ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672

4786 HJUD SJR 15

358

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

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

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

---

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

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

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

---

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

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

105. At common law the mere public carrying of arms was no offense under the Statute of Northhampton, 2 Edw. III, c.3 (1328); Judy v. Lashley, 50 W. Va. 628, 41 S.E. 19[illegible], 200 (1902). To sustain a conviction proof was required that the accused had gone armed "malo animo" (with evil intent) or "to terrify the King's subjects." Rex v. Knight, 87 Eng. Rep. 75, 90 Eng. Rep. 330 (K.B. 1686) (the accused was acquitted). Commentators of that period were in agreement. The person had to be armed offensively in affray of the king's people.

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

M. Dalton, The Countrey Justice 31 (London 1622).

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

Common Defense Purpose

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

---

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

Id. at 29.

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

106. Ark. Const., art. II, § 5; Me. Const. art. I, § 16 Mass. Decl. of Rights, part I, art XVII; Tenn. Const. art I, § 26.

107. *See* notes 74, 75, 77, 79 *supra*. Maine and Massachusetts guarantee a right to self-defense. Me. Const. art. I, § 1; Mass. Decl. of Rights, part I, art. I. Thus in Maine and Massachusetts arms for personal defense are also guaranteed. *See* notes 93-97 *supra*.

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

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

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

---

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

110. Aymette v. State, 21 Tenn. (2 Hum.) 154, 160 (1840).

111. Wilson v. State, 33 Ark. 557, 559, 34 Am. Rep. 52, 54 (1878). An act proscribing concealed carrying is "consistent with the right of the citizen to bear arms." State v. Johnson, 16 S.C. 187, 191 (1881) (S.C. CONST. art. I, § 28 (1868) guaranteed arms for common defense). Parading with an unauthorized body of armed men may be prohibited. Commonwealth v. Murphy, 166 Mass. 171, 44 N.E. 138 (1896). As early as 1780 the Recorder of London, in response to a question "would it be lawful for a vast multitude [to gather], to the amount of many thousand armed men, without any visible occasion or apparent lawful object, unauthorized by government or any magistrate," stated "I should certainly answer in the negative; because, in my opinion, an affirmative answer would amount to a dissolution of all government and subversion of all law." Although he agreed later that "the lawful purposes, for which arms may be used, (besides immediate self-defence) are, the suppression of violent and felonious breaches of the peace, the assistance of the civil magistrates in the execution of the laws, and the defence of the kingdom against foreign invaders." W. BLIZARD, DESULTORY REFLECTIONS ON POLICE: WITH AN ESSAY ON THE MEANS OF PREVENTING CRIMES & AMENDING CRIMINALS 61, 63 (London 1785). "The power to regulate does not fairly mean the power to prohibit; on the contrary, to regulate necessarily involves the existence of the thing or act to be regulated." Andrews v. State, 50 Tenn. (3 Heisk) 165, 181, 8 Am. Rep. 8, 15 (1871).

served] . . . if every citizen may keep arms in readiness upon his place, may render himself skillful in their use by practice, and carry them upon a journey without let or hindrance. . . ."[112] Similarly, a landowner charged with unlawful hunting and possession of a shotgun on a game preserve "could not possibly come within the constitutional rights of the respondent in bearing arms for the common defense while, on the other hand, if possession was not a part of the act of hunting, the constitutional rights of the respondent could be involved."[113] However, a prohibition against a citizen "wearing or carrying a war arm, except upon his own premises or when on a journey travelling through the country with baggage, or when acting as or in aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms."[114] The court noted that crime "must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege."[115] The case involved the carrying of an army pistol to kill wild hogs. Likewise, a city ordinance absolutely forbidding the carrying of "any sort of pistol in any sort of manner" is void,[116] and any attempt "to disarm

---

112. Haile v. State, 38 Ark. 564, 566-67, 42 Am. Rep. 3, 4-5 (1882).

113. State v. McKinnon, 153 Me. 15, ___, 133 A.2d 885, 889 (1957). Since Me. Const. art. I, § 1 guarantees that "All men . . . have certain natural, inherent and unalienable rights, among which are . . . defending life . . . and protecting property, . . . and obtaining safety and happiness," this right when coupled with the guarantee to bear arms indicates bearing arms for personal defense is protected.

114. Wilson v. State, 33 Ark. 557, 560, 34 Am. Rep. 52, 54-55 (1878). *Wilson*, Fife v. State, 31 Ark. 455, 25 Am. Rep. 556 (1876), and Haile v. State, 38 Ark. 564, 43 Am. Rep. 3 (1882), plainly indicate that any implication made in State v. Buzzard, 4 Ark. 18 (1842), that the right to arms belongs only to the militia and not the people has been rejected. Judge Lacy's erudite dissent was heeded:

> I deem the right to be valueless, and not worth preserving; for the State unquestionably possesses the power, without the grant, to arm the militia, and direct how they shall be employed in cases of invasion or domestic insurrection. If this be the meaning of the Constitution, why give that which is no right in itself, and guaranties a privilege that is useless? This construtión, according to the views I entertain, takes the arms out of the hands of the people, and places them in the hands of the Legislature, with no restraint or limitation whatever upon their power, except their own free will and sovereign pleasure.

Buzzard, at 35-36. In the final analysis, Buzzard simply allows a ban on concealed carrying.

115. Wilson v. State, 33 Ark. 557, 560, 34 Am. Rep. 52, 54-55 (1878).

116. Glasscock v. City of Chattanooga, 157 Tenn. 518, 520, 11 S.W.2d 678 (1928).

the people by legislation" would be void under the arms guarantee.[117]

The right to bear arms for the common defense is given a conditional reading, while the right to keep arms for the common defense is given a liberal reading:

> [T]he right to *keep* them, with all that is implied fairly as an incident to this right, is a private individual right guaranteed to the citizen not the soldier. . . . [T]his right was intended, as we have maintained in this opinion, and was guaranteed to, and to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights.[118]

The right to keep arms "necessarily involves the right to purchase and use them in such a way as is usual, or to keep them for the ordinary purposes to which they are adapted,"[119] and thus arms may be used "for his proper defense . . . . He has a right also to protect his own house and family . . . ."[120]

The problems encountered by a narrow interpretation of the right to bear arms for the common defense are best illustrated by an analysis of *Commonwealth v. Davis*.[121] The Massachusetts Supreme Court reasons that the right guaranteed is related only to the common defense, which in turn points to the broadly-based militia. Therefore, a law forbidding the keeping of arms by individuals might interfere with the effectiveness of the militia, thereby infringing on the constitutional guarantee. The court goes on to say, however, that this situation can no longer exist as the militia "is now equipped and

---

117. Smith v. Ishenhour, 43 Tenn. (3 Cold.) 214, 217 (1866).

118. Andrews v. State, 50 Tenn. (3 Heisk.) 165, 182-84 (1871). Although the court felt the militia "has, as an organization, passed away in almost every State of the Union, and only remains to us as a memory of the past, probably never to be revived," the court still found "the prohibition of the statute is too broad to be allowed to stand consistently with the views herein expressed." *Id.* at 184, 187. This indicates that the court honored its duty to carry out the intent of the framers rather than judicially repeal a constitutional right, as the court did in Commonwealth v. Davis, 369 Mass. 886, ___, 343 N.E.2d 847, 849 (1976). However, the experiences of World War II indicate that the militia is still a viable institution. *See supra* notes 85-91.

119. Andrews v. State, 50 Tenn. (3 Heisk.) 165, 178 (1871).

120. State v. Foutch, 96 Tenn. 242, 247, 34 S.W. 1, 2 (1896); *cf.* Carroll v. State, 28 Ark. 99, 101 (1872) (right to bear arms in defense of person and property).

121. 369 Mass. 886, 343 N.E.2d 847 (1976).

supported by public funds."[122] In effect the court judicially repeals a constitutional guarantee found in the people's declaration of rights. What is left is a purposeless hollow shell. In achieving this end the court ignored or overlooked well-established principles of law. The *Davis* opinion cannot be aligned with the intent of the Framers.

All decisions from sister states interpret the arms guarantee for the common defense as an individual right guaranteed to the citizen and not the soldier.[123] Current English arms statutes serve as no support because the British lack a written constitution,[124] and Parliament may abrogate all rights.[125] Americans adopted a written constitution in response to abuses under the English system.[126] The purpose of a written guarantee to keep and bear arms is to place that right beyond the reach of the legislature.[127] When the 1780 Massachusetts Constitution was adopted concern was voiced that the arms guarantee mentioned common defense but failed to mention self-defense.[128] In an apparent effort to satisfy this concern an

122. *Id.* at ___, 343 N.E. 2d at 849. Salina v. Blaksley, 72 Kan. 230, 83 P. 619 (1905), was also cited in *Davis* for the claim that the Massachusetts arms guarantee is "not directed to guaranteeing individual ownership or possession of weapons." For criticism of *Blaskley's* collective right holding, *see supra* notes 38-71 and accompanying text. Furthermore, the militia is more than just the National Guard. *See supra* notes 81, 82.

