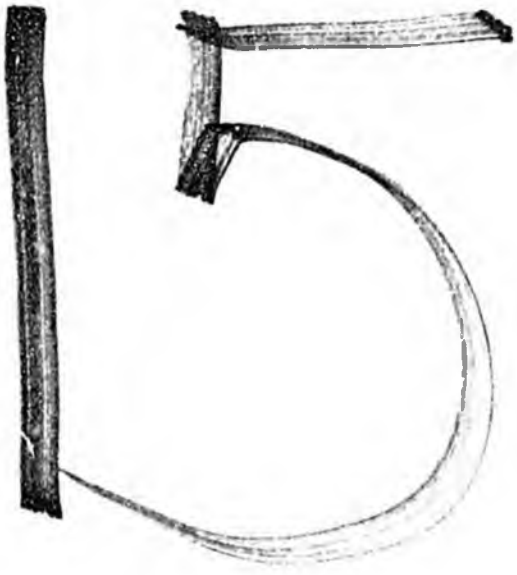
SJR



HOUSE STATE AFFAIRS COMMITTEE NEXT COMMITTEE: JUDICIARY

BILL: SJR 15 CURRENT VERSION: HCR CS SJR 15 (SA) SCHEDULED:

SPONSOR: RODEY PHONE NO: 3793 CONTACT FILE: \LLSA\SJR15.DBF

BILL SUBJECT: AMENDING THE ALASKA CONSTITUTION RELATING TO RIGHT OF A PERSON TO KEEP AND BEAR ARMS

SPONSOR BACKUP: BACKUP INFO FROM GOVERNOR'S CRIMINAL JUSTICE WORKING GROUP AND NATIONAL RIFLE ASSOCIATION

AFFECTED AGENCIES:

DEPARTMENT	CONTACT/PHONE	COMMENT
ELECTIONS	LINDA EDGEWORTH/4611	
LAW	STAPHANIE JOANNIDES/3'28	
P.S.	HORETSKI/4322	

FISCAL NOTES

AGENCY	REQUESTED	DATED	FY 88 AMT	FY 89 AMT
ELECTIONS	2/9/88	2/1/88	-0-	$2.2

ACTION

DATE	COMMENT
2/17/88	PUBLIC HEARING/TESTIMONY FROM RODEY AND NATIONAL RIFLE ASSOCIATION
2/29/88	PUBLIC HEARING CONTINUED
3/2/88	ADDITIONAL TESTIMONY; HELD FOR FURTHER CONSIDERATION
3/9/88	HCS CS SJR 15 (SA) PASSED FROM HOUSE STATE AFFAIRS

7. Rup Andrews
Alaska Field Representative
National Rifle Association
Juneau, AK
789-7422
Supports SJR 15

10. Glenn Herbs
Chief of Police
City of Dillingham
Box 869
Dillingham, AK 99576
842-5354
Send minutes

3. Stephanie Joannides
Department of Law
P.O. Box KC
Juneau, AK 99811
465-3428
Provided background on SJR 15

11. Carrie D. Longoria
STAR
3925 Reka Drive
Anchorage, AK
276-7279

6. Senator Pat Rodey
P.O. Box V
Juneau, AK 99811
465-3793
Prime sponsor of SJR 15

9. Rep. C.E. Swackhammer
P.O. Box V
Juneau, AK 99811
465-2689
Testified on SJR 15

2. Jerry Gertner
Juneau Rifle & Pistol Range
8409 Nugget Drive
Juneau, AK 99801
789-6904(W) or 789-4676(H)

4. Gayle Horetski
Deputy Commissioner
Department of Public Safety
P.O. Box N
Juneau, AK 99811
465-4322

1. Ed Kalwara
State President
Alaska Peace Officers Ass'n.
2760 Sherwood Lane
Juneau, AK 99801
789-2165(W) or 789-0036(H)
Opposed to SJR 15

12. Captain Kevin O'Leary
Anchorage Police Department
Anchorage, AK
786-8758

8. Ron Somerville
Alaska Outdoor Council
3780 McGinnis Drive
Juneau, AK 99801
789-2399
Supports SJR 15

5. Duane Udland
Vice President
Alaska Chief of Police Ass'n.
P.O. Box 2499
Soldotna, AK 99669
262-4455
Opposed to SJR 15; send tape

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

House State Affrs:

2/17/88

2/29/88

3/02/88

3/09/88

Alaska State Legislature
House

Official Business

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

STATE AFFAIRS COMMITTEE
SJR 15

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2A. "KIDS: DEADLY FORCE," NEWSWEEK MAGAZINE, JANUARY 11, 1988

2B. LETTER TO REPRESENTATIVE ULMER FROM ED KALWARA, ALASKA PEACE OFFICERS ASSOCIATION, DATED FEBRUARY 15, 1988

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9. OKLAHOMA CITY UNIVERSITY LAW REVIEW, STATE CONSTITUTIONS AND THE RIGHT TO KEEP AND BEAR ARMS, WRITTEN BY ROBERT DOWLUT AND JANET KNOOP

FISCAL NOTE

A. DIVISION OF ELECTIONS: $2,200

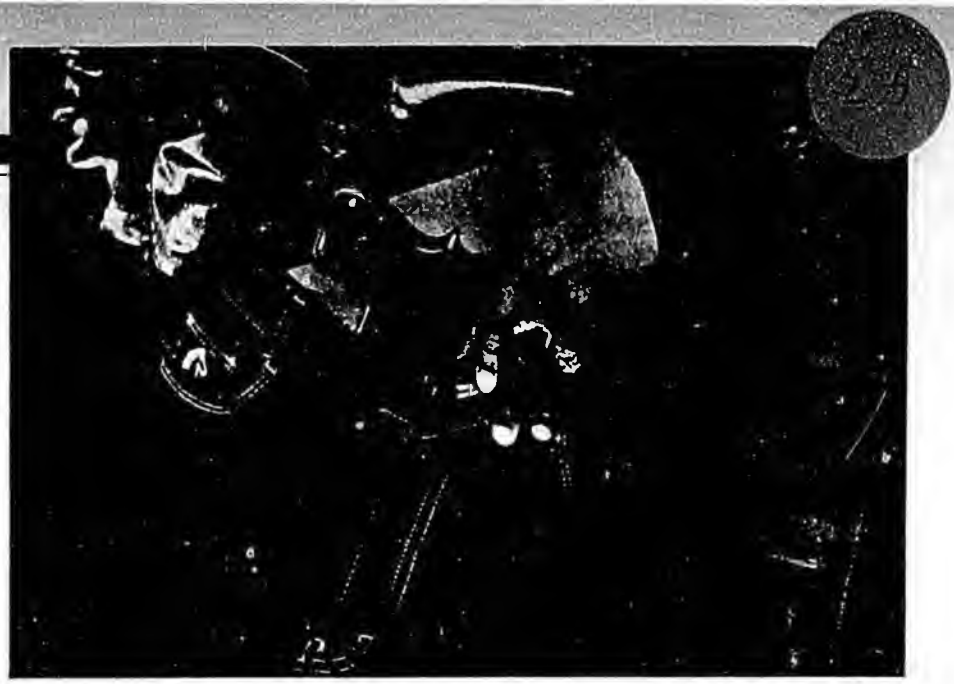
ing in stealth tactics, night rescues and infiltration. "We need to teach these high-school graduates with their football letters from East Cupcake, Neb., a little bit about being streetwise," he barks. From now on, all Marine sentries will carry loaded rifles—one way to possibly avoid a recurrence of 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 hosts 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*

