also to have bow and arrows "contynually in hys house." Anyone who failed to own and use a longbow was subject to a fine. The ban upon crossbows was renewed and the property requirement for such was raised to 300 marks.[19]

In 1514 Henry extended the ban upon crossbows to include "handgonnes" (which at that time meant any firearm carried by hand, as opposed to cannons, rather than what are today called "pistols"), and to extend the ban to possession as well as shooting.[20] Once again the intent was to force ownership and use of the longbow in place of the less efficient firearms of the time.

Unlike his continental equivalents, Henry was soon forced to give up his attempt at gun control. In 1523 the property qualification was lowered from 300 pounds sterling to only 100 pounds, and the penalty was reduced from imprisonment and fine to a fine only.[21] In 1541 the statute was again amended (adding in its preface a protest that despite the earlier law people "have used and yet doe daylie ryde and go in the King's highwayes and elsewhere, having with them crosbowes and little handguns") to permit ownership of the longer arms (over three-quarters of a yard or one yard in total length, depending upon type) by any citizen, and ownership of the shorter arms by citizens with over 100 pounds' worth of land.[22] It also prohibited shooting within a quarter of a mile of a town except upon a range "or for defense of his person or house", and provided that "it shal be laufull from henceforth to all gentlemen, yoemen and servingemen . . . and to all the inhabitants of citties, boroughes and markett townes of this realme of Englande to shote with any handgune, demyhake or hagbutt at anye butt or bank of earth . . . to have and kepe in everie of their houses any such handgune or handgunes . . . with the intent to use and shote the same at a but or bank of earth . . . this present act or anythinge therein conteyned to the contrarie notwithstandinge." Eventually Henry gave up the entire effort and simply rescinded his firearm laws by proclamation.[23] Weapons control—at least that which limited armament rather than required it—was recognized as repugnant to the English system. Indeed, the Tudor legal commentator Sir John Fortescue would comment (in his comparison between the happy state of peasants in England, with its limited monarchy, and the unhappy state of peasants in France, with absolute monarchy) that the French peasants were so poorly off that they not only starved but could not have any "Wepen" or the means to obtain it.[24] The consciousness of English as a weap-

ons owning and using people, in contrast to the French and other Continentals, was beginning to take form.

Under Elizabeth the English militia system developed still farther; indeed, it was during her reign that the phrase "militia" was first used to describe the concept of a universally armed people ready to stand in defense of their nation.[25] The militia were now mustered by county lieutenants and called to formal musters to display and practice with their weapons.[26] Elizabeth also sought the creation of "trained bands" or "train bands", which were small militia units given special training and provided with governmentally purchased arms.[27]

Her efforts largely decayed under her successor James I, who permitted repeal of some of the most important militia statutes. His successor, Charles I, paid the price. Increasing hostility from Parliament, which was now beginning to assert itself as a distinct legislative body, brought the kingdom to the brink of civil war. The king compromised, sending his best advisor to the scaffold, but when Parliament asked for control over the militia he exploded. "By God, not for an hour, you have asked that of me in this, which was never asked of a king,"[28] he replied. An unsuccessful attempt to arrest five members of Parliament on charges of treason led to the final breach. The five members were protected by the London militia, and the king was forced to flee the city and attempt to muster his own army.

As the civil war wore on, Parliament was at length driven to create the "New Model Army", a standing body of veteran troops who were predominantly Puritan.[29] These were rigorously disciplined under the leadership of Oliver Cromwell, who eventually rose to head the army, and with their aid Parliament ended as the victor in the civil war. But in July 1647 the New Model Army (alienated by a failure of pay and by the anti-Puritan measures of the Parliament) marched on London and took over the government. On December 6, 1648 troops, acting on Cromwell's orders, surrounded the Parliament building and drove off over 140 members. The remainder formed what became known as "the Rump Parliament". By 1653 even the Rump was an impediment to Cromwell and he used his troops to totally shut down parliamentary government; the army officers then selected a new Parliament composed largely of Puritan elders. A short time later Cromwell pressured its dissolution and in 1654 he replaced it with yet another Parliament, in whose election only those whose land was worth over 200 pounds sterling could vote. This Parliament in turn named Cromwell "Lord Protector" and king of England in all but name. Yet a year later Cromwell dissolved even this Parliament and established a military dictatorship, dividing the nation into eleven districts, each headed by a major general whose duties included political surveillance, censorship of publications, and influencing future elections.[30] A major factor in the dissolution of several of these parliaments was their attempt to adopt new militia statutes; Cromwell, who controlled by the new model army, had little interest in permitting Parliament to reorganize the militia.

Following Cromwell's death, the English were more than happy to accept back the son of the late Charles, Charles II, as monarch. Charles II promptly dissolved the army, offering full pay plus a

bonus from his own finances, and guaranteeing work on public works projects for the demobilized troops.[31] He also sought to secure himself by a variety of legislation which people in Parliament, in their haste to welcome the end of Puritan rule, did not recognize as dictatorial. In 1661 and 1662 he expanded the definition of treason, imposed press censorship, restricted practice of religion by Puritans and others and leveled the protective walls of many towns which had sided with Parliament.[32] Instructions were also issued to the lord's lieutenant to form special militia units out of volunteers of favorable political views, "the officers to be numerous, disaffected persons watched and not allowed to assemble, and their arms seized. . . ."[33] The excessive searches for arms under that order led to Parliamentary resistance and refusal to grant a militia bill in the sessions of 1660 and 1661.[34] Only in 1662 was Charles able to obtain a militia statute pleasing to him. The 1662 statute permitted the King to appoint Lieutenants for each county and major city; these lieutenants could charge persons with the responsibility of equipping and paying a militia man. But not every Englishman was required to be armed or serve, and those who were required could always hire a substitute to appear for them. The lieutenants were moreover empowered to hire persons "to search for and seize all arms in the costody or possession of any person or persons whom the said lieutenant or any two or more of their deputies shall judge dangerous to the peace of the kingdom. . . ."[35] The Calendar of State Papers for the period is filled with reports of confiscations of weapons from suspicious persons and religious independents.[36] Charles also by proclamation ordered gunsmiths to produce records of all firearms sold; importation of firearms from overseas was banned; and carriers throughout the realm were forbidden to transport firearms without first obtaining a license. (The resemblance between these measures and the American 1968 Gun Control Act is astonishing).

In 1671 this was followed with an amendment to the Hunting Act. Hunting was restricted to those who owned lands worth 100 pounds and, most importantly, those who could not hunt (who formed the vast bulk of the kingdom) were "declared to be persons by the laws of this realm, not allowed to have or keep for themselves, or any other person or persons, any guns, bows, greyhounds. . . ."[37] "Guns" were an addition to the list: all but the wealthiest land-owners could be disarmed. As Charles' reign wore on he encountered increasing opposition from Parliament and from what was becoming the Whig party. This he met by such drastic measures as moving the sitting of Parliament from London (which was quite favorable to the Whigs) to Oxford, and by arresting and executing several Whig leaders on charges of treason. Charles survived, but it was a close race.

James II, Charles' brother and successor, would not be so lucky. He continued to enforce the laws on disarmament, directing them with increasing force against Puritans and his political opponents. Moreover he used his "dispensing power" to permit Catholic officers to stay with the army. He sought to obtain permission to expand the standing army complaining that during rebellion the militia "is not sufficient for such occasions, and that there is nothing but a good force of well disciplined troops in constant pay that

can defend us. . . ."[38] Parliament refused, but James kept a limited standing army on foot from his own resources. In 1686 he issued orders to six lord lieutenants complaining that "a great many persons not qualified by law, under pretense of shooting matches, keep muskets or other guns in their houses," and that he desired them to "cause strict search to be made for such muskets or guns and to seize and safely keep them until further order."[39] In Ireland he ordered General Tyrconnel to disarm the populance:

> A royal order came from Whitehall for disarming the population. This order Tyrconnel strictly executed as he respected the English. Although the country was infested by predatory bands, a Protestant gentleman could scarcely obtain permission to keep a brace of pistols.[40]

These measures did James little good; in 1688 his son-in-law and daughter, William of Orange and Mary entered the nation in a supposed "invasion" which came to be known as the "the Glorious Revolution". After defection of a number of his nobility and refusal of the militia to fight, James fled to the Continent.

This left Parliament with an interesting question: was James king and, if not, how did they go about putting William and Mary on the throne? They approached this problem by promulgating a Declaration of Rights, which listed complaints against James and argued that these had forfeited him the right to rule. After William accepted this Declaration as definitive of the rights of Englishmen, he was permitted to assume the throne and call a Parliament, which then reenacted the Declaration as the Bill of Rights.[41]

The Declaration and Bill of Rights were later said to be "the essence of the revolution"; [42] only a year before the adoption of the American Bill of Rights, the great English jurist Edmund Burke would refer to the Declaration as "the cornerstone of our Constitution."[43] The Declaration listed a variety of civil liberties which James was accused of infringing. Prominent among these was the right to keep and bear arms. The form finally adopted complained that James had violated the liberties of the kingdom by keeping a standing army and moreover by causing his Protestant subjects "to be disarmed at the same time when Papists were both armed and employed contrary to law." It accordingly resolved that "the subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law."[44] Since only slightly over one percent of the population was then Catholic, this amounted to a general right to own arms applicable to virtually all Englishmen. The possible restriction—that they be arms "as allowed by law"—was clarified by prompt amendment of the Hunting Act to remove the word "guns" from items which even the poorest Englishman was not permitted to own. Now all Englishmen could own arms "for their defense suitable to their conditions and as allowed by law" in the form of whatever firearms they desired.[45]

A few modern writers, none of whom cite any historical evidence, have claimed that the Bill of Rights was directed not so much at disarmament as at the fact that Catholics were permitted to be armed while the Protestants had been disarmed.[46] The statutory

history of the Declaration of Rights proves beyond any doubt that this is a totally incorrect. The debates in the House of Commons, as recorded by Lord Somers, the principal draftsman of the Declaration, show that the Members focused on the confiscation of private arms collections under the 1662 Militia Act. Sergant Maynard, for instance, complains of James: "Can he sell or give away his subjects; an act of Parliament was made to disarm all Englishmen, whom the lieutenant should suspect, by day or by night, by force or otherwise—this was done in Ireland for the sake of putting arms into Irish hands." Somers condensed a speech by Sir Richard Temple to "Militia bill—power to disarm all England—now done in Ireland." A Mr. Boscawen complained of "arbitrary power exercised by the ministry—militia—imprisoning without reason; disarming—himself disarmed. . . ." Sergeant Maynard complained of the "Militia Act—an abominable thing to disarm the nation. . . ."[47]

The Lords felt even more strongly about the issue. The Commons originally passed a declaration simply declaring 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 Protestant should provide and keep arms for the common defense; and that the arms which have been seized and taken from them be restored."[48] The Lords apparently felt this did not state the individual rights strongly enough and completely omitted the language regarding the common defense, substituting the final version: "The subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law."[49] The language referring to the fact that Catholics were armed while the disarmaments were proceeding was added only at conference, with the Lords suggesting that it was a "further aggravation" to the underlying illegality and therefore "fit to be mentioned."[50] Indeed, the modern British historian J. R. Western complains that the modifications by the House of Lords created too much of an individual right: "The original wording implied that everyone had a duty to be ready to appear in arms whenever the state was threatened. The revised wording suggested only that it was lawful to keep a blunderbuss to repel burglars."[51]

The "Glorious Revolution" also gave birth to the political philosophy which underlay the American Revolution less than a century later. The two major British parties, the Whigs and the Tories, had achieved both their essence and their names during the fight under Charles II to exclude his brother James II from the succession to the throne. One of the major points of the Whig philosophy was the need for a true militia, in the sense which England had had it during the Tudor years, and the scrapping of the standing army. All the major Whig authors stressed this point; Algernon Sidney counseled that "no state can be said to stand on a steady foundation, except those whose whole strength is in their own soldiery, and the body of their own people;"[52] Robert Molesworth advised that with standing armies "the people are contributors to their own misery; and their purses are drained in order to their misery,"[53] while attacking disarmament under the game laws with the argument that "I hope no wise man will put a hare or a partridge in balance with the safety and liberties of English-

en".[54] These and other Whig authors were to be found in the rary of every American political thinker during the years before e Revolution;[55] John Adams himself would estimate that ninety rcent of Americans were at that time Whigs by sentiment.[56] Notwithstanding this growing support for a true militia, the use the militia system in Britain steadily declined. By 1757, when a w Militia Act was adopted, only 32,000 men, a very small part of e population, were to serve.[57] The officers were to be chosen om the more wealthy of the gentry; property qualifications were posed for all commissioned officers. The government would issue e arms to the militia, which were to be kept under lock and key, d could be seized by the lieutenant or deputy lieutenant of the unty whenever he "shall adjudge it necessary to the peace of the ingdom".[58] "The Whigs considered this "select militia" as little etter than a standing army: it was hardly a true "militia", an rmed citizenry. In the debates over the Scottish militia act, the ord Mayor of London argued to the Commons that the militia could not longer be deemed a constitutional defense, under the mmediate control and direction of the people; for by that bill they ere rendered a standing army for all intents and purpose."[59] his background—that of a tradition of an armed citizenry met vith recent infringements upon the traditional right of bearing rms—formed the background of the political views of the framers f our own Constitution.

The American experience with citizen armament had been more xtensive even than that of Britain. The early colonists brought heir own arms and secured additional ones from the government. As early as September 1622, they were being armed not only with muskets but with "three hundred short pistols with firelocks".[60] Virginia in 1623 ordered that no one was to "go or send abroad with a sufficient party well armed" and each plantation was to insure that there was "sufficient of powder and ammunition within the plantation".[61] In 1631 it ordered that no one work their fields unarmed and required militia musters on a weekly basis following church services: "All men that are fittinge to bear armes, shall bring their peeces to church . . ."[62] By 1673 the colony provided that persons unable to purchase firearms from their own finances would be supplied guns by the government and required to pay a reasonable price when able to do so. Similar legislation was imposed in the other colonies. The first session of the legislature of the New Plymouth Colony required "that every free man or other inhabitant of this Colony provide for himself and each under him able to beare armes, a sufficient musket and other serviceable peece for war" with other equipment.[63] Similar measures were enacted in Connecticut in 1650.

When the colonies began drifting toward revolution following the elections of 1760, the colonists were thus well equipped for their role. The British government began extensive troop movements into Boston in 1768 to reduce opposition, and the town government responded by urging its citizens to arm themselves and be prepared to defend themselves against the deprivations of the soldiers. When Tories responded that this order was illegal, the colonial newspapers responded that the right of personal armament was guaranteed to every Englishman. The Boston Evening Post asserted that

"It is certainly beyond human art and sophistry, to prove that the British subjects, to whom the privilege of possessing arms is expressly recognized by the Bill of Rights, and to live in a province where the law requires them to be equipped with arms, are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs."[64] The New York Journal Supplement argued that the proposal "was a measure as prudent as it was legal" and that "it is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defense. . . ."[65] There can be little doubt from these passages that the American colonists viewed the English 1688 Declaration of Rights as recognizing an individual right to own private firearms for self defense—even defense against government agents.

Years passed before these proposals were actually put into effect, but the warning signs were present long before the revolution itself broke out, and some British heeded them. Pitt, the great Whig minister and friend of the Colonies, had warned that "three millions of Whigs, with arms in their hands, are a very formidable body."[66] Rather than the conciliation he called for, the result was an attempt to disarm the Americans—an attempt which brought on the Revolution. In December, 1774, for instance, export of guns and powder to the colonies was prohibited.[67] When a group of British regulars quietly emptied a militia powder magazine in September, 1774, the reaction was dramatic. To some "it seemed part of a well designed plan to disarm the people";[68] others were inflamed by incorrect rumors that six colonists had been killed during the raid. Over 60,000 armed citizens turned out, heading toward Boston, prepared for war.[69] This was more men under arms than would be boasted by the entire British military establishment at the time. Fortunately for that establishment, the colonists were convinced that their actions were premature and returned to their homes. By September, a Massachusetts town had instituted "the Minutemen", a group of select militia.[70] Others formed special companies of militia—one of which in Virginia included George Washington and George Mason, who would later draft the Virginia Declaration of Rights.[71] In December the Maryland Convention called upon the colonies to form a "well regulated militia" and illustrated what it meant by instructing all citizens between the ages of 16 and 50 to arm themselves and form into companies.[72] The following month the Fairfax Committee of Public Safety, chaired by George Washington, joined in this resolution, further defining its intent with the comment that "A well regulated militia, composed of gentlemen, freeholders, and other freemen, is the natural strength and only security of a free government", and recommending all persons between 16 and 50 to "provide themselves with good firelocks".[73] When Patrick Henry shortly thereafter gave his famed "give me liberty or give me death" speech, the resolution which he moved by his oration began "Resolved, that a well regulated militia, composed of gentlemen and freemen, is the natural strength and only security of a free government".[74]

The Colonials did not have long to wait. General Gage, military governor of Boston, was already writing to London with regard to

the "idea of disarming certain counties."[75] In April, 1775, Gage made the mistake of repeating his earlier raid upon a militia arsenal. This time there was firing and a number of colonists were killed. The regulars were compelled to fight their way back to Boston, swamped under the harrassing fire of militia who swarmed in on their flanks; without a last minute relief attack from Boston the entire column might have been forced to surrender by ammunition exhaustion. The British lost nearly 300 men in killed, wounded, and missing. Within a few days 16,000 militia descended upon Boston and besieged the area. During a British attack on Breeds Hill, colonial sharpshooters (one of whom commented that he fired "taking deliberate aim, as at a squirrel, and saw a number of men fall")[76] inflicted disastrous losses on British troops. Over 1,000 regulars fell, 40 percent of the attacking force and over a tenth of the entire British army in the Colonies. Officers suffered especially serious losses; one rifleman was said to have shot down twenty officers in ten minutes; every single member of Gage's staff was shot down.[77]

In the meantime the militia throughout the rest of the Colonies seized political control at the grass roots. Tories were quickly put down; British foraging parties cut off; the mechanisms of government and administration lay solidly in the hands of revolutionaries. While the British during the French and Indian War were supplied primarily from the Colonies, throughout the revolution they would have to draw primarily from their homeland. The constant damage to British foraging parties ultimately led to a shipping problem which, one historan judges, would have ended the war by 1782 in any event.[78]

The militia played no minor role in the fighting: "Seldom has an armed force done so much with so little—providing a vast reservoir of manpower for a multiplicity of military needs, fighting (often unaided by Continentals) in the great majority of the 1,331 land engagements of the war."[79]

Following the war the colonies were temporarily governed under the Articles of Confederation, which permitted a federal force necessary to garrison forts and prohibited states from maintaining any standing forces. During these years a number of militia proposals were put forward by George Washington, Alexander Hamilton, Baron Steuben and Henry Knox.[80] All involved a general militia—in which essentially every free citizen would serve—and a "select militia". Steuben's proposal gave the greatest emphasis to the select militia; he would have had a small force of 21,000 select militiamen, chosen by volunteering, who would train one month out of each year. None of these proposals became law.

By 1787 the difficulties with the Articles of Confederation were becoming insurmountable, and work began on a new Constitution. As adopted, the Constitution gave Congress the power to provide "for organizing, arming and disciplining the militia" but it could "govern" only those in federal service, while the states would have the power of appointing officers and actually training the militia according to the uniform system of discipline. Militiamen would be subject to federal martial law only when called into active service.

In the state conventions called to ratify the Constitution, the proposal faced serious opposition. A major part of the opposition,

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later termed anti-Federalist, focused on the fact that the Constitution lacked a Bill of Rights. The British Bill of Rights was called into attention as a precedent for such a measure. In the conflicts in the states three themes relating to citizen armament soon became apparent. The first was the acceptance by both Federalist and anti-Federalist of the critical role of the armed citizen; the second was a distrust both of standing armies and of select militia, like the modern National Guard; the third was pressure for a Bill of Rights which would include provisions guaranteeing rights of individual armament.

These thoughts began to take form in Connecticut, the fourth state to ratify. An anti-Federalist article in the Connecticut Journal objected strongly to the failure to outlaw a standing army and went on to criticize the Constitution's militia provisions as permitting the formation of a select militia: "This looks too much like Baron Steuben's militia, by which a standing army was meant and intended."[81] In Pennsylvania the opposition became even stiffer as the sentiment for a Bill of Rights grew. In a pamphlet hurriedly written to support adoption of the Constitution without the Bill of Rights, Noah Webster argued that the existing universal citizen armament made a standing army of little danger. He claimed that a standing army is oppressive only when it is "superior to any force that exists among the people" since otherwise it "would be annihilated on the first exercise of acts of oppression." He advised that the general armament of Americans rendered any constitutional limitations on a standing army unnecessary:

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom of 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."[82]

In the convention the fighting was heavy. Delegate John Smiley argued that "Congress may give us a select militia which will, in fact, be a standing army. . . . When a select militia is formed, the people in general may be disarmed."[83] (The universal hostility to a select militia forms a most convincing refutation to the current argument that the "militia" referred to in the Second Amendment is the National Guard. On the contrary, virtually every citation to such militia during the drafting and ratification period views them as an evil comparable to a standing army and stresses that only a militia composed of the entire body of the populace armed and trained will protect freedom). Ultimately, Delegate Robert Whitehill moved a series of fifteen proposed amendments which would have established a bill of rights protecting freedom of conscience, speech, press, and virtually every other right ultimately incorporated into the Bill of Rights. This proposal was not adopted in Pennsylvania but was widely read in the Colonies and formed the inspiration for later proposals.[84] Its provision of keeping and bearing arms made it every clear that the right protected was to be an individual right:

> 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 real danger of public injury from individuals. . . .[85]

In the Massachusetts Convention similar thoughts were expressed. Delegate Sedgwick asked whether a standing army "could subdue a nation of freemen, who know how to prize liberty, and who have arms in their hands?"[86] Sam Adams, who had done so much to bring on the revolution, spoke convincingly for the anti-Federalist position. He called for a bill of rights which would have provided "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. . . ."[87] Like the Pennsylvania minority, Adams clearly considered the right of armament as a right of individual citizens to own personal arms.

In the following months additional states ratified, bringing the total to eight. A ninth vote was needed before the necessary majority would be obtained and the Constitution would become binding upon the states which had ratified to date. That critical vote was provided by New Hampshire, which added to its ratification a recommendation for a bill of rights including the provision that "Congress shall never disarm any citizen unless such as are or have been in actual rebellion."[88] A clearer statement of an absolute individual right could not have been drafted. The major commercial state—New York—and major intellectual state—Virginia—still remained to be heard from.

The Virginia Convention set the record for legal and intellectual talent. Major participants included Patrick Henry, George Mason, James Madison and John Marshall. The major writings of the period came from Richard Henry Lee, who had in the Continental Congress moved the drafting of the Declaration of Independence. In his "Letters from the Federal Farmer to the Republican" he warned that Congress might suddenly undermine the strength of the "yeomanry of the country" who possessed the lands, "possess arms, and are too strong a body of men to be openly offended."[89] He added "This might be done in a great measure by the Congress, if disposed to do it, by modeling the militia. Should one-fifth or one-eighth of the men capable of bearing arms be made a select militia, as has been proposed . . . and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of an army, while the latter will be defenseless."[90] Like others in Connecticut and Pennsylvania, Lee feared a "select militia" similar to the modern National Guard, which he considered a betrayal of the militia tradition and similar to a standing army. In strong terms he advised:

> First, the Constitution ought to secure a genuine, and guard against a select militia, by providing that the militia shall always be kept well organized, armed and disciplined, and include, according to the past and general

> usage of the states, all men capable of bearing arms, and that all regulations tending to establish this general useless and defenseless, by establishing select corps of militia or distinct bodies of military men, not having permanent attachments in the community, to be avoided.[91]

He extensively criticized select militia and argued that on the contrary "to preserve liberty, it is essential that the whole body of people always possess arms, and be taught alike, especially when young, how to use them. . . ."[92] In the Convention, Patrick Henry seconded Lee's judgments. Henry joined with Lee—and with Sam Adams and others who defended individual armament—explaining that "The great object is that every man be armed" and that "Everyone who is able may have a gun."[93] While Virginia ratified, it did so with a call for a bill of rights, including a recognition "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."[94]

From Virginia, the debate moved to New York. The New York controversy gave rise to the famed "Federalist Papers." Since these were devoted to justifying adoption of the constitution without a Bill of Rights, they are at best of marginal utility in interpreting the early amendments to the Constitution. Even so, their authors stressed citizen armament as a bulwark of liberty which made adoption of the Constitution safe. Hamilton, no friend of the militia (and little friend of democracy, for that matter) attacked proposed limits on standing armies in Federalists 25 and 26. In Federalist 29 he suggested that militia could not be expected to tolerate much professional training: "little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped." This armed but untrained citizenry, together with a select militia would ensure liberty despite a standing army: "That army can never be formitable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and use of arms . . ."

Madison in Federalist 46 argued the point at greater length, stressing citizen armament and state goverments as bulwarks of freedom:

> Besides the advantage of being armed, which the Americans possess over the people, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition . . . 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.

If those people were armed and formed into militia units by subordinate governments, Madison asserted, "It may be affirmed with the greatest assurance that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it." To him citizen armament was not merely a matter of

military service or collective defense, but a guarantee of all other freedoms, to be used if necessary, against the government.

New York joined in ratifying, but by an even closer margin than most states: a shift of two votes out of fifty-seven cast would have rejected the constitution. It proposed amendments, including a recognition "That the people have a right to keep and bear arms; that a well-regulated militia, including the body of the people capable of bearing arms, is the proper, natural, and safe defense of a free state."

Only a few weeks later, word came that North Carolina had joined Rhode Island in rejecting the proposed constitution, citing the lack of a bill of rights. Among the amendments they called for before the delegates would sign was a provision identical to the New York and Virginia "Keep and bear arms" sections.

The constitution thus went into effect with eleven ratifications. But the pressing need for a bill of rights was clear. Not only had two states repudiated the new constitution, but five of the ratifying states had demanded such a bill and influential minorities in two more had striven unsuccessfully for it. (While freedom of speech was designated by only three ratifying states, the right to bear arms was mentioned by all five which called for a bill of rights, as well as by both groups of minority delegates and the dissenting North Carolina convention. This constitutional preference poll would suggest the ratifying conventions considered the right of private armament to be even more important than free speech.)

The Constitution carried in New York and eventually in every other state: but the anti-Federalist sentiment for a bill of rights also triumphed. Ultimately James Madison was put to the task of drafting a bill of rights. From the many proposals by the state conventions, he eventually distilled a limited number of rights deserving specific recognition, protecting the rest with the "catch-all clauses" of the Ninth and Tenth Amendments. The rights given express recognition were primarily procedural. Only the First and Second Amendments created substantive rights and these were a very small number of rights: speech, press, assembly, and keeping and bearing arms. These were viewed as the critical matters upon which the federal government might not infringe, under any conditions (and even by proceeding in accord with the procedural guarantees of the Fourth, Fifth and Sixth Amendments). Madison's initial proposal for what became the Second Amendment was worded: "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."

There is no doubt that Madison saw this as an individual right. His earliest drafts of the Bill of Rights did not separate those proposals into numbered amendments which would follow the constitution. Instead, the amendments would have been inserted into the body of the constitution at specified points. Madison did not place the right to keep and bear arms as a limitation on Congress's power over the militia, set out in Article I section 8 of the constitution. Instead, he grouped the right to arms with rights of freedom of religion, speech and press, to be inserted "in article first, section

nine, between clauses 3 and 4."[95] This would have put these provisions immediately following the general limitations of congressional power over citizens—outlawing suspension of habeas corpus, bills of attainder and ex post facto laws. Madison viewed his right to keep and bear arms proposal as a civil right, not a limit on federalization of the militia. Further, in an outline of a proposed speech on introduction of the Bill of Rights, Madison mentioned these "relate 1st to private rights," and indicated he meant to criticize the 1689 Declaration of Rights as too narrow: "No freedom of the press—conscience—GL warrants . . . attainders—arms to Protestants."[96] Apparently, he felt the 1689 recognition that "Protestants may have arms for their defense" should be extended to all, that the second amendment would broaden, not narrow, this.

Like most of his draft, the wording was both lengthy and convoluted. In the House of Representatives his proposals were edited extensively; since "the right of the people" was already contained in the provision, the comment that the militia would consist "of the body of the people" was deleted. The religious exemption was removed in view of objections that the Congress might exempt too may people on these grounds and thus destroy the concept of the militia. When the proposal was submitted to the Senate, it was proposed that the right be limited to keeping and bearing arms "for the common defense", but the Senate refused the amendment, retaining it in its broadest form.[97]

Contemporaries of the first Congress clearly viewed the Second Amendment as creating an individual right. When St. George Tucker, then a professor at William and Mary School of Law and later a Justice of the Virginia Supreme Court, published a five-volume edition of Blackstone's Commentaries in 1803, he commented that "whenever standing armies are kept up, and the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally under the specious pretext of preserving the game."[98] He criticized the British Bill of Rights for limiting its guarantee of arms ownership to Protestants, whereas the American right was "without any qualification as to their condition or degree, as is the case in the British government."[99] William Rawle in his 1825 "View of the Constitution" suggested that:

> The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to Congress a power to disarm the people.[100]

Tucker and Rawle had unique advantages in interpreting the Bill of Rights. Tucker had fought in the Revolutionary militia and was twice wounded in action. He was a close friend of Jefferson, an associate of Madison, and had a brother in the first Senate. Rawle was a friend of Washington and was offered the post of first Attorney General.

The Congress itself made its intent clear when the second Congress adopted the Militia Act of 1792. This required every "free able bodied white male citizen. . . . who is or shall be of the age of 18 years, and under the age of 45 years" to be enrolled in the

militia and "within six months thereafter, provide himself with a good musket or firelock," plus ammunition and equipment.[101] The bill remained on the books until 1903. Thus, from the subsequent enactments of Congress, as well as the contemporaneous statements of the drafters and their associates, there can be little doubt that the drafters of the Second Amendment viewed that amendment as creating an individual right to keep and carry arms for purposes ranging from self protection to hunting to acquisition of military skills.

The right of individual citizens to keep and bear arms found early recognition by the courts, in a solid chain of precedent stretching forward for nearly two centuries. In 1813, Kentucky adopted the first general concealed weapon ban and nine years later the act was struck down as an invasion of the right to keep and bear arms.[102] Similar statutes were later upheld in other States—upon the grounds that only one form of carrying, not all forms, were restricted.[103] The Alabama Supreme Court, for instance, added:

> We do not desire to be understood as maintaining, that in regulating the manner of wearing arms, the legislature has no limit other than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense would be clearly unconstitutional.[104]

Likewise, when Georgia in 1837 enacted the first ban on pistol ownership, its supreme court promptly struck it down, holding in the process that the second amendment applied to the states. It explained the amendment's meaning: "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 . . . and this for the important end to be achieved, the rearing up and qualifying of a well-regulated militia, so vitally necessary to the security of a free state."[105]

Second amendment issues rarely came before the federal courts at this time, simply because there were no federal controls on arms ownership. But the position of the United States Supreme Court was indicated in the famed *Dred Scott* case, where it held that the free black Americans were not citizens. The majority indicated that if blacks were regarded as citizens, "entitled to the privileges and immunities of citizens," they would have freedom of speech and assembly, "and to keep and carry arms wherever they went."[106]

Post civil war arms enactments encountered judicial limitations arising at the individual right to keep and bear arms. Tennessee, for instance, had to amend its constitution to expressly grant legislative power to "regulate the wearing of arms." Even so, its 1870 ban on carrying small ("pocket") pistols barely passed constitutional muster, the court warning that the legislature might not prohibit the carrying of "all manner of arms" since the power to regulate "does not fairly mean the power to prohibit."[107] Arkansas upheld a ban on pistol carrying only by construing it to apply only to pocket pistols and not to rifles, shotguns, or larger handguns. "To

prohibit a citizen from wearing or carrying a war arm . . . is an unwarranted restriction upon the constitutional right to keep and bear arms. If cowardly and dishonest men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the penitentiary and the gallows, and not by a general deprivation of a constitutional privilege."[108] A similar technique was used to construe Missouri's 1875 carrying ban to apply only to concealed carry, the court citing with approval the concept that legislatures might not limit carrying so as to make the arms useless for defense.[109]

Nor has recognition of the right to keep and bear arms been lacking in our century. City bans on handgun carrying have been struck down in North Carolina ("the right to bear arms is a most essential one to every free people and should not be whittled down by technical constructions")[110] Tennessee,[111] and New Mexico.[112] The Michigan Supreme Court has stricken a ban on gun ownership by non-citizens with the comment that "the guarantee of the right of every person to bear arms in defense of himself means the right to possess arms for legitimate use in defense of himself (and) his property."[113] A similar statute was stricken in Colorado, its Supreme Court expressly rejecting the "collective rights" approach.[114] The U.S. Supreme Court, in *United States* v. *Miller*,[115] held that a court cannot merely take judicial notice that an arm is within the second amendment's protections, but explained:

> The Constitution as originally adopted granted to the Congress power "to provide for calling forth the Militia (etc.) . . ." With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the second amendment were made. It must be interpreted and applied with that end in view.
>
> The signification attributed to the term "militia" appears from the debates in the Convention; the history and legislation of the colonies and states, and the writings of approved commentators. These show plainly enough that the militia comprised all males physically capable of acting in concert for the common defense . . . and further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.

The right to keep and bear arms has found its most recent recognition in two 1980 decisions in Oregon[116] and Indiana,[117] the first striking down a very narrow arms possession ban, the second strictly limiting power to refuse carrying licenses.

In summary, the right to keep and bear arms is, in all probability, the oldest right memorialized in the Bill of Rights. Its common law right extends beyond our written records forward to the 1689 Declaration of Rights—so largely a response to individual disarmament under laws of the 1660's—and to our own Revolution, brought on primarily by British attempts at disarmament of the colonists. The recognition of the right in our own Bill of Rights is a natural outgrowth of that experience and of demands for preserva-

tion of a clearly individual right to own and carry arms. It is a right reserved to "the people"—the same "people" who possess the right to assemble, and security from unreasonable searches and seizures, the "people" whom the tenth amendment distinguishes from "the states." It is clearly not a right relating solely to the National Guard, which had no legal recognition prior to 1903, and whose 18th century predecessors were criticized by Richard Henry Lee and other constitutional figures as equal in danger to standing armies. Rather, it is a right reserved to individual citizens, to possess ("keep") and carry ("bear") arms for personal and political defense of themselves and their rights.

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## Biographic Sketch

David T. Hardy received his Bachelor of Arts degree from the University of Arizona where he graduated cum laude in 1972. He received his Juris Doctorate from the University of Arizona College of Law in 1975. He graduated magna cum laude and served as Associate Editor of the Arizona Law Review from 1974 to 1975. Mr. Hardy is a member of the Bar of the Supreme Court of the United States, the Fourth and Ninth Circuit U.S. Courts of Appeals, and the Arizona Supreme Court, and is a partner in the law firm of Sando and Hardy, Tucson, Arizona. He serves on the Legal Advisory Board of the Second Amendment Foundation, is a member of the American Civil Liberties Union and the National Rifle Association.

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# The Fourteenth Amendment and the Right To Keep and Bear Arms: The Intent of the Framers

By Stephen P. Halbrook*

> 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. —U.S. Const. amend. II.
>
> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. —U.S. Const. amend. XIV, § 1.

If African Americans were citizens, observed Chief Justice Taney in *Dred Scott* v. *Sandford*,[1] "it would give to persons of the negro race . . . the full liberty of speech . . .; to hold public meetings upon political affairs, and to keep and carry arms wherever they went."[2] If this interpretation ignores that Articles I and II of the Bill of Rights designate the respective freedoms guaranteed therein to "the people" and not simply the citizens (much less a select group of orators or militia), contrariwise Dred Scott followed antebellum judicial thought in recognizing keeping and bearing arms as an individual right[3] protected from both federal and state infringement.[4] The exception to this interpretation were cases holding that the Second Amendment only protected citizens[5] from federal, not state,[6] infringement of the right to keep and bear arms, to provide judicial approval of laws disarming black freemen and slaves.