123. *See e.g.*, Wilson v. State, 33 Ark. 557, 34 Am. Rep. 52 (1878); State v. McKinnon, 153 Me. 15, 133 A.2d 885 (1957); State v. Johnson, 16 S.C. 187, 191 (1881); S.C. CONST. art. I, § 28 (1868) (guaranteed the right for the common defense); Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928).

124. Powell v. McCormack, 395 U.S. 486, 523 n.46 (1969).

125. United States v. Brewster, 408 U.S. 501, 508 (1972); C. REMBAR, THE LAW OF THE LAND 24, 287 (1980).

126. Bridges v. California, 314 U.S. 252, 264 n.7 (1941); Grosjean v. American Press Co., 297 U.S. 233, 248-49 (1936). The British Press was subject to licensing. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND.* 152.

127. People v. Zerillo, 219 Mich. 635 ___, 189 N.W. 927, 928 (1922); Commonwealth v. Ray, 218 Pa. Super. 72, ___, 272 A.2d 275, 278-79 (1970) (right to bear arms pre-existed constitution, and cannot be diminished by the legislature), *vacated on other grounds*, 448 Pa. 307, 292 A.2d 410 (1972); Simpson v. State, 13 Tenn. (5 Yer.) 356, 359-60 (1833); Cockrum v. State, 24 Tex. 394, 401-02 (1859).

128. THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASS. CONVENTION OF 1780, *Supra* note 108, at 624. Based on custom and need, the people probably took possession of private arms for all normal purposes, including personal defense, for granted. Since guns were an integral part of their culture, the assignment of a reason for the right was probably not viewed as a restriction on the right. A newspaper article, describing the then-to-be-adopted second amendment, underscores

individual guarantee to self-defense was adopted.[129] This demonstrates that the Framers also intended that arms be kept for self-defense. Thus a right enjoyed since colonial days and placed in a written declaration of rights cannot be destroyed by the passage of a mere statute or be judicially repealed.[130]

The boundaries of the right dictate that the *keeping* of arms suitable for militia use in one's home, place of business or premises cannot be infringed. The purpose of such keeping is to have arms available for possible militia use, for deter-

---

the view that private arms and their keeping and bearing was to [illegible] guaranteed:

> As civil rulers, not having their duty to the people duly be[illegible] them, may attempt to tyrannize and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, *the people are confirmed by the next article in their right to keep and bear their private arms.*

(emphasis added). The Federal Gazette, and Philadelphia Evening Post, June 18, 1789, No. 68 Vol. II, at 2, col. 1. Tench Coxe in a letter to Madison admitted being the author. 12 PAPERS OF JAMES MADISON 241 n.1 (1979).

129. MASS. CONST. DECL. OF RIGHTS, part I, art. I. The constitution should be construed as a whole. Kilpatrick v. Superior Ct. of Maricopa County, 105 Ariz. 413, ___, 466 P.2d 18, 24 (1970).

130. In Boston, British General Gage ordered his troops to seize the inhabitants' arms: 1,778 muskets, 634 pistols, and thirty-eight blunderbusses were surrendered by Bostonians. R. FROTHINGHAM, HISTORY OF THE SEIGE OF BOSTON 95 (6th Ed. 1903). Boston's population of 17,000 declined to 7,000 civilians by July 1775. THE SPIRIT OF 'SEVENTY-SIX 146 (H. Commager & R.B. Morris, eds. 1967). The disarmament of Bostonians would later be listed as one of the grievances justifying the Revolutionary War. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF AMERICAN STATES, H.R. Doc. No. 398, 69th Cong., 1st Sess. 14 (1927). The short-barreled shotgun is the modern equivalent of the ancient blunderbuss. It was not uncommon for a blunderbuss to have a barrel under eighteen inches. F. WILKINSON, ANTIQUE FIREARMS 99 (1969). *Cf.* Burks v. State, 162 Tenn. 406, 36 S.W.2d 892 (1931) (miniature shotgun is constitutionally an arm). T. SWEARENGEN, THE WORLD'S FIGHTING SHOTGUNS (1978) observes the following:

> The modern fighting shotgun is a direct descendent of two of the world's most famous smoothbore firearms. One is the Birding Piece or Long Fowler, which was the father of modern sporting shotguns. The other is the Blunderbuss, accepted as the first true fighting shotgun; and the weapon credited with establishing the basic missions and configurations for shotguns still being used after some 400 years. . . . *Id.* at 2.
>
> [I]n the American West . . . sawed-off shotguns were substituted for the blunderbuss. *Id.* at 2.
>
> The modern short-barrel riot-type shotgun still possesses the same basic characteristics and performs the same missions that occupied the blunderbuss *Id.* at 3.

At one time shotgun pistols were also manufactured. *Id.* at 45-48 & 80-93.

rence against oppression, and for personal defense. The object of the purpose is that the people "shall become familiar with their use in times of peace, that they may the more efficiently use them in times of war; then the right to keep arms for this purpose involves the right to practice their use in order to attain this efficiency."[131] To achieve this end, the boundaries of the right to *bear* arms dictate that arms may be carried openly to and from activities where the constitutional goal is carried out. These activities include lawful target shooting and hunting, moving one's goods to a new home or place of business, going upon a journey, and going to a place of arms purchase or repair.[132] While "habitual carrying does not seem essential to 'common defense,'" the requirement that a pistol "be carried uncovered in the hand" is not only "a very inconvenient mode of carrying them habitually"[133] but is only marginally safe. The more prudent approach would be carrying in a pistol case or holster. Since the home is one's castle, carrying in one's home may be either open or concealed.[134]

Self-Defense and Defense of State Purpose

The right to keep and bear arms for personal defense and defense of the state is guaranteed in fourteen state constitutions.[135] This guarantee protects arms that are (1) suitable for militia use,[136] and (2) also protects arms suitable for personal defense.[137] The plain meaning of the text leads courts to conclude that two separate and distinct categories of arms are

---

131. Andrews v. State, 50 Tenn. (3 Heisk.) 165, 178 (1871).

132. Haile v. State, 38 Ark. 564 (1882); Wilson v. State, 33 Ark. 557, 34 Am. Rep. 52 (1878); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 8 Am. Rep. 8 (1871).

133. Haile v. State, 38 Ark. 564, 566, 43 Am. Rep. 3 (1882). In Maine and Massachusetts the bearing of arms is also for personal security because the right to self-defense is guaranteed. ME. CONST. art. I, § 1; MASS. CONST. DECL. OF RIGHTS, part I art. I.

134. *See* note 104 *supra*.

135. ALA. CONST. art. I, § 26; ARIZ. CONST. art. II, § 26; CONN. CONST. art. I, § 15; FLA. CONST. art. I, § 8; IND. CONST. art. I, § 32; KY. CONST. BILL OF RIGHTS § I, para. 7; MICH. CONST. art. I, § 6; ORE. CONST. art. I, § 27; PA. CONST. art. I, § 21; S.D. CONST. art. VI, § 24; TEX. CONST. art. I, § 23; VT. CONST. ch.I, art. 16; WASH. CONST. art. I, § 24; and WYO. CONST. art. I, § 24.

136. *See supra* notes 74, 75, 77, 79.

137. *See supra* notes 93-97; *see infra* notes 180, 204.

protected.[138] Some courts, however, have overlooked or ignored this distinction.[139]

These guarantees protect a right to keep and bear arms for militia use,[140] as a deterrent against oppression,[141] and for defense of self, home and property.[142] Some courts delving

---

138. State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); People v. Brown, 253 Mich. 537, 235 N.W. 245 (1931). "Moreover, the constitutional debate over this section [IND. CONST. art. I, § 32] underscores the framers' intent that two purposes, rather than one, were served by the section." Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339, 1341 (Ind. App. 1980).

139. State v. Swanton, 129 Ariz. 131, ___, 629 P.2d 98, 99 (Ariz. App. 1981) ("such arms as are recognized in civilized warfare"). It is highly doubtful that the Framers felt the rules on war arms, formulated in international conventions, have any application to a man or woman using a weapon commonly kept by the people against an armed robber who is undergoing drug withdrawal symptoms.

In State v. Duke, 42 Tex. 455, 458 (1875), the court reviewed the text of the constitutional guarantee, and its earlier decision in English v. State, 35 Tex. 473 (1872), that only arms suitable for militia use are protected, and concluded we "do not adopt the opinion expressed that the word 'arms', in the Bill of Rights, refers only to the arms of a militiaman or soldier. Similar clauses in the Constitutions of other States have generally been construed by the courts as using the word *arms* in a more comprehensive sense."

140. Rabbitt v. Leonard, 36 Conn. Super. 108, ___, 413 A.2d 489, 491 (1979); People v. Brown, 253 Mich. 537, 539, 235 N.W. 245, 246 (1931) ("attachment to a militia composed of all able-bodied men"); State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 99 (1980). The posse and the militia are both comprised of able-bodied men and both perform the similar functions of maintaining the public order, with the militia being used exclusively for disorders which traditional civil authorities are unable to prevent. Despite the existence of a large body of professional law enforcement officers, the posse is still called on occasion to apprehend criminals. On June 6, 1977, a posse was sent to search for mass-murderer Theodore Robert Bundy following his escape from the courthouse in Aspen, Colorado R. LARSEN, BUNDY: THE DELIBERATE STRANGER 179-82 (1980). Recently a California posse apprehended two robbers. *The Armed Citizen*, AM. RIFLEMAN at 6 (July 1982).