ALASKA PEACE OFFICERS ASSOCIATION

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

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

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

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

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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

May 8, 1986

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

Dear Representative Miller:

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

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

We are concerned that the language presently contained in CS SJR 39 (Jud) am might allow later constitutional challenge to some existing state statutes. Present law, for example, prohibits a convicted felon from possessing a concealable firearm, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shot guns, prohibits possession of a firearm while intoxicated, the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm

on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.61.200-11.61.220.)

These statutes serve an important public safety function by restricting the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If the legislature does not intend that the proposed amendment of art. I, sec. 19 would render these statutes unenforceable, nor foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds, for example), then the legislature's intent to continue to allow reasonable regulation by law should be made clear.

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Harold M. Brown
Attorney General

STATE OF ALASKA
THE LEGISLATURE

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907 465 1800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M 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

M E M O R A N D U M 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.

PAB:ml
0913 ml

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 t , 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

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 BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right of each citizen of the state [THE PEOPLE] to keep and bear arms for lawful defense of self, family, property, and the state and for lawful hunting, recreation, and other lawful purposes, shall not be infringed by a state or by a borough or city of the state.

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

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

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

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

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

Sincerely,

Harold M. Brown
Attorney General

HMB:GMM:gb-13

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 Hertzbaugher
Municipal Attorney

Brian Porter, Chief
Anchorage Police Department

Alaska State Legislature

Committees:

Chair-State Affairs
V. Chair-Judiciary
Telecommunications
Special Ethics
Legislative Council
Finance Subcommittee
for the University of Alaska
Joint Committee
on Economic Recovery

P.O. Box V
Juneau, Alaska 99811
(907) 465-4947

REPRESENTATIVE FRAN ULMER

March 30, 1988

Duane S. Udland, Chief of Police
Soldotna Police Department
P.O. Box 2499
Soldotna, AK 99669

Dear Duane:

Thank you for your letter of support. I sincerely appreciate it and the cooperative working relationship that has developed with you and other members of the APOA. I only wish that you could vote in my district.

Sincerely,

Fran Ulmer
Representative

Soldotna Police Department

P.O. Box 2499
Soldotna - Alaska 99669

Duane Udland
Chief of Police

March 24, 1988

Representative Fran Ulmer
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, AK 99811

Dear Representative Ulmer

I just wanted to take a moment and thank you for the support you have shown law enforcement this session. I appreciate the work you and your friendly staff have done.

In particular, I want to comment about your approach to SJR 15, having to do with the Right to Keep and Bear Arms. This has become an emotional and touchy issue and you have handled it in a very sensitive and reasonable way.

Political life can be very difficult for any public official who does not automatically support the position of the National Rifle Association. You chose the more difficult path to follow and many of us in law enforcement are appreciative of your efforts.

Good luck for the rest of the session and thanks.

Sincerely,

Duane S. Udland

Duane S. Udland
Chief of Police

Alaska State Legislature

Committees:

Chair-State Affairs
V. Chair-Judiciary
Telecommunications
Special Ethics
Legislative Council
Finance Subcommittee
for the University of Alaska
Joint Committee
on Economic Recovery

PO Box V
Juneau, Alaska 99811
(907) 465-4947

REPRESENTATIVE FRAN ULMER

March 30, 1988

Del Smith, President
Alaska Association Chiefs of Police
4501 S. Bragaw
Anchorage, AK 99507

Dear Del:

Thank you for your letter of support. I sincerely appreciate it and the cooperative working relationship that has developed with you and other members of the APOA. I only wish that you could vote in my district.

Sincerely,

Fran Ulmer
Representative

Alaska Association Chiefs of Police

March 16, 1988

Representative Fran Ulmer
Alaska State Legislature
P.O. Box V (M.S. 3100)
Juneau, Alaska 99811

Dear Representative Ulmer,

I had the pleasure of hearing your presentation to the Alaska Peace Officers Association board in Juneau in January of this year. I have had the occasion since then to review two letters you have written in response to constituent's concerns regarding marijuana and more recently, regarding your stance on SJR 15.

I found your presentation to the Alaska Peace Officers Association to be open, honest and sincere in your questions regarding their positions on various issues. Your letters to the constituents regarding the marijuana and SJR 15 I also find to be well thought out rational responses to very emotional issues. I do not expect you or any other legislator to always agree with law enforcement, but I find you to be open minded and willing to look at both sides of any issue presented to you and make a decision that is in the best interests of your constituents and people of the State of Alaska. I find it extremely refreshing and pleasant to deal with you and I look forward to your continued support on issues that we agree on, and respectful, professional and intelligent opposition in those matters that we do not agree on.

Thank you again for your past assistance and I look forward to working with you in the future.

Sincerely,

Del Smith

Del Smith, President
Alaska Chiefs of Police Association

S.J.R. 15 March 11, 1988

Representative Ulmer:

As a member of this community and a volunteer Hunter Safety Firearms Instructor for the State of Alaska, I recommend that you support the Constitutional Amendment -- S.J.R. 15.

Refusing to allow the committee to vote on this despite the overwhelming support for it could jeopardize the Alaska Constitution for the individual's rights to keep and bear arms.

It is understood that you've been apprised of A.P.O.A.'s misunderstanding of S.J.R. 15 and that it (the amendment) will not preclude the reasonable regulations presently placed on firearms use within the State of Alaska -- regulations backed by the court decisions.

As your constituent I urge you to please reconsider.

Respectfully,

James "Joe" Corbett
Box 211288
Auke Bay, Alaska
99821

March 15, 1988

Representative Fran Ulmer
102 Capitol
P.O. Box V
Juneau, Alaska 99811

Dear Representative Ulmer:

Passage or S.J.R. 15 is necessary to ensure that our right to keep and bear arms is not infringed. The National Rifle Association (NRA) has documented numerous court decisions demonstrating that reasonable regulaations will not be invalidated by S.J.R. 15.

As one of your constituents who helped vote you into office, I ask you to not only allow the House State Affairs Committee to vote on S.J.R. 15, but I also ask you to support S.J.R. 15.