Since the Fourteenth Amendment was meant to overrule Dred Scott by extending individual constitutional rights to black Americans and by providing protection thereof against state infringement,[7] the question arises whether the framers of Amendment XIV and related enforcement legislation recognized keeping and bearing arms as individual right on which no state could infringe. The congressional intent in respect to the Fourteenth Amendment is revealed in the debates over both Amendments XIII and XIV as well as the Civil Rights Act of 1866, the Anti-KKK Act of 1871, and the Civil Rights Act of 1875. Given the unanimity of opinion concerning state regulation of privately held arms by the legislators who framed the Fourteenth Amendment and its enforcement legislation, it is surprising that judicial opinions and scholarly articles fail to analyze the Reconstruction debates.[8]

### A. ARMS AND SLAVERY

Having won their national independence from England through armed struggle, post-Revolutionary War Americans were acutely

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aware that the sword and sovereignty go hand in hand, and that the firearms technology ushered in a new epoch in the human struggle for freedom. Furthermore, both proponents and opponents of slavery were cognizant that an armed black population meant the abolition of slavery, although plantation slaves were often trusted with arms for hunting.[9] This sociological fact explained not only the legal disarming of blacks but also the advocacy of a weapons culture by abolitionists. Having employed the instruments for self-defense against his pro-slavery attackers, abolitionist and Republican Party founder Cassius Marcellus Clay wrote that the pistol and the Bowie knife' are to us as sacred as the gown and the pulpit."[10] And it was John Brown who argued that "the practice of carrying arms would be a good one for the colored people to adopt, as it would give them a sense of their manhood."[11]

The practical necessities of the long, bloody Civil War, demanding every human resource, led to the arming of blacks as soldiers. While originally they considered it a "white man's war," Northern authorities by 1863 were organizing black regiments on a wide scale. At the same time, black civilians were forced to arm themselves privately against mob violence. During the anti-draft riots in New York, according to a Negro newspaper of the time, "The colored men who had manhood in them armed themselves, and threw out their pickets every day and night, determined to die defending their homes. . . . Most of the colored men in Brooklyn who remained in the city were armed daily for self-defense."[12]

Toward the end of the war Southerners began to support the arming and freeing of slaves willing to fight the invaders, and the Virginia legislature, on passing a bill providing for the use of black soldiers, repealed its laws against the bearing of arms by blacks.[13] One opponent of these measures declared: "What would be the character of the returned negro soldiers, made familiar with the use of fire-arms, and taught by us, that freedom was worth fighting for?"[14] Being evident that slaves plus guns equaled abolition, the rebels were divided between those who valued nationhood to slavery and those who preferred a restored union which might not destroy the servile condition of black labor.

As the movement began before the end of the war for the complete abolition of slavery via the Thirteenth Amendment, members of the U.S. Congress recognized the key role that the bearing of arms was already playing in the freeing of the slaves. In debate over the proposed Amendment, Rep. George A. Yeaman (Unionist, Ky.) contended that whoever won the war, the abolition of slavery was inevitable due to the arming of blacks:

> Let proclamations be withdrawn, let statutes be repealed, let our armies be defeated, let the South achieve its independence, yet come out of the war . . . with an army of slaves made freemen for their service, who have been contracted with, been armed and drilled, and have seen the force of combination. Their personal status is enhanced. . . . They will not be returned to slavery.[15]

At the same time, members of the slavocracy were planning to disarm the freedmen. Arguing for speedy adoption of the Thirteenth Amendment, Rep. William D. Kelley (R., Penn.) expressed

shock at the words of an anti-secessionist planter in Mississippi who expected the union to restore slavery. Kelley cited a letter from a U.S. brigadier general who wrote: " 'What,' said I, 'these men who have had arms in their hands?' 'Yes,' he said, 'we should take the arms away from them, of course.' "[16]

The northern government won the war only because of the arming of the slaves, according to Sen. Charles Sumner (R., Mass.), who argued that necessity demanded "first, that the slaves should be declared free; and secondly, that muskets should be put into their hands for the common defense. . . . Without emancipation, followed by the arming of the slaves, rebel slavery would not have been overcome."[17]

### B. THE CIVIL RIGHTS ACT OF 1866

After the war was concluded, the slave codes, which limited access of blacks to land, to arms, and to the courts, began to reappear in the form of the black codes,[18] and United States legislators turned their attention to the protection of the freedmen. In support of Senate Bill No. 9, which declared as void all laws in the rebel states which recognized inequality of rights based on race, Sen. Henry Wilson (R., Mass.) explained in part: "In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen disarming them, perpetrating murders and outrages on them. . . ."[19]

When Congress took up Senate Bill No. 61, which became the Civil Rights Act of 1866,[20] Sen. Lyman Trumbull (R., Ill.), Chairman of the Senate Judiciary Committee, indicated that the bill was intended to prohibit inequalities embodied in the black codes, including those provisions which "prohibit any negro or mulatto from having fire-arms."[21] In abolishing the badges of slavery, the bill would enforce fundamental rights against racial discrimination in respect to civil rights, the rights to contract, sue and engage in commerce, and equal criminal penalities. Sen. William Saulsbury (D., Del.) added: "In my State for many years, and I presume there are similar laws in most of the southern States, there has existed a law of the State based upon and founded in its police power, which declares that free negroes shall not have the possession of firearms or ammunition. This bill proposes to take away from the States this police power. . . ." The Delaware Democrat opposed the bill on this basis, anticipating a time when "a numerous body of dangerous persons belonging to any distinct race" endangered the state, for "the State shall not have the power to disarm them without disarming the whole population."[22] Thus, the bill would have prohibited legislative schemes which in effect disarmed blacks but not whites. Still, supporters of the bill were soon to contend that arms bearing was a basic right of citizenship or personhood.

In the meantime, the legislators turned their attention to the Freedmen's Bureau Bill. Rep. Thomas D. Eliot (R., Mass.) attacked an Opelousas, Louisiana ordinance which deprived blacks of various civil rights, including the following provision: "No freedman who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons, within the limits of the town of Opelousas without the special permission of his employer . . . and

approved by the mayor or president of the board of police."[23] And Rep. Josiah B. Grinnell (R., Iowa) complained: " A white man in Kentucky may keep a gun; if a black man buys a gun he forfeits it and pays a fine of five dollars, if presuming to keep in his possession a musket which he has carried through the war."[24] Yet the right of blacks to have arms existed partly as self-defense against the state militia itself, which implied that militia needs were not the only constitutional bases for the right to bear arms. Sen. Trumbull cited a report from Vicksburg, Mississippi which stated: "Nearly all the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of this militia."[25] Rather than restore order, the militia would typically "hang some freedman or search negro houses for arms."[26] As debate returned to the Civil Rights Bill, Rep. Henry J. Raymond (R., N.Y.) explained of the rights of citizenship: "Make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States under the laws and Constitution of the United States. . . . He has a defined status; he has a country and a home; a right to defend himself and his wife and children; a right to bear arms . . . ."[27] Rep. Roswell Hart (R., N.Y.) further states: "The Constitution clearly describes that to be a republican form of government for which it was expressly framed. A government . . . where 'no law shall be made prohibiting a free exercise of religion;' where 'the right of the people to keep and bear arms shall not be infringed;' . . . ."[28] He concluded that it was the duty of the United States to guarantee that the states have such a form of government.[29]

Rep. Sidney Clarke (R., Kansas) referred to an 1866 Alabama law providing: "That it shall not be lawful for any freedman, mulatto, or free person of color in this State, to own firearms, or carry about his person a pistol or other deadly weapon."[30] This same statute made it unlawful "to sell, give, or lend fire-arms to ammunition of any description whatever, to any freedman, free negro, or mulatto. . . ."[31] Clarke also attacked Mississippi, "whose rebel militia, upon the seizure of the arms of black Union Soldiers, appropriated the same to their own use."[32]

> Sir, I find in the Constitution of the United States an article which declares that "the right of the people to keep and bear arms shall not be infringed." For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws . . . .[33]

Emotionally referring to the disarming of black soldiers, Clarke added:

> Nearly every white man in that State that could bear arms was in the rebel ranks. Nearly all of their able-bodied colored men who could reach our lines enlisted under the old flag. Many of these brave defenders of the nation paid for the arms with which they went to battle. . . . The "reconstructed" State authorities of Mississippi were allowed to rob and disarm our veteran soldiers . . . .[34]

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In sum, Clarke presupposed a constitutional right to keep privately held arms for protection against oppressive state militia.

### C. THE FOURTEENTH AMENDMENT

The need for a more solid foundation for the protection of freedmen as well as white citizens was recognized, and the result was a significant new proposal—the Fourteenth Amendment. A chief exponent of the amendment, Sen. Jacob M. Howard (R., Mich.), referred to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press; . . . the right to keep and to bear arms. . . ."[35] Adoption of the Fourteenth Amendment was necessary because presently these rights were not guaranteed against state legislation. "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[36]

The Fourteenth Amendment was viewed as necessary to buttress the objectives of the Civil Rights Act of 1866. Rep. George W. Julian (R., Ind.) noted that the act

> Is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. South Carolina has the same enactments . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.[37]

It is hardly surprising that the arms question was viewed as part of a partisan struggle. "As you once needed the muskets of the colored persons, so now you need their votes," Sen. Sumner explained to his fellow Republicans in support of black suffrage in the District of Columbia.[38] At the opposite extreme, Rep. Michael C. Kerr (D., Ind.) an opponent of black suffrage and of the Fourteenth Amendment, attacked a military ordinance in Alabama that set up a volunteer militia of all males between ages 18 and 45 "without regard to race or color" on these grounds:

> Of whom will that militia consist? Mr. Speaker, it will consist only of the black men of Alabama. The white men will not degrade themselves by going into the ranks and becoming a part of the militia of the State with negroes. . . . Are the civil laws of Alabama to be enforced by this negro militia? Are white men to be disarmed by them?[39]

Kerr predicted that the disfranchisement of white voters and the above military measure would result in "a war of races."[40]

### D. THE ANTI-KKK ACT

Although the Fourteenth Amendment became law in 1868, within three years the Congress was considering enforcement legislation to suppress the Ku Klux Klan. The famous report by Rep. Benjamin F. Butler (R., Mass.) on violence in the South assumed that the right to keep arms was necessary for protection against the militia but also against local law enforcement agencies. Noting

instances of "armed confederates" terrorizing the negro, the report stated that "in many counties they have preceded their outrages upon him by disarming him, in violation of his right as a citizen to 'keep and bear arms,' which the Constitution expressly says shall never be infringed."[41] The congressional power based on the Fourteenth Amendment to legislate to prevent states from depriving any U.S. citizen of life, liberty, or property justified the following provision of the committee's anti-KKK bill:

> That whoever shall, without due process of law, by violence, intimidation or threats, take away or deprive any citizen of the United States of any arms or weapons he may have in his house or possession for the defense of his person, family, or property, shall be deemed guilty of a larceny thereof, and be punished as provided in this act for a felony.[42]

Rep. Butler explained the purpose of this provision in these words:

> Section eight is intended to enforce the well-known constitutional provision guaranteeing the right in the citizen to "keep and bear arms," and provides that whoever shall take away, by force or violence, or by threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed guilty of larceny of the same. This provision seemed to your committee to be necessary, because they had observed that, before these midnight marauders made attacks upon peaceful citizens, there were very many instances in the South where the sheriff of the county had preceded them and taken away the arms of their victims. This was specially noticeable in Union County, where all the negro population were disarmed by the sheriff only a few months ago under the order of the judge . . .; and then, the sheriff having disarmed the citizens, the five hundred masked men rode at night and murdered and otherwise maltreated the ten persons who were in jail in that county.[43]

The bill was referred to the Judiciary Committee, and when later reported as H.R. No. 320 the above section was deleted—probably because its proscription extended to simple individual larceny over which Congress had no constitutional authority, and because state or conspiratorial action involving the disarming of blacks would be covered by more general provisions of the bill. Supporters of the rewritten anti-KKK bill continued to show the same concern over the disarming of freedmen. Sen. John Sherman (R., Ohio) stated the Republican position: "Wherever the negro population preponderates, there they [the KKK] hold their sway, for a few determined men . . . can carry terror among ignorant negroes . . . without arms, equipment, or discipline."[44]

Further comments clarified that the right to arms was a necessary condition for the right of free speech. Sen. Adelbert Ames (R., Miss.) averred: "In some counties it was impossible to advocate Republican principles, those attempting it being hunted like wild beasts; in other, the speakers had to be armed and supported by

not a few friends."[45] Rep. William L. Stoughton (R., Mich.) exclaimed: "If political opponents can be marked for slaughter by secret bands of cowardly assassins who ride forth with impunity to execute the decrees upon the unarmed and defenseless, it will be fatal alike to the Republican party and civil liberty."[46]

Section 1 of the bill, which was taken partly from Section 2 of the Civil Rights Act of 1866 and survives today as 42 U.S.C. § 1983, was meant to enforce Section 1 of the Fourteenth Amendment by establishing a remedy for deprivation under color of state law of federal constitutional rights of all people, not only former slaves. This portion of the bill provided:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities to which . . . he is entitled under the Constitution or laws of the United States, shall . . . be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .[47]

Rep. Washington C. Whitthorne (D. Tenn.), who complained that "in having organized a negro militia, in having disarmed the white man," the Republicans had "plundered and robbed" the whites of South Carolina through "unequal laws," objected to Section 1 of the anti-KKK bill on these grounds:

> It will be noted that by the first section suits may be instituted without regard to amount or character of claim by any person within the limits of the United States who conceives that he has been deprived of any right, privilege, or immunity secured him by the Constitution of the United States, under color of any law, statute, ordinance, regulation, custom, or usage of any State. This is to say, that if a police officer of the city of Richmond or New York should find a drunken negro or white man upon the streets with a loaded pistol flourishing it, &c., and by virtue of any ordinance, law, or usage, either of city or State, he takes it away, the officer may be sued, because the right to bear arms is secured by the Constitution, and such suit brought in distant and expensive tribunals.[48]

The Tennessee Democrat assumed that the right to bear arms was absolute, deprivation of which created a cause of action against state agents under Section 1 of the anti-KKK bill. In the minds of the bill's supporters, however, the Second Amendment as incorporated in the Fourteenth Amendment recognized a right to keep and bear arms safe from state infringement, not a right to commit assault or otherwise engage in criminal conduct with arms by pointing them at people or wantonly brandishing them about so as to endanger others. Contrary to the congressman's exaggerations, the proponents of the bill had the justified fear that the opposite development would occur, i.e., that a black or white man of the wrong political party would legitimately have or possess arms and a police officer of the city of Richmond or New York who was

drunken with racial prejudice or partisan politics would take it away, perhaps to ensure the success of an extremist group's attack. Significantly, none of the representative's colleagues disputed his assumption that state agents could be sued under the predecessor to § 1983 for deprivation of the right to keep arms.

Rep. William D. Kelly (R., Penn.), speaking after and in reply to Rep. Whitthorne, did not deny the argument that Section 1 allowed suit for deprivation of the right to possess arms, but emphasized the arming of the KKK. He referred to "great numbers of Winchester rifles, and a particular species of revolving pistol" coming into Charleston's ports. "Poor men, without visible means of support, whose clothes are ragged and whose lives are almost or absolutely those of vagrants, are thus armed with new and costly rifles, and wear in their belts a brace of expensive pistols."[49] These weapons were used against Southern Republicans, whose constitutional rights must thereby be guaranteed by law and arms.

However, like Congressman Whitthorne, Rep. Barbour Lewis (R., Tenn.) also decried the loss of state agent's immunity should the bill pass: "By the first section, in certain cases, the judge of a State court, though acting under oath of office, is made liable to a suit in the Federal Court and subject to damages for his decision against a suitor, however honest and conscientious that decision may be; and a ministerial officer is subject to the same pains and penalties. . . ."[50] Tennessee Republicans and Democrats alike thus agreed that what is today § 1983 provided an action for damages against state agents in general for deprivation of constitutional rights.

Debate over the anti-KKK bill naturally required exposition of Section 1 of the Fourteenth Amendment, and none was better qualified to explain that section than its draftsman, Rep. John A. Bingham (R., Ohio):

> Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of a State, are chiefly defined in the first eight amendments to the constitution of the United States. Those eight amendments are as follows:
>
> ARTICLE I
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> ARTICLE 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. . . . [Amendments III–VIII, also listed by Bingham, are here omitted.]

> These eight articles I have shown never were limitations upon the power of the States, until made so by the Fourteenth Amendment. The words of that amendment, "no State shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States," are an express prohibition upon every State of the Union. . . . [51]

This is a most explicit statement of the incorporation thesis by the architect of the Fourteenth Amendment. Although he based the incorporation on the privileges and immunities clause and not the due process clause as did subsequent courts of selective incorporation, Rep. Bingham could hardly have anticipated the judical metaphysics of the twentieth century in this respect. In any case, whether based on the due process clause or on the privileges and immunities clause, the legislative history supports the view that the incorporation of Amendments I-VIII was clear and unmistakable in the minds of the framers of Amendment XIV.

In contrast with the above legal analysis, some comments on the enforcement of the Fourteenth Amendment returned to discussion of power struggle between Republicans and unreconstructed Confederates. While Republicans deplored the armed condition of white Southerners and the unarmed state of black Southerners, Democrats argued that the South's whites were disarmed and endangered by armed carpetbaggers and negro militia. Thus, Rep. Ellis H. Roberts (R., N.Y.) lamented the partisan character of KKK violence: "The victims whose property is destroyed, whose persons are mutilated, whose lives are sacrificed, are always Republicans. They may be black or white. . . ." Of the still rebellious whites: "Their weapons are often new and of improved patterns; and however poor may be the individual member he never lacks for arms or ammunition. . . . In many respects the Ku Klux Klan is an army, organized and officered, and armed for deadly strife."[52]

Rep. Boyd Winchester (D., Ky.) set forth the contrary position, favorably citing a letter from an ex-governor of South Carolina to the reconstruction governor regretting the latter's "Winchester-rifle speech" which "fiendishly proclaimed that this instrument of death, in the hands of the negroes of South Carolina, was the most effective means of maintaining order and quiet in the State."[53] Calling on the governor to "disarm your militia," the letter referred to the disaster which resulted "when you organized colored troops throughout the State, and put arms into their hands, with powder and ball, and denied the same to the white people."[54] The letter proceeded to cite numerous instances where the "colored militia" murdered white people. According to Rep. Winchester, it was the arming of blacks and disarming of whites which resulted in white resistance. "It would seem that wherever military and carpetbagger domination in the South has been marked by the greatest contempt for law and right, and practiced the greatest cruelty toward the people, Ku Klux operations have multiplied."[55]

An instance of black Republican armed resistance to agents of the state who were in the Klan was recounted in a letter cited by Rep. Benjamin F. Butler:

> Then the Ku Klux fired on them through the window, one of the bullets striking a colored woman . . . and wounding her through the knee badly. The colored men then fired on the Ku Klux, and killed their leader or captain right there on the steps of the colored men's house. . . . There he remained until morning when he was identified, and proved to "Pat Inman," a constable and deputy sheriff. . . . [56]

By contrast, Rep. Samuel S. Cox (D., Ohio) assailed those who "arm negro militia and create a situation of terror," exclaimed that South Carolinians actually clamored for United States troops to save them from the rapacity and murder of the negro bands and their white allies," and saw the Klan as their only defense: "Is not repression the father of revolution?" The congressman compared the Klan with the French Jacobins, Italian Carbonari, and Irish Fenians.[57] Rep. John Coburn (R., Ind.) saw the situation in an opposite empirical light, deploring both state and private disarming of blacks. "How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men?"[58]

The next day Rep. Henry L. Dawes (R., Mass.) returned to a legal analysis which again asserted the incorporation thesis. Of the anti-Klan bill he argued:

> The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject-matter of this bill. . . .
>
> . . . In addition to the original rights secured to him in the first article of amendments he had secured the free exercise of his religious belief, and freedom of speech and of the press. Then again he has secured to him the right to keep and bear arms in his defense. [Dawes then summarizes the remainder of the first eight amendments.] . . .
>
> . . . And still later, sir, after the bloody sacrifice of our four years' war, we gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens. . . .
>
> . . . [I]t is to protect and secure to him in these rights, privileges, and immunities this bill is before the House.[59]

Rep. Horatio C. Burchard (R., Ill.), while generally favoring the bill insofar as it provided against oppressive state action, rejected the interpretation by Dawes and Bingham regarding the definition of "privileges and immunities," which Burchard felt were contained only in Articles IV, V, and VI rather than I–VIII. However, Burchard still spoke in terms of "the application of their eight amendments to the States,"[60] and in any case Dawes had used the terms "*rights*, privileges and immunities." The anti-Klan bill finally was passed along partisan lines as An Act to Enforce the Provisions of the Fourteenth Amendment.[61]

### E. THE CIVIL RIGHTS ACT OF 1875

After passage of the anti-Klan bill, discussion concerning arms persisted as interest developed toward what became the Civil

Rights Act of 1875, now 42 U.S.C. § 1984. A report on affairs in the South by Sen. John Scott (R., Penn.) indicated the need for further enforcement legislation: "negroes who were whipped testified that those who beat them told them they did so because they had voted the radical ticket, and in many cases made them promise that they would not do so again, and wherever they had guns took them from them."[62]

Following the introduction of the civil rights bill the debate over the meaning of the privileges and immunities clause returned. Sen. Matthew H. Carpenter (R., Wis.) cited *Cummings* v. *Missouri*,[63] a case contrasting the French legal system, which allowed deprivation of civil rights,. "and among these of the right of voting, . . . of bearing arms," with the American legal system, averring that the Fourteenth Amendment prevented states from taking away the privileges of the American citizen.[64]

Sen. Allen G. Thurman (D., Ohio) argued that the "rights, privileges, and immunities of a citizen of the United States" were included in Amendments I-VIII. Reading and commenting on each of these amendments, he said of the Second: 'Here is another right of a citizen of the United States, expressly declared to be his right—the right to bear arms; and this right, says the Constitution, shall not be infringed." After prodding from John A. Sherman (R., Ohio), Thurman added the Ninth Amendment to the list.[65]

The incorporationist thesis was stated succinctly by Senator Thomas M. Norwood (D., Ga.) in one of the final debates over the civil rights bill. Referring to a U.S. citizen residing in a Territory, Senator Norwood stated:

> His right to bear arms, to freedom of religious opinion, freedom of speech, and all others enumerated in the Constitution would still remain indefeasibly his, whether he remained in the Territory or removed to a State.
>
> And those and certain others are the privileges and immunities which belong to him in common with every citizen of the United States, and which no State can take away or abridge, and they are given and protected by the Constitution . . .
>
> The following are most, if not all, the privileges and immunities of a citizen of the *United States:*
>
> The right to the writ of *habeas corpus;* of peaceable assembly and of petition; . . . *to keep and bear arms* [emphasis added]; . . . from being deprived of the right to vote on account of race, color or previous condition of servitude.[66]

Arguing that the Fourteenth Amendment created no new rights but declared that "certain existing rights should not be abridged by States," the Georgia Democrat explained:

> Before its [Fourteenth Amendment] adoption any State might have established a particular religion, or restricted freedom of speech and of the press, or *the right to bear arms* [emphasis added] . . . A State could have deprived its citizens of any of the privileges and immunities contained in those eight articles, but the Federal Government could not. . .

> . . . And the instant the fourteenth amendment became a part of the Constitution, every State was at that moment disabled from making or enforcing any law which would deprive any citizen of a State of the benefits enjoyed by citizens of the United States under the first eight amendments to the Federal Constitution.[67]

In sum, in the understanding of Southern Democrats and Radical Republicans alike, the right to keep and bear arms, like other Bill of Rights freedoms, was made applicable to the states by the Fourteenth Amendment.

The framers of the Fourteenth Amendment and of the civil rights acts of Reconstruction, rather than predicating the right to keep and bear arms on the needs of an organized state militia, based it on the right of the people individually to possess arms for protection against any oppressive force—including racist or political violence by the militia itself or by other state agents such as sheriffs. At the same time, the militia was understood to be the whole body of the people, including blacks. In discussion concerning the Civil Rights Act of 1875, Sen. James A Alcorn (R., Miss.) defined the militia in these terms: "The citizens of the United States, the Posse comitatus, or the militia if you please, and the colored man composes part of these."[68] Every citizen, in short, was a militiaman. With the passage of the Fourteenth Amendment, the right and privilege individually to keep and bear arms was protected from both state and federal infringement.[69]

REFERENCES

1. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 15 L. Ed. 691 (1857).
2. 15 L. Ed. at 705 [emphasis added]. *And see id* at 719.
3. Protection of the "absolute rights of individuals" to personal security, liberty, and private property is secured in part by "the right of bearing arms—which with us is . . . practically enjoyed by every citizen, and is among his most valuable privileges, since it furnishes the means of resisting as a freeman ought, the inroads of usurpation." I Henry St. Geo. Tucker, Commentaries on the Laws of Virginia 43 (1831) (reference to U.S. Constitution). And see St. Geo. Tucker, 1 Blackstone, Commentaries *144 n. 40 (1st ed. 1803); W. Rawle, A View of the Constitution 125–26 (1829); 3 J. Story, Commentaries on the Constitution 746 (1833); Bliss vs. Commonwealth, 2 Litt. (Ky.) 90, 13 Am. Dec. 251 (1822); Simpson vs. State, 13 Tenn. Reports (5 Yerg.) 356 (1833); Nunn v. State, 1 Ga. 243 (1846). Cf. State v. Buzzard, 4 Ark. 18 (1843).
4. W. Rawle, supra note 3, at 125–26, stated: The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.

Similarly, it was stated in Nunn v. State, 1 Ga. 243, 250–51 (1846):

The language of the second amendment is broad enough to embrace both Federal and state governments—nor is there anything in its terms which restricts its meaning. . . . Is it not an unalienable right, which lies at the bottom of every free government?

And see cases cited at 68 C.J. Weapons §4 n 60 (1934).

According to II J. Bishop, Criminal Law §124 (3rd ed. 1865): "Though most of the amendments are restrictions on the general government alone, not on the States, this one seems to be of a nature to bind both the State and National legislatures." Approved in English v. State, 35 Tex. 473 (1872). For an analysis of U.S. Supreme Court cases related to whether the Second and/or Fourteenth Amendments prohibit state action which infringes on keeping and bearing arms, see S. Halbrook, The Jurisprudence of the Second and Fourteenth Amendments, IV George Mason L. Rev. (1981).

5. State v. Newson, 27 N.C. 203, 204 (1844); Cooper v. Savannah, 4 Ga. 72 (1848).

6. State v. Newson, 27 N.C. 203, 207 (1844). Cf. cases cited at 68 C.J. Weapons §5, n. 19, 21, 22; §8, n. 37, 40 (1934).

7. "What was the fourteenth article designed to secure? . . . [T]hat the privileges and immunities of citizens of the United States shall not be abridged or denied by the United States or by any State; defining also, what it was possible was open to some question after the Dred Scott decision, who were citizens of the United States." Sen. George F. Edmonds (R., Vt.), CONG. GLOBE, 40th Cong., 3rd. Sess., pt. 1, 1000 (Feb. 8, 1869).

8. While it "cannot turn the clock back to 1868 when the Amendment was adopted," *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 492 (1954), the Supreme Court is compelled to interpret Amendment XIV and Reconstruction legislation in accord with the Congressional intent. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549 (1972); *Monell* v. *Dep't. of Social Services of City of New York*, 436 U.S. 658 (1978) ("fresh analyis of debate on the Civil Rights Act of 1871," *id.* 665, justified overruling *Monroe* v. *Pape*, 365 U.S. 167 [1961]). *Cf.* Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stanford L. Rev. 5, 44–45, 57–58, 119–20 (1949) (while contending that the Bill of Rights in general was not intended to apply to the states, cited references to the Second Amendment in congressional debates support incorporation).

Though beyond the scope of this study, the history of the prohibition of arms possession by native Americans or Indians or presents a parallel example of the use of gun control to suppress or exterminate non-white ethnic groups. While legal discrimination against blacks in respect to arms was abolished during Reconstruction, the sale of arms and ammunition to "hostile" Indians remained a prohibition. E.g., 17 stat. 457, 42nd Cong., 3rd Sess., ch. 138 (1873). *See also Sioux Nation of Indians* v. *United States*, 601 F. 2d 1571, 1166 (Ct. Cl. 1979): "Since the Army has taken from the Sioux their weapons and horses, the alternative to capitulation to the government's demands was starvation . . ." The federal government's special restrictions on selling firearms to native Americans were abolished finally in 1979. Washington Post, Jan. 6, 1979, § A, at 11, col. 1.

9. See *State* v. *Hannibal*, 51N.C. 57 (1859); *State* v. *Harris*, 51 N.C. 448 (1859); D. Hundley, Social Relations in our Southern States 261 (1860). Blacks were experienced enough in the use of arms to pay a significant, though unofficial, role as Confederate soldiers, some even as sharpshooters. H. Blackerby, Blacks in Blue and Gray 1–40 (Tusculoosa, Ala. 1979); J. Obatala, Black Confederates, Players 13 ff. (April, 1979). In Louisiana, the only state in the Union to include blacks in the militia, substantial numbers of blacks joined the rebellion furnishing their own arms. M. Berry, *Negro Troops in Blue and Gray*, 8 Louisiana History 165–66 (1867).

10. The Writings of Cassius Marcellus Clay 257 (H. Greeley ed. 1848).

11. DuBois, John Brown 106 (1909).

12. J. McPherson, The Negro's Civil War 72–73 (1965). While all may be fair in love and war, experiences during the conflict suggest that deprivation of one right is coupled with deprivation of others. When the secession movement began, Lincoln suspended habeas corpus and enstated the disarming of citizens and military arrests in Maryland and Missouri. In the latter state, the death penalty was enstated by union officers for those caught with arms, and after an order was issued to arm the militia by random seizures of arms, the searches provided the occasion for general looting. See 3 War of the Rebellion 466–67 (Series 1) and 13 id. at 506; R. Brownlee, Gray Ghosts of the Confederacy 37, 85, & 170 (L.S.U. 1958). The situation became so harsh for Northerners themselves that the Northern Democratic Platform of 1864 declared in its fourth resolution against the suppression of free speech and press and the denial of the right of the people to bear arms in their defense. E. Pollard, The Lost Cause 574 (1867).

13. 61 The War of the Rebellion, ser. 1, pt. 2, 1068 & 1315 (1880–1901); R. Durden, The Gray & The Black 250 (1972).

14. R. Durden, supra note 13, at 169.

15. Cong. Globe, 38th Cong., 2nd Sess., pt. 1, 171 (Jan. 9, 1865).

16. *Id.* 280 (Jan. 18, 1865).

17. *Id.*, 39th Cong., 1st Sess., pt. 1, 674 (Feb. 6, 1866). But see id. at pt. 4, 3215 (June 16, 1866) (allegation by Rep. William E. Niblack (D., Ind.) that the majority of Southern blacks "either adhered from first to last to the rebellion or aided and assisted by their labor or otherwise those who did so adhere.").

18. DuBois, Black Reconstruction in America 167, 172, & 223 (New York 1962).

19. Cong. Globe, 39th Cong., 1st Sess., pt. 1, 40 (Dec. 13, 1865).

20. Civil Rights Act, 14 Stat. 27 (1866). A portion of this act survives as 42 U.S.C. § 1982: "All citizens of the United States shall have the same right, in every State

and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

21. Cong. Globe, 39th Cong., 1st Sess., pt. 1, 474 (Jan. 29, 1866).
22. *Id.* 478.
23. *Id.* 517 (Jan. 30, 1866).
24. *Id.* 651 (Feb. 5, 1866).
25. *Id.* 941 (Feb. 20, 1866).
26. *Id.*
27. *Id.*, pt. 2, 1266 (Mr. 8, 1866).
28. *Id.* 1629 (Mar. 24, 1866).
29. *Id.* 3
30. *Id.* 1838 (Ap. 7, 1866).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* 1839. Ironically, Clarke's home state, Kansas, adopted measures to prohibit former Confederates from possessing arms. Kennett & Anderson at 154.
35. Cong. Globe, 39th Cong., 1st Sess., pt. 3, 2765 (May 23, 1866).
36. *Id.* 2766. Italics added.
37. Id., pt. 4, 3210 (June 16, 1866).
38. Id., 2nd Sess., pt. 1, 107 (Dec. 13, 1866).
39. Id., 40th Cong., 2nd Sess. pt. 3, 2198 (Mar. 28, 1868).
40. Id.
41. 1464 H.R. REP. No. 37, 41st Cong., 3rd Sess. 3 (Feb. 20, 1871).
42. Cong. Globe, 42nd Cong., 1st Sess., pt. 1, 174 (Mar. 20, 1871). Introduced as "an act to protect loyal and peaceable citizens in the south . . .", H.R. No. 189.
43. H.R. Rep. No. 37, supra note 26, at 7–8.
44. Cong. Globe, 42nd Cong., 1st Sess., pt. 1, 154 (Mar. 18, 1871).
45. Id. 196 (Mr. 21, 1871).
46. Id. 321 (Mr. 28, 1871).
47. Id., pt. 2, Appendix, 68. Passed as the Enforcement Act, 17 Stat. 13 (1871), § 1 survives as 42 U.S.C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." The action for conspiracy to deprive persons of rights or privileges under 42 U.S.C. § 1985 derives from the same act.
48. Cong. Globe, 42nd Cong., 1st Sess., pt. 1, 337 (Mr. 29, 1871).
49. *Id.* 339.
50. Id. 385 (Ap. 1, 1871).
51. Id., pt. 2, Appendix, 84 (Mr. 31, 1871).
52. Id., pt. 1, 413 (Ap. 3, 1871).
53. Id. 422 (Ap. 3, 1871).
54. Id.
55. Id. Nathan Bedford Forrest told Congressional investigators in 1871 that the Klan originated in Tennessee for self defense against the militia of Governor William G. Brownlow. N. Burger and J. Bettersworth, South of Appomattox 129, 132, and 137 (1959). Still, two years before, Forrest denounced Klan lawlessness because "the order was being used . . . to disarm harmless negroes having no thought of insurrectionary movements, and to whip both whites and blacks." C. Bowers, THE TRAGIC ERA 311 (1929). The outrages in turn allegedly furnished "a plausible pretext for the organization of State militias to serve the purposes of Radical politices." C. Bowers at 311. Carpetbagger controlled militias were deeply involved in political violence to influence elections, and were blamed for infringing on their opponents' constitutional rights to free speech and to keep and bear arms, among numerous other abuses. E.g., C. Bowers at 439 and passim; O. Singletary, Negro Militia and Reconstruction 35–41, 74–75 (1963).
56. Cong. Globe, 42nd Cong., 1st Sess., pt. 1, 445 (Ap. 4, 1871).
57. Id. 453.
58. Id. 459.
59. *Id.* 475–76 (Ap. 5, 1871). [Emphasis added].
60. Id., 2, Appendix, 314.
61. 17 Stat. 13, 42nd Cong., 1st Sess., ch. 22 (1871).
62. 1484 S. Rep. No. 41, 42nd Cong., 2nd Sess., pt. 1, 35 (Feb. 19, 1872).
63. *Cummings* v. *Missouri*, 71 U.S. 277, 321 (1866).
64. Cong. Globe, 42nd Cong., 2nd Sess., pt. 1, 762 (Feb. 1. 1872).

65. *Id.*, pt. 6, Appendix, 25–26 (Feb. 6, 1872). On Amendment IX as a source of an individual right to keep and bear arms, see Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 Fordham Urban L. J. 31, 49–50 (1976). See also 2 Cong. Rec. 43rd Cong., 1st Sess., pt. 1, 384–385 (Jan. 5, 1874) (statement by Rep. Robert Q. Mills (D., Tex.) that Amendment XIV adopts Bill of Rights privileges).

66. Cong. Rec., 43rd Cong., 1st Sess., pt. 6, Appendix, 241–242 (May 4, 1874). Emphasis added.

67. *Id.* 242. Italic added.