141. Carlton v. State, 63 Fla. 1, ___, 58 So. 486, 488 (1912) ("protecting themselves against oppression and public outrage"); State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 97 (1980).

142. Rabbitt v. Leonard, 36 Conn. Super. 108, ___, 413 A.2d 489, 491 (1979) ("has a fundamental right to bear arms in self-defense, a liberty interest"); Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972) ("for hunting purposes or for the protection of their persons and property"); Davis v. State, 146 So. 2d 892, 893-94 (Fla. 1962) ("to secure to the people the right to carry weapons for their protection"); Watson v. Stone, 4 So. 2d 700, 701, 702-3 (Fla. 1941) ("sense of security afforded by the knowledge of the existence of a pistol in the pocket of an automobile in which they are traveling"); Motley v. Kellogg, 78 Ind. Dec. 316, 409 N.E.2d 1207, 1210 (Ind. App. 1980) ("not making applications available at the chief's office effectively denied members of the community the opportunity to obtain a gun permit and bear arms for their self-defense"); Schubert v. Debard, 398 N.E.2d 1339, 1341 (Ind. App. 1980) ("our constitution provides our citizenry the right to bear arms for their self-de-

into the historical reasoning behind the inclusion of the guarantee were searching for precedent to be used in allowing the legislature to regulate what was textually an unconditional right.[143] The conclusion that the constitution "has neither expressly nor by implication, denied to the Legislature, the right to enact laws in regard to the manner in which arms shall be borne"[144] was reached by focusing on the qualifying language in the English Bill of Rights "that the subjects which are Protestants may have arms for their Defence, suitable to their Conditions and as allowed by law. . . . We have taken this brief notice of the English statute, as it may serve to aid us in the construction of our constitutional provision."[145] In upholding a concealed carrying statute, one court nevertheless recognized that in this country the Constitution and not the legislature is supreme:

> We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretense of regulating, amounts to

---

fense"); People v. Zerillo, 219 Mich. 635, ___, 189 N.W. 927, 929 (1922) ("to possess a revolver for the legitimate defense of their person and property"); State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 100 (1980) ("includes a right to possess certain arms for defense of person and property"); Commonwealth v. Ray, 218 Pa. Super. 72, ___, 272 A.2d 275, 278-79 (1970), *vac. on other grounds* 448 Pa. 307, 292 A.2d 410 (1972) ("to bear arms in defense of themselves; their property and the State"); State v. Duke, 42 Tex. 455, 458 (1875) ("such arms as are commonly kept . . . and are appropriate for open and manly use in self-defense"); State v. Rosenthal, 75 Vt. 295, 297, 55 A. 610 (1903) ("The people of the State have a right to bear arms for the defense of themselves"); Carfield v. State, 649 P.2d 865, 871 (Wyo. 1982) (the right extends to "defending the State or himself").

In People v. Zerillo, 219 Mich. 635, ___, 189 N.W. 927, 928 (1922), the court summarized the defense of self and state guarantee as follows:

> The true meaning of this provision is well stated in the Constitution of the state of Colorado: "That the right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto lawfully summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons. Article 2, § 13."

143. State v. Reid, 1 Ala. 612, 35 Am. Dec. 44 (1840).

144. *Id.* at 616.

145. *Id.* at 615. The term "as allowed by Law" means the common law. Rex v. Meade, 19 The Times Law Reports 540 (1903). The common law did not prevent the peaceful keeping or bearing of arms. Rex v. Knight, 87 Eng. Rep. 75, 90 Eng. Rep., 330 (K.B. 1686); Rex v. Dewhurst, 1 State Trials, New Series 529, 601 (1820); Rex v. Smith, 2 Ir. R. 190 (1914).

> a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional.[146]

The delving into the historical reasoning and the intent of the Framers has also led to the conclusion that the right to bear arms, like any constitutional right, is an important guarantee requiring liberal construction.[147] The Constitution is the supreme law, and courts are not to substitute their judgment for that of the Framers and the people who adopted it as to what the guarantee should protect or to indulge in constitution-making under the guise of interpretation.[148]

In searching for guidelines to set the margins for conduct protected by the right to bear arms in defense of self and state the focus has been on the literal interpretation of the guarantee. If the conduct can be characterized as essential for defense of self or defense of the state, it will be protected.[149] This analysis cuts both ways. The purpose of defense of self and defense of state is also used to limit the rights guaranteed.[150] Under this analysis, a statute against concealed carry-

---

146. State v. Reid, 1 Ala. at 616-17, 35 Am. Dec. 47 (1840).

147. "[C]onstitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." Boyd v. United States, 116 U.S. 616, 635 (1886). "The maintenance of the right to bear arms is a most essential one to every free people and should not be whittled down by technical constructions." State v. Kerner, 181 N.C. 574, ___, 107 S.E. 222, 224 (1921).

148. *See, e.g.*, Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 13 Am. Dec. 251 (1822); State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980).

149. Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980) (where "self-defense" is asserted as a reason for desiring a license to carry a pistol the license cannot be withheld); Watson v. Stone, 4 So. 2d 700, 703 (1941). In narrowly construing a statute the right to bear arms was kept in mind. "It cannot be said that it [the pistol] is placed in the car or automobile for unlawful purposes, but on the other hand it was placed therein exclusively for defensive or protective purposes. These people, in the opinion of the writer, should not be branded as criminals in their effort of self preservation and protection, but should be recognized and accorded the full rights of free and independent American citizens."

150. Carfield v. State, 649 P.2d 865, 871 (Wyo. 1982) (felon possessing gun offense affirmed because no evidence existed he was "defending the State or himself"). In a murder case involving the killing of two deputy sheriffs trying to arrest men who were drunk, carried a pistol concealed, and breached the peace by shooting it off, the court brushed aside a right to bear arms claim with a terse comment that the right

ing would have no connection with the right to bear arms, the rationale being that a regulation of the manner or place where arms may be borne does not destroy the right when viewed in terms of the purpose. Protection of self or state can be maintained by the open wearing of arms.[151]

This guarantee has on the whole been more effective in safeguarding the individual's right to bear arms because the inclusion of the words "defense of themselves" or "defense of self" has compelled courts to reaffirm the fundamental right to bear arms in self-defense,[152] a right subject to being swept away under a less specific provision.[153] Thus courts have not hesitated in striking down weapons possession laws,[154] laws on carrying weapons,[155] and a law requiring the forfeiture of a pistol for violating a misdemeanor carrying statute.[156]

As with each constitutional guarantee, a balance must be struck between the individual's right to exercise that guarantee and society's right to enact laws that will insure some semblance of order. As these interests will necessarily conflict, the question then becomes which party should accept the encroachment on his right. Courts have allowed the encroachment on an individual's right on several theories. The permissive language in the constitutional guarantee has been used to sanction the requirement of a license to carry repeating rifles

---

was not designed to protect a man "who is prone to load his stomach with liquor and his pockets with revolvers or dynamite, and make of himself a dangerous nuisance to society." Carlton v. State, 63 Fla. 1, ___, 58 So. 486, 488 (1912). This dictum, however, was unnecessary because the Florida guarantee provides "the manner of bearing arms may be regulated by law " FLA. CONST. art. I, § 8.

151. State v. Reid, 1 Ala. 612, 619, 35 Am. Dec. 47 (1840) ("[w]e incline to the opinion that the Legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence").

152. State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980); Rabbitt v. Leonard, 36 Conn. Super. 108, 413 A.2d 489 (1979).

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

154. State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); People v. Zerillo, 219 Mich. 635, 189 N.W. 729 (1922).

155. State v. Blocker, 291 Or. 255, 630 P.2d 824 (1981); State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 13 Am. Dec. 251 (1822).

156. Jennings v. State, 5 Tex. Crim. 298 (Tex. Crim. App. 1878).

or pistols even openly[157] and to restrict the carrying of a pistol to one's premises or place of business, unless the person is traveling with baggage or is confronted with immediate and pressing danger "as to alarm a person of ordinary courage."[158] Other courts label a law as not a prohibition but a mere regulation of the right to bear arms. Thus, laws against concealed carrying[159] or carrying an unconcealed pistol upon premises not his own or under his control have been upheld.[160] Most courts merely invoke the term "police power" in upholding a law. The police power often appears to exist and operate at the will of the legislature and courts with no recognition of constitutional limits. Thus laws proscribing the unlicensed carrying of a pistol in any manner away from the home or fixed place of business,[161] or carrying a loaded rifle or shotgun in a vehicle on a public highway have been upheld.[162] Likewise, a sharply divided court upheld a conviction for possessing "a firearm in a public place or within public view under circumstances tending to provoke a breach of the peace," over a right to bear arms claim, where the defendant was peacefully carrying a shotgun in a truck, in the afternoon, in an area where two weeks before a police shooting incident with racial overtones had occured.[163] An opinion which epitomizes

---

157. Davis v. State, 146 So. 2d 892 (Fla. 1962) ("carried a pistol in an unconcealed holder").

158. State v. Duke, 42 Tex. 455 (1875).

159. State v. Reid, 1 Ala. 612 (1840).

160. Isaiah v. State, 176 Ala. 27, 58 So. 53 (1911). In areas of elementary rights, "the constitution is to be liberally construed in favor of the citizen." Randle v. Winona Coal Co., 206 Ala. 254, ___, 89 So. 790, 792 (1921).