Sincerely,

Kim Turley

Mr. Kim Turley, Alaska Professional
Engineer No. 4961
Box 1134
Auke Bay, Alaska 99821

March 11, 1988
9139 Parkwood Drive
Juneau AK 99801

The Honorable Fran Ulmer
Chairperson, House State Affairs Committee
102 Capitol, P.O. Box V
Juneau, Alaska 99811

Dear Representative Ulmer:

My name is Howard G. Beaver, and my wife's name is Anna. We met you and became constituents of yours when you visited our home in the valley during your campaign for the House.

As an Alaskan sportsman, I am writing to urge you to allow a vote on S.J.R.15. I believe Alaskan sportsmen and women need passage of S.J.R.15 to assure that the right to keep and bear arms is guaranteed by the Alaska Constitution.

I first moved to Juneau in 1966. One of the main attractions at that time, and now, is the fact that we in Alaska still enjoy many rights and priviledges that less fortunate residents of communities in other states have lost because of oppressive laws such as the Morton Grove (Illinois) handgun ban.

I understand that even Anchorage, among scores of other communities across the Nation, have attempted to pass such laws as did Morton Grove. Thus, I am firmly convinced that the need for passage of S.J.R.15 is extremely **URGENT.**

We believe you are doing a fine job of representing us in the House. Please don't let us down on this important issue.

Sincerely yours,

Howard G. Beaver

789-3205

cc: Editor, The Juneau Empire

HGB/hb

RICHARD GOTO
9209 James Blvd., Apt. 105
Juneau, Alaska 99801

March 7, 1988

State Rep. Fran Ulmer
1700 Angus Way
Juneau, Alaska 99801

Dear Rep. Ulmer:

As I feel it is important our firearms rights in this state be protected, I am writing to urge you to allow the House State Affairs Committee vote on S.J.R. 15. Alaska's sportsmen and law abiding citizens need and deserve passage of the bill to insure their right to keep and bear arms is not infringed.

Contrary to the Alaska Peace Officers' Association's belief, S.J.R. 15 will have no effect on this state's laws regulating concealed weapons and possession of firearms by intoxicated persons or felons. These are reasonable regulations on firearms that it does not preclude. S.J.R. 15 merely guarantees protection of Alaska sportsmen's and law abiding citizens' rights to keep and bear arms for sport, hunting and self defense.

Whatever the outcome on this matter, thank you for your attention.

Sincerely,

Richard Goto

RICHARD GOTO

11,MARCH 1988

Dear F.Ulmer,

My name is DANIEL HYMER
I and all of my family and friends support S.J.R. 15 without further delay! We feel that it is important to us and all Alaskans.I would like to remind you that the NRA has documented numerous court decisions pointing out that reasonable regulations will not be invalidated by SJR 15. Please do not delay as we feel that this is a very important matter

Thank You

PH 789-3366 WORK
8212 DOGWOOD LN
JUNEAU AK, 99801
Daniel J Hymer

Ron Hagerup
4900 Thane Rd.
Juneau, AK. 99801
March 10, 1988

Representative Fran Ulmer
102 Capitol
P.O. Box V
Juneau, AK. 99811

Dear Representative Ulmer,

I am writing to urge you to allow a vote on S.J.R. 15.

Alaskan's need to reinforce their protection to keep and bear arms (for lawfull purposes) and I urge you to take a stand for this goal.

I believe that it is clear that the founding fathers intended that we be free to own firearms, and that the majority of Americans, and especially Alaskans, feel this way also.

Please do all you can to insure that freedom for us.

Sincerely,
Ron Hagerup

Representative Fran Ulmer
102 Capitol
P.O. Box V
Juneau, Alaska, 99811

Box 188
Douglas, Alaska, 99824
Phone 364-2111 Days
364-3406 Evenings

March 8, 1986

Dear Representative Ulmer

I have attached an NRA letter that claims that your are refusing to allow the State Affairs Committee to vote on S.J.R. 15.

I am a gun collector and hunter as are the other members of my family and strongly support S.J.R. 15 and the right to bear arms in the State of Alaska.

Please keep me informed of the progress of this bill through your committee.

Also please let me know your position on the right to keep and bear arms. Do you hunt or own your own firearms?

Thanks

Respectfully

Jan C. Dille

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."

In addition, since the passage of the Morton Grove (Illinois) handgun ban, over 100 communities -- including Anchorage -- have attempted to pass prohibitive legislation. Your community could be next unless firearms preemption is adopted to clarify that the state guarantee extends to local municipalities and to ensure that firearm laws will be consistent throughout the state.

It is critical that Representative Ulmer hear from you today, letting her know that Alaska's sportsmen need -- and deserve -- passage of S.J.R. 15 without further delay. Clearly, passage of S.J.R. 15 is critical -- yet Representative Ulmer is single-handedly blocking this much-needed reform. Alaska's sportsmen and gun owners are at a crossroads in 1988. Behind lies your state's proud heritage of respect for firearms ownership and sports hunting. Ahead lies a choice: the smooth continuation of that tradition or a rocky road of ever increasing attacks aimed directly at you. **The choice is yours!**

By acting today, you can help ensure the future of your firearms freedom in Alaska. By failing to take action, you will be giving a nod to the anti-gunners that your rights are open for attack. And you can be sure that the anti-gunners will seize every opportunity to harass Alaska sportsmen.

There is no way to overstress the importance of securing S.J.R. 15 and we are counting on **you**, our grassroots support, to make sure we succeed in this critical effort. Here's what we are asking you to do:

✓ TELEPHONE STATE REPRESENTATIVE FRAN ULMER **today**, urging her to allow a vote on S.J.R. 15. Follow-up in writing. Explain that you are a constituent and let her know that Alaska sportsmen need -- and deserve -- passage of S.J.R. 15 to ensure that your right to to keep and bear arms is not infringed. Representative Ulmer's address and phone number at home are: 1700 Angus Way, Juneau 99801; 5/486-6523. Her address and phone number at the Capitol are: 102 Capitol, P.O. Box V, Juneau 99811; 465-4947.

✓ WHILE TALKING TO REPRESENTATIVE ULMER, remind her that the NRA has documented numerous court decisions pointing out that reasonable regulations will not be invalidated by S.J.R. 15. (Contact NRA State Liaison Brian Judy at (916) 446-2455 or NRA Field Representative Rupe Andrews at (907) 789-7422 if you would like to know more specific details.)

✓ RECRUIT YOUR FAMILY, FRIENDS AND FELLOW SPORTSMEN to join you in this critical effort and help send a clear message to Representative Ulmer that Alaska's gun owners are solidly in support of this bill.