68. *Id.* (May 22, 1874). The antebellum exclusion of blacks from the armed people as militia was commented on by Sen. George Vickers (D., Md.), who recalled a 1792 law passed by Congress: "That every free able-bodied white male citizen shall be enrolled in the militia." Vickers added that as late as 1855 New Hampshire "confined the enrollment of militia to free white citizens." Cong. Globe, 41st Cong., 2nd Sess., pt. 2, 1558–59 (Feb. 25, 1870). Exclusion of a right to bear arms by blacks was further evidence of their lack of status as citizens. See 1464 H.R. Rep. No. 22, 41st Cong., 3rd Sess. 7 (Feb. 1, 1871), citing Cooper V. Savannah, 4 Ga. 72 (1848) (not entitled to bear arms or vote).

69. While unrelated to the debates over the Fourteenth Amendment, congressional deliberation over whether the federal government could abolish militias in the Southern states also gave rise to exposition of the Second Amendment. In support of repeal of a statute prohibiting the Southern militias, Sen. Charles R. Buckalew (D., Penn.) pointed out that the U.S. President favored repeal of the statute because at all times, both when it was placed upon the statute-book and every moment since, it was and is in his judgment a violation of the Constitution of the United States. One of the amendments to our fundamental law expressly provides that "the right of the people to keep and bear arms shall not be infringed"—of course by this Government; and it gives the reason that a well-regulated militia in the several divisions of the country is necessary for the protection and for the interests of the people. Cong. Globe, 40th Cong., 3rd Sess., pt. 1, 83–84.

George F. Edmunds (R., Vt.) worried that repeal of the statute "will authorize anybody and everybody in the State of Texas, under what they call its ancient militia laws . . . to organize a militia hostile to the Government," id. at 81, and thus advocated "a selected militia" chosen by State and federal governments. Id. In contrast, Garrett Davis (D. Ky.) stated: "Wherever a State organizes a government it has of its own inherent right and power authority to organize a militia for it. Congress . . . has no right to prohibit that State from the organization of its militia." *Id.* at 84. Willard Warner (R., Ala.) stressed the first clause of the Second Amendment to form militias independent of federal control: we have the right now, being restored to our full relations to the Federal Government, to organize a militia of our own, and that we could have done so at any time in the past, this law to the contrary notwithstanding. Article two of the amendments of the Constitution provides that—

"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." *Id.* at 85.

The prohibitionary statute was repealed, *id.* at 86. *Cf.* Houston v. Moore, 18 U.S. 1, 16–17 (1820).

Thus, while debates over the militia question suggested that the Second Amendment precluded federal legislation which prohibited the states or the people from forming militias, debates over the Fourteenth Amendment demonstrate the intent of Congress to preclude state militias or other state action from infringing on the individual right to keep and bear arms.

# THE SECOND AMENDMENT TO THE UNITED STATES CONSTITUTION GUARANTEES AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS

(By James J. Featherstone, Esquire, General Counsel, National Rifle Association of America and Richard E. Gardiner, Esquire, Robert Dowlut, Esquire, Office of the General Counsel)

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 values of the Framers of the Constitution must be applied in any case construing the Constitution. Inferences from the text and history of the Constitution should be given great weight in discerning the original understanding and in determining the intentions of those who ratified the constitution. The precedential value of cases and commentators tends to increase, therefore, in proportion to their proximity to the adoption of the Constitution, the Bill of Rights or any other amendments. *Powell* v. *McCormack*, 395 U.S. 486, 547 (1969).

## A. COMMON LAW DEVELOPMENT OF THE RIGHT TO KEEP AND BEAR ARMS

The right to keep and bear arms was not created by the Second Amendment; rather, this basic individual right, developed in England before this continent was colonized, pre-dated the constitution and was part of the common law heritage of the thirteen original colonies.

Sir William Blackstone, an authoritative source of the common law for colonists and, therefore, a dominant influence on the drafters of the original Constitution and its Bill of Rights, set forth in his Commentaries the absolute rights of individuals as: personal security, personal liberty, and possession of private property, I *Blackstone Commentaries* 129, these absolute rights being protected by the individual's right to have and use arms for self-preservation and defense. As Blackstone observed, individual citizens were therefore entitled to exercise their "natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Id.* at 144.[1] Clearly evident in this statement is Blackstone's recognition that the exercise of an individual's absolute rights could be imperiled by a standing army as well as by private individuals, a view supported by his observation that "Nothing . . . ought to be more guarded against in a free state than making the military power . . . a body too distinct from the people." *Id.* at 414. To prevent such an occurrence, Blackstone not only believed in the individual's right to have and use arms, but further believed that for its defense a nation should rely not on a standing army, but the citizen soldier. Plainly, for such a concept to be a reality, it was necessary that all able-bodied males possess and be capable of using arms.

Blackstone was not alone in his view that the common law recognized the individual's right to possess arms: in his Pleas of the

Crown, Hawkins noted that "every private person seems to be authorized by the Law to arm himself for [various] purposes." 1 William Hawkins, *Pleas of the Crown*, ch. 28, Section 14, p. 171 (7th ed. 1795). In agreement with Blackstone was Sir Edward Coke who wrote that "the laws permit the taking up of arms against armed persons," 2 E. Coke Institutes of the Laws of England, 574 (Johnson & Warner, ed. 1812).

It was within this legal tradition of the individual's right to have and use arms for his own defense and self-preservation as well as to enable him to contribute to the common defense, that the spark which ignited the American Revolution was struck. The British, by attempting to seize large stores of powder and shot, sought to deny the Massachusetts colonists the ability to protect their absolute rights. The colonists retaliated by exercising their common law right to keep and bear arms, using the very arms which the British wished to render ineffective.[2] It is beyond question that prior to the Second amendment the common law recognized a fundamental individual right to keep and bear arms, subject only to a certain limited police power to regulate the bearing of arms so as not to terrify the good people of the land. 4 Blackstone Commentaries 149.

### B. THE HISTORY OF THE SECOND AMENDMENT

The Second amendment to the United States Constitution provides:

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

The history of the Second Amendment indicates that its purposes were to secure to each individual the right to keep and bear arms so that he could protect his absolute individual rights as well as carry out his obligation to assist in the common defense. It is evident that the framers of the Constitution did not intend to limit the right to keep and bear arms to a formal military body or organized militia, but intended to provide for an "unorganized" armed citizenry prepared to assist in the common defense against a foreign invader or a domestic tyrant. This concept of an unorganized, armed citizenry clearly recognized the right, and moreover the duty, to keep and bear arms in an individual capacity.

One of the gravest decisions faced by the Framers of the Constitution was whether the federal government should be permitted to maintain a standing army. Because of their personal experiences in and prior to the Revolution, the Framers of the Constitution realized that although useful for national defense, a standing army was particularly inimical to the continued safe existence of those absolute rights recognized by Blackstone and generally inimical to personal freedom and liberty.

Unwilling, however, to forego completely the national defense benefits of a standing army, the Framers developed a compromise position. The federal government was granted the authority to "raise and support" an army, subject to the restrictions that no appropriation of money for the army would be for more than two years and civilian control over the army would be maintained. U.S. Constitution, Article I, Section 8, Clause 12. Furthermore, knowing

that the militiaman or citizen soldier had made possible the success of the American Revolution for Independence,[3] the Framers recognized that a militia would provide the final bulwark against both domestic tryanny and foreign invasion. Congress, however, was given only limited authority over the militia; it could "govern . . . [only] such part of the [the militia] as may be employed in the Service of the United States . . .," leaving to the states "the Appointment of the Officers, and the Authority of training the Militia . . ." (emphasis added) U.S. Constitution, Article I, Section 8, Clause 16.

It is evident from the underscored language of Clause 16 that, in addition to that part of the militia over which the Constitution granted Congress authority, there exists a residual, unorganized militia that is not subject to congressional control. The United States Code, in Title 10, Section 311, continues to recognize the distinction between the organized and unorganized militia:

> (a) The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are commissioned officers of the National Guard.
>
> (b) The classes of the militia are: (1) The organized militia, which consists of the National Guard and the Naval Militia; and (2) The unorganized militia which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

This distinction, recognized by the Framers in the Constitution, was first codified in the Militia Act of 1792, which defined both an "organized" militia, and an "enrolled" militia.[4] The unorganized or enrolled militia were not actually in service, but were nonetheless available to assist in the common defense should conditions necessitate either support of the organized militia or possibly defense against internal oppression. As fully explained later, the members of the unorganized militia were expected to be familiar with the use of firearms and to appear bearing their own arms. Obviously, they could be so prepared only if all individuals were guaranteed the right to keep and bear arms.

In his comments on the rights protected by the Constitution, a leading constitutional commentator, in discussing the right protected by the Second Amendment, wrote:

> *The Right is General.* It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrollment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those

> enrolled, the purpose of this guarantee might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. *The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.* But this enables the government to have a well regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies a right to meet for voluntary discipline in arms, observing in doing so the laws of public order. (Emphasis added:) Thomas M. Cooley, LL.D., General Principles of Constitutional Law in the United States of America, 298–299 (3rd ed. 1898).

When the Constitution was sent to the states for ratification, several states, chief among them Virginia, were concerned that in spite of the restrictions written into the main body of the Constitution, a federal standing army might still threaten the hard-won liberties of the people. In Federalist No. 46, written prior to the ratification of the Constitution, James Madison discussed how a federal standing army, which he estimated in 1788 would consist of "one twenty-fifth part of the number able to bear arms," might be checked or controlled:

> To these [the standing army troops] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by [state] governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late successful resistance of this country against the British Arms will be most inclined to deny the possibility of it. *Besides the advantage of being armed, which the Americans possess over the people of almost every other nation.* The existence of subordinate governments to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, . . . the governments [of Europe] are afraid to trust the people with arms. (Emphasis added.)

Alexander Hamilton, too, although more favorably inclined toward a strong central government, feared the detrimental effects on individual liberty that might result from the existence of a federal standing army. He explained in Federalist No. 29 how, under the proposed constitution, a federal standing army could be avoided or at least restrained:

> The attention of the government ought particularly to be directed to the formation of a select corps of moderate size upon such principles as will really fit it for service in case of need. By thus circumscribing the plan it will be possible to have an excellent body of well trained militia ready to take the field whenever the defense of the State shall require it. This will not only lessen the call for military establishments; but if circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people, while there is a large body of citizens little if at all inferior to them in discipline and the use of arms, who stand ready to defend their rights and those of their fellow citizens. This appears to me the only substitute that can be devised for a standing army; the best possible security against it if it should exist.

Hamilton evidently felt that the militia composed of the body of the people would provide a deterrent to a federal standing army or the organized militia, only because the people had the right to keep and bear arms. The states, however, wanted this right to be guaranteed explicitly. A number of them, therefore, proposed amending the Constitution to guarantee an individual right to keep and bear arms.

Consonant with the request of the states, the Congress proposed twelve amendments to the Constitution, one of which concerned the right to keep and bear arms.[5] In its original form, as proposed by James Madison of Virginia, the Second Amendment (the fourth proposed amendment) read:

> 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.

Congressman Elbridge Gerry of Massachusetts opposed the amendment in this form because the provision exempting persons with religious scruples from bearing arms might be used by the federal government arbitrarily to declare an individual religiously scrupulous, thereby denying him the right to bear arms. Gerry offered an amendment modifying the religious exemption to apply only to religious sects and not to individuals. In the course of the floor debate, Gerry discussed the Second Amendment and the purpose of the militia:

> This declaration of rights, I take it, is intended to secure the people against the maladministration of the Government, if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed. Now, I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the Constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.

> What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty. Now, it must be evident that, under this provision, together with their other powers, Congress could take such measures with respect to a militia, as to make a standing army necessary. Whenever Governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was done actually by Great Britain at the commencement of the late Revolution. They used every means in their power to prevent the establishment of an effective militia to the Eastward. The Assembly of Massachusetts, seeing the rapid progrsss that administration were making to devest them of their inherent privileges, endeavored to counteract them by the organization of a militia; but they were always defeated by the influence of the Crown. [Interruption.]
>
> No attempts they made were successful, until they engaged in the struggle which emancipated them at once from their thraldom. Now, if we give a discretionary power to exclude those from militia duty who have religious scruples, we may as well make no provision on this head. For this reason, [I wish] the words to be altered so as to be confined to persons belonging to a religious sect scrupulous of bearing arms. 1 Annals of Congress 749–750 (August 17, 1789).

Gerry plainly understood in making his proposal that one purpose of the amendment was to ensure the existence of the militia composed of the body of the people since the organized militia was subject to federal service; therefore it was necessary to protect the right of all people, that is, each individual, to keep and bear arms.[6] Gerry recognized that only if all individuals, those whose liberties were to be protected, were capable of using arms, could the militia truly serve as the final bulwark against a foreign invader or domestic tyrant. Following Gerry's discussion, the proposed amendment was revised to eliminate any reference to a religious exemption from keeping and bearing arms.

Supporting Gerry's view that the Second Amendment protected an individual right is that the Senate, while also considering the proposed amendments, soundly rejected a proposal to insert the phrase "for the common defense" after the words "bear arms," (1 History of the Supreme Court of the United States, 450 (J. Goebel, Jr. ed. 1971), 2 B. Schwartz, The Bill of Rights: A Documentary History 1153–54 (1971)), thereby emphasizing that the purpose of the Second Amendment was not merely to provide for the common defense, but also to protect the individual's right to keep and bear arms for his own defense and self-preservation.

Not removed from the originally proposed version, however, was the term "well-regulated." Contrary to modern usage, wherein "regulated" is generally understood to mean "controlled" or "governed by rule", in its obsolete form pertaining to troops, "regulated" is defined as "properly disciplined." II Compact Edition, Oxford English Dictionary 2473 (1971). In the Oxford English Dictionary, moreover, the verb "discipline," in its earlier usage, is defined as

"to instruct, educate, train." I Compact Edition, Oxford English Dictionary 741 (1971). Furthermore, as a noun, "discipline," which is etymologically "concerned . . . with practice or exercises," refers to a field of "learning or knowledge" or the "training effect of experience" that, in relation to arms, is defined as "training in the practice of arms . . ." Ibid. Plainly then, by using the term "well regulated," the Framers had in mind not only the individual ownership and possession of firearms but also the voluntary undertaking of practice and training with such firearms so that each person could become experienced with and competent in the use of firearms and thereby be prepared, should the need arise, to carry out his militia obligation. This conclusion is in complete accord with the comment of Thomas M. Cooley, supra, p. 7.

Consistent with this view is a plan drafted by George Mason, the Framer of the Virginia Declaration of Rights and one of the Framers of the Constitution for the inhabitants of Fairfax County, Virginia, in February, 1775, whereby "all the able-bodied Freemen from eighteen to fifty Years of Age" were to "embody [them]selves into a Militia for th[e] County." I Papers of George Mason 215 (U. of N.C. Press, 1970). They did so because they were "thoroughly convinced that a well-regulated militia, composed of the Gentlemen, Freeholders, and other Freemen, is the natural Strength and only safe & stable security of a free Government, & that such Militia will relieve our Mother Country from any Expense in our Protection and Defense, will obviate the Pretence of a necessity for taxing us on that account, and render it unnecessary to keep any standing Army (ever dangerous to liberty) in this Colony . . ." Ibid.

Thus, each subscriber agreed, ". . . we do Each of us, for ourselves respectively, promise and engage to *keep* a good Firelock in proper Order, & to furnish Ourselves as soon as possible with, & *always keep by us*, one Pound of Gunpowder, four Pounds of Lead, one Dozen Gun-Flints, & a pair of Bullet-Moulds, with a Cartouch Box, or powder-horn, and Bag for Balls. That we will use our best Endeavours to perfect ourselves in the Military Exercise & Discipine . . ." (Emphasis added.) Id. at 216.

Finally, the state ratifying conventions provide an excellent insight into the perception of the Framers that the Second Amendment guaranteed to each individual the right to keep and bear arms.

In New Hampshire the ratifying convention advanced a proposal which provided that "Congress shall never disarm *any citizen* unless such as are or have been in Actual Rebellion." (Emphasis added.) Debates in the Federal Convention of 1787 as Reported by James Madison, 658 (Hunt & Scott ed. 1920).

Pennsylvania proposed a provision stating that "the people have the right to bear arms for the defense of themselves, their state, or the United States, and for killing game, and no law shall be enacted for disarming the people except for crimes committed or in a case of real danger of public injury from *individuals* . . ." (Emphasis added.) E. Dumbauld, *The Bill of Rights and What It Means Today* 12 (1957).

And in Massachusetts, Samuel Adams proposed an amendment requiring that the "Constitution be never construed to authorize Congress to . . . prevent the people of the United States, who are

peaceable *citizens* from keeping their *own* arms." (Emphasis added.) Pierce & Hale, Debates of the Massachusetts Convention of 1788 86–87.

The significance of the foregoing history is that the joining of "a well regulated militia" with "the right to keep and bear arms" was a natural and logical result of the experience of the men who had led the Revolution. Only if individuals had the right to keep and bear arms could the people provide for their own defense and self-preservation as well as in their capacity as members of the milita, provide for the common defense from a foreign invader or as a check against the internal usurpation of liberty by a standing army of the central government.

The Bill of Rights must be read in conjunction with the Constitution as an integrated whole. The seven articles comprising the main body of the Constitution establish a form of government and grant that government certain powers to effectuate governance of the United States. The first ten amendments, however, recognize the possibility of abuses against individuals by the government the Constitution established; thus, certain individual rights are guaranteed and protected. The fact that one of those protected and guaranteed rights, the right to keep and bear arms, is joined with language expressing one of its purposes or goals, in no way permits a construction which limits or confines the exercise of that right. To hold otherwise is to violate the principle that the guarantees and protections of the Bill of Rights must be interpreted to give liberty the broadest possible scope and further to turn a blind eye toward the common law and history of the adoption of the Second Amendment. The Supreme Court of Oregon recently recognized this principle by stating:

> We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision, is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.

*State* v. *Kessler,* 289 Or. 359, 614 P.2d 94, 95 (1980).

### C. JUDICIAL INTERPRETATION

A conclusion that the Second Amendment does not guarantee an individual right is not supported by *United States* v. *Miller,* 307 U.S. 174 (1939), or other cases which the Supreme Court and other courts have considered.

In *United States* v. *Cruikshank,* 92 U.S. 542 (1876), the first case in which the Supreme Court had the opportunity to interpret the Second Amendment, the court recognized that the right of the people to keep and bear arms existed prior to the Constitution by stating that such a right "is not a right granted by the Constitution . . . [n]either is it in any manner dependent upon that instrument for its existence." 92 U.S. at 553. The indictment charged, inter alia, a conspiracy by Klansmen to prevent and hinder blacks from exercising their civil rights, including the bearing of arms for

lawful purposes. The Court held, however, that the Second Amendment guaranteed that the right to keep and bear arms shall not be infringed by Congress and hence did not apply to the instant case since the violation alleged was by fellow-citizens, not the federal government.

In *Presser* v. *State of Illinois*, 116 U.S. 252 (1886), although the Supreme Court affirmed the holding in *Cruikshank*, i.e. that the Second Amendment applied only to action by the federal government, it apparently found the states without power to infringe upon the right to keep and bear arms, stating at 265:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and in view of this prerogative of the general government, as well as of its general powers, *the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security and disable the people from performing their duty to the general government.* (Emphasis added.)

The idea of the armed people maintaining "public security" mentioned in this passage from *Presser*, was based on the common law concept that loyal individuals had the right and duty to resist malefactors and the disloyal, such as robbers and burglars, and to use deadly force, if necessary, to do so. The Second Amendment thus also contemplates the right of the people to keep and bear arms so as to be continuously able to maintain the "security of a free State" by aiding in the enforcement of criminal laws such as by making citizens' arrests and aiding peace officers in arresting malefactors. Joyce Lee Malcolm, Disarmed: The Loss of the Right to Bear Arms in Restoration England, p. 5 (Cambridge: The Mary Ingraham Bunting Institute of Radcliffe College, 1980). *Rex* v. *Compton*, 22 Liber Assisarum (Book of Assizes 1347) placitum 55, trans. in J.H. Beale, Jr., A Selection of Cases and other Authorities Upon Criminal Law, p. 501 (2d ed. 1907). E. Coke Institutes of the Laws of England at 56 (1648). Bohlen and Shulman, Arrest With and Without A Warrant, 75 U.Pa.L.Rev. 485, 497 (1927).

In *United States* v. *Miller*, supra, decided in 1939, the only case in which the Supreme Court has had the opportunity to apply the Second Amendment to a federal firearms statute, the Court carefully avoided making an unconditional finding of the statute's constitutionality; it instead devised a standard by which federal statutes relating to firearms are to be judged. The holding of the Court in *Miller*, however, should be viewed as only a partial guide to the meaning of the Second Amendment [77] primarily because neither defense counsel nor defendants appeared before the Supreme Court, nor was any brief filed on their behalf giving the Court the benefit of argument supporting the trial court's holding that Section 11 of the National Firearms Act was unconstitutional. As a result of the absence of the normal adversarial process, the Court was presented with only the prosecution's view of the Second Amendment, a view which, needless to say, was in favor of the constitutionality of Section 11 of the National Firearms Act. In

spite of this severe and critical limitation on its decision-making process, the Court's decision in some degree took account of the common law view of the right to keep and bear arms as well as the historical background of the Second Amendment.

The heart of the Court's ruling is found at the beginning of the opinion; it states:

> *In the absence of any evidence* tending to show that possession or use of a "shotgun having a barrell of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. (Emphasis added.) 307 U.S. at 178.

Two independent thoughts are expressed here: one, that for the keeping and bearing of a firearm to be constitutionally protected, that firearm's possession or use must have some reasonable relationship to the preservation of a well regulated militia; and two, that in this case, the Court would not take judicial notice that a short-barrelled shotgun met such a test. It remanded the case to the trial court for the taking of evidence on that question. [8] The Court's first point, that the right to keep and bear an arm is dependent on the firearm's military value, is faulty, however, because the Court failed to consider fully the common law (see section B above), and misinterpreted cited authorities. Rather, the Court only briefly discussed the common law and, moreover, did not consider the history of the adoption of the Second Amendment, both of which support the proposition that the Second Amendment guarantees and protects a fundamental individual right. As to the misinterpretation of cited authorities, a result undoubtedly of the one-sided argument, one important example should suffice.

In support of its position that the Second Amendment's protection and guarantee was limited to "ordinary military equipment" or weapons whose use "could contribute to the common defense," the Court cited one case, *Aymette* v. *State,* 21 Tenn. 154 2 Humph. 154 (1840). In *Aymette,* however, the Tennessee Supreme Court was construing not the Second Amendment but the provision of Tennessee's constitution guaranteeing the right to keep and bear arms, a provision which, unlike the Second Amendment, spoke of each citizen's right to keep and bear arms only as it related to the common defense. The Tennessee court thus reasoned that not all objects which could conceivably be used as weapons were protected by the Tennessee Constitution, but only those weapons "such as usually employed in civilized warfare." Id. at 158. This limitation is not, however, applicable to the Second Amendment since the First Congress, while debating what ultimately became the Second Amendment, emphatically rejected the "common defense" language upon which the *Aymette* decision turned. It is plain, therefore, that the interpretation of the Second Amendment in *Miller* is more limited than it should be and that the Second Amendment protects the keeping and bearing of all types of arms which could

be carried by individuals. Moreover, the rejection of the "common defense" limitation signified the Framers' intention that the constitutional guarantee of the right to keep and bear arms was not inextricably tied to a militia nexus, but existed independently of it. Even accepting, however, that a militia or common defense nexus was necessary, *Aymette* went on to say that, "The citizens have an unqualified right to keep the weapon." Id. at 160.

One other comment should be made about *Aymette*. What Judge Green was discussing when he said that the legislature could pass laws concerning arms was that laws could be enacted which would punish the misuse of such arms. As an example, Judge Green noted that the legislature could punish a set of ruffians for entering a theatre or a church with drawn swords, guns, and fixed bayonets to the terror of the audience; he went on to observe, moreover, that "the citizens have an unqualified right to keep the weapon" and to bear it except to "terrify the people, or for purposes of private assassination." Id. at 160.

One of the chief values of the *Miller* opinion is its discussion of the development and structure of the militia which, the Court pointed out, consisted of "all males physically capable of acting in concert for the common defense" and that "when called for service these men were expected to appear bearing arms *supplied by themselves* and of the kind in common use at the time." (Emphasis added.) 307 U.S. at 179. The other significant value of *Miller* is its implicit rejection of the view that the Second Amendment guarantees the right to keep and bear arms only to those individuals who are members of the militia. Had the Court reviewed the Second Amendment as guaranteeing the right to keep and bear arms only to "all males physically capable of acting in concert for the common defense" it would certainly have discussed whether Miller met the qualifications for inclusion in the militia as it did with regard to the military value of a short-barrelled shotgun. That it did not signifies the Court's acceptance of the fact that the right to keep and bear arms is guaranteed to each individual without regard to his relationship with the militia.

The *Miller* Court examined in detail, at pages 179-182, not only the duty to assist in the common defense but indeed the legal obligation each individual then had to possess the arms necessary to undertake that common defense. For example, in Massachusetts there were laws which levied fines and penalties against adult males who failed to possess arms and ammunition. In Virginia and New York all males of certain ages were required to own and possess their own firearms at their own expense, and to appear bearing said arms when so notified.

It is clear that *Miller*, for all its shortcomings and limitations, supports the view that the Second Amendment protects and guarantees a fundamental individual right to keep and bear arms, subject to the restriction that only a certain category or categories of arms may, of right, be individually owned and possessed, i.e. those arms whose possession or use are reasonably related to the preservation or efficiency of the militia. As aptly put by Mr. Justice Black, in discussing *Miller* and the Second Amendment, "although the Supreme Court has held this amendment to include only arms necessary to a well-regulated militia, as so construed its

prohibition is absolute." Black, The Bill of Rights, 35 N.Y.U.L. Rev. 865, 873 (1960). [9]

In *United States* v. *Tot*, 131 F.2d 261 (3rd Cir. 1942), the Third Circuit cited *Miller* in upholding the conviction under the Federal Firearms Act of a felon for possessing a pistol which had traveled in interstate commerce. [10]

The Third Circuit did not deny that individuals have the right to keep and bear arms; it merely stated, in dicta, its view that the Second Amendment was adopted as a protection for the states in the maintenance of their militia organizations against possible encroachments by the federal power. The heart of the Third Circuit's holding is that it was entirely reasonable for Congress to prohibit the receipt of weapons from interstate transactions by persons who have previously by due process of law been shown to be aggressors against society and that this classification did not infringe upon the preservation of the well-regulated militia protected by the Second Amendment.

The Court could have gone on to point out that the maintenance of the militias of the states is dependent upon the right of individuals, who may be called upon to serve in the militias, to keep and bear arms.

In *Cases* v. *United States*, 131 F.2d 916 (1st Cir. 1942), the First Circuit upheld the constitutionality of the Federal Firearms Act of 1938. In so doing it observed that apparently under *Miller* although the federal government could *limit* the keeping and bearing of arms by a certain type of individual, it could not

> . . . *prohibit* the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia. (emphasis added) 131 F.2d at 922,

a distinction arising from *Miller's* holding that the protections of the Second Amendment are limited to those firearms with a militia nexus. The Court indicated its unwillingness to accept the broad reach of *Miller* when it reasoned that it was already outdated because in "commando units" some sort of military use seems to have been found for almost any modern, lethal weapon. If this were true, concluded the court, the protection of the Second Amendment as set forth in *Miller* would be absolute except for antique weapons which have no modern military use since, as the court accurately observed, ". . . almost any other [weapon] might bear some reasonable relationship to the preservation or efficiency of a well regulated militia unit of the present day . . ." Id. at 922.

The First Circuit failed to consider the unambiguous wording of the Second Amendment in reaching its conclusion. The Second Amendment speaks not only of the right to keep arms, but to bear them as well, implying that the category of arms, the possession of which is protected, is limited to those arms that an ordinary individual can bear and does not extend to weapons such as cannons, trench mortars, and antitank guns, which cannot be carried by an ordinary individual. Also not protected are instrumentalities such as bombs which, although conceivably they could be carried by a single individual, are not arms in the sense used in the Second Amendment; rather, the historically and constitutionally protected

arms are those such as muskets, shotguns, rifles and pistols, which are ordinarily possessed by private individuals. To argue, ad absurdum, as the *Cases* court did, that all weapons are protected by the Second Amendment overlooks the fact that the Framers of the Bill of Rights were fully aware of the existence of heavier, horse-drawn and crew served arms which the individual was physically incapable of bearing. Had framers of the Bill of Rights intended to protect all weapons, they would not have linked the right to bear arms with the right to keep arms.[11]

Since, however, the Supreme Court did not review the *Cases* decision, *Miller* persists as that Court's guidance to the interpretation of the Second Amendment.

It is clear, therefore, based on analysis of the decided cases, the common law, and the history of the Second Amendment that the Second Amendment guarantees an individual's right to keep and bear arms.

### D. THE RIGHT TO SELF-DEFENSE

The right to keep and bear arms is inextricably connected to the individual's absolute and inalienable right of self-defense which is, of course, derived from the Natural Law.

As referred to earlier, Blackstone clearly recognized as a natural right that of keeping and using arms for "resistance and self-preservation." I *Blackstone Commentaries* 144. The basic right to defend one's person with deadly force has, moreover, been recognized by the Supreme Court, *Beard* v. *United States,* 158 U.S. 550 (1895) and every state in the union. For example, in *State* v. *Dawson,* 272 N.C. 535, 159 S.2d, 1, 9 and 11 (1968), the Supreme Court of North Carolina, in interpreting a provision of that state's constitution which tracked the language of the Second Amendment, held that the individual right of self-defense was assumed by the Framers, and that any statute or construction of a common law rule which would amount to a destruction of the right to bear arms would be unconstitutional. Also, the *State* v. *Kessler,* supra, the court noted that "the necessity of self protection in a frontier society also was a factor" in guaranteeing the right to keep and bear arms.

The right to defend one's person is so fundamental that it was not set forth in the constitution but certainly exists as one of those rights included in the penumbra of unwritten rights surrounding the First, Second, Third, Fourth, Fifth, and Ninth Amendments. It is manifestly an inalienable right, incapable of surrender to the central government and encompassed by the Ninth Amendment as retained by the people.

*II. Antebellum judicial construction*

In the period from the adoption of the constitution to the War Between the States, keeping and bearing arms was treated as a virtually unquestioned right of each individual. The fundamental right to have arms was based in part on the political lessons of the Revolutionary experience. "None but an armed nation can dispense with a standing army," Jefferson wrote in 1803. "To keep ours armed and disciplined, is therefore at all times important." The

Jefferson Cyclopedia 553 (1900). In 1814, Jefferson further observed that "we cannot be defended but by making every citizen a soldier, as the Greeks and Romans who had no standing armies." Id. at 551. In addition to the prevention of aggression from domestic tyranny or foreign invasion, individual possession of arms functioned to provide a basic means of self-defense, as well as of subsistence for hunters.

That the Second Amendment secured an individual right to keep and bear arms was not an issue for partisan politics, and the courts fairly consistently so held. The major exception to this rule appeared in the context of slavery. Specifically, to disarm slaves as well as black freemen, certain courts originated the views that the guarantee was limited to citizens rather than to all people and that the Second Amendment did not restrain the states. The exceptions were aberrations to prevent black freedom, as most courts which analyzed the Second Amendment regarded all individuals as having the right and construed it as a restraint on state infringement.

### A. JUDICIAL COMMENTARIES

Although Federalist and Republican differences in interpretation of the Constitution appeared early in judicial thought on subjects as diverse as the general welfare clause and the right of free speech, these points of divergence did not arise with respect to the Second Amendment. William Rawle, one of the first commentators on the Second Amendment, analyzed its two basic clauses in some detail:

> In the second article, it is declared, that a *well regulated militia is necessary to the security of a free state;* a proposition from which few will dissent. Although in actual war, the services of regular troops are confessedly more valuable; yet, while peace prevails, and in the commencement of a war before a regular force can be raised, the militia form the palladium of the country. They are ready to repel invasion, to suppress insurrrection, and preserve the good order and peace of government. . . .
>
> The corollary, from the first position, is, that the right of the people to keep and bear arms shall not be infringed.
>
> The prohibition is general. No clause in the Constitution could by any 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 any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.

W. Rawle, A view of the Constitution, 125–56 (1829).

Rawle's analysis stresses the significance of the first clause of the Second Amendment as an imperative for a militia system as opposed to a standing army. Clause two is then treated both in its linkage to clause one in that the individual right to keep and bear arms encourages a militia system, and independently as recognition of a fundamental right to have arms unrestrained by state no less than federal legislation. In negative remarks on English policy,

Rawle also clarified that the right to have arms is deemed more absolute in America than Britian, and that the Second Amendment protects individual use of arms for non-militia purposes such as hunting.

St. George Tucker, a veteran of the Revolutionary War and an early Justice of the Supreme Court of Virginia, followed Blackstone closely in regard to the common law right to have arms, at the same time stressing the more absolute character of the right under American law:

> The right of bearing arms—which with us is not limited and restrained by an arbitrary system of game laws as in England; but, is practically enjoyed by every citizen, and is among his most valuable privileges, since it furnishes the means of resisting as a freeman ought, the inroads of usurpation. . . . I St. Geo. Tucker, Commentaries on the Laws of Virginia, 43 (1831).

In addition to his explicit characterization of keeping and bearing arms as an individual right, elsewhere Justice Tucker distinguished the language of the English Bill of Rights that subjects may have arms for their defense, "suitable to their condition and degree, and such as are allowed by law," from the Second Amendment, wherein the right to have arms exists "without any qualification as to their condition or degree, as in the case of the British government." I *Blackstone Commentaries* *144 n. 40 (St. Geo. Tucker, ed. 1803).

### B. STATE CASES

A provision of the Kentucky Constitution, "The right of the citizens to bear arms in defense of themselves and the state, shall not be questioned," provided the occasion for perhaps the first state judicial opinion on the nature and source of the right to bear arms. *Bliss* v. *Commonwealth*, 2 Litt. (Ky.) 90, 13 Am. Dec. 251 (1822). Defendant appealed his conviction for having worn a sword cane by asserting the unconstitutionality of an act prohibiting concealed weapons. The court held, "Whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution." Id. at 91-92. Observing that wearing concealed weapons was considered a legitimate practice when the constitutional provision was adopted, the court reasoned:

> The right existed at the adoption of the constitution; it had then no limits short of the moral power of the citizens to exercise it, and in fact consisted in nothing else but in the liberty of the citizens to bear arms. Diminish that liberty, therefore, and you necessarily restrain the right; and such is the diminution and restraint, which the act in question most indisputably imports, by prohibiting the citizens wearing weapons in a manner which was lawful to wear when the constitution was adopted. Id. at 92.[12]

Whether carrying and wearing dangerous weapons constituted an affray at common law was the issue in the Tennessee case of *Simpson* v. *State*, 13 Tenn. Reports (5 Yerg.) 56 (1833). The Court

answered in the negative, citing Blackstone for the proposition that violence which terrifies the people must also be present. The government cited Serjeant Hawkins, Pleas of the Crown, Bk. 1, ch. 28, sec. 4, regarding the Statute of Northampton, 2 Edw. 3, c.3(1328), that an affray could exist where one is armed with unusual weapons which naturally cause terror to the people, but the court rejected those "ancient English statutes, enacted in favour of the king, his ministers, and other servants" which provided that "no man . . . except the king's servants, & c. shall go or ride armed by night or by day." 13 Tenn. Reports (5 Yerg.) 358 (1833). The court seemed resentful of royal privilege in noting that the same source adds "persons of quality are in no danger of offending against this statute by wearing their common weapons" and, while rejecting the existence of a common law abridgement of the right to bear arms (*Id.* at 359), argued in the alternative that any such abridgement would be abrogated by the state constitution, which provided "that the freemen of this State have a right to keep and bear arms for their common defense."

> By this clause of the constitution, an express power is given and secured to all the free citizens of the State to keep and bear arms for their defense, without any qualification whatever as to their kind or nature. . . . *Id.* at 360.