161. Matthews v. State, 237 Ind. 677, 148 N.E.2d 334 (1958). The dissenting opinion of Chief Justice Emmert goes into a lengthy historical and constitutional discussion to explain why unconcealed carrying should require no license. *Id.* at ___, 148 N.E.2d at 338. It has been cited with approval by the majority in State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 98 (1980), and the concurring opinion in Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980).

162. State v. Duranleau, 128 Vt. 206, 260 A.2d 383 (1969). VT. CONST., ch. I, art. 1 also guarantees the right of "defending life . . . and protecting property, and . . . obtaining . . . safety . . . ." This guarantee and the right to bear arms guarantee appear to make it abundantly clear that effective security in a vehicle is protected.

163. Hyde v. City of Birmingham, 392 So. 2d 1226 (Ala. Crim. App. 1980), *cert. denied* 392 So. 2d 1229 (1981) (5 to 4 decision). *Cf.* State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971). Conviction affirmed for possessing a shotgun and shells off his premises in an area declared a state of emergency and for violating emergency curfew. Although the right to bear arms was not properly raised procedurally, the court

the lack of careful reflection in the use of the term "police power" is *Caswell & Smith v. State*,[164] where the court upheld a confiscatory tax on the sales of pistols, although earlier case law had established that pistols are constitutionally protected arms[165] and cannot even be forfeited for a misdemeanor carrying conviction.[166] The court failed to grasp that the right to purchase arms is included in the right to keep and bear arms guarantee.[167]

The object of this guarantee, to maintain a militia, would not be frustrated by a requirement that arms be carried openly. Arms carried for the purpose of self-defense can likewise be carried openly. However, the traditions of a state and the intent of the Framers may be such that concealed carrying is also protected conduct.[168] At common law the mere carrying of a concealed weapon was no offense. In America, it was considered normal for eighteenth century civilians to carry pocket pistols for protection while traveling.[169] Thomas Jefferson owned a pair of screw-barreled pocket pistols.[170] The following excerpt from a letter written from Falmouth, Virginia, on July 29, 1764, by William Allason, a merchant, to Messrs. Boyle and Scott, merchants in Glasgow, is instructive on the defensive pistol-carrying habits of civilians:

---

hinted that the right was not infringed. *Id.* at ___, 178 S.E.2d at 461-62.

164. 148 S.W. 1159 (Tex. Civ. App. 1912). Until the law was repealed dealers simply leased pistols for 99 years. A tax may not be imposed to suppress or destroy a constitutional right. Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, ___ U.S. ___,103 S. Ct. 1365 (1983).

165. State v. Duke, 42 Tex. 455 (1875).

166. Jennings v. State, 5 Tex. Crim. App. 298 (1878).

167. City of Lakewood v. Pillow, 180 Colo. 20, ___, 501 P.2d 744, 745 (en banc 1972); Andrews v. State, 50 Tenn. 165, 178, 8 Am. Rep. 8, 13 (1871).

168. Since the people had the right to carry arms concealed when the constitution was adopted that right cannot be infringed under the guise of mere regulation. Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822). The constitution was subsequently changed to allow a ban on concealed carrying. KY. CONST. BILL OF RIGHTS § 1, para. 7. Concealed carrying without a license was sanctioned in State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903), and concealed carrying with a license was sanctioned in Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980), based on the intent of the Framers. In Pennsylvania an effort by some Framers to protect only open carrying (it would have read "openly to bear arms") was rejected by a 54 to 23 vote. 7 DEBATES OF THE CONVENTION TO AMEND THE CONST. OF PENN. 258-61 (1873).

169. G. NEUMANN, THE HISTORY OF WEAPONS OF THE AM. REVOLUTION 150-51 (1967).

170. HALSEY, *Jefferson's Beloved Guns*, AM. RIFLEMAN, Nov. 1969, at 17.

> As it is sometimes dangerous in traveling through our wooden Country Particularly at this time when the Planters are pressed for old Ballances, we find it necessary to carry with us some defense Weapons, for that purpose, you'll be pleased to send us by some of the first Ships for this River a pair of Pistols about 30/[shillings] Price. Let them be small, for the convenience of carrying in a side Pockett, and as neat as the Price will admit of.[171]

The boundaries of this right are such that the possession and carrying in one's home may be either open or concealed, keeping the castle doctrine in mind.[172] The open peaceful carrying in one's business place, vehicle, or on a public street in the ordinary course of one's travels also cannot be prohibited.[173] A measure which prevents a person from carrying a constitutionally protected arm in his vehicle, for example, is a measure which prevents a person from bearing an arm for self-defense. To claim that such a prohibitory measure is a mere regulation or a mere exercise of the police power is to admit that ordinary words and ordinary understanding have been replaced by judicial "newspeak."

Keeping in mind that a law requiring a license to carry a gun is in derogation of the common law,[174] that the purpose of a written constitution is to place rights beyond the reach of the police power,[175] and that licensing officials can be very creative in frustrating applicants,[176] to carry an arm openly

---

171. ALLASON LETTER BOOK 1757-1770, f. 134 (Va. State Library).

172. *See* note 104 *supra*.

173. *See* note 105 *supra*.

174. State v. Beauton, 170 Conn. 234, ___, 365 A.2d 1105, 1108 (1976).

175. "The provision in the Constitution granting the right to all persons to bear arms is a limitation upon the power of the Legislature to enact any law to the contrary." People v. Zerillo, 219 Mich. 635, ___, 189 N.W. 927, 928 (1922).

176. "[N]ot making applications available at the chief's office effectively denied members of the community the opportunity to obtain a gun permit and bear arms for their self-defense." Motley v. Kellogg, 78 Ind. Dec. 316, ____, 409 N.E.2d 1207, 1210 (Ind. App. 1980). A Silver Spring, Maryland man was murdered after being denied a license to carry a pistol because the state police felt there was a lack of sufficient evidence presented to justify fear. Ahlers, *Years of Feuding Set Scene for Murder*, THE MONTGOMERY JOURNAL, May 29, 1981, A1, at col. 1. In ordering the police to issue a carrying license one court brushed aside arguments that the applicant "has not yet been the victim of crime" with the comment that "one such incident may render moot forever his application." Matter of Magliocco, 184 N.Y.L.J. 4 (N.Y. Co. Sup. Ct. Aug. 14, 1980).

should not require a license. "The exercise of a right guaranteed by the Constitution cannot be made subject to the will of the sheriff."[177] The constitutional purpose would not be frustrated by a prohibition of carrying arms while drunk, or to a church, polling place, court, or public assembly, or in a manner calculated to inspire terror.[178]

Defense of Self, Home, Property and State Purpose

The framers of constitutions in six states carefully chose explicit wording so that a broad guarantee would be secured and so that the boundaries of the guarantee would be self-evident.[179] They did not restrict the guarantee to a militia purpose or to a common defense purpose but rather included a guarantee for personal defense and security purposes—defense of "home, person, or property." The textual context dictates that two separate and distinct categories of arms are guaranteed: those suitable for personal defense[180] and those suitable for militia use.[181] The constitutions protect the right of people to use arms for defense of home, person, and property,[182] for militia use,[183] and as a deterrent against

177. People v. Zerillo, 219 Mich. 635, ___, 189 N.W. 927, 928 (1922).

178. *See supra* notes 50, 101.

179. Colo. Const. art. II, § 13; Miss. Const. art. III, § 12; Mo. Const. art. I, § 23; Mont. Const. art. II, § 12; N.H. Const. part I, art. 2 a; Okla. Const., art. II, § 26. For purposes of textual clarity, the New Hampshire guarantee omits mention of the home but mentions family, while Colorado, Mississippi, Missouri, Montana, and Oklahoma mention home but omit family. In New Hampshire protection of the home is implied in the specific guarantee of protection of family or property, and in Colorado, Mississippi, Missouri, Montana, and Oklahoma protection of the family is implied in the specific guarantee of protection of the home. Therefore, this minor textual difference in this group is insignificant.

This group is a more explicit pronouncement of the true meaning of the defense of self and state guarantee. People v. Zerillo, 219 Mich. 635, ___, 189 N.W. 927, 928 (1922).