Act today to protect your firearms freedom for all future generations. **We're counting on you — for all of us!**

Sincerely,

Ted G. Bryan

Theodore A. Lattanzio
Director of State and Local Affairs

6 March 1988

to State Rep. Fran Ulmer:

Re. S.J.R. 15

as a long time Juneau resident I and most of my friends are concerned about your apparent refusal to allow the Committee to vote on - S.J.R. 15 -

The N.R.A. has documented numerous Court decisions pointing out that reasonable regulations will not be invalidated by S.J.R. 15.

Trusting you will fairly bring S.J.R. 15 to vote.

Thank you, Remain Constituent

Frank E Brown
P.O. Box 32879
Juneau AK. 99803
789-5552

Mr. & Mrs. Ronald G. Hansen
4117 Birch Lane
Juneau, Alaska 99801

3-7-88

Rep Fran Ulmer
Box V, Juneau 99811

Re: SJR 15

Dear Representative Ulmer,

1. See attached from NRA.

2. Pass SJR 15.

3. NRA maintains APOA based a position to you on a mistaken belief. Order them to appear before the committee and explain.

4. As an aside I'm really surprised (and afraid) of the AG's opinion - as stated in the last ¶ of pg 1. Rectify my fear by passing SJR 15.

Sincerely

Ronald G. Hansen

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

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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."

WOW!

In addition, since the passage of the Morton Grove (Illinois) handgun ban, over 100 communities -- including Anchorage -- have attempted to pass prohibitive legislation. Your community could be next unless firearms preemption is adopted to clarify that the state guarantee extends to local municipalities and to ensure that firearm laws will be consistent throughout the state.

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- ✓ TELEPHONE STATE REPRESENTATIVE FRAN ULMER today, urging her to allow a vote on S.J.R. 15. Follow-up in writing. Explain that you are a constituent and let her know that Alaska sportsmen need -- and deserve -- passage of S.J.R. 15 to ensure that your right to to keep and bear arms is not infringed. Representative Ulmer's address and phone number at home are: 1700 Angus Way, Juneau 99801; 486-6523. Her address and phone number at the Capitol are: 102 Capitol, P.O. Box V, Juneau 99811; 465-4947.

- ✓ WHILE TALKING TO REPRESENTATIVE ULMER, remind her that the NRA has documented numerous court decisions pointing out that reasonable regulations will not be invalidated by S.J.R. 15. (Contact NRA State Liaison Brian Judy at (916) 446-2455 or NRA Field Representative Rupe Andrews at (907) 789-7422 if you would like to know more specific details.)

- ✓ RECRUIT YOUR FAMILY, FRIENDS AND FELLOW SPORTSMEN to join you in this critical effort and help send a clear message to Representative Ulmer that Alaska's gun owners are solidly in support of this bill.

Act today to protect your firearms freedom for all future generations. **We're counting on you — for all of us!**

Sincerely,

Ted

Theodore A. Lattanzio
Director of State and Local Affairs

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.

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 yesterday, 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

CC: Theodore Lattanzio, NRA
Grace Berg Schaible, Attorney General
Arthur Snowden, Alaska Court System
Arthur English, Department of Public Safety
Dana Fabe, Public Defender
Myra Munson, Department of Health and Social Services
Susan Humphrey-Barnett, Department of Corrections
Del Smith, Alaska Association of Chiefs of Police
Brant McGee, Public Advocate
Harold M. Brown, Alaska Judicial Council
John Havelock, Consultant on Criminal Justice Planning

6. Sue Arthur
P.O. Box 32662
Juneau, AK 99803

7. Bruce Bowler
P.O. Box 244
Juneau, AK 99802
789-2582

3. Jay Davis
4118 Aspen Avenue
Juneau, AK 99801
789-6255(w) or 789-7688(h)
Wants vote on SJR 15

2. Kelly Feathers
P.O. Box 210743
Auke Bay, AK 99821
789-4041 or 789-7639
Wants vote on SJR 15

13. Ronald Hansen
4117 Birch Lane
Juneau, AK 99801

14. May Hymer
8212 Dogwood Lane
Juneau, AK 99801

16. Jan Still
Box 188
Douglas, AK 99824

9. Dan Travis
P.O. Box 021184
Juneau, AK 99802
Supports SJR 15

1. Mark Bellinger
8453 Valley Avenue
Juneau, AK 99801
APOA member; no concealed weapons

15. Frank Brown
P.O. Box 32879
Juneau, AK 99803
789-5552

10. Harry Day
Box 021082
Juneau, AK 99802

11. Dennis Grawcock
P.O. Box 210831
Auke Bay, AK 99821
780-4334

12. Chuck Haywood
P.O. Box 21566
Juneau, AK 99801

5. Joe Merrill
Box 465
Douglas, AK 99824
586-1447

4. Cliff Towle
P.O. Box 33524
Juneau, Ak 99803
789-4600

8. Kevin Weir
Box 494
Douglas, AK 99824

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."

In addition, since the passage of the Morton Grove (Illinois) handgun ban, over 100 communities — including Anchorage -- have attempted to pass prohibitive legislation. Your community could be next unless firearms preemption is adopted to clarify that the state guarantee extends to local municipalities and to ensure that firearm laws will be consistent throughout the state.

It is critical that Representative Ulmer hear from you today, letting her know that Alaska's sportsmen need — and deserve -- passage of S.J.R. 15 without further delay. Clearly, passage of S.J.R. 15 is critical -- yet Representative Ulmer is single-handedly blocking this much-needed reform. Alaska's sportsmen and gun owners are at a crossroads in 1988. Behind lies your state's proud heritage of respect for firearms ownership and sports hunting. Ahead lies a choice: the smooth continuation of that tradition or a rocky road of ever increasing attacks aimed directly at you. **The choice is yours!**

By acting today, you can help ensure the future of your firearms freedom in Alaska. By failing to take action, you will be giving a nod to the anti-gunners that your rights are open for attack. And you can be sure that the anti-gunners will seize every opportunity to harass Alaska sportsmen.

There is no way to overstress the importance of securing S.J.R. 15 and we are counting on you, our grassroots support, to make sure we succeed in this critical effort. Here's what we are asking you to do:

✓ TELEPHONE STATE REPRESENTATIVE FRAN ULMER today, urging her to allow a vote on S.J.R. 15. Follow-up in writing. Explain that you are a constituent and let her know that Alaska sportsmen need -- and deserve — passage of S.J.R. 15 to ensure that your right to to keep and bear arms is not infringed. Representative Ulmer's address and phone number at home are: 1700 Angus Way, Juneau 99801; 486-6523. Her address and phone number at the Capitol are: 102 Capitol, P.O. Box V, Juneau 99811; 465-4947.

✓ WHILE TALKING TO REPRESENTATIVE ULMER, remind her that the NRA has documented numerous court decisions pointing out that reasonable regulations will not be invalidated by S.J.R. 15. (Contact NRA State Liaison Brian Judy at (916) 446-2455 or NRA Field Representative Rupe Andrews at (907) 789-7422 if you would like to know more specific details.)