The classic antebellum opinion which held that the Second Amendment protects an individual right from both state and federal infringement, but that the manner in which arms could be borne was a proper subject for regulation, was *Nunn* v. *State,* 1 Ga. 243 (1846). An ambiguous Georgia statute proscribed breast pistols, but not horseman's pistols, which were not worn openly. While upholding the proscription of concealed weapons, the court said that the state constitutions "confer no *new rights* on the people which did not belong to them before," that no legislative body in the Union could deny citizens the privilege of being armed to defend self and country, and that the colonial ancestors had this right which "is one of the fundamental principles, upon which rests the great fabric of civil liberty. . . ." Id. at 249.

Anticipating twentieth century selective incorporation by referring to the First, Fourth, Fifth, and Sixth Amendments as binding on both state and federal governments, the court reasoned:

> The language of the second amendment is broad enough to embrace both Federal and state government—nor is there anything in its terms which restricts its meaning. . . . Is this a right reserved to the States or to themselves? Is it not an unalienable right, which lies at the bottom of every free government? We do not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures. This right is too dear to be confided to a republican legislature. Id. at 250.

The Georgia court explained the relation between individual arms possession and the militia by reference to the fact that "in order to train properly that militia, the unlimited right of the people to keep and bear arms shall not be impaired," (*Id.* at 251),

and added that both constitutional and natural rights were at stake. Contending that the state governments were prohibited from violating the rights to assembly and petition, against unreasonable searches and seizures, to an impartial jury in criminal prosecutions, and to assistance of counsel, the court continued:

> Nor is the right involved in this discussion less comprehensive or valuable: "The right of the people to bear arms shall not be infringed." 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 such merely as are used by the militia, shall not be infringed, curtailed or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this right. . . . Id. at 251.

In the Texas case of *Cockrum* v. *State*, 24 Tex. 394 (1859), the Court explained that the object of the Second Amendment was that "the people cannot be effectually oppressed and enslaved, who are not first disarmed." Id. at 401, and added:

> The right of a citizen to bear arms, in lawful defense of himself or the State, is absolute. He does not derive it from the State government. It is one of the "high powers" delegated directly to the citizen, and "is excepted out of the general powers of government." A law cannot be passed to infringe upon or impair it, because it is above the law, and independent of the lawmaking power. Id. at 401-402.

### C. SLAVERY AND THE DRED SCOTT DILEMMA

Despite the general rule in the antebellum courts that the Second Amendment guaranteed an individual right to keep and bear arms free from both federal and state infringement, to disarm blacks a few courts took the view that only citizens could have arms and that the Second Amendment did not apply to the states. In some states, free and slave blacks were disarmed by law to maintain their servile condition. State legislation which prohibited arms bearing by blacks was held to be constitutional owing to the lack of status of African Americans as citizens, despite the fact that the United States Constitution and most state constitutions referred to arms bearing as a right of "the people" rather than "the citizen."

In *State* v. *Newsom*, 27 N.C. 203 (1844), the Supreme Court of North Carolina upheld "an act to prevent free persons of color from carrying fire arms" on the ground that "the free people of color cannot be considered as citizens." Id. at 204. The court also stated: "in the second article of the amended Constitution, the States are neither mentioned nor referred to. It is therefore only restrictive of the powers of the Federal Government." Id. at 207. In *Cooper* v. *Savannah*, 4 Ga. 72 (1848), Georgia found its similar provision constitutional on the following logic: "Free persons of

color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office." Id. at 72.

The practical hardships suffered by individual blacks due to restrictive legislation is exemplified in *State* v. *Hannibal*, 51 N.C. (6 Jones) 57 (1859), which indicates that in the eighteenth century it was not illegal for a black to carry guns, but he was required to obtain a court certificate to hunt. An enactment in 1854 provided that "no slave shall go armed with a gun, or shall keep such weapons," with a penalty of up to 39 lashes. Id. at 57. In this instance, a master had given two slaves guns to guard his store at night, and the slaves were sentenced to twenty lashes each. Id. at 57.

Just as virtually the only antebellum state cases which limited the right to have arms functioned to disarm blacks, the ruling of the U.S. Supreme Court in *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857), conceded that if members of the African race were "citizens," they would be "entitled to the privileges and immunities of citizens" and would be exempt from special "police regulations" applicable to them.

> It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies . . .; and it would give them full liberty of speech . . .; to hold public meetings upon political affairs, and *to keep and carry arms wherever they went.* (emphasis added) 60 U.S. at 417.

It is clear, therefore, that the Supreme Court included among the rights of every citizen the right to have arms wherever he goes; it is equally evident that in granting citizenship to African Americans by Amendments XIII and XIV, blacks were later guaranteed the fundamental rights of citizens. The Court's language also suggests that the right to have and carry arms anywhere is a right of national citizenship which the states cannot infringe any more than can the federal government—that the Second Amendment applies to the states.

Explaining further the rights of citizens, Chief Justice Taney observed that:

> The Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully, deny any right which it has reserved. . . . Nor can Congress deny the people the right to keep and bear arms, nor the right to trial by jury, nor compel anyone to be a witness against himself in a criminal proceeding. 60 U.S. at 450.

III. The Framers of the fourteenth amendment intended that the guarantees of the second amendment would be applied to the States

After the War Between the States, judicial commentators continued to interpret the Second Amendment as protecting an individual right from both state and federal infringement. The right to keep and bear arms and other Bill of Rights freedoms were viewed

as common law rights explicitly protected by the Constitution. T. Farrar, Manual of the Constitution, 59, 145 (1867). Joel P. Bishop wrote in 1865:

> The constitution of the United States provides, that, "a well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." This provision is found among the amendments; and; though most of the amendments are restrictions on the General Government alone, not on the States, this one seems to be of a nature to bind both the State and National legislatures. II J. Bishop, Commentaries on the Criminal Law, Section 124 (1865).

Yet Bishop's references to "statutes relating to the carrying of arms by negroes and slaves" (II J. Bishop, supra, n. 2, at 120, n. 6), and to an "act to prevent free people of color from carrying firearms" (*Id.* at 125, n. 2) exemplified the need for further constitutional guarantees to clarify and protect the rights of all individuals.

### A. FIREARMS AND THE ABOLITION OF SLAVERY

Having won their national independence from England through armed struggle, post-Revolutionary War Americans were acutely aware that the sword and sovereignty go hand-in-hand, and that distribution of firearms among the oppressed ushered in a new epoch in the human struggle for freedom. Furthermore, both proponents and opponents of slavery were cognizant that an armed black population meant the abolition of slavery, although some blacks were trusted with arms to guard property, for self defense, and for hunting. This sociological fact explained not only the legal disarming of blacks, but also the advocacy of a weapons culture by abolitionists. Having employed the instruments for self-defense against his pro-slavery attackers, abolitionist and Republican Party founder Cassius Marcellus Clay wrote that " 'the pistol and the Bowie knife' are to us as sacred as the gown and the pulpit." 7 The Writings of Cassius Marcellus Clay, 257 (H. Greeley ed. 1848).

### B. THE CIVIL RIGHTS ACT OF 1866

After the Civil War, the slave codes, which limited access of blacks to land, to arms, and to the courts, began to reappear in the form of black codes, (W. DuBois, Black Reconstruction in America, 167, 172, and 223 (1962); E. Coulter, The South During Reconstruction 40 (1947)) and United States legislators turned their attention to the protection of the freedmen. In support of Senate Bill No. 9, which declared as void all laws in the rebel states which recognized inequality of rights based on race, Sen. Henry Wilson (R., Mass.) explained in part: "In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them. . . ." Cong. Globe, 39th Cong., 1st Sess., pt. 1, 40 (Dec. 13, 1865).

When Congress took up Senate Bill No. 61, which became the Civil Rights Act of 1866, (14 Stat. 27 (1866)) Sen. Lyman Trumbull (R., Ill.), Chairman of the Senate Judiciary Committee, indicated

that the bill was intended to prohibit inequalities embodied in the black codes, including those provisions which "prohibit any negro or mulatto from having fire-arms." Cong. Globe, 39th Cong., 1st Sess., pt. 1, 474 (Jan. 29, 1866). In abolishing the badges of slavery, the bill would enforce fundamental rights against racial discrimination in respect to civil rights, the rights to contract, sue and engage in commerce, and equal criminal penalties. Sen. William Saulsbury (D., Delaware) added:

> In my State for many years, and I presume there are similar laws in most of the southern states, there has existed a law of the State based upon and founded in its police power, which declares that free negroes shall not have the possession of firearms or ammunition. This bill proposes to take away from the States this police power. . . ." Id. at 474.

The Delaware Democrat opposed the bill on this basis, anticipating a time when "a numerous body of dangerous persons belonging to any distinct race" endangered the state, for "the State shall not have the power to disarm them without disarming the whole population." Id. at 478. Thus, the bill would have prohibited legislative schemes which in effect disarmed blacks, but not whites. Still, supporters of the bill were soon to contend that arms bearing was a basic right of citizenship or personhood.

In the meantime, the legislators turned their attention to the Freedman's Bureau Bill. Rep. Thomas D. Eliot (R., Mass.) attacked an Opelousas, Louisiana ordinance which deprived blacks of various civil rights, including the following provision: "No freedman who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons, within the limits of the town of Opelousas without the special permission of his employer . . . and approved by the mayor or president of the board of police." Id. at 517 (Jan. 30, 1866). And Rep. Josiah B. Grinnell (R., Iowa) complained: "A white man in Kentucky may keep a gun; if a black man buys a gun he forfeits it and pays a fine of five dollars, if presuming to keep in his possession a musket which he has carried through the war." Id. at 651 (Feb. 5, 1866).

As debate returned to the Civil Rights Bill, Rep. Henry J. Raymond (R., N.Y.) explained of the rights of citizenship: "Make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States under the laws and Constitution of the United States. . . . He has a defined status; he has a country and a home; a right to defend himself and his wife and children; a right to bear arms. . . ." Id., pt. 2, 1266 (Mar. 8, 1866). Rep. Roswell Hart (R., N.Y.) concluded that it was the duty of the United States to guarantee that the states have a republican form of government, "A government . . . where 'no law shall be made prohibiting a free exercise of religion;' where 'the right of the people to keep and bear arms shall not be infringed;' . . ." Id. at 1629 (Mar. 24, 1866).

Rep. Sidney Clarke (R., Kansas) objected to an 1866 Alabama law providing: "That it shall not be lawful for any freedman, mulatto, or free person of color in this State to own firearms, or carry about his person a pistol or other deadly weapon." Id. at 1838 (April 7,

1866). Clarke also attacked Mississippi, "whose rebel militia, upon the seizure of the arms of black Union soldiers, appropriated the same to their own use." Id. at 1838.

> Sir, I find in the Constitution of the United States an article which declares that "the right of the people to keep and bear arms shall not be infringed," For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in ther local laws. . . . Id. at 1838.

### C. THE FOURTEENTH AMENDMENT

The need for a more solid foundation for the protection of freedmen as well as white citizens was recognized, and the result was a significant new proposal—the Fourteenth Amendment. A chief exponent of the amendment, Sen. Jacob M. Howard (R., Mich.), referred to the "personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press; . . . *the right to keep and to bear arms. . .* " [*emphasis added*] Cong. Globe, 39th Cong. 1st Sess. pt. 3, 2765 (May 23, 1866). Adoption of the Fourteenth Amendment was necessary because these rights were not then effectively guaranteed against state legislation. "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." Id. at 2766.

The Fourteenth Amendment was viewed as necessary to buttress the objectives of the Civil Rights Act of 1866. Rep. George W. Julian (R., Ind.) noted that the act

> Is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. South Carolina has the same enactments. . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact. Id. at pt. 4, 3210 (June 15, 1866.)

### D. THE ANTI-KKK ACT

Within three years of the adoption of the Fourteenth Amendment in 1868, Congress was considering enforcement legislation to suppress the Ku Klux Klan. The famous report by Rep. Benjamin F. Bulter (R., Mass.) on violence in the South assumed that the right to keep arms was necessary for protection not only against the militia, but also against local law enforcement agencies. Noting instances of "armed confederates" terrorizing the negro, the report stated that "in many counties they have preceded their outrages upon him by disarming him, in violation of his right as a citizen to 'keep and bear arms,' which the Constitution expressly says shall never by infringed," 1464 H.R. Rep. No. 37, 41st Cong., 3rd Sess. 3 (Feb. 20, 1871). The congressional power based on the Fourteenth Amendment to legislate to prevent states from depriving any U.S. citizen of life, liberty, or property accounted for the following provision of the committee's anti-KKK bill:

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> That whoever shall, without due process of law, by violence, intimidation, or threats, take away or deprive any citizen of the United States of any arms or weapons he may have in his house or possession for the defense of his person, family, or property, shall be deemed guilty of a larceny thereof, and be punished as provided in this act for a felony. Cong. Globe, 42nd Cong., 1st Sess., pt. 1, 174 (Mar. 20, 1871).

Rep. Butler explained the purpose of this provision in these words:

> Section eight is intended to enforce the well-known constitutional provision guaranteeing the right in the citizen to 'keep and bear arms,' and provides that whoever shall take away, by force or violence, or by threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed guilty of larceny of the same. This provision seemed to your committee to be necessary, because they had observed that, before these midnight marauders made attacks upon peaceful citizens there were very many instances in the South where the sheriff of the county had preceded them and taken away the arms of their victims. This was specially noticeable in Union County, where all the negro population were disarmed by the sheriff only a few months ago under the order of the judge. . . .; and then, the sheriff having disarmed the citizens, the five hundred masked men rode at night and murdered and otherwise maltreated the ten persons who were in jail in that county. H.R. Rep. No. 37, supra, note 38, at 7-8.

The bill was referred to the Judiciary Committee, and when later reported as H.R. No. 320 the above section was deleted—undoubtedly because its proscription extended to simple individual larceny over which Congress had no constitutional authority, and because state or conspiratorial action involving the disarming of blacks would be covered by more general provisions of the bill. Supporters of the rewritten anti-KKK bill continued to show the same concern over the disarming of freedmen as they had prior to the adoption of the Fourteenth Amendment. Sen. John Sherman (R., Ohio) stated the Republican position: "Wherever the negro population preponderates, there they [the KKK] hold their sway, for a few determined men. . . can carry terror among ignorant negroes . . . without arms, equipment, or discipline." Cong. Globe, 42nd Cong. 1st Sess., pt. 1, 154 (Mar. 18, 1871).

Further comments clarified that the right to arms was a necessary condition for the right of free speech. Sen. Adelbert Ames (R., Miss.) averred: "In some counties it was impossible to advocate Republican principles, those attempting it being hunted like wild beasts; in others, the speakers had to be armed and supported by not a few friends." Id. at 196. (Mar. 21, 1871). Rep. William L. Stoughton (R., Mich.) added: "If political opponents can be marked for slaughter by secret bands of cowardly assassins who ride forth with impunity to execute the decrees upon *the unarmed and de-*

*fenseless,* it will be fatal alike to the Republican party and civil liberty." [Emphasis added] Id. at 321 (Mar. 28, 1871).

Section 1 of the bill, which was taken partly from Section 2 of the Civil Rights Act of 1866, and survives today as 42 U.S.C. 1983 was meant to enforce Section 1 of the Fourteenth Amendment by establishing a remedy for deprivation under color of state law of federal constitutional rights of all people, not only former slaves. This portion of the bill provided:

> That any person who, under color of any law, statute, ordinance, regulation, custom or usage of any State shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities to which . . . he is entitled under the Constitution or laws of the United States, shall . . . be liable to the party injured in an action at law, suit in equity, or other propoer proceeding for redress . . . Id. pt. 2. Appendix, 68. 17 Stat. 13 (1871).

Rep. Washington C. Whitthorne (D., Tenn.), who complained that "in having organized a negro militia in having disarmed the white man," the Republicans had "plundered and robbed" the whites of South Carolina through "unequal laws," objected to Section 1 of the anti-KKK bill on these grounds.

> It will be noted that by the first section suits may be instituted without regard to amount or character of claim by any person within the limits of the United States who conceives that he has been deprived of any right, privilege, or immunity secured him by the Constitution of the United States, under color of any law, statute, ordinance, regulation, custom, or usage of any State. This is to say, that if a police officer of the city of Richmond or New York should find a drunken negro or white man upon the streets with a loaded pistol flourishing it, &c., and by virtue of any ordinance, law or usage, either of city or State, he takes it right away, the officer may be sued, *because the right to bear arms is secured by the Constitution,* and such suit brought in distant and expensive tribunals. [Emphasis added] Cong. Globe, 42nd Cong., 1st Sess., pt. 1, 337 (Mar. 29, 1871).

The Tennessee Democrat assumed that the right to bear arms was absolute, deprivation of which created a cause of action against state agents under Section 1 of the anti-KKK bill. In the minds of the bill's supporters, however, the Second Amendment as incorporated in the Fourteenth Amendment recognized a right to keep and bear arms safe from state infringement, not a right to commit assault or otherwise engage in criminal conduct with arms by pointing them at people or brandishing them so as to endanger others. Contrary to the congressman's exaggerations, the proponents of the bill had the justified fear that the opposite development would occur, i.e. that a black or white man for political reasons would be unconstitutionally deprived of his right to possess arms by state action. Significantly, none of the representative's colleagues disputed his statement that state agents could be sued

under the predecessor to Section 1983 for deprivation of the right to keep arms.

Debate over the anti-KKK bill naturally required exposition of Section 1 of the Fourteenth Amendment, and none was better qualified to explain that section than its draftsman, Rep. John A. Bingham (R., Ohio):

> Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States . . . .
>
> These eight articles . . . never were limitations upon the power of the States, until made so by the fourteenth amendment. The words of that amendment, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" are an express prohibition upon every State of the Union . . . . Id. at pt. 2, Appendix 84 (Mar. 31, 1871).

This is a most explicit statement of the incorporation thesis by the architect of the Fourteenth Amendment. Although he based the incorporation on the Privileges and Immunities Clause and not the Due Process Cause as have subsequent courts of selective incorporation, Rep. Bingham could hardly have anticipated the judicial metaphysics of the twentieth century in this respect. In any case, whether based on the Due Process Cause or on the Privileges and Immunities Clause, the legislative history supports the view that the incorporation of Amendments I-VIII was clear and unmistakable in the minds of the legislators attempting to effectuate the provision of the Fourteenth Amendment.

Rep. Henry L. Dawes (R. Mass.) also asserted the incorporation thesis when he argued:

> The rights, privileges and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject-matter of this bill. . . .
>
> In addition to the original rights secured to him in the first article of amendments he had secured the free exercise of his religious belief, and freedom of speech and of the press. Then again he has secured to him the *right to keep and bear arms in his defense*. . . . [Dawes then summarizes the remainder of the first eight amendments.]
>
> And still later, sir, after the bloody sacrifice of our four years' war, we gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens. . . .
>
> [I]t is to protect and secure to him in these rights, privileges, and immunities this bill is before the House. [emphasis added] *Cong. Globe*, 42nd Cong., 1st. Sess., pt. 1, 475-476 (April 5, 1871).

## E. THE CIVIL RIGHTS ACT OF 1875

After passage of the anti-KKK bill, discussion concerning arms persisted as interest developed toward what became the Civil Rights Act of 1875, now 42 U.S.C. 1984. A report on affairs in the South by Sen. John Scott (R., Penn.) indicated the need for further enforcement legislation: "negroes who were whipped testifed that those who beat them told them they did so because they had voted the radical ticket, and in many cases made them promise that they would not do so again, and wherever they had guns took them from them." 1484 S. Rep. No. 41, 42nd Cong., 2nd Sess., pt. 1, 35 (Feb. 19, 1872).

Following the introduction of the Civil Rights Bill the debate over the meaning of the Privileges and Immunities Clause returned. Sen. Matthew H. Carpenter (R., Wisc.) cited *Cummings* v. *Missouri*, 71 U.S. 277, 321 (1866) a case contrasting the French legal system, which allowed deprivation of civil rights, "and among these of the right of voting, . . . of bearing arms," with the American legal system, stating that the Fourteenth Amendment prevented states from taking away the privileges of the American citizen. *Cong. Globe*, 2nd Sess., pt. 1, 762 (Feb. 1, 1872).

Sen. Allen G. Thurman (D., Ohio) argued that the "rights, privileges, and immunities of a citizen of the United States" were included in Amendments I–VIII. Reading and commenting on each of these amendments, he said of the Second: "Here is another right of a citizen of the United States, expressly declared to be his right—the right to bear arms; and this right, says the Constitution, shall not be infringed." *Id.* at pt. 6, Appendix, 25–26 (Feb. 6, 1872).

The incorporationist thesis was stated succinctly by Senator Thomas M. Norwood (D., Ga.) in one of the final debates over the Civil Rights Bill. Referring to a U.S. citizen residing in a Territory, Senator Norwood stated:

> His right to bear arms, to freedom of religious opinion, freedom of speech, and all others enumerated in the Constitution would still remain indefeasibly his, whether he remained in the Territory or removed to a State.
>
> And those and certain others are the privileges and immunities which belong to him in common with every citizen of the United States, and which no State can take away or abridge, and they are given and protected by the Constitution. . . .
>
> The following are most, if not all, the privileges and immunities of a citizen of the *United States:*
>
> The right to the writ of *habeas corpus;* of peaceable assembly and of petition; . . . *to keep and bear arms;* . . . from being deprived of the right to vote on account of race, color or previous condition of servitude. [emphasis added] *Cong. Rec.*, 43rd Cong., 1st Sess., pt. 6, Appendix 241–242 (May 4, 1874).

Arguing that the Fourteenth Amendment created no new rights but declared that "certain existing rights should not be abridged by States," the Georgia Democrat explained:

> Before its [Fourteenth Amendment] adoption any State might have established a particular religion, or restricted freedom of speech and of the press, or *the right to bear arms*. . . . A State could have deprived its citizens of any of the privileges and immunites contained in those eight articles, but the *Federal Government* could not. . . .
>
> . . . And the instant the fourteenth amendment became a part of the Constitution, every State was at that moment disabled from making or enforcing any law which would deprive any citizen of a State of the benefits enjoyed by citizens of the United States under the first eight amendments to the Federal Constitution. (emphasis added) *Id.* at 242.

In sum, in the understanding of Southern Democrats and Radical Republicans alike, the right to keep and bear arms, like other Bill of Rights freedoms, was made applicable to the states by the Fourteenth Amendment.

REFERENCES

1. Although the common law in effect in the colonies did not develop any limitation on the absolute right of individuals to keep arms, it did recognize certain restrictions on the manner in which individuals could *use* arms.

2. Individual colonists, of course, kept their own firearms, with powder and shot, in their residences.

3. Justice Story wrote in 1833: "The militia is the natural defense of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample on the rights of the people. *The right of the citizen to keep and bear arms has justly been considered, as the palladium of the liberties of a republic;* since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them." (emphasis added.) 3 *Commentaries on the Constitution of the United States*, Section 1890, pp. 746–747 (1833).

4. Actually, the militia embraces a larger class of persons than today's statutory unorganized militia since it consists of at least all persons "physically capable of acting in concert for the common defense." *U.S. v. Miller*, 307 U.S. 174, 179 (1939). The Virginia Constitution, upon which the Bill of Rights was modeled, provides that the militia is "composed of the body of the people." Article I, Section 13.

5. Of the twelve proposed amendments, all but the first two dealt with the protection of the rights of individuals; all but the first two were ratified. Since, of the ten remaining, Amendments 1 and 3 through 10 have repeatedly been held to secure fundamental individual rights, it is logical that the Second Amendment also secures a fundamental individual right.

6. The word "people" as used in the First, Fourth, Ninth, and Tenth Amendments has consistently been construed to mean individual.

7. This view is supported by the Congressional Research Office of the Library of Congress which has observed, "At what point regulation or prohibition of what classes of firearms would conflict with the [Second] Amendment, whether there would be a conflict, the *Miller* case does little more than cast a faint degree of illumination toward answering." *The Constitution of the United States of America, Analysis and Interpretation*, Senate Document No. 92-82.

8. Applying this test, the defendant would have little difficulty today in demonstrating that possession of such a shotgun is protected by the Second Amendment, since shotguns were military issue in both World Wars, Korea, and Vietnam.

9. Numerous cases have held that a handgun is an arm for constitutional purposes, for example, in *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 224 (1921), the Court observed that the "historical use of pistols as 'arms' of offense and defense is beyond controversy. . . ." Similar holdings are found in *In re Brickey*, 8 Ida. 597, 70

P. 609 (1902) and *State* v. *Rosenthal*, 75 Vt. 295, 55 A. 610 (1903). Moreover, in colonial times pistols saw considerable service as a personal weapon. As a noted historian observed:

It was considered normal for civilians to carry pocket pistols for protection while traveling . . . Among eighteenth century civilians who traveled or lived in large cities, pistols were common weapons. Usually they were made to fit into pockets, and many of these small arms were also carried by military officers. George C. Neumann, The History of Weapons of the American Revolution, pp. 150–151 (Bonanza Books, N.Y. 1967).

10. Although *Tot* was appealed to the Supreme court, the Second Amendment issue was not addressed by that Court.

11. This view, moreover, is consistent with the common law which prohibited the bearing of arms when carried in such a manner as would terrify the people. 4 Blackstone Commentaries 149. Furthermore it is consistent with the concept of the militia as a body of persons who maintained firearms in their homes for self-defense and to be ready to contribute to the common defense.

12. But see *State* v. *Reid*, 1 Ala. Reports 612, 616–7 (1840), while holding that a statute prohibiting the carrying of concealed weapons was not incompatible with the right to keep and bear arms in defense of self and state, added: "A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional."

# THE RIGHT TO BEAR ARMS: THE DEVELOPMENT OF THE AMERICAN EXPERIENCE

JOHN LEVIN*

## I. INTRODUCTION

AS THE crime rate in the United States grows and pressures mount for laws restricting the use of firearms, the need for an understanding of the development of the "right to bear arms" has increased. Perhaps more than any other "right" enumerated in the federal and state constitutions, the "right" to bear arms was directed to maintaining a balance of power within our society. The "right to bear arms" developed at a time when a well-armed population was necessary for defense, and when the social and political structure was kept in balance by a balance of armed power.

While the American "right to bear arms" developed at the time of the Revolution, it grew out of the duty imposed on the early colonists to keep arms for the defense of their isolated and endangered communities. The definition of "bearing arms" as the phrase was used in legal instruments up to revolutionary times was "serving in an organized armed force."[1] It did not imply any personal right to possess weapons. For example, when Parliament in drafting the English Bill of Rights[2] or Blackstone in his *Commentaries on the Laws of England*[3] intended to convey the meaning of a personal right to possess arms, they spoke of the right to *have* arms, not of the right to *bear* arms.

## II. EARLY HISTORY

### A. *The Colonial Period*

The earliest colonial statutes requiring that the colonists arm themselves were Virginia statutes of 1623 stating that "no man go or send abroad without a sufficient party will [sic] armed," and that "men go not to worke in the ground without their arms (and a centinell upon

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[1] *See* the materials on the colonial statutes and on the United States Constitution discussed below.

[2] 1 W & M. I, St. 2, ch. 2 (1689).

[3] W. Blackstone, Commentaries on the Law of England 143-44 (1766).

them)."[4] In 1658 Virginia required that "every man able to beare armes have in his house a fixt gunn."[5] The colony, being unable to afford to arm its militia or troops, required them to arm themselves.[6] If the militia, however, found itself under-armed, the county courts could levy on the population for the provision of arms and distribute them to those not provided—the distributees then paying for the arms at a reasonable rate.[7]

Massachusetts in 1632 required each person to "have . . . a sufficient musket or other serviceable peece for war . . . for himself and each man servant he keeps able to beare arms."[8] In the Code of 1672 men were to provide their own arms, but arms would be supplied to those unable to obtain them. In New York, each town was to keep a stock of arms, and each man between 16 and 60 was to have arms.[9] Even those not obligated to serve in the militia were required to keep arms and ammunition in their houses.[10] The militia provisions of the Connecticut Code of 1650 said, "All persons . . . shall beare arms . . .; and every male person . . . shall have in continuall readiness, a good muskitt or other gunn, fitt for service." South Carolina had similar codes.[11]

This duty to keep and bear arms was limited by the interest of colonial governments in preventing the use of firearms for harmful ends. In order to prevent civil disturbances the colonial governments strove to keep arms from falling into the "wrong hands." To provide against Negro insurrections, Virginia forbade Negroes from carrying arms without their masters' certificate.[12] Pennsylvania had a similar provision by 1700,[13] and South Carolina even required that the master keep all arms not in use safely locked up in his house.[14] Virginia forbade the sale of arms or ammunition to Indians,[15] and Massachusetts

[4] Acts of the Grand Assembly 1623-1624, Nos. 24 and 25.
[5] Acts of the Grand Assembly 1658-1659, Act 25.
[6] Acts of the Grand Assembly 1684, Act 4.
[7] Acts of the Grand Assembly 1673, Act 2.
[8] The Compact with the Charter and General Laws of the Colony of New Plymouth 44-45 (1836).
[9] Duke of York's Laws (1665-1675).
[10] First Gen. Assembly, 2d Sess., ch. 20 (October 1684).
[11] S.C. Stat., No. 206 (1703).
[12] Acts of the Grand Assembly 1680, Act 10.
[13] Penn Stat., ch. 61 §5 (1700).
[14] S.C. Stat., No. 314 (1712).
[15] Acts of the Grand Assembly 1633, Act 10.

required that Indians possess a license to carry a gun within certain areas of the colony.[16]

In times of civil disturbance the colonies controlled arms to protect the security of orderly government. For example, in 1692 the Massachusetts Assembly felt it necessary to arrest "such as shall ride, or go armed offensively before any of their majesties' justices or other of their officers or ministers doing their office or elsewhere by night or by day, in fear or affray of their majesties' people."[17]

In addition to those laws preventing arms from falling into the hands of those groups openly hostile to colonial society, statutes regulated the conditions under which arms could be used. As the settlements grew crowded, shooting was restricted in order to protect people and livestock. By 1678 Massachusetts forbade shooting "so near or into any House, Barn, Garden, Orchards or High-Wayes in any town or towns of this Jurisdiction, whereby any person or persons shall be or may be killed, wounded or otherwise damaged."[18] In order to prevent fires caused by gunfire, Pennsylvania in 1721 forbade firing a gun within the city of Philadelphia without a special license from the governor.[19] Pennsylvania also forbade hunting by anyone on improved lands without the permission of the owner, and forbade those not qualified to vote from hunting on unimproved lands without the permission of the owner.[20]

Colonial statutes established a duty to keep and bear arms for the defense of the colonies and regulated the use of the arms in circulation. The American Revolution in turn provided fertile ground for the growth of the concept of the right of revolution and the related right to bear arms.

### *B. The Revolutionary Period*

During the revolutionary period the issue of arms and the bearing of arms developed along two distinct lines. One line of development related to the balance of military power between the people and their respective governments. The people feared that if the state or federal

[16] Gen. Ct., Sess. of May 23, 1677.
[17] Province Laws 1692-1693, ch. 18, § 6.
[18] Council held in Boston, March 28, 1678.
[19] Penn. Stat., ch. 245, § 4 (1721).
[20] Penn. Stat., ch. 246, § 3 (1721).

government became too powerful, that government would abridge the liberties of the people and impose its will by force. The other line of development related to the balance of military power between the governmental bodies of the union. The state governments feared that if they entrusted too much power in the hands of the central government, that government would destroy the political and military independence of the states. Both lines of development concerned the creation of a military balance within the political structure which would result in the maintenance of liberty of the constituent parts—whether personal liberty under a government or state liberty in a union; and both lines of development resulted in the creation of a "right to bear arms" in order to insure the liberty of those constituent parts.

The colonists, fearful of oppression by governmental power, and being aware of the events of 17th Century England, believed that liberty was guaranteed by giving the rulers as little power as possible and by balancing governmental power with popular power.[21] The foremost factor in this balance of power was the existence of a standing army. Standing armies had been used by the English crown and by continental monarchs to impose their will on their subjects,[22] and royal forces had been used by the English crown to intimidate and control the colonies.[23] In 1774 the Continental Congress declared that keeping a "standing army in these colonies, in time of peace, without the consent of the legislature of that colony, in which such army is kept, is against law."[24] In 1775 the draftsmen of the Declaration of the Causes and Necessity of Taking up Arms[25] gave the presence of royal troops a prominent role in that declaration, and several sections of the Declaration of Independence were given to the issue.[26] Colonial mistrust of standing armies extended even to colonial troops. In 1776 Sam Adams wrote:

> [A] standing army, however necessary it be at some times, is always dangerous to the liberties of the people. Soldiers are apt to consider themselves as a body distinct from the rest of the citizens. They have their arms always in their hands. Their rules and their discipline is severe. They soon become attached to their officers and disposed to

[21] C.E. Merriam, A History of American Political Theories 83 (1926).
[22] *See e.g.*, G.M. Trevelyan, I-III History of England (1953).
[23] S. Morison, The Oxford History of the American People ch. XII, XIII, and XIV (1965).
[24] R. Perry and J. Cooper, Sources of our Liberties 288 (1959) (hereinafter cited as Sources).
[25] *Id.* at 295.
[26] *Id.* at 319.

yield implicit obedience to their commands. Such a power should be watched with a jealous eye.[27]

## III Constitutional Provisions

The state constitutions framed during the War for Independence reflected the fears of a standing army. The framers felt that such an army would create an overbearing force at the disposal of the state governments. All the states included provisions regarding standing armies and militia in their bills of rights. Several had provisions similar to Virginia's:

> 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; 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.[28]

Several others were similar to that of Maryland:

> XXV. That a well-regulated militia is the proper and natural defense of a free government.
>
> XXVI. That standing armies are dangerous to liberty, and ought not to be raised or kept up, without the consent of the Legislature.
>
> XXVII. That in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power.
>
> XXVIII. That no soldier ought to be quartered in any house, in time of peace, without the consent of the owner; and in time of war, in such manner only, as the Legislature directs.
>
> XXIX. That no person, except regular soldiers, mariners, and Marines in the service of this State, or militia when in actual service, ought in any case to be subject to or punishable by martial law.[29]

Some specifically mentioned a "right to bear arms," such as Pennsylvania's:

> That the people have a right to bear arms for the defense of themselves and the State; and as standing armies in the 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.[30]

North Carolina included a "right to bear arms" for the "defense of

[27] Letter to James Warren, quoted in M. Jensen, The New Nation—A History of the United States During the Confederation 1781-1789 29 (1962).

[28] Sources at 312.

[29] *Id.* at 348.

[30] *Id.* at 330.

the State,"[31] and Massachusetts included such a right for "the common defense."[32] Widespread copying by the draftsmen of state constitutions created, in part, the similarity between provisions.[33] These provisions were to be the basis of the militia provisions in the federal Constitution and Bill of Rights.

When the draftsmen of the majority of the state bills of rights wrote of replacing the standing army with a popular militia, they believed it would remove a source of arbitrary military power from the hands of the state governments and replace it with a military less likely to oppress the people.[34] They attempted to structure the political and military balance in the new states by making the governments less powerful and the citizens more powerful. The "right to bear arms" was a more extreme and revolutionary manifestation of this restructuring. By having a right to "bear arms," *i.e.*, to serve in the armed forces of the state, the people would have far greater military power than if the militia were merely the preferred defense, for the state governments would be unable to maintain a narrowly based standing army against the interests of the people. Rather the people would rely on their "right" to bear arms and demand that the defense force be broadly based.

The "right to *have* arms" was an adjunct to the right of revolution. The right of revolution is the natural right of a people to overthrow their government when that government no longer serves the purpose for which it was formed. By the middle of the 18th century, Blackstone had recognized that the primary rights of Englishmen—"personal security, personal liberty, and private property"—could not be maintained solely by law, for "in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment."[35] There were auxiliary rights in order to enable the subject to preserve the primary rights, and,

> The fifth and last auxiliary right of the subject . . . is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law. Which . . . is indeed a public allowance, under

[31] *Id.* at 356.
[32] *Id.* at 376.
[33] R. Rutland, The Birth of the Bill of Rights 1776-1791 *passim* (1962).
[34] *See* the material on the discussion of the United States Constitution below.
[35] *Supra* n.3 at 140.