180. *See supra* notes 93-97. *See also* People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (1936) (shotgun); State v. Keet, 269 Mo. 206, ___, 190 S.W. 573, 576 (1916) ("rifle on his shoulder, his hunting knife on his belt"); State v. Shelby, 90 Mo. 302, ___, 2 S.W. 468, 469 (1886) ("a revolving pistol comes within the description of such arms as one may carry for the purposes designated in the constitution . . ."). Taylor v. McNeal, 523 S.W.2d 148 (Mo. Ct. App. 1975) (pistols and ammunition clips); State v. Nickerson, 126 Mont. 151, 247 P.2d 188 (1952) (revolver).

181. *See supra* notes 74, 75, 77, 79.

182. City of Lakewood v. Pillow, 180 Colo. 20, ___, 501 P.2d 744, 745 (1972)(en banc) ("possess a firearm in a vehicle or in a place of business for the purpose of self-

oppression.[184]

Despite the clear purposes enunciated in these guarantees, the Oklahoma Supreme Court almost immediately after the passage of the Oklahoma Constitution, in *Ex parte Thomas*,[185] a case involving the concealed carrying of a pistol, disregarded the carefully chosen words of the Framers and held that only arms suitable for militia use are protected and that the purpose behind the guarantee is the "maintenance of an armed militia." The opinion demonstrates inattentiveness to the Framers' precise language and a lack of deliberative precision. The court claimed inability to find a state with a like guarantee, overlooking like guarantees already adopted in Colorado, Mississippi, Missouri, and Montana, as well as a Missouri opinion explaining the right and holding that "a revolving pistol" is constitutionally an arm.[186] The *Thomas* court relied heavily on cases from Arkansas, Tennessee and Georgia, in which the state constitutions, unlike that of Oklahoma, reveal a common defense or militia purpose.[187] In

---

defense"); People v. Nakamura, 99 Colo. 262, 264, 62 P.2d 246, 247 (1936) ("cannot disarm any class of persons or deprive them of the right guaranteed under section 13, article 2 of the Constitution, to bear arms in defense of home, person and property"); Taylor v. McNeal, 523 S.W.2d 148, 150 (Mo. Ct. App. 1975) ("every citizen has the right to keep and bear arms in defense of his home, person and property . . ."); State v. Nickerson, 126 Mont. 151, 247 P.2d 188 (1952) (defense of home, person, or property).

183. *Ex parte* Thomas, 1 Okla. Crim. 210, ___, 97 P. 260, 264-65 (1908) (the court limited the right to a militia purpose).

184. *See supra* note 141.

185. 1 Okla. Crim. 210, 97 P. 260 (1908).

186. *Id.* at ___, 97 P. at 262. In State v. Shelby, 90 Mo. 302, 2 S.W. 468, 469 (1886), the court conceded, "[t]he constitution secures to the citizen the right to bear arms in the defense of his home, person, and property . . . [and] . . . that a revolving pistol comes within the description of such arms as one may carry for the purposes designated in the constitution."

187. *See supra* note 183 at 262-63. Despite the Oklahoma court's apparent attempt to hold that a pistol is not a constitutionally protected arm, the *Andrews, Fife, English,* and *Hill* cases it cites all hold that larger pistols or horse pistols are militia arms and are thus constitutionally protected. The court's citation of *Blaksley* is puzzling, for that case held that the people collectively have a narrow right to bear arms only in the organized militia or any military organization provided by law. *See supra* notes 38-71 for a criticism of *Blaksley*. In any event, the Oklahoma guarantee, adopted subsequent to *Blaksley*, uses the singular term *citizen*, thus preventing a collective right interpretation. A case interpreting constitutional language similar to that in *Blaksley* and implicitly holding that a pistol is a protected arm was overlooked: *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902) (statute prohibiting carrying

its citation of a Texas case to support a narrow view of the term *arms*, the court failed to mention that the cited case had been overruled.[188]

There was no need to disregard the text of the Oklahoma guarantee on defense of self, home or property to uphold a conviction for the concealed carrying of a pistol because the Oklahoma guarantee specifically provides that "nothing herein contained shall prevent the Legislature from regulating the carrying of weapons."[189] The court also failed to heed its own principles on constitutional interpretation that all provisions designed to safeguard the liberty and security of the citizen should be liberally construed and that the courts cannot refuse obedience to constitutional mandates:

> We have a Constitution in which the utmost pains have been taken to preserve all the securities of individual liberty, and the courts cannot refuse obedience to its mandates. The Legislature cannot alter, annul, or avoid the constitutional safeguards of person and property set forth in the Bill of Rights. They are beyond the reach of any legislative enactment.[190]

Except for Oklahoma, in attempts to interpret this guarantee reliance has been placed on the actual words used in the guarantee. It was used as a justification for holding that the right to bear arms allowed the exhibition of arms "in a rude, angry, or threatening manner without fear of successful prosecution when his home or possessions are invaded or his per-

---

pistol in town in any manner voided).

188. *See supra* note 183, at 262. State v. Duke, 42 Tex. 455, 458 (1875) (overruling *English*'s holding that only militia arms are guaranteed).

189. OKLA. CONST. art. II, § 26.

190. Salter v. State, 2 Okla. Crim. 464, ___, 102 P. 719, 725 (1909). Nevertheless, in Pierce v. State, 42 Okla. Crim. 272, ___, 275 P. 393, 395 (1929), the court not only upheld a conviction for the peaceful unconcealed carrying of a .38 caliber Colt pistol within the curtilage of defendant's own premises but went so far as to say the legislature "also has the power to even prohibit the ownership or possession of such arms" as are not "used for purposes of war." This means that by ignoring the "defense of his home, person, or property" purposes in the constitution, a good portion of the arms commonly possessed by Oklahomans are not constitutionally protected. One hopes that an Oklahoma court in the future will pay attention to the mandate of the clear language in the constitution, and in light of this reexamination and opinions from states with similar guarantees, will put to rest the present unwarranted and restrictive interpretation.

sonal safety threatened. . . ."[191] However, "[t]he moment the citizen ceases to act in protection of his home, his person, or his property . . . he steps out from under the protection of the Constitution. . . ."[192] He has no right to be an unlawful aggressor. The text has also been characterized as "limiting language" and thus it is not "an absolute right to bear arms under all situations."[193] This analysis and the exercise of the police power have allowed courts to uphold reasonable regulations, such as prohibiting the possession of a firearm while under the influence of intoxicating liquor or narcotic drugs.[194]

Courts have been mindful that "the state legislature cannot, in the name of the police power, enact laws which render nugatory our Bill of Rights and other constitutional protections."[195] Game laws which prohibit possession of a firearm,[196] or firearms ordinances "which sweep unnecessarily broadly and thereby invade the area of protected freedoms"[197] have been struck down because they conflicted with the right to bear arms. Furthermore, cases must be construed with the constitutionally guaranteed right in mind.[198]

The specific boundaries of this right indicate that the open peaceful carrying in one's business place, vehicle, or on a public street in the ordinary course of one's travels cannot be prohibited.[199] The concealed carrying of arms in the home should be protected, especially since the home is specifically mentioned in the guarantees.[200] Obviously the ends to be

---

191. State v. White, 299 Mo. 599, ___, 253 S.W. 724, 727 (1923). *See also* State v. Nickerson, 126 Mont. 151, 247 P.2d 188 (1952) (right to bear arms permits defendant to forcibly evict trespasser who refused to quietly and peacefully leave his home).

192. State v. White, 299 Mo. 599, ___, 253 S.W. 724, 727 (1923).

193. People v. Blue, 190 Colo. 95, ___, 544 P.2d 385, 391 (1975)(en banc) (convicted felon can be prevented from owning a gun).

194. People v. Garcia, 197 Colo. 550, 595 P.2d 228 (1979).

195. *See supra* note 193.

196. People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (1936)(en banc).

197. City of Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744, 745 (en banc 1972) (ordinance would have proscribed carrying in vehicle or place of business or conducting gunsmithing).

198. Patterson v. State, 251 Miss. 565, ___, 170 So. 2d 635, 639 (1965) (art. III § 12 cited in reversing conviction).

199. *See supra* note 105.

200. *See supra* note 104. Although Wilson v. State, 81 Miss. 404, 33 So. 171 (1903), held that concealed carrying even in the home may be prohibited, it did so without a full airing of all relevant issues.

served by the guarantee would not be defeated or called in question by a prohibition against carrying arms while drunk, or to a polling place, court, church, or public assembly, or in a manner calculated to inspire terror.[201]

Security and Defense Purpose

Security and defense is listed as a purpose for the right of the individual to keep and bear arms in five state constitutions.[202] This guarantee protects arms that are suitable for militia use;[203] likewise arms suitable for personal defense are protected.[204] These guarantees protect a right to keep and

---

While the Colorado, Mississippi, Missouri, Montana, and Oklahoma guarantees have specific language authorizing a proscription against concealed carrying, the 1982 New Hampshire guarantee contains no limiting language. A previously proposed guarantee in New Hampshire containing such limiting language was defeated by the voters in 1978; question 1 read: "All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state, but the legislature may prescribe the manner in which they may be borne and may prohibit convicted felons from carrying or possessing them." This seems to be an indication that a proscription against concealed carrying was rejected by the voters and that forms of concealed carrying are constitutionally guaranteed. *See also supra* note 168.