✓ RECRUIT YOUR FAMILY, FRIENDS AND FELLOW SPORTSMEN to join you in this critical effort and help send a clear message to Representative Ulmer that Alaska's gun owners are solidly in support of this bill.

Act today to protect your firearms freedom for all future generations. **We're counting on you — for all of us!**

Sincerely,

Ted A. Lattanzio

Theodore A. Lattanzio
Director of State and Local Affairs

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 credentials.

E. W. Bracken 13910 Glacier Hwy. Juneau, AK 99801
(my typist is in Bartlett Memorial today)

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 SJR 18 (S/A) [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

Terry Martin (without amendment)

Mark Ulmer

David Donley (without amendment)

SIGNING OTHER RECOMMENDATIONS:

Duncan Hoffman Dallas

Chairman's signature

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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. IOWA 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. Hay, 218 Pa. Super. 72, — , 272 A.2d 275, 276 (1970), *rev'd 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 affects 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

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 168, 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. 9 (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. 11 (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. 769, 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 existence of such a guarantee in the state constitution leaves the Legislature [illegible] to deal with the subject." *Ex Parte* Roberts, 194 Cal. 614, [illegible] 226 P. 201 [illegible]

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-

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 20, col. 3.

8. Wash. Post, Nov. 9, 1982, at 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. Supreme Court, 105 Ariz. 413, [illegible] 468 P.2d 18, 20-21 (1970). *Cf.* Lemons v. Noller, 141 Kan. 814, [illegible] 64 P.2d 177, 180 (1940) (constitution limits rather than confers power on legislature).

11. People *ex rel.* Director & 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

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 *412 (o

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

16. Id. at *405.

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 1769 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, desolation 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. Declaration of Independence para. 1 (U.S. 1776).

20. 1 Macaulay, Critical and Historical Essays, Contributed to the Edinburgh Review 163 (London 1855).

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 (1960).

The Nazis seized Albert Einstein's bank account for a weapon [illegible] the possession of a certain knife in his home. [illegible] Adolf Hitler [illegible] "The [illegible] with [illegible]

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. Solzhenitsyn, The Gulag Archipelago 195 (1974). The right to have firearms or other weapons is forbidden and self defense is also curtailed. 2 A. Solzhenitsyn, 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 [illegible] the requirements for self defense and food gathering [illegible] firearms [illegible] nearly everyone." D. Boorstin, The Americans: The Colonial Experience [illegible] (1958).

26. [illegible] "The right of self defence in [illegible] founded in the law of nature, and is not [illegible] law of society." 2 J. Kent, Commentaries on American Law [illegible] "The right of self defence is the first law of nature." 1 St. George Tucker, Blackstone's Commentaries [illegible] (Phil. 1803).

27. See [illegible] State v. Hardie [illegible]

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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[illegible] Ohio App. 2d 325, 337 N.E.2d 773 (1974).

28. Warren v. District of Columbia, 444 A.2d 1 (D.C. App. 1981); Weiner v. Metro Transp. Auth., 55 N.Y.2d 175, 418 N.Y.S.2d 141 (1982). *Contra* Yingst v. Pratt, 139 Ind. App. 695, ___, 220 N.E.2d 276, 230 (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 [illegible] 49, 59 [illegible]

[illegible] state has the authority to train its able bodied men so that they may per[illegible] military or [illegible] duties when called upon. Hamilton v. Regents of Univ. of Cal., [illegible]

29. [illegible] 486 F.2d 616, 618 (7th Cir. [illegible])

30. [illegible]

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. 1, § 24. Proscribing concealed carry: Colo. Const. art. II, § 13; Idaho Const. art. 1, § 11; Ky. Const. Bill of Rights, § 1, para. 7; La. Const. art. 1, § 11; Miss. Const. art. 3, § 12; Mo. Const. art. 1, § 23; Mont. Const. art. II, § 12; N.M. Const. art. II, § 6; N.C. Const. art. 1, § 30. Manner of bearing arms may be regulated: Fla. Const. art. 1, § 8; Ga. Const. art. 1, § 1 para. 5; Idaho Const. art. 2, § 26; Tenn. Const. art. 1, § 26; Tex. Const. art. 1, § 23. The right may be regulated: Utah Const. art. 1, § 6. The right is subject to the police power: Ill. Const. art. 1, § 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. [illegible], 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. [illegible] People v. Warren, 11 Ill. 2d 420, 425, 143 N.E.2d 28, [illegible] (1957).

35. [illegible]

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 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]

36. J. Nash, Bloodletters and Badmen 55, 255, 345, 406 (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. [illegible] (18[illegible]).

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 [illegible] 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. Costantino 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, § [illegible]

44. *Id.* § [illegible]

45. *Id.* § [illegible]

46. *Id.* § [illegible]

47. Kirkpatrick v. King, 228 Ind. 236, [illegible] 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. Kolmes, [illegible] [illegible] 80 A. [illegible] (19[illegible]).

48. 72 Kan. 230, 83 P. 619 (1905). [illegible] the right to bear arms to a collective right has been [illegible] by other courts. See, e.g., People v. [illegible] [illegible] State v. Dawson, 272 N.C. 535, [illegible] S.E.2d [illegible]

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] These 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-

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).

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, 616-17 (Am. Dec. 40 (1840). The prevailing view is that prohibiting concealed carrying of weapons does not infringe the private right to bear arms. "Anyone 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. 344-45 (1886).

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

52. In re Ha[illegible], 70 P. 6[illegible] (Kan.).

53. 166 Mass. 171, 44 N.E. 139 (1896).

54. 116 U.S. [illegible] (1886).

55. [illegible] 72 Kansas 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, 12-13 (1820). This refutes John Marshall's view that the states had retained their power over the militia. J. Dunn, Jr., on the Federal Constitution 119-21 (1900).

60. Luther v. Borden, 48 U.S. (7 How.) 1, 35 (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 voluntary 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 the right to attain these 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 [illegible] 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 Educ., 347 U.S. 483 (1954) with Plessy v. Ferguson, 163 U.S. 537 (1896).

71. At common law a felony is [illegible] a forfeiture of all the defender's lands or goods and often subject [illegible] punishment. 4 W. Blackstone, Commentaries [illegible] Laws of England [illegible] at common law usually only the [illegible] were felonies [illegible] the modern trend [illegible]

V. Constitutionally Protected Arms

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

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, (Co. 4 124) for all acts done by him in his lunacie, are as the acts 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, 221, 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. [illegible] ch. 33 (1834).

Some early constitutional guarantees of arms were restricted to "free white men." [illegible] Const. art. I, § 21 (1845); Tenn. Const. art. I, § 26 (1834); [illegible] Const. art. III, art. [illegible] (1845). The passage of the thirteenth and fourteenth amendments means that except for idiots, the mentally [illegible], and persons of tender years, all of the people are guaranteed the right to bear arms. See also T. Cooley, A Treatise on Constitutional Limitations [illegible] (7th ed. [illegible]).