> due restrictions, of the natural right of resistance and self-preservation when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[36]

The provisions in the state constitutions granting a "right to bear arms" were not intended to permit a public allowance of the right of revolution. In the first place, the phrase "to *bear* arms" only meant serving in an organized armed force.[37] In the second place, the right of revolution, or at least a statement of the principle of that right, was specifically contained in other sections of most state constitutions.[38] In the third place, the guaranty of the "right to bear arms" or similar statements of preference for the militia was contained in that section of the constitutions directly concerned with controlling the military power of the state and not in the section recognizing the right of revolution.

When the Constitutional Convention met on May 14, 1787, it was faced with some issues quite dissimilar to those which had troubled the states. In the years during and immediately following the Revolution, the doctrine of the natural right of revolution was an accepted part of colonial political theory.[39] After the Revolution, however, the need for stable and orderly government grew, and the philosophy of rebellion withered.[40] The fundamental problem facing the convention was not to support and nourish a revolutionary situation, but to create a viable federal government out of the jealous and independent states. One of the major aspects of this problem was the creation of a national army. The delegates to the convention feared that if the new federal government could obtain sufficient military power, it could then impose its will on the states and on the people.

The delegates, however, did not consider the new federal standing army to be a danger to the states or the people since Congress would have strict control over the appropriations for troops, and most delegates assumed that the standing army would be small.[41] The Articles of Confederation had left complete control of land forces in the hands

[36] *Supra* n.3 at 143-144.

[37] *See* text at n.1, n.2, and n.7.

[38] E. Douglas, Rebels and Democrats *passim* (1965).

[39] C. Becker, The Declaration of Independence 7-8 (1942).

[40] M. Jensen, The New Nation—A History of the United States During the Confederation 1781-1789 (1962).

[41] M. Farrand, II The Records of the Federal Convention of 1787 329-30 (1966).

of the states which raised them,[43] and by 1788 the Army of the Confederation consisted of only 679 officers and men.[42] The question of the balance of military power between the states and the federal government was raised rather on the issue of federal control over the state militia.

On August 18, 1787, a motion was made in the convention to give Congress the power "to make laws for the regulation and discipline of the Militia of the several States reserving to the States the appointments of Officers."[44] Here the military power of the states was at stake. John Dickinson exclaimed that "we are come now to a most important matter, that of the sword . . . The states never would or ought to give up all authority over the Militia."[45] Oliver Ellsworth believed that "the whole authority over the Militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power."[46] Supporters of the motion recalled how ineffectual the militia was during the Revolution. They stressed the need for an effective and centralized military.[47]

When the debate continued on August 23rd, Edmund Randolph felt that the militia could be trusted to look after the liberties of the people. He asked, "What dangers there could be that the Militia could be brought into the field and made to commit suicide on themselves. This is a power that cannot from its nature be abused, unless indeed the whole mass should be corrupted."[48] Elbridge Gerry stated, when a motion was made to allow the federal government to appoint the general officers, that "as the States are not to be abolished, he wondered at the attempts that were made to give powers inconsistent with their existence."[49] James Madison replied: "As the greatest danger is that of disunion of the States it is necessary to guard against it by sufficient powers to the Common Government and as the greatest danger to the

[42] H. Commager, I Documents of American History 112-13 (7th ed. 1963).
[43] *Supra* n.41 at 365.
[44] *Id.* at 330.
[45] *Id.* at 331.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 387. For a discussion of the relation of the militia to popular uprisings in colonial America, *see* P. Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 28 Wm. & Mary Q. (3rd Ser. 1970).
[49] *Supra* n.41 at 388.

liberty is from large standing armies, it is best to prevent them by an effectual provision for a good Militia."[80]

A compromise was reached whereby the federal government would maintain a standing army plus have the authority to regulate and call out the militia, and the states would have authority over the militia except when it was called into federal service. The results of the compromise appear in article I, section 8 of the United States Constitution declaring that Congress shall have power:

> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer term than two Years;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining the Militia, and for governing such Parts of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

Thus, a tentative military balance was achieved between the federal government and the states.

Before the Constitution was ratified, however, its provisions were debated before the state legislatures and in the press. The militia provisions were again argued in terms of the balance of military power between the states and the federal government. Charles Pinckney argued for a federalized militia to give the federal government the power to impose its will on the states:

> The exclusive right of establishing regulations for the Government of the Militia of the United States ought certainly to be vested in the Federal Councils. As standing Armies are contrary to the Constitutions of most of the States, and the nature of our Government, the only immediate aid and support that we can look up to, in case of necessity, is the Militia . . . Independent of our being obliged to rely on the Militia as a security against Foreign Invasions or Democratic Convulsions, they are in fact the only adequate force the Union possesses, if any should be requisite to coerce a refractory or negligent Member, and to carry the Ordinances and Decrees of Congress into execution. This, as well as the cases I have alluded to, will sometimes make it proper to order the Militia of one State into another. At present the United States possesses no power of directing the Militia, and must depend upon the States to carry their Recommendations upon this sub-

[80] *Id.*

> ject into execution . . . To place therefore a necessary and Constitutional power of defense and coercion in the hands of the Federal authority, and to render our Militia uniform and national, I am decidedly in opinion they should have exclusive right of establishing regulations for their Government and Discipline, which the States should be bound to comply with, as well as with their Regulations for any number of Militia, whose march into another State, the Public safety or benefit should require.[81]

Luther Martin, speaking before the Maryland legislature, argued against the federalized militia as it would give the federal government so great a power that it could destroy the integrity of the states:

> [Through] this extraordinary provision, by which the Militia, the only defense and protection which the State can have for the security of their rights against arbitrary encroachments of the general government, is taken entirely out of the power of their respective States, and placed under the power of Congress . . . . It was argued at the Constitutional convention that, if after having retained to the general government the great powers already granted, and among those, that of raising and keeping up regular troops, without limitations, the power over the Militia should be taken away from the States, and also given to the general government, it ought to be considered as the last *coup de grace* to the State governments; that it must be the most convincing proof, the advocates of this system design the destruction of the State governments, and that no professions to the contrary ought to be trusted: and that every State in the Union ought to reject such a system with indignation, since, if the general government should attempt to oppress and enslave them, they could not have any possible means of self-defense . . . .[82]

Superimposed upon this debate over the balance of power between the states and the federal government was the issue of the balance of power between the people themselves and the new government. To assuage fears that the new federal government would infringe upon the rights of the people, the authors of *The Federalist* raised the factors of militia, arms, and the right of revolution in describing how the new government could be controlled. Federalist Number 28 mentioned the right of revolution:

> If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense which is paramount to all positive forms of government.[83]

And the military power of the states:

> When will the time arrive that the federal government can raise and maintain an army capable of erecting a despotism over the great body

[81] *Id.* III at 118-19.
[82] *Id.* at 208-09.
[83] The Federalist, No. 28 (Hamilton).

> of the people of an immense empire, who are in a situation, through the medium of their States governments, to take measure for their own defense, with all the celerity, regularity and system of independent nations?[54]

The 46th Federalist by Madison discussed the armed population and its relationship to the militia and the central government:

> Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments to which the people are attached, and by which the Militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit. 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.[55]

Though the Constitution was ratified, the issue of the federal militia was not resolved until adoption of the second amendment. Several of the states had suggested during their ratifying conventions that a bill of rights be added to the United States Constitution.[56] When such a bill of rights was debated in the First Congress, the militia amendment was first reported out of committee of the House of Representatives reading:

> A well-regulated Militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.[57]

Several of the representatives objected to the provision excusing those people "religiously scrupulous" from bearing arms. Elbridge Gerry stated that as the purpose of the militia "is to prevent the establishment of a standing army" it was "evident, that under this provision, together with their own powers, Congress could take such measures with respect to a Militia, as to make a standing army necessary." This could be accomplished by Congress using "a discretionary power to exclude those from the Militia who have religious scruples."[58] In such event, so many citizens would attempt to avoid Militia duty on religious grounds that a standing army would be necessary for national defense.

In any event the religious exemption from the militia was dropped and the amendment in its final form read:

[54] *Id.*
[55] The Federalist, No. 46 (Madison).
[56] For a study of the forces at work to create a bill of rights, *supra* n.33.
[57] 1 Annals of Congress 778.
[58] *Id.* at 778-79.

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.[59]

From the debates it seems clear that the intent of Congress in passing the second amendment was to prevent the federal government from destroying the state militia. Pinckney would keep a defense force uniform and at the disposal of the federal government. Martin was assured that the federal government would not emasculate the states and leave them at the mercy of federal troops. The "right to bear arms" was a corporate right used to insure that a desired balance between liberty and authority within the union would be maintained.

Attempts were made to include a personal right to have arms in the Bill of Rights. Sam Adams introduced a bill in the Massachusetts legislature that the state support an amendment holding that the "Constitution be never construed to authorize Congress to . . . prevent the people of the United States, who are peaceable citizens from keeping their own arms."[60] New Hampshire supported a provision that "Congress shall never disarm any citizen unless such as are or have been in Actual Rebellion."[61] Though these provisions were never adopted, they indicate that there has never been any absolute "American" philosophy on the right to bear arms. This confusion arises from America's situation of being a frontier nation created out of revolution and espousing a belief in revolution but which also desires and needs to create an orderly social and political structure.

The result has been the use of the concept of the right to bear arms to support several different, and often contradictory, theories of the relation of armed citizens to the government. The judicial opinions of the courts of the various jurisdictions in the United States best exemplify this situation.

## IV. Relevant Court Decisions

### A. *State Courts*

The first pronouncement on the right to bear arms was by a Kentucky court in *Bliss v. Commonwealth*.[62] The court held that "the right of

[59] U.S. Const. Amend. II.

[60] Pierce & Hale, Debates of the Massachusetts Convention of 1788 86-87, quoted in Feller and Gotting, *The Second Amendment: A Second Look*, 61 Nw. U. L. Rev. 47 (1966).

[61] Feller and Gotting, *The Second Amendment: A Second Look*, 61 Nw. U. L. Rev. 59 (1966).

[62] 2 Ky. 90 (1822).

the citizens to bear arms in defense of themselves and the State must be preserved entire," and all legislative acts "which diminish or impair it as it existed when the Constitution was framed are void."[63] Thus an act prohibiting the wearing of concealed arms was declared void. This point of view which considers the right to bear arms as absolute, unabridgable, and personal is rare. Most cases follow the reasoning of a Texas court which asked "How far personal liberty may be restrained for the prevention of crime."[64]

A few states adopted the thinking of the early Tennessee case of *Aymette v. State*[65] which held that the right to bear arms was a right of the people to enable them to rise up and defend their rights against an oppressive government. This concept was similar to Blackstone's presentation of the right to bear arms as a public allowance of the right of revolution. Courts holding this theory consider that, as the right is by public allowance, the state can regulate the use of arms to insure the public peace and welfare. This position was well presented by the Arkansas court in *Haile v. State*:[66]

> The constitutional provision sprung from the former tyrannical practice, on the part of governments, of disarming the subjects, so as to render them powerless against oppression. It is not intended to afford citizens the means of prosecuting, more successfully, their private broils in a free government. It would be a perversion of its object, to make it a protection to the citizen, in going, with convenience to himself, and after his own fashion, prepared all time to inflict death upon his fellow citizens, upon the occasion of any real or imaginary wrongs.[67]

While most courts have not attempted to counter the assertion of the right of revolution, an earlier Arkansas court had stated in *State v. Buzzard*[68] that such a right was unnecessary under a free, republican government which could be changed at the will of the people.

The *Aymette* line of cases is perhaps truest to the intention of the draftsmen of the state bills of rights. The right to bear arms was a means of preserving the liberty of the people by balancing the military power in the hands of the state by military power in the hands of the

[63] *Id.* at 91.
[64] English v. State, 35 Tex. 437, 477 (1872).
[65] 2 Tenn. 154 (1840).
[66] 38 Ark. 564 (1882).
[67] *Id.* at 566.
[68] 4 Ark. 18, 24 (1843).

people. The desire to maintain such a balance has had a long history dating from feudal times, through the English revolution to the present day. Such thinking, however, is rare in judicial opinions. Similarly rare is the unitary concept of society and government expressed by the Kansas court in *City of Salina v. Blakesly*.[69]

> The provision . . . that 'the people have the right to bear arms for their defense and security' refers to the people as a collective body. It was the safety and security of society that was being considered when this provision was put into our Constitution . . . . The provision in question applies only to the right to bear arms as a member of the State Militia, or some other military organization provided for by the law.[70]

Such thinking indicates belief that there is no need to provide for a military balance within the political and social structure when that structure is responsive to the people.

Most state courts have never spoken of the right to bear arms in the sophisticated terms of political balance, but rather treated the right as synonymous with the right of self-defense. In 1950 an Illinois court warned in the construction of an arms control statute "that it is aimed at persons of criminal instincts, and for the prevention of crime, and not against use in the protection of person or property."[71] In *Andrews v. State*,[72] a dissenting judge found that "the right exists only for the purpose of defense: and this is a right which no constitutional or legislative enactment can destroy." The dissent in the Oklahoma case of *Pierce v. State*[73] proclaimed—"From time immemorial, the home, be it ever so humble, has been sacred—the castle of the occupant—with the right to repell [sic] invasion or any trespass."

Answers to such claims vary from the flat declaration in *Buzzard* that individuals have surrendered the right of self-defense to the society as a whole, to the more moderate holding in *Andrews* that "every good citizen is bound to yield his preference as the means to be used, to the demands of the public good."[74] A Michigan court put forth a novel answer saying that the state's power is "subject to the limitation that its exercise be reasonable [and does not result] in the prohibition of

[69] 70 Kan. 230, 83 P. 619 (1905).
[70] *Id.* at 231-32, 83 P. at 620.
[71] People v. Liss, 406 Ill. 419, 424, 94 N.E.2d 329, 323 (1950).
[72] 50 Tenn. 165 (1871).
[73] 275 P. 393, 397 (Okla. Crim. Ct. App. 1929).
[74] 50 Tenn. 165, 193 (1871).

those arms which, by the common opinion and usage of law-abiding people, are [to be kept for] protection of person and property."[75]

These debates over the issue of the right of self-defense, though of primary interest today, have little relation to the intent of the draftsmen of the Bill of Rights. The right of self-defense has had a long history; but its history was parallel to, not connected with, the right to bear arms. The use of the right of self-defense to support a right to bear arms is of modern usage. Nevertheless, its modernity does not affect its relevance. The concept is the supreme law in several states of the union, and is a concept to be considered by any legislature hoping to pass restrictive arms legislation.

The confusion in the state courts over the right to bear arms is partly due to the judicial process itself. A court generally does not base its decision on political theory but considers the facts of the particular case before it. If a court feels a particular restrictive arms statute to be necessary and fair, and if the facts of the case before it are favorable, then the court will uphold the statute using whatever language and doctrine is required to so hold. If the statute appears unfair, if the times are unfavorable, or if the factual situation is difficult, then the court will use the language and doctrine necessary to overturn the statute. For example, a Florida court stated in 1912 that the right to bear arms "was intended to give the people the means of protecting themselves against oppression and public outrage, and was not designed as a shield for the individual man."[76] Fifty years later the court declared that "doubtless the guarantee was intended to secure to the people the right to carry weapons for their protection."[77] Similar situations have occurred in several states.[78] The development of federal doctrine, however, has followed a more constant and evolutionary course.

### B. *Federal Courts*

Cases concerning the second amendment arose in the federal courts only after the Civil War. The first of such cases, *U.S. v. Cruick-*

[75] People v. Brown, 253 Mich. 537, 541, 235 N.W. 245, 246 (1931).

[76] Carlton v. State, 63 Fla. 1, 9, 58 So. 486, 488 (1912).

[77] Davis v. State, 146 So.2d 892, 893 (Fla. 1962).

[78] *Cf.* State v. Buzzard, 4 Ark. 18 (1843); Wilson v. State, 33 Ark. 557 (1878); Haile v. State, 38 Ark. 564 (1882); City of Akron v. Williams, 172 N.E.2d 28 (Mun. Ct. Akron, Ohio 1960); City of Akron v. Williams, 177 N.E.2d 802 (Ct. App. Ohio 1960), aff'd without opinion, 172 Ohio St. 287, 175 N.E.2d 174 (1961).

*shank*,[79] implied that there was a *personal* right to bear arms upon which Congress could not infringe. The central point of the opinion, however, was to state that the second amendment did not apply to state governments, and such governments could pass whatever legislation they desired without fear of federal sanction.

*Cruickshank* was not directly concerned with the right to bear arms or the militia, but with civil rights legislation. The first federal case to be directly concerned with arms was *Presser v. Illinois*.[80] Presser was convicted for leading a military parade in violation of an Illinois statute which forbade such parades by any group but the state militia. Presser claimed that the Illinois statute was in violation of the second amendment. The court relied on *Cruickshank* in stating that the "amendment is a limitation only upon the power of Congress and the National Government, and not upon that of the States,"[81] but added a restriction upon the State's power:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve Militia of the United States as well as of the States; and, in view of this prerogative of the General Government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government.[82]

This principle harkens back to the citizen army of Saxon times and had little relevance in 1886. It was understandable, however, that only twenty years after the Civil War, the Supreme Court would be concerned with state attempts to weaken the central government by withholding arms and troops from national service. Nevertheless, the restriction is a complete reversal from the aims of the draftsmen of the Constitution and Bill of Rights which was to restrict the military power of the central government and give the state more leverage.

On one subject *Presser* was quite clear—there was no right to band together in paramilitary organizations:

> Military organization and military drill and parade under arms are subjects especially under the control of the government of every

[79] 92 U.S. 542 (1874).
[80] 116 U.S. 252 (1886).
[81] *Id.* at 264.
[82] *Id.* at 265.

> country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and Federal Governments, acting in due regard to their respective prerogatives and powers.[43]

Thus, whatever right to bear arms was recognized, that right was limited to arms and organizations that did not threaten the security of the government. The court did not approve of an armed population as a balance to governmental power.

For many years after *Presser* the issue of the second amendment appeared in federal courts only in reaffirming the *Cruickshank* holding that the second amendment did not apply to the states.[44] In the 1930's Congress passed two laws, the Federal Firearms Act[45] and the National Firearms Act,[46] to control commerce in certain types of dangerous weapons. Both acts were attacked in court for being in violation of the second amendment. In upholding the National Firearms Act, the district court held in *United States v. Adams*[47] that the second amendment "refers to the Militia, a protective force of government; to the collective body and not individual rights." This language was quoted verbatim by another district court in *United States v. Tot*[48] in upholding the Federal Firearms Act. Neither court went into the problem of the extent to which the collective right could be regulated, but both made clear that no personal right to own arms existed under the federal Constitution.

The issue of regulating the collective right arose in *United States v. Miller*[49] in which the Supreme Court held that as long as the weapon regulated did not have a direct relationship to the arms used in maintaining a well-regulated militia, they could be controlled:

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated Militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.[50]

The difficulty with such an interpretation is that were a weapon to have

[43] *Id.* at 266-67.
[44] Miller v. Texas, 153 U.S. 535 (1894).
[45] 15 U.S.C.A. 901-909.
[46] 26 U.S.C.A. 5801-5862.
[47] 11 F. Supp. 216, 219 (S.D. Fla. 1935).
[48] 28 F. Supp. 900, 903 (D. Conn. 1939); rev'd on other grounds, 319 U.S. 463 (1943).
[49] 307 U.S. 174 (1939).
[50] *Id.* at 178.

such a "reasonable relationship" it would be a protected weapon under the second amendment. The circuit court in *Cases v. United States*[91] recognized this problem saying: "But to hold that the Second Amendment limits the federal government to regulations concerning only weapons which can be classed as antiques or curiosities,—almost any other might bear some reasonable relationship to the preservation or efficiency of a well-regulated militia unit of the present day,—is in effect to hold that the limitation of the second amendment is absolute."[92] The court also recognized that such an interpretation would prohibit the federal government from prohibiting private ownership of heavy weapons "even though under the circumstances of such possession or use it would be inconceivable that a private person could have any legitimate reason for having such a weapon."[93] The court then decided it would be impossible to formulate any general test to determine the limits of the second amendment and each case would have to be decided on its individual merits.

The federal courts have interpreted the right to bear arms contained in the second amendment very narrowly. The right exists only to the extent that the arms are required for a well-regulated militia. Since *Presser*, however, the second amendment has been interpreted as a source of federal power and not as a protection of state power. The need for the old military balance between state and national governments had disappeared, and the federal courts no longer recognized its existence.

Similarly, the federal courts no longer recognized the need for a military balance between the population and its government. Rather, the courts have held that the interests of order and stability must be balanced against the need for revolution, and such interests may outweigh any need for the right of revolution. Thus, there could also be restrictions on other, subsidiary natural rights such as the right to bear arms. As Justice Vinson said in *Dennis v. United States*[94] in upholding the Smith Act:

> That it is within the *power* of the Congress to protect the government

[91] 131 F.2d 916, (1st Cir. 1942); *cert. den. sub. nom.* Cases Velasquez v. United States, 319 U.S. 770 (1943); rehearing denied, 324 U.S. 889 (1945).

[92] *Id.* at 922.

[93] *Id.*

[94] 341 U.S. 494 (1951).

> of the United States from armed rebellion is a proposition which requires little discussion. Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparations for revolution, which principle, carried to its logical conclusion, must lead to anarchy.[96]

Even thought the right of revolution has never been recognized by the courts of the United States, armed rebellion has been—and still is—an important part of the American political tradition. From the early Republic to the present day dissident elements who have not been able to achieve their goals within the political structure have resorted to arms as a final resort.[96] In many instances, such elements have been punished as rebellious or treasonable, but in others the use or threat of violence has forced the political structure to compromise with the dissidents. Though not protected by the Constitution, this use of arms is the most important and relevant use of arms today.

## V. Conclusion

Regardless of the long history of violence and assassination in the United States, the right to bear arms has remained closely and jealously guarded. This right appears to provide the individual with the means of protecting himself against other individuals and of protecting himself against his government. The maintenance of a military balance within the political structure was the genesis of this right, and the desire to continue such a balance will promote its continuation. The right to bear arms supports man in his fear of being defenseless in the face of personal danger or oppression.

The possibility, however, of maintaining a military balance within a political structure has become smaller as society has become more complex and warfare more destructive. In the words of Roscoe Pound:

> In the urban industrial society of today a general right to bear efficient arms so as to be enabled to resist oppression by the government would mean that gangs could exercise an extra-legal rule which could defeat the whole Bill of Rights.[97]

Thus, after over three centuries, the right to bear arms is becoming anachronistic. As the policing of society becomes more efficient, the

[96] *Id.* at 501.
[96] *See* R. Ginger, Age of Excess (1965), and references cited therein.
[97] R. Pound, The Development of Constitutional Guarantees of Liberty 91 (1957).

need for arms for personal self-defense becomes more irrelevant; and as the society itself becomes more complex, the military power in the hands of the government more powerful, and the government itself more responsive, the right to bear arms becomes more futile, meaningless and dangerous.

John Levin. "The Right to Bear Arms: The Development of the American Experience." Chicago - Kent Law Review, Fall-Winter 1971.

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# Standing Armies And Armed Citizens: An Historical Analysis of The Second Amendment

By Roy G. Weatherup*

## I. Introduction: Guns and the Constitution

As a result of a steadily rising crime rate in recent years, a sharp public debate over the merits of federal firearms regulation has developed. "Crime in the streets" has become a national preoccupation; politicians cry out for "law and order"; and the handgun has become a a target of attention. The number of robberies jumped from 138,000 in 1965 to 376,000 in 1972, while murders committed by guns shot up from 5,015 to 10,379 in the same period, and the proportion of cases in which the murder weapon was a firearm rose from 57.2 percent to 65.6 percent.[1] The recent attempt on the life of President Ford in Sacramento by an erstwhile member of the "Manson Gang" serves to heighten the terror of a nation already stunned by the assassinations of John F. Kennedy, Martin Luther King and Robert F. Kennedy, and the maiming of George Wallace. Many people assert that these tragedies could have been prevented by keeping the murder weapons out of the hands that used them. Others vehemently dispute this claim.

The free flow of firearms across state lines has undermined the traditional view of crime and gun control as local problems. In New York City, long noted for strict regulation of all types of weapons, only 17 percent of the 390 homicides of 1960 involved pistols, by 1972, this proportion had jumped to 49 percent of 1,691. In 1973, there were only 31,000 lawfully possessed handguns in the nation's largest city, but police estimated that there were as many as *1.3 million* illegal handguns, mostly imported from southern states with lax laws.[2] These statistics give credence to the arguments of proponents of gun control that federal action is needed, if only to make local laws enforcible.

The great majority of the American people now support registration of both handguns and rifles. When the Gallup Poll asked the

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1. U.S. Bureau of the Census, Statistical Abstract of the United States: 1974 at 147 51. (95th ed. 1974).

2. N.Y. Times, Dec. 2, 1973, § 1, at 1, col. 5 (city ed.).

question: "Do you favor or oppose registration of all firearms?" in a recent survey, more than two-thirds (67 percent) favored the concept, while 27 percent opposed it, and 6 percent had no opinion. Even gun-owners endorsed registration by a margin of 55 percent to 39 percent with 6 percent undecided.[3] Yet, although the intensity of belief is undoubtedly far stronger in the minority than in the majority Congress has remained dormant.[4] The zeal of those individuals dedicated to the preservation of the "right to keep and bear arms" in its present form cannot be doubted.

American history has often seen social and political problems transformed into constitutional issues.[5] The gun control issue is no exception to this phenomenon, and particular attention has been focused on the Second Amendment to the United States Constitution, which provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Proponents of gun control seize the phrase "a well regulated Militia" and find in it the sole purpose of the constitutional guarantee. They therefore assert that "the right of the people to keep and bear Arms" is a collective right which protects only members of the organized militia, e.g., the National Guard, and only in the performance of their duties. It is their belief that no one else can claim a personal right

3. L.A. Times, June 5, 1975, § 1, at 29, col. 1.

4. Congressional lethargy cannot be attributed to a lack of proposed legislation. At every session of the Congress, a number of bills for the control of handguns and other weaponry are introduced, only to be shunted to committee and never heard from again. For example, the following is only a partial listing of proffered statutes for the First Session of the 94th Congress: S. 750 was introduced by Senator Hart (Mich.) to prohibit the importation, manufacture, sale, purchase, transfer, receipt, possession or transportation of handguns unless authorized by federal or state authorities. S. 1477, introduced by Senator Kennedy (Mass.) and known as the Federal Handgun Control Act of 1975 is basically a registration and licensing statute. It would prohibit the private sale or manufacture of handguns under six inches in length. (Both bills are currently pending in the Senate Judiciary Subcommittee on Juvenile Delinquency.)

S. 1880, authored by Senator Bayh (Ind.) was passed by the Senate by a vote of 68 to 25, only to die on the floor of the House of Representatives. Entitled the Violent Crime and Repeat Offender Act of 1975, it would have provided additional penalties for felonies committed with firearms, and required the prompt reporting of theft of firearms by licensees.

In addition, there is a major bill pending in the House of Representative which is not duplicated in the Senate. H.R. 2381 would prohibit the importation and manufacture of hollow-point bullets. This bill is now pending in the House Ways and Means Committee as well as in the House Interstate and Foreign Commerce Committee.

5. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (the question of abortion); Schechter Corp. v. United States, 295 U.S. 495 (1935) (the New Deal's National Recovery Administration); Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) (the [illegible] of slavery as a controversy).

to keep and bear arms for any purpose whatsoever, criminal or otherwise.

Opponents maintain that having guns is a constitutionally protected individual right, similar to other guarantees of the Bill of Rights. Some hold this right to be absolute, while others would allow reasonable restrictions, perhaps even licensing and registration. Still others would limit the protection of the Second Amendment to individuals capable of military service and to weapons useful for military purposes. The essential characteristic of the "individualist" interpretation, as opposed to the "collectivist" view, is that the Second Amendment precludes, to some extent at least, congressional interference in the private use of firearms for lawful purposes such as target shooting, hunting and self-defense.

It is one of the ironies of contemporary politics that the many of the most vocal supporters of "law and order" are persistent critics of federal firearms regulation. "Guns don't kill people; people kill people" is their philosophy. Firearms in private hands are viewed as a means of protecting an individual's life and property, as well as a factor in helping to preserve the Republic against foreign and domestic enemies. Whereas strict constructionism is often the preferred doctrine in interpreting the constitutional rights of criminals, such a narrow view of the Second Amendment is unacceptable. Far from being narrowly construed, the Second Amendment is held out to be a bulwark of human freedom and dignity as well as a means of safeguarding the rights of the individual against encroachment by the federal government. It thus becomes a weapon in the arsenal of argument against gun control, and each new proposal is said to infringe upon the rights of the people to keep and bear arms.

The clash between "collectivist" and "individualist" interpretations of the Second Amendment has not been definitely resolved. Even members of Congress believe that their power to regulate firearms is limited by the existence of an individual right to have, to hold, and to use them. Senator Hugh Scott, Republican of Pennsylvania, writes in *Guns & Ammo* magazine: "As my record shows, I have always defended the right-to-bear-arms provision of the Second Amendment. I have a gun in my own home and I certainly intend to keep it."[6]

There has been very little case law construing the Second Amendment, perhaps because there has been very little federal legislation on the subject of firearms. This may change, and it may become necessary for the Supreme Court to rule upon constitutional challenges to federal statutes based on the Second Amendment. Even before this

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6. Scott, *Leading Senator Admits Gun Law Mistake!*, Mar. 1970 GUNS & AMMO., 46, 47.

occurs, it would be helpful to dispel the uncertainties that exist in Congress about the extent of federal legislative power.

In order to determine accurately the intended meaning of the Second Amendment, it is necessary to delve into history. It is necessary to consider the very nature of a constitutional guarantee—whether it is an inherent, fundamental right, derived from abstract human nature and natural law or, alternatively, a restriction on governmental power imposed after experience with abuse of power.

Historically, the right to keep and bear arms has been closely intertwined with questions of political sovereignty, the right of revolution, civil and military power, military organization, crime and personal security. The Second Amendment was written neither by accident nor without purpose; it was the product of centuries of Anglo-American legal and political experience. This development will be examined in order to determine whether the "collectivist" or "individualist" construction of the Second Amendment is correct.[7]

## II. The Evolution of British Military Power

Victorious at the Battle of Hastings in 1066, William the Conqueror was able to assert personal ownership over all the land of England and sovereignty over its people. All power emanated from the King, and all persons held their property and privileges at his sufferance.

Feudal society was organized along military lines in 1181. King Henry II, great grandson of the Conqueror, issued the Assize of Arms, which formalized the military duties of subjects. The first three articles of the decree specify what armament each level of society is to maintain—ranging from the holder of a knight's fee, who must equip himself with a hauberk, a helmet, a shield and a lance, down to the poorest freeman armed only with an iron headpiece and a lance. The philosophy of the law is expressed in the fourth article, which is as follows:

> Moreover, let each and every one of them swear that before the feast of St. Hilary he will possess these arms and will bear allegiance to the lord king, Henry, namely the son of the Empress Maud, and that he will bear these arms in his service according to his order and in allegiance to the lord king and his realm. And let none of those who hold these arms sell them or pledge them or offer them, or in any other way alienate them; neither let a lord

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7. For an earlier article which discusses the "collectivist" versus the "individualist" approach to the Second Amendment, *see* Feller & Gotting, *The Second Amendment: A Second Look*, 61 NW. U.L. REV. 46 (1966-67). The authors conclude: "[T]he 'right of the people' refers to the collective right of the body politic of each state to be under the protection of an independent, effective state militia". *Id.* at 69. (citation omitted). *But see* Hays, *The Right to Bear Arms, a Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960). Hays contends that the right to bear arms is an individual one.

> in any way deprive his men of them either by [illegible], or [illegible] surety or in any other manner.[8]

The remainder of the statute prescribes rules and procedures governing its administration. The Assize of Arms marked the beginning of the militia system; its clear purpose was to strengthen and maintain the King's authority.

In 1215, the rebellious Norman barons forced King John to sign the Magna Carta, a document justly regarded as the foundation of Anglo-American freedom. The Great Charter consists of sixty-three articles which set forth in great detail certain restrictions on the King's prerogative. Its introductory article concludes, "Ye have also granted to all the free men of Our kingdom, for Us and Our heirs forever, all the liberties underwritten, to have and to hold to them and their heirs of Us and Our heirs."[9] Implicit in this statement is the fact that sovereignty is deemed to be vested in the office of kingship, and that the King is restricting his powers in favor of his subjects. Roscoe Pound makes this comment on the Magna Carta:

> The ground plan to which the common-law polity has built ever since was given by the Great Charter. It was not merely the first attempt to put in legal terms what became the leading ideas of constitutional government. It put them in the form of limitations on the exercise of authority, not of concessions to free human action from authority. It put them as legal propositions, so that they could and did come to be a part of the ordinary law of the land invoked like any other legal precepts in the ordinary course of orderly litigation. Moreover, it did not put them abstractly. In characteristic English fashion it put them concretely in the form of a body of specific provisions for present ills, not a body of general declarations in universal terms. Herein, perhaps, is the secret of its enduring vitality.[10]

Centuries were to pass before an English sovereign would again proclaim the doctrine of unrestricted royal power which William the Conqueror had established by force of arms, and which King John had lost in the same manner.

Even though medieval England had not yet developed firearms, the government found it necessary to severely restrict such weapons as did exist. In 1328 Parliament passed the celebrated Statute of Northhampton, which made it an offense to ride armed at night, or by day in fairs, markets, or in the presence of king's ministers.[11]

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8. The Assize of Arms, ¶ 4 (1181), in 2 English Historical Documents 416 (D. Douglas & G. Greenaway ed. 1953).

9. Magna Carta: Text and Commentary 34 (A.E.D. Howard ed. 1964).

10. R. Pound, The Development of Constitutional Guarantees of Liberty 18-19 (1957).

11. Statute of Northhampton, 2 Edw. 3, c.3 (1328).

The fifteenth century dynastic struggle known as the War of Roses virtually destroyed the feudal system, and prepared the way for a new consolidation of royal power beginning with the coronation of Henry Tudor as King Henry VII in 1485. The Tudors maintained a large degree of national unity. Their task was made easier by practical applications of gunpowder. The royal cannon made resistance by the nobility futile.

Perhaps because of the weakness of their hereditary claims, the Tudor monarchs attempted to control and manipulate Parliament, rather than assert the royal prerogative in defiance of Parliament. It was even admitted that Parliament could regulate the succession to the throne, acting in conjunction with the reigning monarch, of course. In the reign of Elizabeth, it was declared to be high treason to deny that Parliament and the Queen could "make laws and statutes of sufficient force and validity to limit and bind the crown of this realm, and the descent, limitation, inheritance, and government thereof."[12]

The long war with the Hapsburg Empire that began at the time of the Spanish Armada contributed to an upsurge of national sentiment. Faith in the English militia was vindicated as free men had held their own against the massive, professional standing armies of the Spanish King. Englishmen came to believe the militia was the best security for their country and their liberties.

At the death of Elizabeth I in 1603, King James VI of Scotland ascended the English throne as James I. The advent of the House of Stuart marked the beginning of a century of religious and political struggle between Crown and Parliament. Out of this struggle, what we know as the English Constitution emerged. The monarchy was finally and firmly restricted, but preserved, the supremacy of Parliament was established, the common law became a strong, independent force, and the liberties of the people were encased in a Bill of Rights.

Although a model constitutional monarch in some respects, in the realm of political theory, James I challenged the sensibilities of the nation. He boldly proclaimed the divine right theory of government—that kings hold their thrones by the will of God alone, and not by the will of peoples or parliaments. Typical of his sentiment are these excerpts from his speech to Parliament on March 21, 1610:

> The State of MONARCHIE is the supremest thing upon earth: For Kings are not onely GODS Lieutenants upon earth, and sit upon GODS throne, but even by GOD himselfe they are called Gods. . . . In the Scriptures Kings are called Gods, and so their power after a certaine relation compared to the Divine Power.