201. *See supra* notes 50, 102.

202. KAN. CONST. BILL OF RIGHTS, § 4; NEV. CONST. art. I. § 11, para. 1; N.M. CONST. art. II, § 6; OHIO CONST. art. I, § 4; UTAH CONST. art. I, § 6. This guarantee is similar to the defense of self and state guarantees. State v. Vlacil, 645 P.2d 677, 682 (Utah 1982) (Oaks, J., concurring). The view of Kansas courts that only a collective right to serve in the militia and bear arms in the militia is protected has been criticized in notes 38-71 *supra* and accompanying text. Whether the Kansas court has obliquely retreated from this position is raised by Junction City v. Mevis, 226 Kan. 526, 601 P.2d 1145 (1979), where the court found a gun control ordinance too broad. It cited City of Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744 (en banc 1972), where a gun ordinance was struck down because it was too broad and reached beyond permissible limits to impinge on the Colorado guarantee to bear arms.

Ohio and Utah also have a separate guarantee on defense of self and property. OHIO CONST. art. I, § 1; UTAH CONST. art. I, § 1; *see* State v. Hardy, 60 Ohio App. 2d 325, 397 N.E.2d 773 (1978) (even a felon has a right to self-defense). The "lawful hunting and recreational use and for other lawful purposes" of the Nevada and New Mexico guarantees indicate that activities such as gun collecting, competitive and informal target shooting, and exhibiting guns at a gun show are also protected; however, as a practical matter all guns could have as incidental use lawful hunting, lawful recreational use, and lawful exhibition of guns at a gun show.

203. *See supra* notes 74, 75, 77, 79.

204. *See supra* notes 93-97, 180. *See also* Las Vegas v. Moberg, 82 N.M. 626, ___, 485 P.2d 737, 738 (N.M. App. 1971) ("a pistol in a holster"); *In re* Brickey, 8 Idaho 597,598, 70 P. 609 (1902) ("loaded revolver") (the guarantee then was for "security and defense").

bear arms for protection of the person, family, property, and home,[205] for militia use,[206] and for deterrence against oppression.[207]

The dimensions of this right have been summarized as follows:

> The constitutional right to bear arms is intended to guaranty to the people, in support of just government, such right, and to afford the citizen means for defense of self and property. While this secures to him a right of which he cannot be deprived, it enjoins a duty in execution of which that right is to be exercised. If he employs those arms which he ought to wield for the safety and protection of his country, his person, and his property, to the annoyance and terror and danger of its citizens, his acts find no vindication in the bill of rights. That guaranty was never intended as a warrant for vicious persons to carry weapons with which to terrorize others. Going armed with unusual and dangerous weapons, to the terror of the people, is an offense at common law. A man may carry a gun for any lawful purpose, for business or amusement, but he cannot go about with that or any other dangerous weapon to terrify and alarm a peaceful people.[208]

Keeping these dimensions in mind, the constitutional purpose would not be frustrated by a prohibition of carrying arms while drunk, or to a court, polling place, church, or public assembly, or in a manner calculated to inspire terror.[209]

---

205. Lopez v. Chewiwie, 51 N.M. 421, 186 P.2d 512 (1947) (protection of home); State v. Hogan, 63 Ohio St. 202, ___, 58 N.E. 572, 575 (1900) ("to afford the citizen means for defense of self and property"). When the Idaho guarantee was for "security and defense" it was construed to protect personal self-defense. Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971) (self-defense); State v. Hart, 66 Idaho 217, ___, 157 P.2d 72, 73 (1945); City of Akron v. Dixon, 36 Ohio Misc. 133, ___, 303 N.E.2d 923, 925 (Mun. Ct. 1972) ("if engaged in the defense of his security or that of his family [one] is entitled to possess them [pistols]").

206. State v. Hogan, 63 Ohio St. 202, ___, 58 N.E. 572, 575. (1900) ("protection of his country").

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

208. State v. Hogan, 63 Ohio St. 202, ___, 58 N.E. 572, 575 (1900) (tramp law upheld where tramp threatened an injury).

209. *See supra* notes 50 & 102. In State v. Montoya, 91 N.M. 262, ___, 572 P.2d 1270, 1273 (N.M. App. 1977), the court hinted that it would uphold a law proscribing carrying a gun into a licensed liquor establishment, a fourth degree felony, where the right to bear arms was raised by "[i]nnuendo in defendant's brief." *See supra* note

The boundaries of this right would sanction the carrying of arms in the home either openly or concealed.[210] The open peaceful carrying in one's business place, vehicle, or on a public street in the ordinary course of one's travels is also constitutionally sanctioned.[211]

71, for criticism of making a regulatory offense a felony.

210. *See supra* note 104. In State v. Nieto, 101 Ohio St. 409, ___, 130 N.E. 663, 664 (1920), the court held that a jury instruction in a case where a "Mexican" was acquitted of carrying concealed a pistol in a bunkhouse was erroneous in that it carved out a home exception to a concealed carrying statute. The court reasoned that concealed carrying even in the home could be proscribed because "[t]he statute does not operate as a prohibition against carrying weapons, but as a regulation of the manner of carrying them." The dissenting opinion noted "Southern States have very largely furnished the precedents. It is only necessary to observe that the race issue there has extremely intensified a decisive purpose to entirely disarm the negro, and this policy is evident upon reading the opinions." *Id.* at ___, 130 N.E. at 669 (Wanamaker, J., dissenting). The correctness of the dissent is exemplified in Watson v. Stone, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring):

> I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and 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 white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested.

211. *See supra* note 105. An ordinance prohibiting the unconcealed carrying of arms was voided in Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971). *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902), struck down a statute prohibiting the carrying of firearms in town. At the time, the Idaho guarantee was for "security and defense." On the other hand, in State v. Vlacil, 645 P.2d 677 (Utah 1982), a conviction for possession of a firearm by a non-citizen of the U.S. was upheld. The court noted the arms guarantee stated "The Legislature may regulate the exercise of this right by law." Three separate opinions were written to affirm the conviction. In view of cases where such alien in possession statutes were voided on right to bear arms grounds, People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (en banc 1936), and People v. Zerillo, 219 Mich. 635, 189 N.W. 729 (1922), it appears that the majority was swayed by the fact that the arm involved was "fully automatic" and that it was used for the aggressive purpose of wounding a man rather than for self-defense. Mo-

No Specific Purpose Assigned.

Five state constitutions guarantee the right to keep and bear arms without assignment of a specific purpose. Their guarantees are generally worded as the right "to keep and bear arms shall not be infringed" or "abridged."[212] As this guarantee is without assignment of a purpose, it must be assumed the Framers intended at a minimum to protect the basic historical reasons for a right to arms: (a) the right of personal defense;[213] (b) preference for a militia over a standing army;[214] and (c) the deterrence of governmental oppression.[215] One court simply capsulized the reasons for having arms as follows: "The Constitutions of the United States and Louisiana give us the right to keep and bear arms. It follows, logically, that to keep and bear arms gives us the right to use the arms for the intended purpose for which they were manufactured."[216] It can also be inferred that the Framers were aware of the guiding principles of interpretation "*Inclusio Unis Est Exclusio Alterius*" (the inclusion of one is the exclusion of another) and feared that by including or assigning only one of the historical reasons, e.g., militia, the courts would, given their penchant for a restrictive interpretation of the right,[217]

---

sher v. Dayton, 48 Ohio St. 243, 358 N.E.2d 540 (1976), invoked the police power to uphold an ordinance mandating obtaining an identification card to demonstrate lack of disabilities, such as being a convicted felon, and to show entitlement to possess a pistol. The dissent argued legislation must be reasonable and necessary which seeks to restrain "one of the fundamental civil rights." *Id.* at ___, 358 N.E.2d at 544 (Celebrezze, J., dissenting). An ordinance forbidding the employment of special guards during a strike was voided on grounds of right to bear arms for "defense and security" (art. I, § 4) and "defending life and protecting property" (art. I, § 1). *In re* Reilly, 31 Ohio Dec. 364, 367-68 (1919).

212. GA. CONST. art. I, § 1, para. V; IDAHO CONST. art. I, § 11; ILL. CONST. art. I, § 22; LA. CONST. art. I, § 11; R.I. CONST. art. I, § 22. Idaho's present constitutional provision was ratified in the general election of November 7, 1978. As originally adopted in 1890, the provision secured to the people the right to bear arms for their security and defense. Under this provision a statute that prohibited a citizen from bearing arms in any manner within the confines of a city, town or village was held void. *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902).

213. *See supra* notes 14, 24-27.

214. *See supra* notes 14, 81-92.

215. *See supra* notes, 14, 19-22.

216. McKellar v. Mason, 159 So. 2d 700, 702 (La. App. 1964), *aff'd* 245 La. 1075, 162 So. 2d 571 (1964). This was when the Louisiana Constitution tracked the second amendment. In 1974 it was amended to the present guarantee.

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

limit the guaranteed right only to the purpose stated.