(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,

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 [illegible] (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 [illegible] (1755). [illegible] the arms provision in [illegible] Const. art. [illegible] (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 . . . powder . . . 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 . . . ." "that 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. 192-94 (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 1623, 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 [illegible] 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 25-[illegible] (U.S. Army Technical Manual 9-2200, Oct. 1956).

76. We have not been directed to any authority nor are we aware of any that would [illegible] abridgement of one form of constitutionally protected communication [illegible] there are alternative means of communication [illegible] N.Y. [illegible] Interest Research Group, Inc. v. Roslyn Estates, [illegible] F. Supp. [illegible] (E.D.N.Y. [illegible]).

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 7-11 (U.S. ARMY TECHNICAL MANUAL 9-2200, OCT. 1956); PISTOLS AND REVOLVERS 103 (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 [illegible] 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 . . . that which is guaranteed by the Constitution." [illegible] "the Constitution [illegible]" that deadly guns, cannon, [illegible] would be [illegible]." State v. Kerner, 181 N.C. 574, [illegible] 107 S.E. 222, [illegible] (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, equipment, 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

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, § 1 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 (1864). 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 "militiaman" 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. Grayston, 349 Mo. 700, —, 163 S.W.2d 335, 337 (en banc 1942). The militia is classified into the National Guard and the reserve militia. *Id.* at —, 163 S.W.2d at 339. *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 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. I, § 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, 41 (Office of Sec. of Defense, Mar. 1981).

86. *Id.* at 50, 62-64.

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]

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 106 (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. Schelkopf, Virginia's Guard—Civilian Defense and the State Militia in the Second World War 15, 101 (1949).

90. *E.g.*, N.Y. Times, Mar. 30, 1942, at 1.

91. R. Lee, Germany Warfare 53 (Penguin Books & Infantry Journal 1942); H. Lee, Operation Manual for Pistol Education, 1941.

92. Lang, *The Militia of the U.S.*, Military Review 13, 16 (May 1932). 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]

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 S.C. 374, —, 187 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, 216 Pa. Super. 485, 271 A.2d 911 (1970).

VI. Textual Differences

Militia Purpose

Five state constitutions guarantee that "the right of the people to keep and bear arms shall not be infringed"[158] and assign a well regulated militia as a purpose for this right. Arms suitable for militia use are protected under these guarantees.[159] 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.[160]

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."[161] 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.[162] Echoing this view is an early case

158. 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.

159. 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 note [illegible] supra.

160. State v. Kerner, 181 N.C. 574, [illegible] 107 S.E. 222, 225 (1921). The right to self-defense was asserted by the Framers. State v. Dawson, 272 N.C. 535, [illegible] 159 S.E.2d 1, [illegible] (1968). See also Nunn v. State, 1 Ga. 243 ([illegible]).

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

162. [illegible] State v. Dawson, 272 N.C. 535, [illegible] 159 S.E.2d 1, 10 (1968); State v. Kerner, 181 N.C. 574, [illegible] 107 S.E. 222, 225 (1921); Hill v. State, 53 Ga. 472 ([illegible]). Ga. Const. art. I, § [illegible] para. 14 tracked the second amendment. In [illegible] [illegible] 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.[163]

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

has a clear right to carry a weapon 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 difficulty 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."

163. Hill v. State, 53 Ga. 472, 476 ([illegible]). [illegible] State v. [illegible] (Alaska [illegible]) [illegible]

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 surprise 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, 701, aff'd 245 La. 1075, 162 So. 2d 574 (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. 1739). "[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 Lessee 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 Northampton, 2 Edw. III, c. 3 (1328); Judy v. Lashley, 50 W. Va. 628, 41 S.E. 197, 200 (1902). To sustain a conviction proof was required that the accused had gone armed "in terrorem" (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 Sheriffe, and other the Kings officers, and) every Justice of Peace (upon his owne view, or upon complaint made) [illegible] them to be stayed and arrested, & [illegible] 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[eace] [illegible] every Constable may [illegible] take away their Armour and other weapons, and [illegible] them to be praised, and answered to the king as forfeited; and the Justice of P[eace] may do by the First Assignment [illegible]

M. Dalton, The Countrey Justice [illegible] [illegible]

> [illegible] to Affray, [illegible] there be [illegible] [illegible] [illegible] or offered to be given, or other attempt to such purpose [illegible] words, [illegible] affray [illegible]

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 23.

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 solemn 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 460; *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. Constitution of 1780, at 624 (O. & M. Handlin eds. 1966). Those state courts 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-

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 adopted 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 (1831).

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. 139 (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 lawless 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 & ABUSES, CLASSICALLY CL. C1 (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. (1 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

112. Heile 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, 42 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 buried:

> 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 guarantee 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 [illegible] simply allows a ban on concealed carrying.

115. Wilson v. State, 33 Ark. [illegible] 34 Am. Rep. [illegible] (1878).

116. Glasscock v. City of Chattanooga, [illegible] 118 S.W.2d [illegible]

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

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 181, 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 [illegible] World War II indicate that the militia is still a viable institution. *See supra* notes [illegible] 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.* [illegible], 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

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 *Blaksley*'s collective right holding, *see supra* notes 39-71 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. 1, § 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, 528 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, 246 (1936) ("The British Press was subject to licensing"); 1 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, 218 Pa. Super. 72, ___, 272 A.2d 275, 278-79 (1970) (right to bear arms pre-[illegible] constitution [illegible] by the legislature), vacated on other grounds, 448 Pa. 307, 292 A.2d 410 (1972); [illegible] v. State, 11 Tenn. (3 Yerg.) 356, [illegible] (1833); [illegible] v. State, 24 Tex. [illegible], 401-02 (1859).

128. The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780 [illegible] the people [illegible] for all lawful purposes including personal defense [illegible] part of their culture, the [illegible] right. A [illegible]

individual guarantee to self-defense was adopted.[128] 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.[129]

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 be guaranteed:

> As civil rulers, not having their duty to the people duly before 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, [illegible], 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 SIEGE 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 93 (1969). *Cf.* Harkey v. State, 152 Tenn. [illegible], 46 S.W.2d 852 (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 [illegible] 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 [illegible] and configurations for shotguns still being used after some 400 years. . . . *Id.* at 2.
>
> [I]n the American West . . . [illegible] of shotguns were [illegible] [illegible] *Id.* at 2.
>
> The modern [illegible] [illegible] the same [illegible] that [illegible] the blunderbuss. *Id.* at [illegible].

[illegible] *Id.* at [illegible].

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, 42 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 [illegible] supra.