The King concluded that "to dispute what GOD may doe, is blas-

12. Treasons Act, 13 Eliz. 1, c. 1 (1571).

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phemie," and thus it is "sedition in Subjects, ... may do in the height of his power."[13] Here was a King not restricted by any human law.

Neither the legal profession nor Parliament was willing to accept such a boundless royal prerogative. Having grown up in the civil law tradition of Scotland, James I was indifferent to the common law, but the English lawyers argued that, while the King had many privileges at common law, he was limited by and subordinate to it. When James I asserted that Parliament existed only by "the grace and permission of our ancestors and us,"[14] the House of Commons passed the famous Protestation of December 18, 1621, which asserted:

> That the Liberties, Franchises, Privileges and Jurisdictions of Parliament, are the ancient and undoubted birthright and inheritance of the subjects of England; and that the arduous and urgent affairs concerning the King, State and defence of the realm, and of the Church of England, and the making and maintenance of laws, and redress of mischiefs and grievances, which daily happen within this realm, are proper subjects and matter of counsel and debate in Parliament: and that in the handling and proceeding of those businesses every member of the House hath, and of right ought to have, Freedom of Speech, to propound, treat, reason and bring to conclusion the same. . . .[15]

The King's response was to walk into the House of Commons and to tear from the Journal the page containing these words.

The leading legal theorist of the time was Sir Edward Coke, whose writings and leadership were to enhance the prestige of the common law, and bring it into alliance with Parliament against the monarchy. In response to an inquiry from James I, Coke and his colleagues declared:

> That the King by his proclamation cannot create any offence which was not an offence before, for then he may alter the law of the land by his proclamation in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment . . .; That the King hath no prerogative, but that which the law of the land allows him. . . .[16]

The common law courts asserted jurisdiction to inquire into the legality of acts of servants of the Crown, and thus began the doctrine of the rule of law.

In response to the wars waged by James I's improvident heir, Charles I, Parliament enacted the Petition of Right in 1628, inspired

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13. King James I, The Workes of the Most High and Mightie Prince James 529, 531 (1616).
14. 1 Parl. Hist. Eng. 1351 (1621).
15. *Id.* at 1361.
16. 7 The Reports of Sir Edward Coke, KNT 76 (G. Wilson trans. 1777).

and drafted largely by Coke. The petition was an assertion of the power of Parliament and the common law, and contained a long list of grievances. The abuses of the King's military power—billeting, martial law, imprisonment without trial, and forced loans—were particularly resented. Charles I had no choice but to sign the petition, since he needed revenues from Parliament, but he secretly consulted his judges who assured him that his signature would not be binding. Soon afterward, in 1629, the King dissolved Parliament and began the long period of personal rule which was to end in the Great Rebellion.

Charles I was short of money, and revived an ancient tax; his judges upheld the legality of this action in the famous Ship Money case of 1635. The King also wished to strengthen the Church of England, the mainstay of the monarchy. The ecclesiastical canons of 1640 emphatically affirmed the theory of Divine Right of Kings and, in addition, promulgated the doctrine of nonresistance:

> For subjects to bear arms against their Kings, offensive or defensive, upon any pretence whatsoever, is at least to resist the powers which are ordained of God; and though they do not invade but only resist, St. Paul tells them plainly they shall receive to themselves damnation.[17]

This doctrine of "nonresistance" was to have an important role in religion and politics in both England and America, for the next century and a half.

Faced with a Scottish rebellion, Charles I was forced to summon the English Parliament in 1640 in order to obtain the resources necessary to put down the insurrection. After eleven years of personal royal government, Parliament trusted neither the King nor his leading minister, the Earl of Strafford. Parliament demanded a wide array of religious and political concessions, including the removal of Strafford as governor of Ireland and the disbanding of the strong army he had created there. When the King acceded to these demands, Ireland rebelled.

Charles I was now desperate. Scotland and Ireland were in open rebellion, and the Parliament of England was dominated by the King's enemies. The King had made numerous concessions, but to no avail. Strafford wanted to bring John Pym, the parliamentary leader, to trial for treasonable dealings with the Scottish army invading England, but Pym struck first with a bill of attainder against Strafford. The main charge was the creation of a powerful army in Ireland for the purpose of crushing opposition in England. The bill of attainder passed, and the King was forced to send his ablest servant to the scaffold in 1641.

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17. Constitutions and Cannons Ecclesiastical, Treated Upon by the Archbishops of Canterbury and York (1640), in 1 SYNODALIA 390-91 (E. Cardwell ed. 1842).

Still unsatisfied, Parliament presented its Nineteen Propositions as an ultimatum to the King in 1642. The Propositions, if acceded to, would have established a very limited monarchy with the King surrendering the power of the sword and Parliament obtaining complete control over the militia. Instead, the King raised the royal standard at Nottingham and proclaimed Parliament to be in rebellion. Thus began the Civil Wars, which resulted in the decapitation of Charles I and the proclamation of a republic in 1649.

Oliver Cromwell and the Puritans came to power by force of arms and the creation of a disciplined standing army. Cromwell soon quarreled with Parliament and assumed the role of a military dictator. The soldiers supported their leader because Parliament proposed to disband much of the army thus depriving them of their livelihood, and also because they feared that Parliament might once again come under the control of the Anglicans, who would revive persecution of the Puritan sects.

It was soon proposed that Cromwell be made king, but only because that office would have definite constitutional restrictions. Finally Cromwell assumed the title of Lord Protector in 1653, under a written constitution that gave him virtually royal power. Although Cromwell's government brought domestic peace and ruled efficiently, it did not gain in popularity. The Lord Protector's government was created and maintained by bayonets, and the people came to hate it. The end of the Protectorate and its legacy have been described by historian Eric Sheppard as follows:

> The great soldier's death in 1658, while the army he had made was still fighting victoriously in Flanders, marked the beginning of the end of that army's rule; its leaders soon had no choice but to accept the inevitable, and in May 1660 the red coats of the New Model were arrayed on Blackheath to do honor to the monarch whom nine years before it had hunted into exile. A few months later, setting an example which has since been followed by all the great armies of England, it . . . laid down its arms and passed silently and peacefully into the pursuits of peace, leaving behind it, in the minds of the governing class and the people, besides a deservedly high military reputation, a legacy of hatred and distrust of all standing armies which has endured to our own day.[18]

The mood of England at the restoration of Charles II, son of the martyred Charles I, was one of relief and enthusiasm. An act was swiftly passed which recited that "the people of this kingdom lie under a great burden and charge in the maintenance and payment of the present army," and provided that it should be disbanded with "all convenient speed."[19]

18. E. Sheppard, A Short History of the British Army (4th ed. 1959).
19. Disbanding Act, 12 Car. 2, c. 15 (1660).

Once again reliance for the country's security was placed in the militia system, which had fallen into disuse after two decades of professional armies, civil wars and military government. Statutes were passed in 1661 and 1662 declaring that the King had the sole right of command and disposition of the militia, and providing for its organization.[20] Winston Churchill makes this comment on the Cavalier Parliament, which had restored the monarchy:

> It rendered all honour to the King. It had no intention of being governed by him. The many landed gentry who had been impoverished in the royal cause were not blind monarchists. They did not mean to part with any of the Parliamentary rights which had been gained in the struggle. They were ready to make provision for the defence of the country by means of militia; but the militia must be controlled by the Lord-Lieutenants of the counties. They vehemently asserted the supremacy of the Crown over the armed forces; but they took care that the only troops in the country should be under the local control of their own class. Thus not only the King but Parliament was without an army. The repository of force had now become the county families and gentry.[21]

The revival of the militia did not mean that the King was forbidden to raise and maintain armies. He had no means of doing so, however, because Parliament held the purse strings, and the quartering of soldiers had been condemned since the days of the Petition of Right.

Foreign wars made the development of a standing army inevitable, and it reached 16,000 men by the end of the reign of Charles II. It was done with the consent of Parliament, and English country gentlemen were secure in their control of the domestic armed power—the militia. In addition, guns were taken out of the hands of the common people. Among the conditions of a 1670 statute was one that no person, other than heirs of the nobility, could have a gun unless he owned land with a yearly value of L100.[22] The protection of the people's liberties was thus committed entirely to Parliament and other legal institutions. The possibility of a citizen army, such as that created by Oliver Cromwell, was precluded.

In the reign of Charles II, religious controversy dominated politics. The Cavalier Parliament wished to maintain the established Anglican Church and persecute dissenters, Catholic and Puritan alike. Parliament was also alarmed by the prospect that the King's Catholic brother, the Duke of York, would succeed to the throne. A parliamentary attempt to exclude the Duke failed, but in 1673 and 1678, two Test Acts

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20. First Militia Act, 13 Car. 2, Stat. I, c. 6 (1661); Second Militia Act, 14 Car. 2, c. 3 (1662).

21. 2 W. Churchill, A History of the English-Speaking Peoples 336 (1956).

22. Game Preservation Act, 22 Car. 2, c. 25, § 3 (1670).

were passed which barred [illegible]
and from both Houses of Parliament.[23]

In 1685, the Catholic Duke of York ascended to the throne as James II. The new King quieted the fears of his subjects by proclaiming his intention to maintain church and state as they were by law established. The people were also comforted by the fact that the heirs to the throne were his Protestant daughters, Mary and Anne, and his Protestant nephew, William of Orange, stadholder of the Dutch Republic and Mary's husband. Because of the Test Acts, James II inherited an entirely Protestant government.

At the same time a rebellion, led by the Duke of Monmouth, broke out in the western counties. The King successfully crushed the uprising, but in the process succeeded in doubling his standing army to 30,000 men, granting commissions to catholic officers, and bringing in recruits from Catholic Ireland. In addition he quartered his new army in private homes. These arbitrary actions were in direct violation of previous parliamentary proclamations.

James II then asked Parliament to repeal the Test Acts and the Habeas Corpus Act, which Parliament refused to do. The King also asked the representatives of the nation to abandon their reliance on the militia, in favor of standing armies:

> My Lords and Gentlemen,
>
> After the storm that seemed to be coming upon us when we parted last, I am glad to meet you all again in so great Peace and Quietness. God Almighty be praised, by those Blessing that Rebellion was suppressed: But when we reflect, what an inconsiderable Number of Men began it, and how long they carried [it] on without any Opposition, I hope every-body will be convinced, that the Militia, which hath hitherto been so much depended on, is not sufficient for such Occasions; and that there is nothing but a good Force of well disciplined Troops in constant Pay, that can defend us from such, as, either at Home or Abroad, are disposed to disturb us . . .[24]

John Dryden, the poet, shared the King's attitude toward the militia when he wrote these timeless words:

> The country rings around with loud alarms,
> And raw in fields the rude militia swarms;
> Mouths without hands; maintained at vast expense,
> In peace a charge, in war a weak defence;
> Stout once a month they march, a blustering band,
> And ever, but in times of need, at hand.

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23. Test Act, 25 Car. 2, c. 2. (1673); Parliamentary Test Act, 30 Car. 2, Stat. 2, c. 1 (1678) (an exemption allowed the Duke of York to retain his seat in the House of Lords).

24. 9 H.C. Jour. 756 (1685).

This was the morn when, issuing on the guard,
Drawn up in rank and file they stood prepared
Of seeming arms to make a short essay,
Then hasten to be drunk, the business of the day.[25]

Parliament adjourned in 1686 without resolving any of the basic issues. The King kept his army and pursued his policies through extra-parliamentary means.

To get rid of the Test Act, and to revive the royal prerogative at the same time, the King arranged a collusive lawsuit. A coachman in the service of a Roman Catholic officer brought suit under the Test Act to receive the statutory reward for discovering violators, and the officer pleaded a royal dispensation in defense. The King's judges in *Godden v. Hales*[26] upheld the validity of the dispensation and gave judgment for the defendant. Lord Chief Justice Herbert stated:

> We are satisfied in our judgments before, and having the concurrence of eleven out of twelve, we think we may very well declare an opinion of the court to be, that the King may dispense in this case: and the judges go upon these grounds;
>
> 1. That the kings of England are sovereign princes.
> 2. That the laws of England are the king's laws.
> 3. That therefore 'tis an inseparable prerogative in the kings of England, to dispense with penal laws in particular cases and upon particular necessary reasons.
> 4. That of those reasons and those necessities the king himself is sole judge: And then, which is consequent upon all,
> 5. That this is not a trust invested in or granted to the king by the people, but the ancient remains of the sovereign power and prerogative of the kings of England; which never yet has taken from them, nor can be.[27]

Thus armed with the law, the King proceeded to dispense with statutes as he saw fit. He replaced Protestants and Catholics at high posts in government, particularly at important military garrisons. The army was further enlarged and 13,000 men were stationed at Hounslow Heath, just outside London, in order to hold the city in subjection if necessary. How far James II planned to carry his religious and political program is unknown, but his powerful standing army made many Protestants fearful and uneasy about the future.

With the birth of a son, who would take precedence over the King's Protestant daughters in the succession, fear led to revolution.

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25. J. Dryden, Cymon and Iphigenia, in The Poetical Works of John Dryden 641 (W. Christie ed. 1893).

26. Godden v. Hales, 89 Eng. Rep. 1050 (Ex. 1686), *as reported in*, 11 State Trials 66 (T. Howell comp. 1811).

27. *Id.* at 1199.

Leading [illegible] to England in defense of the liberties [illegible] to the Crown. When William landed with a large Dutch army, the English army and government deserted James II who fled to France. Thus the Glorious Revolution of 1688 was accomplished. James II had believed that his enemies were paralyzed by the Anglican doctrine of nonresistance, but he had so alienated his subjects that he was deposed without being able to put up any resistance himself.

William and Mary were offered the Crown jointly after they accepted the Declaration of Rights on February 13, 1689. The Declaration was later enacted in the form of a statute, known as the Bill of Rights.[28] The document is divided into two main parts: 1) a list of allegedly illegal actions of James II, and 2) a declaration of the "ancient rights and liberties" of the realm.

The sections of the first part of the statute that are relevant to the right to bear arms are the allegations that James II

> did endeavor to subvert and extirpate the Protestant Religion and the Laws and Liberties of this Kingdom . . .
>
> 5. By raising and keeping a Standing army within this Kingdom in Time of Peace without Consent of Parliament and quartering Soldiers contrary to Law.
>
> 6. By causing several good Subjects, being Protestants, to be disarmed at the same Time when Papists were both armed and employed contrary to Law.[29]

It should be pointed out that the King did not disarm Protestants in any literal sense; the reference is to his desire to abandon the militia in favor of a standing army and his replacement of Protestants by Catholics at important military posts.

The parallel sections of the declaration of rights part of the statute are:

> 5. That the raising or keeping a Standing Army within the Kingdom in Time of Peace unless it be with the Consent of Parliament is against Law.
>
> 6. That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law.[30]

The purpose, and meaning of, the right to have arms recognized by these provisions is clear from their historical context. Protestant members of the militia might keep and bear arms in accordance with

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28. Bill of Rights, 1 W. & M., sess. 2, c. 2 (1689).
29. *Id.*
30. *Id.* Securing the Peace in Scotland Act.

their militia duties for the defense of the realm. The right was recognized as a restriction on any future monarch who might wish to emulate James II and abandon the militia system in favor of a standing army without the consent of Parliament. There was obviously no recognition of any personal right to bear arms on the part of subjects generally, since existing law forbade ownership of firearms by anyone except heirs of the nobility and prosperous landowners.

In summary, the English Bill of Rights represents the culmination of the centuries old problem of the relationship of sovereignty and armed force. The king could have an army, but only with the express consent of Parliament. The king could not, however, dismantle and disarm the militia. There was no individual right to bear arms; the rights of subjects could be protected only by the political process and the fundamental laws of the land.

## III. England and Her Colonies

The revolutionary settlement that followed the accession of William and Mary gave the English people permanent security. England, however, had become the center of an Empire, and the relationship between England and the outlying territories raised legal and political problems.

When William and Mary, and, later, Queen Anne, all died without heirs, the Crown passed to the distantly-related House of Hanover in Germany. Uprisings led by the son and grandson of James II were suppressed in 1715 and in 1745, and Parliament felt it necessary to deprive the people entirely of the right to bear arms in large parts of Scotland.[31]

The history of the English colonies in America was closely intertwined with that of the Mother Country. The New England colonies had been settled by Puritan refugees from the early Stuart kings. When Cromwell and the Puritans came to power in England, thousands of royalists fled to the southern colonies, swelling their populations.

The foundation of government in the colonies was the charter granted by the king. An important feature of a charter was the provision securing for the inhabitants of the colony the rights of Englishmen. For example, the 1606 Charter of Virginia contains this passage:

> Also we do . . . DECLARE . . . that all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the

31. 1 Geo. 1, Stat. 2, c. 54 (1715).

> Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of *England*, or any other of our said Dominions.[32]

During the seventeenth century and the first half of the eighteenth century, the North American colonies were essentially self-governing republics following the political and legal model of England. In 1720, Richard West, counsel to the Board of Trade, gave this description of the state of law in the colonies:

> The Common Law of England is the Common Law of the Plantations, and all statutes in affirmance of the Common Law, passed in England antecedent to the settlement of a colony, are in force in that colony, unless there is some private Act to the contrary; though no statutes, made since those settlements, are there in force unless the colonies are particularly mentioned. Let an Englishman go where he will, he carries as much of law and liberty with him, as the nature of things will bear.[33]

The legal relationship of Britain and the colonies became more than an academic problem after the end of the Seven Years' War in 1763. That war, known in America as the French and Indian War, brought large British armies to colonies which had hitherto known no armed force but the colonial militia. The cost of the war was enormous, and the British government decided that the colonies should share it.

In his efforts to tax and govern the colonies, George III acted in two capacities: as King, armed with the prerogatives of his office, and as the agent of the British Parliament which at that time was under his personal control. The colonists acknowledged the authority of the King, but only in accordance with their charters and with the same restrictions that limited his power in Britain. Many of the colonists denied the authority of the British Parliament to regulate their internal affairs in any way.

Colonial resistance forced the British government to abandon the Stamp Tax, but Parliament passed the Declaratory Act in 1766 entitled "An Act for the better securing the Dependency of his majesty's dominions in *America* upon the Crown and parliament of *Great Britain*."

> Whereas several of the Houses of Representatives in his Majesty's Colonies and Plantations in *America*, have of late, against Law,

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32. VA. CHARTER (1606), in 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3788 (F. Thorpe ed. 1909) (hereinafter cited as CONSTITUTIONS).

33. 1 G. CHALMERS, OPINIONS OF EMINENT LAWYERS ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE 194, 195 (1814).

> claimed to themselves or to the General Assemblies of the same, the sole and exclusive Right of imposing Duties and Taxes upon his Majesty's Subjects in the said Colonies and Plantations; and have, in pursuance of such Claim, passed certain Votes, Resolutions and Orders, derogatory to the Legislative Authority of Parliament, and inconsistent with the Dependency of the said Colonies and Plantations upon the Crown of *Great Britain* be it declared . . . That the said Colonies and Plantations in *America* have been, are, and of Right ought to be, subordinate unto, and dependent upon, the Imperial Crown and Parliament of *Great Britain*; and that the King's Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons of *Great Britain* in Parliament assembled, had, hath, and of Right ought to have, full Power and Authority to make Laws and Statutes of sufficient Force and Validity to bind the Colonies and People of *America*, Subjects of the Crown of *Great Britain*, in all Cases whatsoever.[34]

The colonists were free-born Englishmen and they were not willing to accept inferior status. They could not admit the authority of Crown and Parliament to bind them "in all cases whatsoever." They fell back on the doctrine of fundamental law as expressed in 1764 by James Otis:

> 'Tis hoped it will not be considered as a new doctrine, that even the authority of the Parliament of *Great-Britain* is circumscribed by certain bounds, which if exceeded their acts become those of meer *power* without *right*, and consequently void. The judges of England have declared in favour of these sentiments, when they expressly declare; that *acts of Parliament against natural equity are void*. That *acts against the fundamental principles of the British constitution are void*. This doctrine is agreeable to the law of nature and nations, and to the divine dictates of natural and revealed religion.[35]

The concept of fundamental law was developed and grounded squarely on the English legal tradition. In 1772, Samuel Adams wrote in response to another writer in the *Gazette*:

> Chromus talks of *Magna Charta* as though it were of no greater consequence that an act of Parliament for the establishment of a corporation of button-makers. Whatever low ideas he may entertain of the *Great Charter* . . . it is affirm'd by Lord Coke, to be declaratory of the principal grounds of the fundamental laws and liberties of England. "It is called *Charta Libertatum Regni, the Charter of the Liberties of the kingdom*, upon great reason . . . because *liberos facit, it makes and preserves the people free*." . . . But if it be declaratory of the principal grounds of the fundamental laws and liberties of England, it cannot be altered in any of its essential parts, without altering the constitution. . . . Vatel tells us plainly and without hesitation, that "the supreme legislative can-

34. Declaratory Act, 6 Geo. 3, c. 12 (1766).

35. J. Otis, The Rights of the British Colonies Asserted and Proved 72-73 (1764).

> not change the constitution." . . . If then according to Lord Coke, *Magna Charta* is declatory of the principal grounds of the *fundamental* laws and liberties of the people, and Vatel is right in his opinion, that the supreme legislative cannot change the constitution, I think it follows, whether Lord Coke has expressly asserted it or not, that an act of parliament made against Magna Charta in violation of its essential parts, is void.[36]

This statement of fundamental law later influenced the intellectual foundation of judicial review in the United States.

In order to sustain his claim of full and unrestricted sovereignty, George III sent large standing armies to the colonies. America was outraged. The colonists drew their arguments from Whig political theorists on both sides of the Atlantic who maintained that standing armies in time of peace were tools of oppression, and that the security of a free people was best preserved by a militia.

The American colonists, who had always relied on their own militia, hated and feared standing armies even more than their English brethren. In quartering his redcoats in private homes, suspending charters and laws, and eventually imposing martial law, George III was doing in America what he could not do in England. The royal prerogative had virtually ended in England with the Revolution of 1688, but the King was reviving it in America.

The Fairfax County Resolutions, drawn up under the leadership of George Washington and passed on July 18, 1774, reflect the colonial attitude in the year prior to the outbreak of war. Of particular interest is the following paragraph:

> *Resolved*, That it is our greatest wish and inclination, as well as interest, to continue our connection with, and dependence upon, the *British* Government; but though we are its subjects, we will use every means which Heaven hath given us to prevent our becoming its slaves.[37]

In October of the same year, the First Continental Congress assembled and stated the position of the colonies in these resolutions:

> *Resolved*, . . . 1. That they are entitled to life, liberty, & property, and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent.
>
> *Resolved*, . . . 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.

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36. S. Adams, *Candidus Letters* (1772), in 2 The Writings of Samuel Adams 324-26 (H. Cushing ed. 1906).

37. Fairfax Co. Resolutions, (1774) in A. E. D. Howard, The Road From Runnymede: Magna Carta and Constitutionalism in America 435 (1968).

> *Resolved*, . . .3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their decendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.
>
> *Resolved*, . . . 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed. . . .[38]

After stating these general principles, the Congress listed specific rights that had been violated by George III, including the following:

> *Resolved*, . . . 9. That the keeping a Standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.[39]

The colonists were asserting, in effect, that the restrictions on royal power that had been won by Parliament in its long struggle against the Stuart kings were binding against the sovereign, in favor of the colonial legislatures as well as Parliament. In order to make that claim good, the colonists were forced to take up arms.

## IV. Popular Sovereignty and the New Nation

America's long war in defense of the rights of Englishmen began in 1775. Although many colonists still hoped for a reconciliation with the mother country, it was necessary to set up state governments in the interim. In Connecticut and Rhode Island, all that was necessary was to strike the King's name from the colonial charters, which continued to serve for many years as state constitutions.

In other states, written constitutions were drawn up. They generally had these features: 1) an assertion that political power derives from the people; 2) provision for the organization of the government with a three-fold separation of powers; 3) a powerful legislature with authority to pass all laws not forbidden by the Constitution; and 4) a specific bill of rights restricting governmental power in the same way that the English Bill of Rights restricted the King. It is important to emphasize that the concept of enumerated powers had not yet been

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38. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, 67-68 (Oct. 14, 1774) (W. C. Ford ed. 1904-1907).

39. *Id.* at 70.

developed, and that rights were [illegible] defined . . . the nature of restrictions on power, not as individual freedoms.[40]

The Declaration of Independence substituted the sovereignty of the people for that of the King, and appealed to the "Laws of Nature and of Nature's God," but it did not proclaim a social or legal revolution. It listed the colonists' grievances, including the presence of standing armies, subordination of civil to military power, use of foreign mercenary soldiers, quartering of troops, and the use of the royal prerogative to suspend laws and charters. All of these legal actions resulted from reliance on standing armies in place of the militia.

Although America repudiated the British King, it did not repudiate British law. The Constitution of Maryland, for example, declared:

> That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury according to the course of that law, and to the benefit of such of the English statutes as existed on the fourth day of July, seventeen hundred and seventy six, and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the courts of law or equity. . . .[41]

The War for Independence was fought by fourteen different military organization—the Continental Army under Washington, and the thirteen colonial militias. The debate over the relative merits of standing armies and the militia continued even during the fighting. A defender of standing armies, Washington wrote to the Continental Congress in September of 1776 as follows:

> To place any dependence upon Militia, is, assuredly, resting upon a broken staff. Men just dragged from the tender Scenes of domestick life; unaccustomed to the din of Arms; totally unac-

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40. For example, the Virginia Bill of Rights, adopted June 12, 1776, declared: "That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; 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." VA. CONST., Bill of Rights, § 13 (1776) in 7 CONSTITUTIONS 3814.

The comparable provision in Massachusetts was as follows: "The people have a right to keep and to bear arms for the common defence. And as, in time 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., Declaration of Rights, art. 17 (1780) in 3 CONSTITUTIONS 1892. (Considered in its context, the meaning of the "right to keep and bear arms" is clear. The words "for the common defence" makes it obvious that a collective right is intended. The people of Massachusetts did not want to risk a second British occupation.)

41. MD. CONST., Declaration of Rights, art. 3 (1851), in 3 CONSTITUTIONS 1713.

> quainted with every kind of military skill, which being followed by a want of confidence in themselves, when opposed to Troops regularly train'd, disciplined, and appointed, superior in knowledge and superior in Arms, makes them timid, and ready to fly from their own shadows. . . .
>
> The Jealousies of a standing Army, and the Evils to be apprehended from one, are remote; and, in my judgment, situated and circumstanced as we are, not at all to be dreaded; but the consequence of wanting one, according to my Ideas, formed from the present view of things, is certain, and inevitable Ruin; for if I was called upon to declare upon Oath, whether the Militia have been most serviceable or hurtful upon the whole; I should subscribe to the latter.[42]

To maintain the supremacy of civil power over that of the military Article II of the Articles of Confederation provided that each state would retain "its sovereignty, freedom, and independence."[43] A provision that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred" was included in Article VI.[44] In contrast, the military powers of the United States rested in Congress were strictly limited; Congress could not maintain standing armies without the consent of nine of the thirteen states.

The government of the United States under the Articles of Confederation was weak. Experience was to show that it needed to be strengthened in its military powers.

## V. Forging a More Perfect Union

When the War for Independence ended, the government of the Confederation was faced with one gigantic, insoluble problem—money. As troublesome as foreign and domestic bondholders were, there was one stronger pressure group that simply could not be ignored: the former soldiers who had been promised back pay and large pensions. Organized under the name of the Society of Cincinnati, these veterans were viewed with suspicion by many Americans, who nurtured fears of standing armies.

The danger to civil authority from the military was not entirely imaginary. In the summer of 1783 there was a direct attempt to coerce the Confederation into paying what had been promised to the army. Originally intended as a peaceful protest march on the capitol in Philadelphia, the ex-soldiers were soon "mediating more violent measures,"

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42. Letter from George Washington to the President of Congress, Sept. 24, 1776, in 6 THE WRITINGS OF GEORGE WASHINGTON 110, 112 (J. Fitzpatrick ed. 1931-1944).

43. *See generally* M. JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789 (1950).

including "seizure of the members of Congress."[44] Alarmed, Congress adjourned and fled to Trenton, New Jersey. The soldiers eventually gave up, and the officers who led them escaped.

Following the abortive demonstrations in Philadelphia in the summer of 1783, Madison and other leaders felt the need to reorder the nation's military structure.

The other important military event that precipitated demands for a stronger national government was Shays' Rebellion in Massachusetts in 1786. Oppressed by debt, farmers in the western part of the state seized military posts and supplies and defied the state government. Although the insurrection was suppressed fairly easily and Shays himself pardoned, exaggerated reports of the uprising circulated among the states, and conservatives were aghast. Madison, in writing the introduction to his notes on the Federal Convention, lists Shays' Rebellion as one of the "ripening incidents" that led to the Convention.[45]

Thomas Jefferson, in contrast, was not alarmed by the apparent dangers of anarchy, and he criticized the clamor of the Federalists. Just after receiving a copy of the proposed Constitution, he wrote from Paris:

> . . . We have had 13 states independent 11 years. There has been one rebellion. That comes to one rebellion in a century & a half for each state. What country before ever existed a century & a half without rebellion? & what country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is set them right as to facts, pardon & pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. It is natural manure. Our Convention has been too much impressed by the insurrection of Massachusetts: and in the spur of the moment they are setting up a kite to keep the hen-yard in order.[46]

Whatever the merits of Jefferson's beliefs, they were not shared by the majority of the Convention, which wished to prevent insurrections by strengthening the military powers of the general government.

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44. Debates of the Congress of the Confederation (June 2, 1783), in 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 93 (J. Elliot ed. 1836-1845) [hereinafter cited as STATE DEBATES].

45. DRAFTING THE FEDERAL CONSTITUTION: A REARRANGEMENT OF MADISON'S NOTES GIVING CONSECUTIVE DEVELOPMENTS OF PROVISIONS IN THE CONSTITUTION OF THE UNITED STATES 10 (A. Prescott ed. 1941) [hereinafter cited as MADISON REARRANGED].

46. Letter from Thomas Jefferson to William Stephen Smith, Nov. 13, 1787, in 4 THE WORKS OF THOMAS JEFFERSON 362 (P. Ford ed. 1892-1899).

The new military powers of Congress were listed in Article I, Section 8 of the proposed constitution, and include the following authority:

> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

The spirited debate over these provisions in the Federal Convention reflects the purposes and fears of the framers of the Constitution.

There was universal distrust of standing armies. For example, in June of 1787, Madison stated:

> . . . A standing military force, with an overgrown Executive will not long be safe companions to liberty. The means of defence agst. foreign danger, have been always the instruments of tyranny at home. Among the Romans it was a standing maxim to excite a war, whenever a revolt was apprehended. Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people. It is perhaps questionable, whether the best concerted system of absolute power in Europe cd. maintain itself, in a situation, where no alarms of external danger c. tame the people to the domestic yoke. The insular situation of G. Britain was the principal cause of her being an exception to the general fate of Europe. It has rendered less defence necessary, and admitted a kind of defence wch. c. not be used for the purpose of oppression.[47]

The defense "which could not be used for the purpose of oppression" was the militia, which was still revered on both sides of the Atlantic, even with its shortcomings.

Yet, despite the preference for the militia, it was generally agreed that Congress must have authority to raise and support standing armies in order to protect frontier settlements, the national government, and the nation when threatened by foreign powers. However, a few members were still fearful. Elbridge Gerry and Luther Martin, both of whom later opposed the Constitution, moved that a definite limit—two or three thousand men—be placed on the size of the national standing army. Voting by states, as always, the Convention unani-

47. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 465 (M. Farrand ed. 1911).

mously rejected the motion. The judgment of Congress and the two year appropriation limitation were thought to be sufficient safeguards.[48]

The proper extent of federal authority over the militia was much more heatedly debated. The subject was introduced by George Mason, author of the Virginia Bill of Rights, who later opposed the Constitution, but who now maintained that uniformity of organization, training and weaponry was essential to make the state militias effective. His hope was that the need for a standing army would be minimized; perhaps only a few garrisons would be required. Mason's opinions were shared by Madison, who gave this analysis:

> The primary object is to secure an effectual discipline of the Militia. This will no more be done if left to the states separately than the requisitions have been hitherto paid by them. The states neglect their militia now, and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety, and the less prepare its militia for that purpose; in like manner as the militia of a state would have been still more neglected than it has been, if each county had been independently charged with the care of its militia. The discipline of the militia is evidently a *national* concern, and ought to be provided for in the *national* Constitution.[49]

Despite such explanations, there were still opponents to the militia clauses. Gerry, for example, declared:

> This power in the United States, as explained, is making the states drill sergeants. He had as lief-let the citizens of Massachusetts be disarmed as to take the command from the states and subject them to the general legislature. It would be regarded as a system of des[illegible][50]

Later, as the Convention moved toward resolution of the issue, Gerry marshalled his final arguments. One can sense his feeling of outrage, as he solemnly warned of the dangers of centralized military power: "Let us at once destroy the state governments, have an executive for life or hereditary, and a proper Senate; and then there would be some consistency in giving full powers to the general government. . . ."[51] But as the states are not to be abolished, he wondered at the attempts that were made to give powers inconsistent with their existence. He warned the Convention against pushing the experiment too far. Some people will support a plan of vigorous government at every risk. Others, of a more democratic cast, will oppose it with equal determination; and a civil war may be produced by the conflict.

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48. MADISON REARRANGED 513-26.
49. *Id.* at 522.
50. *Id.* at 521.
51. *Id.* at 523-24.

Madison rose immediately and answered Gerry in these words:

> As the greatest danger is that of disunion of the states, it is necessary to guard against it by sufficient powers to the common government; and as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good militia.[52]

The last discussion of the militia clauses took place on September 14, 1787, just before the Convention finished its work. Mason moved to add a preface to the clause that allowed federal regulation of the militia, in order to define its purpose. His proposed addition was "that the liberties of the people may be better secured against the danger of standing armies in time of peace." The motion was opposed as "setting a dishonourable mark of distinction on the military class of citizens," and was rejected.[53]

Thus ended the Convention's debate over the relative merits and difficulties of standing armies and the militia. The debate was soon to be revived, however, as the new nation prepared to consider the proposed new form of government.

## VI. The Ratification Controversy and the Bill of Rights

The new Constitution was signed on September 17, 1787 and the contest over its ratification soon began. The controversy was carried on mainly through the printed media. It was an unequal contest because the proponents of the new government, who now called themselves Federalists, controlled most of the newspapers. The Antifederalists resorted mainly to pamphlets and handbills.

Because the Antifederalist effort was decentralized and local in nature, it is difficult to generalize about the arguments used against the Constitution. The unifying theme, to the extent there was one, was that the new government would overreach its powers, destroy the states, deprive the people of their liberty, and create an aristrocratic or monarchical tyranny. In finding evidence of such dangers, the Antifederalists often made inconsistent interpretations of what the Constitution provided. In the case of the militia powers, for example, it was said that Congress would disarm the militia in order to remove opposition to its standing army; at the same time it was argued that Congress would ruthlessly discipline the militia and convert it into a tool of oppression.

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52. *Id.* at 524.
53. *Id.* at 525.