Since the text is not restricted to a purpose, both arms suitable for militia use[218] and for personal defense[219] are guaranteed. Since the right cannot be infringed or abridged, to give this right effect the open peaceful carrying in one's business place, vehicle, or on a public street in the ordinary course of one's travels must be allowed.[220] The mandate guarantees the carrying of arms in the home openly or concealed.[221]

A reading of cases under this heading reveals that the fears of the Framers were justified, and in spite of the precautions taken by the exclusion of a specific purpose for the right to keep and bear arms so as not to restrict that right, some courts tend to limit the guarantee as though only the militia reason were assigned.[222]

Historically, Louisiana courts have interpreted their state constitutional provisions to include defense of self,[223] even

---

State, 42 Okla. Cr. 272, 275 P. 393 (1929); City of Salina v. Blakslay, 72 Kan. 230, 83 P. 619 (1905).

218. *See supra* notes 74, 75, 77, 79.

219. *See supra* notes 93-97, 180, 204.

220. *See supra* notes 105, 197, 211. Strickland v. State, 137 Ga. 1, 72 S.E. 260 (1911) (upheld statute requiring license to carry pistol away from home or place of business) People v. Williams, 60 Ill. App. 3d 726, 377 N.E.2d 285 (1978) (upheld statute forbidding carrying of loaded gun in vehicle or in city, unless at home, place of business, or upon own land); State v. Storms, 112 R.I. 121, 308 A.2d 463 (1973) (upheld statute prohibiting carrying a pistol without a license except in home, place of business, or upon possessed land). A constitution should not be read with the prolixity of a civil code. However, the hostile treatment that the right to bear arms has been given by some courts prompted the 1978 amendment to IDA. CONST. art. I, § 11 to specifically forbid licensing, registration, or special taxation, or confiscation, except for commission of a felony.

221. *See supra* note 104.

222. In Strickland v. State, 137 Ga. 1, 72 S.E. 260 (1911), the court relied on previous Georgia constitutions, with a militia reason, to assign a militia purpose to the present one and to imply that only pistols suitable for militia use are constitutionally protected. The court trivialized the decision of the Framers to omit reference to the militia in the arms guarantee by stating that reference to the militia was already made in article 10, the militia article, "and it was doubtless deemed unnecessary to reiterate them in both connections." *Id.* at ___, 72 S.E. at 263. In Carson v. State, 241 Ga. 622, ___, 247 S.E.2d 68, 73 (1978), the court seems to recognize the absence of the militia reason. Other courts have paid careful attention to the language of the text. For example, the Indiana Constitution covers bearing arms in Art. I, § 32 and the militia in art. 12, § 1, but the court held the right to arms was not restricted to militia arms or purposes. Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980).

223. McKellar v. Mason, 159 So. 2d 700, 702 (La. App. 1964), *aff'd* 245 La. 1075,

though the guarantee before the 1974 Amendment was couched only in terms of a well-regulated militia.

With the exception of Rhode Island, each guarantee under this heading contains permissive language allowing the right to be regulated in some manner.[224] Although this express declaration of intent is not necessary for the courts to infer reasonable police power regulations,[225] some courts have relied on these phrases in their determinations.[226]

A recent Illinois case demonstrates that regardless of how careful the Framers were in spelling out what arms are constitutionally protected,[227] and regardless of the pains they took to spell out permissable exercises of the police power[228] so as to harmonize the police power with the right to keep and bear

---

162 So. 2d 571 (1964); State v. Bias, 37 La. Ann. 259, 260 (1885) ("musket to shoulder, or carbine slung on back, or pistol belted to his side . . . is bearing arms"); State v. Chandler, 5 La. Ann. 489, 490, 52 Am. Dec. 599, ___, (1850). Under the present guarantee the police power can be exercised to limit the possession of firearms by convicted felons. State v. Amos, 343 So. 2d 166 (La. 1977). The dissent noted that except for concealed carrying, the constitution sets out "an individual right in absolute terms." *Id.* at 170 (Calogero, J., dissenting).

224. *See supra* notes 31 & 212.

225. Carson v. State, 241 Ga. 622, 247 S.E.2d 68 (1978); State v. Storms, 112 R.I. 121, 308 A.2d 463 (1973).

226. Strickland v. State, 137 Ga. 1, ___, 72 S.E. 260, 262 (1911); People v. Williams, 60 Ill. App. 3d 726, 377 N.E.2d 285 (1978); Rawlings v. Department of Law Enforcement, 73 Ill. App. 3d 267, 391 N.E.2d 758 (1979) (applicant for gun license was mental patient within statutory five years of application).

227. The majority report of the Committee on Bill of Rights reported "the 'arms' involved are not limited by the armaments or needs of the state militia or other military body. The substance of the right is that a citizen has the right to possess and make reasonable use of arms that law-abiding persons commonly employ for purposes of recreation or the protection of person and property. Laws that attempted to ban all possession or use of such arms, or laws that subjected possession or use of such arms to regulations or taxes so onerous that all possession or use was effectively banned, would be invalid." 6 SIXTH ILL. CONST. CONVENTION, RECORD OF PROCEEDINGS 87 (1969-1970) (hereinafter referred to as ILL. PROCEEDINGS). The committee cited People v. Brown, 253 Mich. 537, 235 N.W. 245 (1931) and State v. Duke, 42 Tex. 455 (1875), to demonstrate that arms include rifles, shotguns and pistols. *Id.* at 87 n.7. It also cited *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902); People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921), for examples of invalid regulation. *Id.* at 87 n.8.

228. A valid exercise of the police power would be to ban weapons not commonly and peacefully used by individuals, such as machine guns; to proscribe possesion by minors or by persons in high-risk groups, such as felons; to require a license to possess a gun; to regulate carrying and to implement this power by licensing; to regulate the purchase and sale of arms. Nowhere was the handgun singled out for a ban. 6 ILL. PROCEEDINGS 88-90.

arms and prevent the police power from turning the right into a hollow shell or an intangible abstraction, a court is willing to ignore the intent of the framers and the understanding of the people. In *Quilici v. Village of Morton Grove*[229] a divided court brushed aside arguments, that included the Illinois guarantee on arms, and upheld an ordinance which in effect banned the possession of handguns, even in the home.[230] The court concluded that although the handgun was intended to be included within the class of constitutionally protected arms, the ban did not violate the state constitution. To support this incongruous conclusion, the court relies chiefly on statements made by a delegate during the floor debates that handguns could be banned. A closer reading of the convention debates reveals that the court's reliance on isolated statements was misplaced.[231]

---

229. Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982). The village removed the action from state to federal court because federal as well as state questions were involved. This article will confine itself to the Illinois guarantee to keep arms.

230. With the exception of British efforts to disarm Patriots and an effort to disarm people in Tennessee during the Civil War (See *supra* notes 117 & 130) no one has made an attempt to disarm the populace and no court has ever sustained such an attempt.

231. Every member of such a convention acts upon such motives and reasons as influence him personally, and the motions and debates do not necessarily indicate the purpose of a majority of a convention in adopting a particular clause. It is quite possible for a clause to appear so clear and unambiguous to the members of a convention as to require neither discussion nor illustration; and the few remarks made concerning it in the convention might have a plain tendency to lead directly away from the meaning in the minds of the majority. It is equally possible for a part of the members to accept a clause in one sense and part in another. And even if we were certain we had attained to the meaning of the convention, it is by no means to be allowed a controlling force, especially if that meaning appears not to be the one which the words would most naturally and obviously convey. For as the constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruce meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.

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 1686 (Mr. Lennon).

234. 6 ILL. PROCEEDINGS 165.

235. 3 ILL. PROCEEDINGS 1691-92 (President Witwer).

236. *Id.* at 1692-93 (Mr. Gertz). Mr. Foster, on whose statements the court relied, stated that Mr. Gertz was incorrect because "there could be a ban on certain categories." *Id.* at 1693.

237. *Id.* at 1699-1700 (Mr. Arrigo).

238. *Id.* at 1707 (Mr. Hutmacher). He cited People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922), which held that even an alien could not be deprived of possessing a pistol. That case was cited in the majority report and reveals that delegates were cognizant of the report and its views. 6 ILL. PROCEEDINGS 87 n.8. One delegate who admitted owning "two shotguns and a pistol" supported the right to bear arms for protection and sporting purposes. He felt that everybody should not be punished for the misconduct of a few, and that the proposed guarantee would prevent confiscation. *Id.* at 1712-13 (Mr. Hendren).

239. 3 ILL. PROCEEDINGS 1718. (Mr. Foster). Such a broad statement could not be taken seriously. It was made probably in an effort to play down the scope of the right and to secure undecided votes for its passage. Regarding the arms guarantee, he also stated "I wish I'd never seen this thing." *Id.* at 1721.

240. *Id.* at 1701: "Let's pay attention to the debates, please. People that have to

were sparsely attended.[241] The majority report spelled the right out, and all efforts to specifically isolate the handgun as a weapon which should be given no constitutional protection were rejected.[242] Thus statements during the debates can hardly be taken as demonstrating consensus. A court 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

---

have conversations, will you kindly take them outside?" (President Witwer). *Id.* at 1704: "May we have quiet in the room so that we can hear what Father Lawlor has to say?" (President Witwer). *Id.* at 1705: "I think if we are going to be in session, we ought to be in session and listen to the debate. And it's a simple matter for those who do not want to hear it to go out in the hall." (President Witwer).