135. ALA. CONST. art. I, § 26; ARIZ. CONST. art. II, § 26; CONN. CONST. art. I, § 15; [illegible] art. I, § [illegible]; [illegible] CONST. art. I, § [illegible]; [illegible] CONST. BILL OF RIGHTS § [illegible]; [illegible] CONST. art. I, § [illegible]; [illegible] CONST. art. II, § 12; PA. CONST. art. I, § 21; S.D. CONST. art. VI, § [illegible]; [illegible] CONST. art. I, § [illegible]; VT. CONST. ch. I, art. 16; WASH. CONST. art. I, § 24; and WYO. CONST. art. I, § 24.

136. See [illegible] supra [illegible].

137. [illegible]

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 composed 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) [illegible] fundamental right to bear arms in self defense, a liberty interest"); [illegible] 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, [illegible] (Fla. 1962) [illegible] to the people the right to carry weapons for their protection"); [illegible] 2d 700, 701, 702 [illegible] (Fla. 1961) [illegible] the existence of a pistol in the pocket of an automobile [illegible] they are traveling"); Motley v. Kellogg, 76 Ind. Dec. [illegible] N.E.2d [illegible] (Ind. App. [illegible]) [illegible] application available at the [illegible] of the community, the [illegible] for their self defense"); Schubert v. DeBard, [illegible] N.E.2d [illegible] (Ind. App. 1980) [illegible] constitution provides our citizens the right to [illegible]

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, 459 (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. Buzzard, 4 Ark. [illegible] (1842).

144. *Id.* [illegible]

145. *Id.* at [illegible] [illegible] the common law [illegible] The common law did not prevent the [illegible]

> 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

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 1369 (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."

149. Cottrell v. State, 649 P.2d 865, 871 (Wyo. 1982) (when prosecuting gun offense attempted because defendant stated he was "defending the State of Israel" it is not for case involving the killing of two deputy sheriffs trying to arrest drunk who, very drunk, carried a pistol concealed, and brandished the pistol by shooting it off, the court brushed aside a right to bear arms claim with a terse statement 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

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, 64 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 purpose 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 1369 (Ind. App. 1980); Rabbitt v. Leonard, 36 Conn. Supp. 148, 413 A.2d 489 (1979).

153. Commonwealth v. Davis, 369 Mass. 886, 341 N.E.2d 857 (1976).

154. State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); People v. Zerillo, 219 Mich. 418, 189 N.W. 927 (1922).

155. State v. Blocker, 291 Or. 255, 630 P.2d 810 (1981); State v. Rosenthal, 75 Vt. 276, 54 A. 1081 (1903); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 13 Am. Dec. 251 (1822).

156. Jennings v. State, 3 Tex. Crim. App. 295 (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

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." Handle 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. [illegible], 289 Or. [illegible], 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. I 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 hinted that the right was not infringed. *Id.* at ___, 178 S.E.2d at 461-62.

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:

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 ...") was rejected by a 54 to 23 vote. 7 Debates of the Convention to Amend the Constitution of Penn. 258-61 (1873).

169. G. Neumann, The History of Weapons of the American Revolution 151 (1967).

170. Hat[illegible], *Jefferson's* [illegible], 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

171. ARTASON LEITER BOOK 1757-1770, f. 134 (Va. State Library).

172. *See* note 104 *supra*.

173. *See* note 105 *supra*.

174. State v. Beaulon, 170 Conn. 234, ___, 365 A.2d 1105, ... (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 residents 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. Alders, *Years of Pleading 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 a crime" with the comment that "one such incident may render him forever the applicant." Matter of Maglocco, 181 N.Y.L.J. 4 (N.Y. Co. Sup. Ct. Aug. 11, 1978).

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. 296, ___, 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 does within the description of such arms as one may carry for the purposes designated in the constitution ...") Taylor v. McNeal, 524 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, 744 (1972) ("an [owner] 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

defense"), People v. Nakamura, 99 Colo. 362, 364, 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, 521 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 168 (1952) (defense of home, person, or property).

185. *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 184 at 262-63. Despite the Oklahoma court's apparent attempt to hold that a pistol is not a constitutionally protected arm, the *Andrews*, *Fife*, *Fenlock*, 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 *Blakeley* 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* note 78-79 for a criticism of *Blakeley*. In any event, the Oklahoma guarantee, adopted after resort to *Blakeley*, uses the singular term *citizen*, thus preventing a militia right interpretation. A case interpreting constitutional language similar to that in *Blakeley* and explicitly holding that a pistol is a protected arm was overlooked. *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902) (Idaho 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-

pistol in town in any manner voided).

188. See *supra* note 183, at 262; State v. Duke, 42 Tex. 455, 459 (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, 12 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 came about by ignoring the "defense of his home, person, or property" purpose in the constitution, a good portion of the other commonly possessed, 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 recommendation and opinions from states with similar guarantees will put to rest the present unintended 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

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 645, 699 (1965) (art. III § 12 cited in reversing conviction).

199. *See supra* note [illegible].

200. *See supra* note [illegible]. Although Watson v. State, 81 Miss. 301, 33 So. [illegible] (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

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. 1, § 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 35-71 *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 71-[illegible], 79.

204. *See supra* notes [illegible]. *See also* Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737, 738 (N.M. App. 1971) ([illegible] 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, 64 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 924, 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, 64 Ohio St. 202, ___, 58 N.E. 572, 575 (1900) ("protection of the country").

207. *See supra* notes 20, 21, & 141.

208. State v. Hogan, 64 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, 12[illegible] (N.M. App. 1977) the court hinted that it would uphold a law prescribing carrying a gun into a licensed liquor establishment, a fourth degree felony, where the right to bear arms was raised by "[a]nyone in defendant's hand." *See supra* note 71, for criticism of making a regulatory offense a felony.

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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210. *See supra* note 101. 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 hunkhouse 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 saw mill 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 such 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. Mead, 641 P.2d 652 (Utah 1982), a conviction for possession of a firearm by a convicted felon under the U.S. was upheld. The court noted the arms guarantee states [illegible] The Legislature may regulate the exercise of this right by law." Three separate [illegible] were written to affirm the conviction in view of cases where such arms in possession [illegible] were voided on right to bear arms grounds. People v. Nakamura, [illegible] 2 P.2d 20 (1st Dist. Ct. App. 1931) and People v. Zerillo, 219 Mich. 635, [illegible] (1922), it appears that the majority was swayed by the fact that the [illegible] and that it was used for the apprehension [illegible] rather than for self-defense. Mc

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]

sher v. Dayton, 48 Ohio St. 213, 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 541 (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, 11 Ohio Dec. 364, 367-68 (1891).

212. Ga. Const. art. I, § 1, para. V; Idaho Const. art. I, § 11; Ill. Const. art. I, § 22; La. Const. art. I, § 11; Ky. 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, 31-32.