Bearing in mind the inconsistency of [illegible], some of the pamphlets and articles will be examined in order to see how the fears of military power existed. One of the most scurrilous critics of the Constitution was "Philadelphiensis." His identity is uncertain, but he is believed to have been Benjamin Workman, a radical Irishman and a tutor at the University of Pennsylvania. His comments include the following:

> Who can deny but the *president general* will be a *king* to all intents and purposes, and one of the most dangerous kinds too; a king elected to command a standing army? Thus our laws are to be administered by this *tyrant*; for the whole, or at least the most important part of the executive department is put in his hands.
>
> The thoughts of a military officer possessing such powers, as the proposed constitution vests in the president general, are sufficient to excite in the mind of a freeman the most alarming apprehensions; and ought to rouse him to oppose it at *all events*. Every freeman of America ought to hold up this idea to himself, *that he has no superior but God and the laws*. But this tyrant will be so much his superior, that he can at any time he thinks proper, order him out in the militia to exercise, and to march when and where he pleases. His officers can wantonly inflict the most disgraceful punishment on a peaceable citizen, under pretense of disobedience, or the smallest neglect of militia duty.[54]

Another anonymous writer, Brutus, appealed to history as proof that standing armies in peacetime lead to tyranny:

> The same army, that in Britain, vindicated the liberties of that people from the encroachments and despotism of a tyrant king, assisted Cromwell, their General, in wresting from the people that liberty they had so dearly earned. . . .
>
> I firmly believe, no country in the world had ever a more patriotic army, than the one which so ably served this country in the late war. But had the General who commanded them been possessed of the spirit of a Julius Caesar or a Cromwell, the liberties of this country . . . [might have] in all probability terminated with the war.[55]

Still another unknown, styling himself "A Democratic Federalist," asserted that the Revolution had proved the superiority of the militia over standing armies:

> Had we a standing army when the British invaded our peaceful shores? Was it a standing army that gained the battles of Lexington and Bunker Hill, and took the ill-fated Burgoyne? Is not a well-regulated militia sufficient for every purpose of internal defense? And which of you, my fellow citizens, is afraid of any

54. 'Philadelphiensis' *Letter*, Independent Gazetteer (Phila.), Feb. 7, 1788.
55. 'Brutus' *Letter*, N. Y. Journal, Jan. 24, 1788.

invasion from foreign powers that our brave militia would not be able immediately to repel?[56]

Some writers, such as "Centinel," feared that national control over the militia would transform that bulwark of democracy into a tool of oppression:

> This section will subject the citizens of these states to the most arbitrary military discipline: even death may be inflicted on the disobedient; in the character of militia, you may be dragged from your families and homes to any part of the continent and for any length of time, at the discretion of the future Congress; and as militia you may be made the unwilling instruments of oppression, under the direction of government; there is no exemption upon account of conscientious scruples of bearing arms, no equivalent to be received in lieu of personal services. The militia of Pennsylvania may be marched to Georgia or New Hampshire, however incompatible with their interests or consciences; in short, they may be made as mere machines as Prussian soldiers.[57]

Other Antifederalist propagandists believed that the true motive for assertion of national control over the militia was not to use it, but to destroy it, and thus eliminate any opposition to the new standing army. The Bostonian who used the pseudonym "John De Witt" asked these questions about the militia clauses:

> Let us inquire why they have assumed this great power. Was it to strengthen the power which is now lodged in your hands, and relying upon you and *you solely* for aid and support to the civil power in the execution of all the laws of the new Congress? Is this probable? Does the complexion of this new plan countenance such a supposition? When they unprecedently claim the power of raising and supporting armies, do they tell you for what purposes they are to be raised? How they are to be employed? How many they are to consist of, and where stationed? Is this power fettered with any one of those restrictions, which will show they depend upon the militia, and not upon this infernal engine of oppression to execute their civil laws? The nature of the demand in itself contradicts such a supposition, and forces you to believe that it is for none of these causes—but rather for the purpose of consolidating and finally destroying your strength, as your respective governments are to be destroyed. They well know the impolicy of putting or keeping arms in the hands of a nervous people, at a distance from the seat of a government, upon whom they mean to exercise the powers granted in that government. . . .
>
> It is asserted by the most respectable writers upon government, that a well regulated militia, composed of the yeomanry of the country, have ever been considered as the bulwark of a free people. Tyrants have never placed any confidence on a militia composed of freemen.[58]

56. 'A Democratic Federalist' *Letter*, Pa. Packet (Phila.), Oct. 23, 1787.
57. 'Centinel' *Letter*, Independent Gazetteer (Phila.), Nov. 8, 1787.
58. 'John De Witt' *Letter*, Am. Herald (Boston), De. 3, 1787.

Anonymous pamphleteers and p[illegible] persons concerned about standing armies and [illegible]. Henry Lee, in a letter that was widely circulated in Virginia, [illegible] the contradictory arguments that the militia would be abandoned in favor of a standing army, and that the militia would be strengthened and forged into an instrument of tyranny. He foresaw that a small proportion of the total militia would be made into a select unit, much like a standing army, while the rest of the militia would be disarmed:

> Should one fifth, or one eighth part of the men capable of bearing arms, be made a select militia, as has been proposed, and those the young and ardent part of the community, possessed of but little or no property, and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of any army, while the latter will be defenceless.[59]

A necessary premise underlying Antifederalist attack on the militia clauses of the Constitution was that these clauses operated to place exclusive jurisdiction over the militia in the hands of the general government. Though the Federalists denied this premise, it was affirmed even by Luther Martin and Elbridge Gerry, who had been members of the Federal Convention, but who now opposed the Constitution. Martin is particularly interesting because he advanced all of the contradictory arguments used by the antifederalists. Speaking on November 29, 1787 to the Maryland legislature, he said:

> . . . Engines of power are supplied by the standing Army—unlimited as to number or its duration, in addition to this Government has the entire Command of the Militia, and may call the whole Militia of any State into Action, a power, which it was vainly urged ought never to exceed a certain proportion. By organizing the Militia Congress have taken the whole power from the State Governments; and by neglecting to do it and encreasing the Standing Army, their power will increase by those very means that will be adopted and urged as an ease to the People.[60]

Martin later invoked the opposite approach, that the milita would be subject to ruthless discipline and martial law, and would be marched to the ends of the continent in the service of tyranny. In a letter published on January 18, 1788, Martin wrote that the new system for governing the militia was "giving the states the last coup de grace by taking from them the only means of self preservation."[61]

Elbridge Gerry, like many of the pamphleteers, viewed centralized military power as inseparable from monarchy:

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59. R. H. Lee, Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention 24-25 (1787).

60. 3 The Records of the Federal Convention of 1787, at 157 (M. Farrand ed. 1911).

61. Martin, *Letter*, Md. Journal, Jan. 18, 1788.

> By the edicts of authority vested in the sovereign power by the proposed constitution, the militia of the country, the bulwark of defence, and the security of national liberty is no longer under the control of civil authority; but at the rescript of the Monarch, or the aristocracy, they may either be employed to extort the enormous sums that will be necessary to support the civil list—to maintain the regalia of power—and the splendour of the most useless part of the community, or they may be sent into foreign countries for the fulfilment of treaties, stipulated by the President and two thirds of the Senate.[62]

The supporters of the proposed constitution were well-prepared to meet these and similar arguments. They had the support of America's two national heroes, George Washington and Benjamin Franklin, and this helped make the Constitution respectable, as well as alleviating fears. Articles favoring the Constitution, such as the *Federalist Papers*, were often reprinted in distant states. Intelligent and well-educated, the proponents of the new government carefully and consistently answered the arguments of their rivals.

To the general argument that there were not sufficient restrictions on the power of the proposed general government, the federalists replied that no bill of rights was necessary. This was because the Constitution would establish a novel type of government, one of enumerated powers; restrictions were necessary only where full sovereignty was conferred. In Federalist Number 84, Alexander Hamilton made the argument in these words:

> It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CHARTA, obtained by the barons, sword in hand from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the Petition of Right assented to by Charles I, in the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants.[63]

To particular criticism of the military clauses of the proposed Constitution, both Hamilton and Madison replied in detail in the Federalist Papers.

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62. E. GERRY, OBSERVATIONS ON THE NEW CONSTITUTION AND ON THE FEDERAL AND STATE CONVENTIONS 10 (1788).

63. THE FEDERALIST No. 84, at 536 (H. Lodge ed. 1888) (A. Hamilton).

Hamilton denied that a standing army was necessary, citing recent experience:

> Here I expect we shall be told that the militia of the country is its natural bulwark, and would be at all times equal to the national defence. This doctrine, in substance, had like to have lost us our independence. It cost millions to the United States that might have been saved. . . .
>
> The American militia, in the course of the late war, have, by their valor on numerous occasions, erected eternal monuments to their fame; but the bravest of them feel and know that the liberty of their country could not have been established by their efforts alone, however great and valuable they were. War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.[64]

Hamilton did not, however, go so far as to say that standing armies were a good thing. Instead, he argued that a strong militia would minimize the need for them.[65]

Madison also addressed himself to the fear that the new national government would disarm the militia and destroy state government. He first argued that the states would still have concurrent power over the militia, thus denying that the proposed Constitution gave exclusive jurisdiction over the militia to the general government. He also pointed out that the militia, comprised of half a million men, was a force that could not be overcome by any tyrant.[66]

The arguments of the federalists appear to have quieted the fears of their countrymen, since the early state conventions were all easy victories for the new Constitution. Between December 7, 1787 and January 9, 1788, Delaware, Pennsylvania, New Jersey, Georgia and Connecticut all ratified unconditionally and overwhelmingly; the vote was unanimous in three of these states. In Massachusetts, the contest was close. On February 6, 1787, the state convention ratified the new Constitution by a narrow margin.

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64. *Id.* No. 25 at 150 (A. Hamilton).

65. Hamilton explained: "If a well-regulated militia be the most natural defence of a free country, it ought certainly to be under the regulation and at the disposal of that body which is constituted the guardian of the national security. If standing armies are dangerous to liberty, an efficacious power over the militia, in the body to whose care the protection of the state is committed ought, as far as possible, to take away the inducement and the pretext to such unfriendly institutions. If the federal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force. If it cannot avail itself of the former, it will be obliged to recur to the latter. To render an army unnecessary will be a more certain method of preventing its existence than a thousand prohibitions upon paper." *Id.* No. 29, at 169 (A. Hamilton).

66. *Id.* No. 46, at 297-99 (J. Madison).

On the other hand, Maryland overwhelmingly approved the Constitution on April 28, 1787. South Carolina was next, on May 23, 1787. Eight states had now ratified the document and only one more was needed. All of the ratifications, except Massachusetts, had been by majorities of two-thirds or more. The remaining states were to see close contests, and all of them would suggest that a Bill of Rights be added to the Constitution.

New Hampshire, on June 21, 1787, became the ninth state to approve the new form of government, thus assuring that the proposed Constitution would go into effect. The New Hampshire convention proposed some amendments in its ratifying resolution. Among the proposals were a three-fourths vote requirement for keeping standing armies, a flat prohibition on quartering troops, and a prohibition against Congressional disarmament of the militia. Although no records were kept of the debates, it seems likely that the delegates feared that New England's experiences with General Gage's redcoats would be repeated.

As yet undecided, Virginia was vital to the Union as the largest, richest, and most populous state. The Virginia convention was also important because it was the only one in which the military clauses of the Constitution were extensively discussed.

The main protagonist of the Virginia debates was Patrick Henry, backwoods lawyer, ardent republican, and incomparable orator. By means of the rhetorical question, Henry was able to capture the fears and emotions which led to the adoption of the Second Amendment:

> A standing army we shall have, also, to execute the execrable commands of tyranny; and how are you to punish them? Will you order them to be punished? Who shall obey these orders? Will your mace-bearer be a match for a disciplined regiment? In what situation are we to be? . . .
>
> Your militia is given up to Congress, also, in another part of this plan: they will therefore act as they think proper: all power will be in their own possession. You cannot force them to receive their punishment: of what service would militia be to you when, most probably, you will not have a single musket in the state? for, as arms are to be provided by Congress, they may or may not furnish them. . . .
>
> By this, sir, you see that their control over our last and best defence is unlimited. If they neglect or refuse to discipline or arm our militia, they will be useless: the states can do neither—this power being exclusively given to Congress. . . .
>
> . . . If we make a king, we may prescribe the rules by which he shall rule his people, and interpose such checks as shall prevent him from infringing them; but the President, in the field, at the head of his army, can prescribe the terms on which he shall reign master,

so far that it [illegible] under the galling yoke. . . .[67]

While other critics lacked Henry's oratorical talents, they also feared disarmament of the militia by the new national government. George Mason, for example, spoke as follows:

> . . . There are various ways of destroying the militia. A standing army may be perpetually established in their stead. I abominate and detest the idea of government, where there is a standing army. The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless—by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them . . .[68]

Mason then went on to cite the case of a former British governor of Pennsylvania who had allegedly advised disarmament of the militia as part of the British government's scheme for "enslaving America." The suggested method was not to act openly, but "totally disusing and neglecting the militia."[69] Mason said:

> . . . This was a most iniquitous project. Why should we not provide against the danger of having our militia, our real and natural strength, destroyed? The general government ought, at the same time, to have some such power. But we need not give them power to abolish our militia . . .[70]

In these words lie the origin of the Second Amendment. The new government should be allowed to keep its broad general military powers, but it should be forbidden to disarm the militia.

Madison, leader of the Federalist forces, still argued that the militia clauses were adequate as written. He said the states and national government would have concurrent power over the militia. In response to a question, he explained why the general government was to have power to call out the militia in order to execute the laws of the union:

> . . . If resistance should be made to the execution of the laws, he said, it ought to be overcome. This could be done only in two ways—either by regular forces or by the people. If insurrections should arise, or invasions should take place, the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army. The best way to do these things was to put the militia on a good and sure footing, and enable the government to make use of their services when necessary.[71]

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67. Spoken at the Virginia Convention 3 STATE DEBATES 51-59.
68. *Id.* at 379.
69. *Id.* at 380.
70. *Id.*
71. *Id.* at 378.

It is interesting to note that Madison uses the words "people" and "militia" as synonymous, as does the Second Amendment, which he was later to draft.

The Federalists still maintained that a bill of rights was unnecessary where there was a government of enumerated powers. Governor Randolph, who had attended the Philadelphia Convention and had refused to sign the Constitution, but who was now supporting its adoption, spoke as follows:

> On the subject of a bill of rights, the want of which has been complained of, I will observe that it has been sanctified by such reverend authority, that I feel some difficulty in going against it. I shall not, however, be deterred from giving my opinion on this occasion, let the consequence be what it may. At the beginning of the war, he had no certain bill of rights; for our charter cannot be considered as a bill of rights; it is nothing more than an investiture, in the hands of the Virginia citizens, of those rights which belonged to British subjects. When the British thought proper to infringe our rights, was it not necessary to mention, in our Constitution, those rights which ought to be paramount to the power of the legislature? Why is the bill of rights distinct from the Constitution? I consider bills of rights in this view—that the government should use them, where there is a departure from its fundamental principles, in order to restore them.[72]

This statement is very important, because it clearly explains how men in the eighteenth century conceived of a right. A right was a restriction on governmental power, necessitated by a particular abuse of that power.

The Virginia convention, however, decided that it would be wise to impose restrictions on the power of the general government before abuses occurred. So the delegates appended to their ratification resolution a long document recommended to the consideration of the Congress. This document is divided into two distinct parts: a declaration of principles and specified suggested amendments to the Constitution designed to secure these principles.

The declaration of principles tells much about the social and political philosophy of eighteenth century Americans. The theory of government as a social compact is affirmed. There are five provisions that relate directly to the background of the Second Amendment.

The third principle condemns the Anglican doctrine of nonresistance as "absurd, slavish, and destructive of the good and happiness of mankind."[73] This is not surprising, since Virginia had recently dis-

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72. *Id.* at 466.

73. J. Madison, The Debates in the Federal Convention of 1787 660 (G. Hunt & J.B. Scott ed. 1920).

established the Anglican church, [illegible] authority of the head of that church.

The seventh principle is "that all power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people in the legislature is injurious to their rights, and ought not to be exercised."[74] The attempt to assert such power had cost James II his throne and George III his American colonies, even though both Kings had been backed by powerful standing armies.

The seventeenth, eighteenth and nineteenth principles are as follows:

> Seventeenth, That the people have a 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 defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.
>
> Eighteenth, That no Soldier in time of peace ought to be quartered in any house without the consent of the owner, and in the time of war in such manner only as the laws direct.
>
> Nineteenth, That any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead.[75]

These words encapsulate the Whig point of view in the long debate over the relative merits of standing armies and the militia. The specific amendments that were proposed to protect these principles were:

> Ninth, That no standing army or regular troops shall be raised or kept up in time of peace, without the consent of two thirds of the members present in both houses.
>
> Tenth, That no soldier shall be inlisted for any longer term than four years, except in time of war, and then for no longer term than the continuance of the war.
>
> Eleventh, That each State respectively shall have the power to provide for organizing, arming and disciplining it's own Militia, whensoever Congress shall omit or neglect to provide for the same. That the Militia shall not be subject to Martial law, except when in actual service in time of war, invasion, or rebellion; and when not in the actual service of the United States, shall be subject only to such fines, penalties and punishments as shall be directed or inflicted by the laws of its own State.[76]

It is important for our purposes to note that there is no mention here of any individual right.

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74. *Id.* at 661.
75. *Id.* at 662.
76. *Id.* at 663.

**The Purpose of the Second Amendment**

There might never have been a federal Bill of Rights had it not been for one alarming event that is almost forgotten today. As part of the price of ratification in New York, it was agreed unanimously that a second federal convention should be called by the states, in accordance with Article V of the Constitution, to revise the document. Governor Clinton wrote a circular letter making this proposal to the governors of all the states.

Madison feared that a new convention would reconsider the whole structure of government and undo what had been achieved. Professor Merrill Jensen, in *The Making of the American Constitution*, analyzes the situation as follows:

> The Bill of Rights was thus born of Madison's concern to prevent a second convention which might undo the work of the Philadelphia Convention, and also of his concern to save his political future in Virginia. On the other side such men as Patrick Henry understood perfectly the political motives involved. He looked upon the passage of the Bill of Rights as a political defeat which would make it impossible to block the centralization of all power in the national government.[77]

Madison had outmanuevered the antifederalists by drafting the Bill of Rights very soon after the First Congress met.

Madison's original draft of the provision that eventually became the Second Amendment read:

> The right of the people to keep and bear arms shall not be infringed; a well armed but 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.[78]

There was debate in Congress over the religious exemption, and it was removed. Otherwise, there was general discussion of standing armies and the militia, and widespread support for the proposal. It became part of the Constitution with the rest of the Bill of Rights on December 15, 1791.

Considering the immediate political context of the Second Amendment, as well as its long historical background, there can be no doubt about its intended meaning. There had been a long standing fear of military power in the hands of the executive, and, rightly or wrongly, many people believed that the militia was an effective military force which minimized the need for such executive military power. The pro-

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77. M. JENSEN, THE MAKING OF THE AMERICAN CONSTITUTION 149 (1964).
78. 1 ANNALS OF CONG. 434 (1789).

posed Constitution authorized standing armies without Congressional power over the militia. Some even feared disarmament of the militia. The Second Amendment was clearly and simply an effort to relieve that fear.

Neither in the Philadelphia Convention, in the writings of the pamphleteers, in the newspapers, in the convention debates, nor in Congress was there any reference to hunting, target shooting, duelling, personal self-defense, or any other subject that would indicate an individual right to have guns. Every reference to the right to bear arms was in connection with military service.

Thus the inevitable conclusion is that the "collectivist" view of the Second Amendment rather than the "individualist" interpretation is supported by history. It thus becomes necessary to examine the decisions of the Supreme Court in order to determine whether that body has expanded the right to bear arms beyond what was intended in 1789.

## VII. Supreme Court Interpretation of the Second Amendment

The Second Amendment has been directly considered by the Supreme Court in only four cases: *United States v. Cruikshank*,[79] *Presser v. Illinois*,[80] *Miller v. Texas*[81] and *United States v. Miller*.[82]

In *Cruikshank*, the defendants had been convicted of conspiracy to deprive negro citizens of the rights and privileges secured to them by the Constitution and laws of the United States, in violation of the criminal provisions of the Civil Rights Act of 1870. Among the rights violated were the right to peaceably assemble and the right to keep and bear arms for a lawful purpose.

Chief Justice Waite, speaking for the majority, held that the rights violated by the defendants were not secured by the Constitution or laws of the United States, and thus the judgment of conviction was affirmed. The chief justice began with a long discussion of the nature of the federal system in general, and the attributes of state and national citizenship in particular. The only rights protected by the national government were those necessary for participation in that government. The right to petition Congress would be such a right, but a person must look

79. 92 U.S. 542 (1875).
80. 116 U.S. 252 (1886).
81. 153 U.S. 535 (1894).
82. 307 U.S. 174 (1939).

to his state government for protection of similar rights in other situations.

In particular reference to the Second Amendment, the opinion states:

> The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in *The City of New York v. Miln*, 11 Pet. 139, the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States.[83]

The only dissenter in *Cruikshank* was Justice Clifford, who found the indictment vague on its face. He thus concurred in the result reached by the majority without discussing any constitutional issues.

The next, and undoubtedly the most important Second Amendment case was *Presser v. Illinois*[84] decided in 1886. Herman Presser, a German-American, was the leader of *Lehr und Wehr Verein*, a fraternal, athletic and paramilitary association incorporated under Illinois law. He was convicted for parading and drilling with men under arms, in violation of an Illinois statute, and was fined ten dollars.

On appeal to the United States Supreme Court, it was contended that the Illinois statute conflicted with the military powers given to Congress by the Constitution, with federal statutes passed in pursuance of those powers, and with various other parts of the Constitution, including the Second Amendment. The Supreme Court unanimously rejected all of these claims and affirmed the conviction.

It should be emphasized that *Presser* was argued and decided as a case presenting broad issues of the relationship of state and federal military power, and that the Second Amendment was only one aspect of that question. In reference to the Illinois statute, the Court observed:

> We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep

83. 92 U.S. at 553 (1875).
84. 116 U.S. 252 (1886).

> and bear arms. But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States.[85]

The Court cited *Cruikshank* in support of this proposition. The inapplicability of the Second Amendment to the states was a sufficient ground for rejecting Presser's Second Amendment contentions, but the Court did not stop there. It preferred to discuss the problem further and make clear the nature of the right protected by the Second Amendment.

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.[86]

One view of the Second Amendment suggests that this dicta constitutes the first step toward incorporating the right to bear arms into the Fourteenth Amendment,[87] apparently forgetting that the Court was laying the Second Amendment "out of view." The Court had stated that the Illinois law does not have the effect of depriving the federal government of its military capacity.

To further clarify its view that the Second Amendment is concerned only with military matters, the opinion focuses on *Presser*:

> The plaintiff in error was not a member of the organized volunteer militia of the State of Illinois, nor did he belong to the troops of the United States or to any organization under the militia law of the United States. On the contrary, the fact that he did not belong to the organized militia or the troops of the United States was an ingredient in the offence for which he was convicted and sentenced. The question is, therefore, had he a right as a citizen of the United States, in disobedience of the State law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the State? If the plaintiff in error has any such privilege he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred.[88]

The obvious implication here is that any right to bear arms by virtue of the Second Amendment, even if asserted against the national gov-

85. *Id.* at 264-65.
86. *Id.* at 265.
87. *See generally* H. Black, *The Bill of Rights*, 35 N.Y.U.L. Rev. 865 (1960).
88. *Id.* at 266.

ernment, is contingent upon military service in accordance with statutory law. This implication is confirmed later in the opinion, as the Court declared:

> The right to voluntarily assemble together as a military company or organization, or to drill or parade with arms, without, and independent of, an act of Congress or law of the State authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law.[89]

Thus the *Presser* case clearly affirms the meaning of the Second Amendment that was intended by its framers. It protects only members of a state militia, and it protects them only against being disarmed by the federal government. There is no individual right that can be claimed independent of state militia law. Furthermore, the dicta relating to preservation of the nation's military capacity could not be used as the basis for questioning any regulation of private firearms, unless such a regulation violated an act of Congress; Congress is obviously the best judge of the proper means of preserving the nation's military capacity.

The third, and least important, of the Second Amendment cases was *Miller v. Texas*.[90] A convicted murderer asserted that the state had violated his Second and Fourth Amendment rights. The Supreme Court unanimously dismissed the claim in one sentence, relying on the inapplicability of these provisions to the states, and citing *Cruikshank* and other cases.

The fourth and last time that the Supreme Court considered the Second Amendment was in *United States v. Miller*.[91] The result reached by Justice McReynolds for a unanimous Court was obviously correct, but the opinion is so brief and sketchy that it has undoubtedly caused much of the uncertainty that exists today about the meaning of the Second Amendment.

Defendants Miller and Layton were indicted for violation of the National Firearms Act of 1934,[92] which was designed to help control gangsters, and which infringed the right to keep and bear sawed off shotguns, among other arms. The District Court of the United States for the Western District of Arkansas sustained a demurrer and quashed the indictment, holding the 1934 Act unconstitutional on Second

89. *Id.* at 267.
90. 153 U.S. 535 (1894).
91. 307 U.S. 174 (1939).
92. National Firearms Act *as amended* 26 U.S.C. §§ 5801-5872 (1972).

Amendment grounds. The government appealed to the Supreme Court, which reversed and remanded.

When *Miller* was argued before the High Court, there was no appearance for the defendants. With only one side presenting a case, it is easy to understand why the Court viewed the issues as rather simple, and not needing very much analysis.

The Court began by observing that the National Firearms Act was a valid revenue measure, and not a usurpation of the police powers of the states. The opinion then addresses itself to the Second Amendment issue:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[93]

It is this paragraph that is the source of the uncertainty and confusion arising from the *Miller* case. The Court was merely correcting the error of the district judge, but it made the mistake of looking at the weapon, rather than the person, in determining that the Second Amendment is not applicable.

Fortunately, however, Justice McReynolds went on and partially clarified the ambiguity in the above paragraph. He cited the militia clauses of the Constitution and said:

> With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.[94]

These words alone undercut any individual right interpretation of the Second Amendment.

Justice McReynolds then proceeded to give a brief history of the militia, stressing its function as a military force. He then considered the relevance of state interpretations of the right to bear arms, and noted:

> Most if not all of the States have adopted provisions touching the right to keep and bear arms. Differences in the language employed in these have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed.[95]

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93. 307 U.S. at 178.
94. *Id.*
95. *Id.* at 182.

...e concluded that such decisions did not support the trial judge's ruling. He then referred the reader to "some of the more important opinions" concerning the militia. First among these opinions was *Presser v. Illinois*."[96]

Thus, in spite of some ambiguity in the Court's opinion in *Miller*, there is no reason to suppose that there was any change in the established view that the Second Amendment defines and protects a collective right that is vested only in the members of the state militia.

## VIII. Conclusion

In the last angry decades of the twentieth century, members of rifle clubs, paramilitary groups and other misguided patriots continue to oppose legislative control of handguns and rifles. These ideological heirs of the vigilantes of the bygone western frontier era still maintain that the Second Amendment guarantees them a personal right to "keep and bear arms."[97] But the annals of the Second Amendment attest to the fact that its adoption was the result of a political struggle to restrict the power of the national government and to prevent the disarmament of state militias.[98] Not unlike their English forbears, the American revolutionaries had a deep fear of centralized executive power, particularly when standing armies were at its disposal. The Second Amendment was adopted to prevent the arbitrary use of force by the national government against the states and the individual.

Delegates to the Constitutional Convention had no intention of establishing any personal right to keep and bear arms. Therefore the "individualist" view of the Second Amendment must be rejected in favor of the "collectivist" interpretation, which is supported by history and a handful of Supreme Court decisions on the issue.

As pointed out previously, the nature of the Second Amendment does not provide a right that could be interpreted as being incorporated into the Fourteenth Amendment. It was designed solely to protect the states against the general government, not to create a personal right which either state or federal authorities are bound to respect.

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96. 116 U.S. 252 (1886).

97. A recent call to action was made by an organization which calls itself the *Sheriff's Posse Comitatus*. This group, dismayed over claimed violations of the Second Amendment promises to "come together and do something about it." Its propaganda concludes rather ominously, "The PEOPLE are the rightful masters to both congress and courts, not to over throw (sic) the Constitution, but to over throw (sic) the men who pervert the Constitution." *Flyer, Sheriff's Posse Comitatus*, Petaluma, California, 1975.

98. See notes 60-66 and accompanying text.

The contemporary meaning of the Second Amendment is the same as it was at the time of its adoption. The federal government may regulate the National Guard, but may not disarm it against the will of state legislatures. Nothing in the Second Amendment, however, precludes Congress or the states from requiring licensing and registration of firearms; in fact, there is nothing to stop an outright congressional ban on private ownership of all handguns and all rifles.

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# Gun Control Legislation

*By* THE COMMITTEE ON FEDERAL LEGISLATION

## *INTRODUCTION*

Since the enactment of the Gun Control Act of 1968 there has been a substantial increase in the incidence of gun-related crimes and it has become evident that the existing system of law is inadequate. Efforts have been underway in both Houses of Congress to enact further gun control legislation and the Executive Branch has indicated support for stronger gun control. Both the Subcommittee on Crime of the House Committee on the Judiciary and the Subcommittee on Crime and Juvenile Delinquency of the Senate Committee on the Judiciary have accumulated a substantial factual record on which to base legislation.

We believe that the contribution of handguns to the current increase in homicide and other violent crimes requires immediate and comprehensive action. In our opinion, the continued existence of an unwarranted supply of handguns is an underlying factor in the decline of our major urban centers. This Committee does not find any substantial justification for the continued widespread public possession of handguns, and, accordingly, we strongly endorse the legislative proposals calling for a prohibition on the manufacture, importation, sale, and private possession of handguns.[1] Whether or not our recommendations are politically feasible at this moment in time, we are of the firmly held conviction that a complete ban on handguns should be the ultimate objective of any new federal gun control legislation.

This report is divided into four parts. Part I describes the current federal law and the congressional proposals for change. Part II examines the constitutional bases for Congress legislating a prohibition on the manufacture, importation, sale, and private possession of handguns. Part III discusses the need for adopting far-reaching gun control legislation. Our recommendations are contained in Part IV.

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## II. *GUN CONTROL AND THE CONSTITUTION*

To determine whether a federal statute restricting handguns would be constitutional, two questions must be answered: (A) Is there a constitutional right to possession of handguns which cannot be infringed by legislation, and (B) does regulation of handguns fall within the scope of any of the subjects on which Congress is empowered by the Constitution to legislate? A review of the relevant decisions demonstrates that Congress may constitutionally enact legislation restricting and prohibiting the possession of handguns by private citizens.[10]

### A. *Is There a Constitutional Right to Possess Handguns?*

Debates on the merits of gun control legislation are regularly punctuated by claims of a constitutional right to possess firearms. The source of these claims is the Second Amendment to the Constitution, which provides:

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

Although spirited controversy as to the meaning of the Second Amendment continues unabated among commentators,[11] courts over a long period of time have consistently given the amendment a very narrow construction. The Second Amendment as so interpreted places no restrictions on Congress' ability to regulate handguns.

A constitutional provision concerning the right to "bear Arms" is directed at checking power. The question is what the framers of the Constitution intended. There are basically three relationships which could have been intended to be affected: (1) the individual against the world; (2) the populace against the government, whether state or federal; and (3) the state government against the federal government. The first possibility, that the framers were concerned with the right of individuals to protect their homes and their persons from whatever depredations might confront them, appears to be without historical support.[12] The amendment itself speaks of the "security of a free State." The disputes have centered around the second and third possibilities.

The initial question is the proper interpretation of the term "Militia." The practice in Europe of maintaining large standing armies while prohibiting the general populace from having guns led to a preference in colonial America for the militia as the primary military force. This force would be drawn from the people and would be active only in time of military need.[13]

Some have argued that the militia was regarded as the populace at large—or at least those members of the populace capable of bearing arms.[14] To these commentators, militia meant the "unorganized militia," so that the Second Amendment must be read as permitting the populace to maintain arms as a check against excesses of any or all government. This position is sometimes characterized as more extreme than it really is. The framers of the

Constitution need not have created a "right to revolution" or a license to band together in paramilitary organizations to have established a check on the government by permitting the populace to keep and bear arms.[15] Whatever the merits of the "unorganized militia" analysis may be, however, it has never found judicial favor.

The federal courts have long regarded the Second Amendment as concerned only with the "organized militia" maintained by the states. In 1875, the Supreme Court ruled in *United States* v. *Cruickshank*[16] that the Second Amendment restricted Congress alone and not state governments. More recently, in *United States* v. *Miller*,[17] the Supreme Court held that Congress could regulate firearms so long as there was no evidence of a relationship between the regulation and the preservation or efficiency of the state militia. The Court said that Miller could not attack his indictment for interstate shipment of a sawed-off shotgun under the Second Amendment:

> "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."[18]

Some have argued that the *Miller* case should be read narrowly, since evidence of a military use can be shown as a matter of fact for most kinds of weapons.[19] However, federal courts after *Miller* have read the decision as requiring a showing that the challenged legislation actually interfered with the state militia. Under this standard, Second Amendment challenges to federal gun control legislation uniformly have been rejected.[20]

Further, even if the Second Amendment were to be interpreted to refer to an "unorganized militia," it would not follow that Congress would be barred from regulating the ownership of handguns. Such regulation would still be constitutional unless handguns were regarded as "Arms" within the meaning of the Second Amendment. It appears instead that the "Arms" of the militia were understood to consist of rifles and muskets.

In addition to the constitutional provisions and old state statutes quoted in *United States* v. *Miller*[21] and other secondary sources,[22] there are a number of early cases considering whether handguns are "Arms" within the meaning of the Second Amendment. While the decisions are not uniform, the weight of authority is that handguns do not constitute such "Arms."[23]

This position is most effectively expressed in *State* v. *Workman*,[24] where the Supreme Court of Appeals of West Virginia wrote:

> ". . . in regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets,—arms to be used in defending the state and civil liberty,—and not to pistols, bowie-knives,

> brass knuckles, billies, and such other weapons as are usually employed in brawls, street fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the state."[25]

Thus, in our view, the Second Amendment poses no barrier to congressional efforts to reduce "the terror of the community and the injury of the state" by prohibiting the private possession of handguns.

### B. *Does Congress Have Power to Regulate the Manufacture, Possession and Sale of All Handguns?*

While several congressional powers could be invoked in support of gun control legislation,[26] justification is ordinarily found under Congress' power to regulate interstate and foreign commerce.[27] There can be no serious dispute that certain kinds of gun-related activities—for example, interstate sales of firearms—can be regulated under the commerce clause. The disagreements arise over how far Congress may go in regulating local gun activity under its power to regulate matters "affecting" commerce.

In *United States* v. *Bass*,[28] the Supreme Court recently avoided a constitutional issue concerning 18 U.S.C. § 1202, which prohibits the transportation, receipt or possession of guns by felons, by holding that proof that the prohibited conduct in each case was in commerce or affected commerce was required by the statute. Prior courts of appeals decisions had differed as to whether that statute was a constitutional exercise of the commerce power without such proof.[29]

However, in *Perez* v. *United States*,[30] a case decided shortly before the *Bass* case, the Supreme Court had laid the groundwork for the power to create a federal criminal law under the commerce clause. The *Perez* case concerned the constitutionality of a provision in Title II of the Consumer Credit Protection Act, 18 U.S.C. §§ 891 *et seq.*, making loansharking a federal crime. In holding that Perez had been lawfully convicted despite the absence of proof of the effect of his conduct on commerce, the Court cited a variety of reports and statistical studies providing evidentiary support for the congressional finding that, in the aggregate, loansharking had an effect on commerce. It concluded, therefore, that Congress could prohibit the practice regardless of the extent to which the activities of each particular loanshark may have affected commerce.

An examination of *Perez* and its progeny, and of other federal criminal legislation regulating local activity, points out what may have led the Supreme Court to take a very narrow position in the *Bass* case, namely the lack of any substantial legislative findings. In *Perez*, the Court put great emphasis on the findings made by Congress of the impact of loan sharking on interstate commerce, even as a local activity, and on the very substantial evidence which was available to Congress to support those findings. In *Bass*, in contrast, there was virtually no legislative history to guide the Court in its interpretation of congressional intentions.

The implication of the limitation on Congress' attempted exercise of

power in the *Bass* case is that if gun control legislation is supported by substantial documentation and carefully drawn congressional findings concerning the effects of the proscribed activity on interstate commerce generally, the Supreme Court would sustain the exercise of power under the commerce clause even if the activity of specific individuals were purely local in nature.

In a number of cases involving federal gun control legislation arising after *Bass*, courts have followed *Perez* to uphold the power of Congress to regulate firearms felonies without a showing in each case of a nexus with interstate commerce.[31] In *United States* v. *Nelson*,[32] the Fifth Circuit affirmed a conviction under 18 U.S.C. § 922(a)(6), which prohibits the making of false statements in connection with the acquisition of a firearm, in spite of a failure to show a nexus between the defendant's false statements to the gun dealer and interstate commerce. Although the individual activity was clearly local, the court found that under *Perez* the Congress does have the power to regulate an intrastate activity, an isolated instance of which may have no direct connection with interstate commerce, because that intrastate activity in the aggregate does impose a burden on interstate commerce.[33]

The decision in *Nelson* leaves open the question whether Congress has the power under the *Perez* theory to regulate possession of a firearm. It could be argued that the manufacture and sale of firearms presents a stronger case for federal regulation since a potential impact on interstate commerce is discernible, while possession of a firearm could be an entirely and perpetually local activity in a given instance. Such an argument ignores the aggregate effect on commerce of a substantial number of people possessing firearms. In an analogous situation, regulation of the possession of narcotics and other controlled substances under 21 U.S.C. §§ 841 and 844, and predecessor statutes, courts have upheld the regulation without a showing in each case of a nexus with interstate commerce.

In *Deyo* v. *United States*,[34] for example, the Ninth Circuit affirmed a conviction for possession and sale of a drug against the contention of the defendant that the conviction was invalid because there had been no proof of a connection between the defendant's activities and interstate commerce. The court described at length the congressional findings supporting federal control of the possession of these drugs. The court concluded that effective interstate regulation was not possible if intrastate transactions were not also regulated.[35]

The conclusion to be drawn from the narcotics possession cases is that if it can be shown through proper congressional findings that possession of handguns as a class of activity has an effect on interstate commerce, then individual possession could be legitimately proscribed without any showing in each case of a nexus with interstate commerce, notwithstanding that a particular weapon had never been in interstate commerce. Indeed it is the possession of handguns that can be viewed as being responsible for their manufacture, importation and sale. Thus, if undertaken after congressional findings of effect on interstate commerce based on substantial investigation, federal legislation banning the manufacture, sale and possession of handguns would in our view be authorized by the commerce clause.

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

April 13, 1983
Redated 7/1/83 for printing purposes

The Honorable Pat Rodey
Senator
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

The Honorable Charlie Bussell
Representative
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Handgun Ban
Our file No.: 366-444-83

Dear Senator Rodey and Representative Bussell:

You have asked this office whether a landlord, through a leasehold agreement, may prohibit a tenant from possessing handguns. We conclude that in certain circumstances a landlord may restrict or prohibit the use and/or possession of handguns on property which is leased to another individual.

Our initial inquiry regarding this matter commenced with a review of relevant Alaskan Constitutional provisions. The Alaska Constitution directly addresses a citizens ability to bear arms at Article I, Section 19 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.

The language embodied in Alaska's Constitution pertaining to arms is virtually identical, save for two changes in punctuation, to language found in Article II of the United States Constitution. Article II of the United States Constitution was proposed by the Congress on September 25, 1789 and became the law of the United States on December 15, 1791. During the one hundred and ninety two years since adoption of the Second Amendment to the United States Constitution and the twenty-four years since the Alaska Constitution has been in effect, numerous court cases have interpreted the constitutional language which establishes the right to bear arms.

We note the period since the adoption of the Second Amendment has witnessed an ever increasing issuance of opinions from the judiciary of the various states and the federal courts which place limits on an individual's ability to bear arms. Some commentators have theorized that the legislative and judicial limitations increased significantly with the availability of inexpensive surplus weapons following the American Civil War. 1/ According to this theory, the increase in restrictive gun control measures and corresponding judicial interpretations was associated with increasing acquisition of firearms by recently emancipated Black Americans and immigrants coupled with the increased availability of firearms in the post Civil War industrial America. The right of 'bearing arms' is not a right granted by the Constitution nor is it in any manner dependant upon that instrument for its existence. U.S. v. Cruikshank, 92 U.S. 553 (D.C.La. 1875).

While offering no judgment on the propriety or effectiveness of the restrictive legislative and judicial measures, we observe that the current state of the law pertaining to the constitutional language holds that:

> [The] purpose of this amendment, guaranteeing that the right of the people to keep and bear arms, was to preserve the effectiveness and assure the continuation of the state militia. U.S. v. Oakes, 564 F.2d, cert. denied 98 S.Ct. 1493 (C.A. Kan. 1977).

The modern judicial view has increasingly found that the guaranteed right to keep and bear arms is not an individually protected right, but rather a collective right which allows the people of the various states to serve in a militia. The contemporary judicial view in the great majority of states interprets the constitutional language as posing no limitations on the legislature's power to regulate the ownership or control of firearms. Whatever the scope of any common-law or constitutional right to bear arms, it is not absolute and does not guarantee to individuals the right to carry weapons abroad at all times and in all circumstances. Application of Atkinson, 291 N.W.2d 396 (Minn. 1980). By analogy then, a landlord, too, could restrict

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1/ Kates, Don B. Restricting Handguns, North River Press, pages 7-30 (1979)

the possession of handguns on property he or she owns and leases. If the State can restrict arms without running afoul of constitutional provisions, an individual almost certainly has similar abilities.

It is conceivable that a landlord's ban on handgun ownership could be challenged under constitutional doctrines which afford a right of privacy. The United States Constitution, while not containing an express provision guaranteeing privacy has been interpreted to afford an individual certain protections, Cf. Griswold v. Connecticut, 381 U.S. 479 (1965). "The Constitution extends special safeguards to the privacy of the home, including activities which might be prohibited in other contexts." Cf. U.S. v. Orito, 413 U.S. 137, 142 (1973).

While it is unlikely that a court would find that an individuals right to possess arms (for example a gun collection) is protected by the privacy shield of the U.S. Constitution, the argument could be maintained. We are unaware of this argument being successfully asserted in any anglo-american jurisdiction.

A more likely source of protection under the right to privacy doctrine may be afforded by the Alaska Constitution at Article I, Section 22 which states that:

> The right of the people to privacy shall not be infringed. The legislature shall implement this section.

The Alaska Supreme Court has explicitly stated that the right of privacy guaranteed to Alaskans is broader in scope than that guaranteed by the federal constitution. Woods & Rohde, Inc., v. State, 565 P.2d 138 (1977). Even so, the meaning of privacy or necessity must vary depending on the factual context and the often compelling interests of society and the individual. State v. Glass, 583 P.2d 879 (1978). The test for what interests are protected under Alaska's constitutional right to privacy are, first, whether a person has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable". Hilbers v. Municipality of Anchorage, 611 P.2d 31 (1980).

The question of handgun ownership in Alaska and whether such ownership is "reasonable" in the context of a landlord tenant relationship is open ended. Probably the "expectation" and reasonableness of gun ownership in Alaska is different than the reasonableness of gun ownership in many other jurisdictions where actual firearm ownership and use is reduced. In any event,

absent specific language under the Alaska Uniform Residential Landlord and Tenant Act, AS 34.03.010 et seq., or other relevant Alaska law, prohibiting inclusion of provisions in a leasehold agreement, we believe a landlord can properly restrict the terms of the tenancy. 2/ In all probability, under existing Alaska law, a landlord can restrict possession of handguns for tenants in a manner not unlike a landlord's ability to prohibit tenants from possessing dogs, operating businesses in a residential leasehold or operating obnoxious stereo equipment. 2/

While a landlord will probably be able to impose a restriction prohibiting future tenants from possessing handguns, an across-the-board ban applicable to tenants with existing leasehold agreements may be invalid. Under classic contract principles, neither party to an agreement may superimpose an additional term on a valid contract without the consent of each party to the contract. Consequently, a landlord may not prohibit handgun possession among tenants during the pendency of an existing lease. Conversely, where a landlord and tenant agree to a lease agreement which contains a restriction banning handguns, remedial legislative action interpreting Alaska's right to privacy law to permit such possession probably would not invalidate existing prohibitions.

Finally, concern was expressed regarding the state's liability with respect to landlord/tenant agreements which prohibit handgun ownership in buildings located on property owned by the State. This last point is conceivably problematic if the land on which the Panoramic View Apartments are located is conveyed to the state as a result of the current Alaska Railroad transfer negotiations. Attached is a copy of a memorandum by Assistant Attorney General Jack McGee which deals with this subject.

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2/ In passing, we note that a landlord concerned with unjustified gun play need not necessarily prohibit gun ownership. Other remedies exist for controlling individual tenants with a propensity to abuse gun ownership. Cf. Osness v. Dimond Estates, Inc., 615 P.2d 605 (1980), where the landlord obtained a Forcible Entry and Detainer (F.E.D.) thereby removing a tenant that proved incapable of properly handling firearms.

Redated 7/1/83 for printing purposes



We trust this response answers your inquiry. If you have any additional questions, please let me know.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Joseph W. Geldhof
Assistant Attorney General

JWG:vrb

cc: Norman C. Gorsuch
Attorney General

Ronald W. Lorensen
Deputy Attorney General

# STATE OF ALASKA
# THE LEGISLATURE

## LEGISLATIVE AFFAIRS AGENCY

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

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 postrevolutionary 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

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.

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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

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Bill Sheffield, Governor

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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 BEIN 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-13

Municipality
of
Anchorage

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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

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

Municipality of Anchorage

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TONY KNOWLES,
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

May 6, 1986

Members of the House Judiciary Committee

Re: SJR 39

The Municipality does not oppose a constitutional amendment that redefines the "right to bear arms" as a personal right vested in each citizen of the state. We are very concerned however with the way in which the measure is now drafted. Our concerns are based on the fact that the present language, quite arguably, would not permit the state or a municipality to regulate either the type of arms possessed or the manner and circumstances of possession.

While the version passed by the Senate clearly allows regulation of the use of arms, many existing laws do not relate to the simple use of a weapon, but rather to its function and to the manner and circumstances in which it is possessed. Public safety concerns demand that the state legislature and local assemblies be permitted to ban certain types of arms such as bombs, hand grenades, machine guns, silencers, sawed-off shotguns and bullets designed to pierce protective devices worn by law enforcement officials. We believe likewise that the constitution should permit the Legislature to bar the possession of arms by certain classes of convicted criminals, intoxicated or mentally disturbed persons. Finally we feel it is essential to control the circumstances in which otherwise lawful weapons are possessed by limiting the carrying of concealed weapons, the possession of loaded firearms on licensed premises, the possession of a firearm by a minor without parental consent, et cetera. We reiterate the position taken by Attorney General Harold Brown in his March 26, 1986 letter regarding SJR 39:

> These statutes [that would be invalidated by SJR 39] 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 legislatures intent to continue to allow a reasonable regulation by law should be made clear.

The clarity of intent referred to by the Attorney General must be embodied in the measure itself. Otherwise both State and Municipal prosecutors will face a flurry of legal challenges by those charged with weapons-related offenses.

In conclusion, we urge that if the committee does not intend to invalidate existing statutes and ordinances regulating the type of arms that may be possessed, and the circumstances of possession, then it must embody this intent clearly within the amendment that is offered to the voters for ratification.

Jerry Hartzbaugher
Municipal Attorney

Brian Porter, Chief
Anchorage Police Department

298 Or. 395

**STATE of Oregon, Petitioner on Review,**

**v.**

**Joseph Luna DELGADO, Respondent on Review.**

**TC CR83-946, CA A30962, SC S31059.**

Supreme Court of Oregon, In Banc.

Argued and Submitted Nov. 6, 1984.

Decided Dec. 28, 1984.

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

Decision of the Court of Appeals affirmed.

Weapons ⇐1

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

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

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

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

LENT, Justice.

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

ORS 166.510(1) provides, in relevant part:

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

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

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

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

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

1. The defendant had also filed a motion to suppress the knife as evidence on the basis that it was obtained as a result of an unlawful search and seizure. The trial court's denial of that motion was not assigned as error.

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

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

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

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

In *State v. Kessler*, *supra*, this court for the first time considered the scope of Article I, section 27. There, following the discovery by police officers of two billy clubs in his apartment, defendant was charged with the possession of billy clubs in violation of ORS 166.510(1), the same statute at issue in the case at bar. On appeal defendant argued that the statute violated Article I, section 27, of the Oregon Constitution. The Court of Appeals held that ORS 166.510(1) was within the reasonable exercise of what the court called the state's "police power" to control crime. 43 Or.App. 303, 307, 602 P.2d 1096, 1097 (1979). We reversed.

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

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

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

2. We have in mind that defendant's principal argument is that, insofar as this charge of criminal conduct is concerned, the statute is overbroad in proscribing conduct in which he has a state constitutional right to engage. Ordinarily, we would have no reason to go beyond the facts described in the accusatory instrument to resolve whether error was committed in overruling defendant's demurrer. In this case, however, a factual record was developed, and the defendant also assigned as error the denial of his motion for judgment of acquittal. The facts are recounted to show that there is no evidence to support any possible charge of an illegal intent to use the weapon or an illegal use of the weapon.

289 Or. at 372, 614 P.2d at 100.[3]

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

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

There are statutes now on the books that concern the manner in which weapons are carried, the intent with which they are carried, the use to which they may not be put and the status of a person that results in forbidding his possessing a weapon.

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

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

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

3. One year later, in *State v. Blocker*, 291 Or. 255, 259, 630 P.2d 824, 826 (1981), we held that the possession of a billy club outside as well as inside the home is constitutionally protected.

4. At one time the single-action, single-shot handgun was carried by many men for defense. Did the development of the double-action feature of the handgun or the addition of the revolving cylinder which enabled one to fire the gun several times without pausing to reload, as a matter of law, transform the handgun from a defensive weapon to an offensive weapon? Obviously, the gun, both before and after such changes, could be used for either defense or offense.

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

the next few paragraphs is drawn from those works.

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

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

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

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

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

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

This brings us to the switch-blade knife. A switch-blade is defined as a "pocketknife having the blade spring-operated so that pressure on a release catch causes it to fly open." Webster's Third International Dictionary 2314 (1971). If ORS 166.510(1) proscribed the possession of mere pocketknives, there can be no question but that the statute would be held to conflict directly with Article I, section 27. The only difference is the presence of the spring-operated mechanism that opens the knife. We are unconvinced by the state's argument that the switch-blade is so "substantially different from its historical antecedent" (the jackknife) that it could not have been within the contemplation of the constitutional drafters. They must have been aware that technological changes were occurring in weaponry as in tools generally. The format and efficiency of weaponry was proceeding apace. This was the period of development of the Gatling gun, breach loading rifles, metallic cartridges and repeating rifles. The addition of a spring to open the blade of a jackknife is hardly a more astonishing innovation than those just mentioned.[6]

We stress again, as we have stressed before, that this decision does not mean individuals have an unfettered right to possess or use constitutionally protected arms in any way they please. The legislature may, if it chooses to do so, regulate possession and use. *See State v. Blocker, supra*, 291 Or. at 259, 630 P.2d at 826; *State v. Kessler, supra*, 289 Or. at 270, 614 P.2d at 100. This court recognizes the seriousness with which the legislature views the possession of certain weapons, especially switch-blades.[7] The problem here is that ORS 166.510(1) absolutely proscribes the mere possession or carrying of such arms. This the constitution does not permit.[8]

The decision of the Court of Appeals is affirmed.



71 Or.App. 356

**Gerald Lee ALBERS, Appellant,**

**v.**

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

137975; CA A31762.

Court of Appeals of Oregon.

Argued and Submitted Nov. 28, 1984.

Decided Dec. 12, 1984.

Reconsideration Denied Jan. 25, 1985.

Review Denied Feb. 12, 1985.

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

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

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

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

In the present case, had Publishers made a reasonable inquiry and informed Stevens that the inquiry was in preparation for its purchase of the timberland from Fernandez, then Stevens would have informed Publishers that plaintiffs held a mortgage on the timberland and had a "standard timber restriction" clause covering the land. The discovery of these facts would have immediately informed both parties that Fernandez was defrauding plaintiffs. Publishers is therefore charged with knowledge of the fraud because it would have learned of the fraud had it made a reasonable inquiry. *Murray v. Wiley, supra* at 407.

We therefore conclude that Publishers failed to sustain its burden of proving its affirmative defense. Publishers was not entitled to the status of a bona fide purchaser without notice.

Affirmed.



No. 68—July 15, 1980

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
*Respondent,*
*v.*
RANDY KESSLER,
*Petitioner.*

(TC DA 160004-7811, CA 14296, SC 26705)

On review from the Court of Appeals.*

Argued and submitted March 4, 1980.

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

W. Benny Won, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief was James A. Redden, Attorney General, and Walter L. Barrie, Solicitor General, Salem.

Before Denecke, Chief Justice, and Tongue, Howell, Lent and Peterson, Justices.

LENT, J.

Affirmed in part, reversed in part.

*Appeal from Circuit Court, Multnomah County Philip T. Abraham, Judge 43 Or App 303, 602 P2d 1096 (1979).

STATE v. KESSLER, 289 OR. 359 (1980)

614 P.2d 94

LENT, J.

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

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

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

(a) To whom does the right belong?

(b) What is the meaning of "defense of themselves"?

(c) What is the meaning of "arms," and what, if any, weapons of current usage are included in this term?

The scope of Article I, section 27, has not previously been analyzed by Oregon courts.[3] The decisions construing the second amendment to the United

[1] ORS 166.510(1) provides:

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

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

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

[3] In *State v. Robinson*, 217 Or 612, 619, 343 P2d 886 (1959) this court held that ORS 166.270 which prohibits ex-convicts from possessing concealed weapons did not violate Article I, section 27, of the Oregon Constitution. Accord, *State v. Carturight*, 246 Or 120, 134-137, 418 P2d 822 (1967).

States Constitution are not particularly helpful because the wording of the second amendment differs substantially from our state provision. The second amendment has not yet been held to apply to state limitations on the bearing of arms.[4] The wording of Oregon's right to bear arms provision also differs from many other state constitutional provisions.[5]

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

[4] The second amendment to the United States Constitution provides:

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

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

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





I. *The historical background*

The first article of Oregon's constitution of 1859 contains the state's bill of rights. Article I, section 27, regarding the right to bear arms was taken verbatim from sections 32 and 33 of the Indiana Constitution of 1851. C. Carey, *A History of the Oregon Constitution* 469 (1926); Palmer, *The Sources of the Oregon Constitution*, 5 Or L Rev 200, 202 (1926).

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

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

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

James II, a Catholic king, ascended the English throne in 1685 amidst domestic religious controversy between the Catholics and Protestants. James II established a strong standing army which he

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

quartered in private homes. He sought to repeal certain laws of Parliament which barred Catholics from public offices. The Protestants revolted in the "Glorious Revolution" of 1688 and succeeded in deposing James II and bringing to power the king's Protestant daughter, Mary, and her husband, William of Orange. William and Mary were offered the crown in 1689 on condition that they sign the Declaration of Rights. The Declaration was later enacted as a statute, which was divided into two parts, first listing the allegedly illegal actions of James II, then declaring the rights of the people. The first part stated that James II:

> "* * * did endeavor to subvert and extirpate the Protestant Religion and the Laws and Liberties of this Kingdom * * *.
>
> "5. By raising and keeping a Standing army within this Kingdom in Time of Peace without Consent of Parliament and quartering Soldiers contrary to Law.
>
> "6. By causing several good Subjects, being Protestants, to be disarmed at the same Time when Papists were both armed and employed contrary to Law."

The parallel provisions of the declaration of rights provided:

> "* * * 5. That the raising or keeping a Standing Army within the Kingdom unless it be with the Consent of Parliament is against Law.
>
> "6. That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law."[7]

Historians have noted that the early colonial legislatures perceived themselves as descendants of the House of Commons who shared many of the same political experiences of their 17th century English counterparts. See B. Schwartz, *The Great Rights of Mankind* 15, 31-32 (1977). The French and Indian War ending in 1763 brought large numbers of British

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





soldiers to the colonies. King George III maintained and increased these standing armies following that war, and ordered the troops to be quartered in private homes. The colonists who were accustomed to relying on their own citizen militias viewed the standing armies as an unlawful instrument of oppression. *See* Weatherup, *Standing Armies and Armed Citizens; An Historical Analysis of the Second Amendment*, 2 Hastings Const L Q 961, 975-978 (1975). The state constitutions drafted in the revolutionary war era therefore included provisions guaranteeing the right to bear arms and prohibiting standing armies in time of peace. The relevant provisions of the English Bill of Rights of 1689 provided a useful model for the colonial drafters.

## II. *The Oregon right to bear arms*

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

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

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

"Sec. 23. That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned. "Sec. 24. That no standing army shall, in time of peace, be kept up, without the consent of the legislature; and the military shall, in all cases and at all times, be in strict subordination to the civil power."

W. Swindler, *Sources and Documents of U. S. Constitutions*, Vol 4, p 183 (1975).

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

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

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

*(Continued on following page)*

state" appears in the present day constitutions of Oregon, Indiana, and six other states.[9] The language is subject to varying interpretations. It has been suggested that the language includes three separate justifications for a state constitutional right to bear arms: (a) The preference for a militia over a standing army; (b) the deterrence of governmental oppression; and (c) the right of personal defense.[10]

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

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

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

*(Continued from previous page)*

"That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power."

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

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

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

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





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

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

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

"Defense of themselves" has also been said to include an individual's right to bear arms to protect his person and home. *Schubert v. DeBard*, Ind , 398 NE2d 1339, 1341 (1980) (Indiana constitution provides citizenry the right to bear arms for their personal self-defense). Self-defense has been recognized as a privilege in both civil and criminal law since about 1400 in England and at all times in the United States.[13] Although the right to bear arms for self protection does not appear to have been an important

[12] *See* text accompanying note 7 *supra*.

[13]

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

development in England, the justification for a right to bear arms in defense of person and home probably reflects the exigencies of the rural American experience. *See People v. Brown, supra. Cf., Matthews v. State,* 237 Ind 677, 689-692, 148 NE2d 334, 339-341 (1958) (Emmert, C. J., dissenting) (constitutional guarantee based on historical necessity for personal defense.)[14]

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

The term "arms" is also subject to several interpretations. In the colonial and revolutionary war era, weapons used by militiamen and weapons used in defense of person and home were one and the same. A colonist usually had only one gun which was used for hunting, protection, and militia duty, plus a sword, and knife. G. Neumann, *the American Revo* the



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

development in England, the justification for a right to bear arms in defense of person and home probably reflects the exigencies of the rural American experience. *See People v. Brown, supra. Cf., Matthews v. State,* 237 Ind 677, 689-692, 148 NE2d 334, 339-341 (1958) (Emmert, C. J., dissenting) (constitutional guarantee based on historical necessity for personal defense.)[14]

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

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

[14] *Compare* the provisions in several state constitutions which guarantee that a person has the right to bear arms "in defense of his home, person and property." Colo Const, Art II, § 13; Miss Const, Art III, § 12; Mo Const, Art I, § 23; Mont Const, Art III, § 13; Okla Const, Art II, § 26; *State v. Nickerson,* 126 Mont 157, 247 P2d 188 (1952) (defendant cannot be convicted of assault if he pointed a loaded gun at a trespasser in his home); *accord, State v. Pleasant,* 356 Mo 90, 195 SW2d 495 (1946).





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

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

The constitutional guarantee that persons have the right to "bear arms" does not mean that all individuals have an unrestricted right to carry or use personal weapons in all circumstances. For example,

the danger of firearms was recognized shortly after the development of gunpowder. The English Statute of Northampton in 1327 forbade persons to ride at night carrying a firearm for the purpose of terrifying the people.[15] A 1678 Massachusetts law forbade shooting near any house, barn, garden, or highway in any town where a person may be "killed, wounded, or otherwise damaged."[16] The courts of many states have upheld statutes which restrict the possession or manner of carrying personal weapons. The reasoning of the courts is generally that a regulation is valid if the aim of public safety does not frustrate the guarantees of the state constitution. For example, many courts have upheld statutes prohibiting the carrying of concealed weapons, *see, e.g., State v. Hart*, 66 Idaho 217, 157 P2d 72 (1945); and statutes prohibiting possession of firearms by felons, *see, e.g., State v. Carturight*, 246 Or 121, 418 P2d 822 (1966).

III. *The present case*

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

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

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

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





The defendant appealed to the Court of Appeals, contending first that his acts did not amount to the crime of disorderly conduct, and second that the statute prohibiting possession of billy clubs, ORS 166.510(1), violates Article I, section 27, of the Oregon Constitution. The Court of Appeals did not consider defendant's first contention because it was not raised at trial.[17] The Court of Appeals held that ORS 166.510(1) was within the reasonable exercise of the "police power" of the state to curb crime. 43 Or App 303, 307, 602 P2d 1096 (1979).

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

The club is considered the first personal weapon fashioned by humans. O. Hogg, *Clubs to Cannon* 19 (1968). The club is still used today as a personal

[17] The general rule in both civil and criminal cases is that a question not raised and preserved in the trial court will not be considered on appeal. *State v. Abel*, 241 Or 465, 467, 406 P2d 902 (1965). Failure to raise an objection in trial court does not automatically preclude appellate review. The defendant's contention that his acts did not constitute the crime of disorderly conduct, however, does not present the exceptional circumstance or manifest error which justifies this court's consideration of such a claim. It follows that defendant's conviction of disorderly conduct is affirmed. Note that this case is not concerned with that aspect of the statute prohibiting disorderly conduct which we held to be unconstitutional in *State v. Spencer*, 289 Or 225, P2d (1980).

weapon, commonly carried by the police. ORS 166.510 prohibits possession of a "billy;" however, ORS 166.520 states that peace officers are not prohibited from carrying or possessing a weapon commonly known as a "blackjack"[18] or "billy."

The statute in this case, ORS 166.510, prohibits the mere possession of a club. The defendant concedes that the legislature could prohibit carrying a club in a public place in a concealed manner, but the defendant maintains that the legislature cannot prohibit all persons from possessing a club in the home. The defendant argued that a person may prefer to keep in his home a billy club rather than a firearm to defend against intruders.

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

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

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



Vol. 80 August 4, 1980 No. 24

# COURT OF APPEALS REPORTS

## 47 OR APP 1 — 108

machine gun 4—

(81).

CASES DECIDED
by the
COURT OF APPEALS

St v Becker poss of billy club outside of home

The CITY OF LAKEWOOD, a municipal corporation of the State of Colorado, Petitioner,

v.

Charles Edward PILLOW, Respondent.

No. C-164.

Supreme Court of Colorado, En Banc.

Oct. 10, 1972.

Defendant was convicted in Municipal Court of violation of city ordinance making it unlawful to possess dangerous or deadly weapon, and he appealed. The District Court, Jefferson County, Christian D. Stoner, J., reversed and declared ordinance invalid, and certiorari was granted. The Supreme Court, Hodges, J., held that the ordinance was unconstitutionally overbroad, where it would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on substantial part of their business, it appeared to prohibit individuals from transporting guns to and from such places of business, it made it unlawful for person to possess firearms in vehicle or in place of business for purpose of self-defense, and several of such activities were constitutionally protected and, depending upon circumstances, might be entirely free of criminal culpability.

Affirmed.

1. Weapons ⇐3

City ordinance prohibiting possession of dangerous or deadly weapon was unconstitutionally overbroad, where it would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on substantial part of their business, it appeared to prohibit individuals from transporting guns to and from such places of business, it made it unlawful for person to possess firearm in vehicle or in place of business for purpose of self-defense, and several of such activities were constitutionally protected and, depending upon circumstances, might be entirely free of criminal culpability. 1965 Perm.Supp., C.R.S., section 40-11-1; Const. art. 2, § 13.

2. Constitutional Law ⇐81

Governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under police power, may not be achieved by means which sweep unnecessarily broad and thereby invade area of protected freedoms.

3. Constitutional Law ⇐83(1)

Even though governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

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Raymond C. Johnson, Lakewood, for petitioner.

Theodore P. Koeberle, Boulder, for respondent.

HODGES, Justice.

On petition of the City of Lakewood, we granted certiorari to review the district court's declaration that a Lakewood ordinance is invalid.

The respondent Pillow was convicted in municipal court of a violation of this ordinance which makes it unlawful to possess a dangerous or deadly weapon. He appealed to the district court which reversed the conviction on the basis of a finding that there was a failure of proof before the municipal court and on the further ground that the ordinance was invalid. The district court's declaration of invalidity was premised on its finding that the subject matter of the ordinance is a matter of statewide concern and is therefore preempted by a state statute pertaining to the carrying of a concealed weapon. This state statute is 1965 Perm.Supp., C.R.S. 1963, 40-11-1.

We affirm the district court's reversal of the respondent's conviction but do so on the ground that the Lakewood ordinance is

unconstitutionally overbroad. It is therefore unnecessary to discuss the failure of proof issue; moreover, this case is not a suitable vehicle for a consideration of the preemption issue. Our decision to resolve this case in this manner was prompted to some degree by statements made by counsel for the City of Lakewood during oral argument. He conceded that the ordinance lacked specificity in certain respects and that a replacing ordinance was in the process of preparation.

The subject Lakewood ordinance is numbered 0–70–47, Sec. 3–9 and is set forth in full as follows:

"*Unlawful to Possess, Carry or Use Dangerous or Deadly Weapons.* (a) It shall be unlawful for any person to have in his possession, except within his own domicile, or to carry or use, a revolver or pistol, shotgun or rifle of any description, which may be used for the explosion of cartridges, or any air gun, gas operated gun or spring gun, or any bow made for the purpose of throwing or projecting missiles of any kind by any means whatsoever; provided that nothing in this section shall prevent use of any such instruments in shooting galleries or ranges under circumstances when such instruments can be fired, discharged or operated in such manner as not to endanger persons or property and also in such manner as to prevent the projectile from traversing any grounds or space outside the limits of such gallery or range; and provided further, that nothing herein contained shall be construed to prevent the carrying of any type of gun, when unloaded, or any bow, to or from any range, gallery or hunting areas. (b) Nothing in this section shall prevent the possession or use of any of said instruments by persons duly licensed for such purpose by the City of Lakewood. (c) Nothing in this section shall prevent the use of or possession of any said instrument by law enforcement personnel."

[1] An analysis of the foregoing ordinance reveals that it is so general in its scope that it includes within its prohibitions the right to carry on certain businesses and to engage in certain activities which cannot under the police powers be reasonably classified as unlawful and thus, subject to criminal sanctions. As an example, we note that this ordinance would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on a substantial part of their business. Also, the ordinance appears to prohibit individuals from transporting guns to and from such places of business. Furthermore, it makes it unlawful for a person to possess a firearm in a vehicle or in a place of business for the purpose of self-defense. Several of these activities are constitutionally protected. Colo.Const. art. II, § 13. Depending upon the circumstances, all of these activities and others may be entirely free of any criminal culpability yet the ordinance in question effectively includes them within its prohibitions and is therefore invalid. Shuttlesworth v. Birmingham, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965); Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948); People of the City of Detroit v. Sanchez, 18 Mich.App. 399, 171 N.W.2d 452 (1969).

[2,3] A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1963); NAACP v. Alabama, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964). Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Aptheker v. Sec-

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).

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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

Weekend, Page D-1


# Anchorage Daily News

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Anchorage Daily News/Jim Lavrakas

William O'Shea at his arraignment Wednesday

# Victim of shooting dies

## Mental health director says suspect had sought help

By LARRY CAMPBELL
Daily News reporter

Renee Vega, the 31-year-old insurance agent shot in her office Tuesday afternoon, died at Providence Hospital Wednesday night.

Vega died at 8 p.m., according to a nursing supervisor.

Earlier Wednesday, William O'Shea, her former boyfriend, sat in a courtroom charged in the shooting.

O'Shea, 35, had been charged with attempted murder and being a felon in possession of a firearm. Assistant District Attorney Stephen Branchflower said he will file new first-degree murder charges today.

O'Shea was captured by Anchorage police two hours after the shooting in an Oceanview neighborhood nearby. He is jailed in lieu of a $1 million, cash-only bond.

Instead of being in court Wednesday afternoon, O'Shea had been scheduled to be in a counselor's office at the Southcentral Counseling Center. That was where Jan Campbell, executive director for the Alaska Mental Health Association, said she had made an appointment for O'Shea after he asked for her help last week.

"This afternoon was the soonest I could get him an appointment," Campbell said Wednesday. "He had come to see me a week ago and said he really needed help.

"He was using all the buzzwords — afraid of hurting someone, very sad and concerned and wanting help before getting into trouble. But Wednesday afternoon was the best I could do."

Campbell said she was willing to talk about his case because she felt the system had let O'Shea down.

Court papers filed by state prosecutors Wednesday say that Vega and O'Shea had been romantically involved for some months, but that the relationship had soured. According to the documents, Vega tried to break it up, but O'Shea refused. He beat her and ransacked her home last Friday, court papers charged.

A judge granted Vega a domestic violence writ against O'Shea the next day and she kicked him out, court papers said.

But the writ would only

See Back Page, SHOOTING

# Senate OKs trade bill;

## SPIRITUAL BATTLE BECOMES POLITICAL BATTLE

...uary.

...n Corrupt Practices Act ...es have to know specifically that ...violated the law" by bribing foreign ...s to be liable for punishment. This is also ...ored by business.

■ An easier course for passage of one of the ...resident's trade priorities, the U.S.-Canada free ...rade agreement. Senate Majority Leader Robert C. ...yrd has said a bruising veto battle over the trade bill ...ould jeopardize congressional ratification of the ...Canadian pact.

**For labor, the bill contains:**

■ A plant-closing notification provision that the ...unions insisted the Democratic leadership keep in the ...ill and that President Reagan has made the major ...ason for his veto. Companies would be required to ...ve 60 days' advance notice of plans for mass layoffs ...r plant closings. Business supports the veto over this ...rovision.

■ A $1 million training program for displaced ...workers, initially proposed by the administration, and ...$80 million in expanded assistance to workers who ...lose their jobs because of imports.

■ Stronger enforcement of voluntary restraint ...agreements curbing steel imports.

■ Language making violations of international ...norms of workers' rights grounds for trade complaints.

**Business, which played a major role in crafting the bill, gains:**

■ Tougher rules against unfair trade practices, ...for presidential retaliation in the

...bluff on the south side of Bird Creek ...ear the highway bridge.

Pollitt could not say what sparked the chase.



Anchorage Daily News/Bob Hallinen

**Troopers inspect the car that was rolled during a high-speed chase.**

# SHOOTING: Victim dies; counselor says suspect sought help

Continued from Page A-1

protect her if a police officer witnessed him harassing her. Otherwise, if O'Shea again bothered her, all she could do is appeal to the court to issue a warrant for his arrest.

But the morning of the shooting, O'Shea called her repeatedly at work, apparently distraught, according to office co-workers who overheard Vega's conversation.

The court papers also charge that, sometime after 1:30 p.m. Tuesday, O'Shea walked into the Fred Meyer department store on East Northern Lights Boulevard and bought a Ruger .22-caliber semi-automatic pistol — the weapon used 90 minutes later against Vega. In addition, the gun's packing box and receipt were found Wednesday morning in a men's room at the Village Inn restaurant next to Fred Meyer.

O'Shea had just completed a term of probation 24 days ago. He has a criminal record that includes convictions for burglary in 1974, check forgery in 1982, previous probation violations and misdemeanors. Court papers on this case, as well as documents from past court cases, show O'Shea struggled with drug and alcohol problems.

In addition, Campbell said O'Shea had told her of being under psychiatric care while in jail.

"He was looking for help, and it made me sick at heart," Campbell said.

But a quite different O'Shea was known to others, like Ray Clements, executive director of Parents United Inc., a non-profit aid agency for sexually abused children. For the past two months, O'Shea was supposed to be working for the group on contract as a fund-raiser. He had done the same work for Areela House, a drug rehabilitation center.

"We had a lot of plans in process, and he seemed very effective as a fund-raiser," Clements said Wednesday. "He had even stopped in the office earlier that day. To find out what had happened later in the day was shocking, certainly."

# ICE CLASSIC: Three men split $130,000 pot

Continued from Page A-1

dents and ice classic officials.

"The ice was real thick so everyone, including myself and the National Weather

# TV GLASSES: A boost from space technology

Continued from Page A-1