215. *See supra* notes 14, 19-23.

216. McKellar v. Mason, 120 So. 2d 700, 702 (La. App. 1960), *aff'd* 240 La. 1065, 126 So. 2d 371 (1961). 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. ___, 41 N.E.2d 847 (1976); Porter v. State, 42 Okla. Crim. 272, 275 P. 393 (1929); City of Salina v. Blaksley, 72 Kan. 230, 83 P. 619 (1905).

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

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 265 (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, 309 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 261. 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, 403 Ind. Dec. 540, 398 N.E.2d 1339 (Ind. App. 1980).

223. McKellar v. Mason, 120 So. 2d 700, 702 (La. App. 1960), *aff'd* 240 La. 1065

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

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 hip 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 63 (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 759 (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. 603, 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 peaceably used by individuals, such as machine guns, to prescribe possession by persons 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 peaceful use 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]

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 abstruse 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.

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

232 *See supra* note 227.

233 3 Ill. Proceedings 1666 (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. Huttmacher). He cited People v. Zerillo, 219 Mich. 643, 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 1710 (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 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).

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 aptly 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

241 *Id.* at 1701. "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 out a cot so he could go to sleep. *Id.* at 1712

242 7 Ill. Proceedings [illegible] Legal and Research Advisers Memorandum No. [illegible] The Bill of Rights Committee rejected an attempt to amend the present arms guarantee by adding the phrase "except but arms" following the word "arms." Minutes of the Committee on Bill of Rights, May 12, 1970

243 Board of Education v. Rook, [illegible] (Ill. [illegible] Dixon, 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

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 policemen and homeowners 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 Ass'n, 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,

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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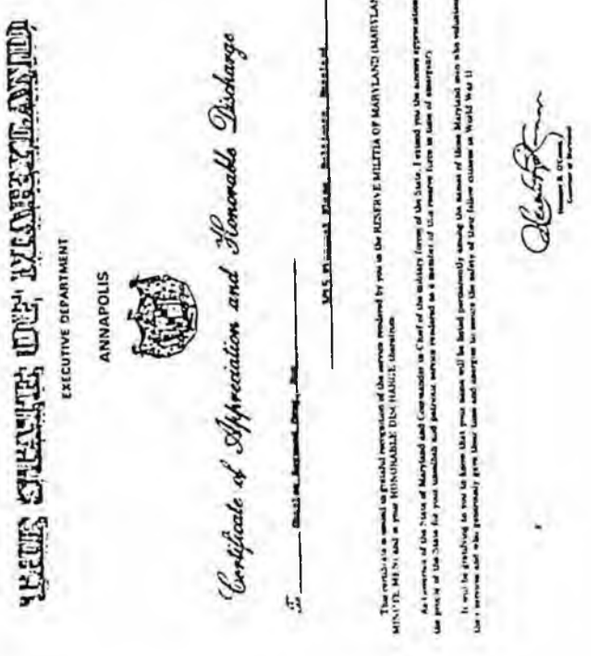
249 State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 95 (1980).

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. 362, 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 La. 574, 160 S.E. 222 (1931); *In re* Reilly, 31 Ohio Dec. 364 (C.P. 1919); State v. Blocker, 201 Or. 255, 270 P.2d 824 (1954); State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 9 Am. Rep. 8 (1871); Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928); Smith v. Liberator, 41 Tenn. (1 Cold.) 214, 217 (1860); State v. Rosenthal, 75 Vt. 225, 54 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).



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 citizen 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. § 1, 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 when 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 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 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.

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.

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
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.

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 conv.cted 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)

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 [illegible] 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.

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.2d 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); *Canfield 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 the 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 the 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.

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 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.

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
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(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

NATIONAL RIFLE ASSOCIATION OF AMERICA
INCORPORATED 1871

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

RUFE ANDREWS
FIELD REPRESENTATIVE
ALASKA

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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
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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.

DISCUSSION: 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.

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.

BY THE WAY IT'S ON FILE
PASSED ALSO
GOV'S DESK

GENERAL COUNSEL

DL685/SUB A

JUL 17 1986

4/23/86
PASSED SENATE
32 TO 7

8 6 --S 2646 SUBSTITUTE A

AN ACT

RELATING TO FIREARMS

STATE OF RHODE ISLAND

6/25/86
PASSED HOUSE
68 TO 10

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 1986

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. 26, 1986), the National Safety Council's Accident Facts, 1985, the FBI Uniform Crime 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 death 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, 133.3 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 (56,000), 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 7/4/8

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 Havelock. "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 suspending" the Bill of Rights, 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: 18)

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: 146 Should not: 28)

1984 CONSTITUTIONAL AMENDMENT
ALASKA

"The right of the person to keep and bear arms in defense of self, home, family, or the state, or for lawful hunting or recreational use, or for other lawful purposes shall not be infringed, but this provision shall not prevent passage of laws to regulate carrying weapons concealed, nor prevent legislation proscribing possession of firearms by convicted felons, minors, mental incompetents or illegal aliens. The General Assembly shall have exclusive power to legislate in this field."

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."

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STATE CONSTITUTIONAL GUARANTEES OF 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.

NATIONAL RIFLE ASSOCIATION OF AMERICA
INCORPORATED 1871

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FIELD REPRESENTATIVE
ALASKA

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March 5, 1987

Honorable Jalmar Kertulla
Chairman, Senate Judiciary Committee
Pouch V, Juneau, AK 99811

Dear Senator Kertulla:

Please enter this letter as official testimony to the Senate Judicary Committee regarding Senate Joint Resolution 15. SJR 15 proposes an amendment to the Constitution of the State of Alaska relating to the right of a person to keep and use firearms.

The National Rifle Association of America supports this resolution and has had a continuing concern with placing the amendment proposed by this resolution before the Alaskan electorate. Our reasons are several. Not the least are the results of numerous polls taken in Alaska over the recent past that overwhelmingly favor the constitutional right to own and to legally use firearms.

While the current Alaska constitutional provision on the right to own and bear firearms in Alaska is strong and mirrors the U.S. Constitution, a number of individuals have sought to turn the Constitution into a mere administrative priviledge. Adoption of the proposed constitutional amendment will clarify and reaffirm the rights of law abiding firearm owners in Alaska that their rights are protected in the future and will end any potential for ambiguity.

Alaskan membership in NRA totals 22,000 individuals. As the Alaskan field representative for NRA, this testimony is entered onto the official record in their collective behalf. We ask for your personal support and the support of your committee for SJR 15.

Please find appended a brief discussion of the need to clarify state constitutions of any ambiguity as regards the individuals right to own and use firearms. Thank you for this opportunity to comment.

Sincerely,

Rupe Andrews

Rupe Andrews, Field Representative

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.

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."

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.

A

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
Division: Elections
Phone: 465-4611
Date: 1/22/88

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

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

SJR

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