241. *Id.* at 1703: "We have a lot of absentees now. I hope the people in the lounge will come up and share the load." (President Witwer). At one point Witwer had the sergeant-at-arms bring in at least one more delegate to have a quorum. *Id.* at 1712.

242. 7 ILL. PROCEEDINGS 2901 (Proposal 131); Legal and Research Advisor's Memorandum No. 25 (Feb. 18, 1970). The Bill of Rights Committee rejected an attempt to amend the present arms guarantee by adding the phrase "except handguns" following the word "arms." *Minutes of the Committee on Bill of Rights*, Mar. 12, 1970.

243. Board of Education v. Bakalis, 54 Ill. 2d 448, ___, 299 N.E.2d 737, 751-52 (1973) (Ryan, J., concurring).

troublesome. Constitutional guarantees, including the right to possess arms, apply equally to the entire state.[244]

The people understand the police power to be "the inherent power of a government to exercise reasonable control over persons and property within its jurisdiction in the interest of the general security, health, safety, morals, and welfare *except where legally prohibited.*"[245] The people also believe they have a constitutional right to own a gun and oppose a ban on the private ownership of handguns.[246] It is apparent that the voters in Illinois felt that they were adopting a constitutional guarantee, which was subject only to reasonable regulation, and not a hollow promise which could be granted or revoked whenever it suited a legislative body. From a policy consideration, the vast majority of handgun owners present no threat to society and most gun owners will not obey a law banning handguns.[247]

The ends to be secured by guarantees under this heading would not be infringed or abridged by a prohibition against carrying arms while drunk, or to a polling place, court, church, or public assembly, or in a manner calculated to inspire

---

244. State v. Blocker, 291 Or. 255, 630 P.2d 824 (1981).

245. WEBSTER'S NEW COLLEGIATE DICTIONARY 889 (1977) (emphasis added).

246. "Equally large majorities *oppose* an outright ban on private handgun ownership, although there is a majority sentiment favoring a ban on the manufacture and sale of cheap, low-quality handguns. Majorities approaching 90 percent believe they have a constitutional right to own a gun." WRIGHT & ROSSI, WEAPONS, CRIME AND VIOLENCE IN AMERICA (Executive Summary) 17 (U.S. Justice Dept., Nov. 1981). *See also* WRIGHT, PUBLIC OPINION AND GUN CONTROL, 455 THE ANNALS OF THE AM. ACADEMY OF POL. & SOCIAL SCIENCE 24 (May 1981).

247. Fifty percent or more of gun owners will defy a confiscation law. Furthermore, the rate of defiance of Chicago's registration law is estimated at over two-thirds. In Cleveland the rate of compliance with their handgun registration law is estimated at less than 12 percent. RESTRICTING HANDGUNS—THE LIBERAL SKEPTICS SPEAK OUT 201 (D. Kates, Jr. ed. 1979). Another study indicated that both gun owners and nonowners felt half or fewer of gun owners would comply with a gun ban. D. BORDUA, GUN CONTROL AND OPINION MEASUREMENT: ADVERSARY POLLING AND THE CONSTRUCTION OF SOCIAL MEANING 6 (Paper Presented at Annual Meeting of Am. Sociological Assn., N.Y., Aug. 27-31, 1980). Also wide-spread violation of the law would place upon us unacceptable societal costs of enforcement. KAPLAN, THE WISDOM OF GUN PROHIBITION, 455 THE ANNALS OF THE AM. ACADEMY OF POL. & SOCIAL SCIENCE 11 (May 1981). "It is commonly hypothesized that much criminal violence, especially homicide, occurs simply because the means of lethal violence (firearms) are readily at hand, and thus, that much homicide would not occur were firearms generally less available. There is no persuasive evidence that supports this view." WRIGHT & ROSSI, *supra* note 246 at 2.

terror.[248]

Conclusion

It is well settled that courts are to presume that constitutional language was carefully chosen, and the words used are to be taken in their general and ordinary sense. Furthermore, courts are to presume that the people do not go through the effort of passing a constitutional guarantee as an idle exercise to protect nugatory rights or nebulous entitlements, or to secure an intangible abstraction. Accordingly, judges deciding the meaning of the right to keep and bear arms should confine themselves to enforcing norms that are stated clearly or implicitly in the written guarantee.

The six classifications of constitutional text discussed in this article should be viewed as a pyramid, the base representing the text which protects the broadest individual rights and the apex representing the text which protects a more conditional right. The base of this pyramid would be represented by the *No Specific Purpose Assigned* text. Moving upwards, the next level would be represented by the *Defense of Self, Home, Property and State Purpose* text, followed by the *Security and Defense Purpose* text on a par with the *Self-Defense and Defense of State Purpose* text. The final levels would be the *Militia Purpose* text, concluding with the *Common Defense Purpose* text.

While principles of law indicate the *No Specific Purpose Assigned* text should serve as the best protection against infringement, case law experiences suggest that the strongest guarantee of individual liberty would be one which reads with the prolixity of a civil code.

The right to keep and bear arms is at the forefront of the emotional issues which confront society, especially the legal community. Nevertheless, judges have an obligation to interpret the Constitution so as to carry out the intent of the Framers, regardless of the human sentiments in their hearts. If this obligation is abandoned, the courts will appear to be political institutions, their decisions less rooted in the law than in the personalities and politics of the individual judges,

---

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]

---

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

250. Wilson v. State, 33 Ark. 557, 34 Am. Rep. 52 (1878); City of Lakewood v. Pillow, 180 Colo. 20, 23, 501 P.2d 744, 745 (en banc 1972); People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (en banc 1936); Nunn v. State, 1 Ga. (1 Kelly) 243 (1846); *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 13 Am. Dec. 251 (1822); People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921); *In re* Reilly, 31 Ohio Dec. 364 (C.P. 1919); State v. Blocker, 291 Or. 255, 630 P.2d 824 (1981); State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); Andrews v. State, 50 Tenn. (3 Heisk) 165, 8 Am. Rep. 8 (1871); Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928); Smith v. Ishenhour, 43 Tenn. (3 Cold) 214, 217 (1866); State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903); City of Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971); Jennings v. State, 5 Tex. Crim. App. 298 (1878).

THE STATE OF MARYLAND

EXECUTIVE DEPARTMENT

ANNAPOLIS

Certificate of Appreciation and Honorable Discharge

To [illegible]

[illegible] Place, Baltimore, Maryland

This certificate is issued in grateful recognition of the service rendered by you in the RESERVE MILITIA OF MARYLAND (MARYLAND MINUTE MEN) and as your HONORABLE DISCHARGE therefrom.

As Governor of the State of Maryland and Commander-in-Chief of the military forces of the State, I extend you the sincere appreciation of the people of the State for your unselfish and patriotic service rendered as a member of this reserve force in time of emergency.

It will be gratifying to you to know that your name will be listed permanently among the names of those Maryland men who volunteered their services and who generously gave their time and energies to assure the safety of their fellow citizens in World War II.

HERBERT R. O'CONOR,
Governor of Maryland.

District of Columbia)
) ss:
City of Washington)

Affidavit

Comes now Charles Raymond Gray, and after being duly sworn, deposes and states:

1. That during World War II affiant was a resident of Maryland.

2. That during said war the Maryland National Guard was sent overseas.

3. That the Governor of Maryland therefore called upon men of all ages and stations in life to volunteer for the manning of home guard stations for the task of repelling invasion forays, parachute raids, and sabotage uprisings in the state.

4. That these volunteers served in the Reserve Militia of Maryland and were officially designated Maryland Minute Men.

5. That affiant was a member of the Maryland Minute men during World War II.

6. That members of the Maryland Minute Men were required to supply their own arms, which included rifles, shotguns, pistols, and hunting knives, for training and used those personally owned arms on guard duty.

7. That while serving as a private with the Maryland Minute Men affiant was armed with a personally owned .32 caliber handgun and .22 caliber rifle while training and performing guard duty.

8. That affiant was honorably discharged from the Reserve Militia of Maryland (Maryland Minute Men) by Governor Herbert R. O'Connor, and that a true copy of his discharge certificate is attached to this affadavit.

Further affiant saith not.

____

Charles Raymond Gray

Subscribed and sworn to before me this __2nd__ day of November, 1981.

____

Notary Public

My commission expires:November 30, 1983

APPENDIX

STATE CONSTITUTIONAL PROVISIONS ON THE RIGHT TO KEEP AND BEAR ARMS

Thirty-nine (39) states have constitutional provisions on the right to keep and bear arms.

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

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

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

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

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

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

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

Georgia: "The right of the people to keep and bear arms, shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne." GA. CONST. art. I, § 1, para. 5.

Hawaii: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." HAWAII CONST. art. I, § 15.

Idaho: "The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not

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

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

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

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

Kentucky: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons." KY. CONST. § I, para. 7.

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

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

Massachusetts: "The people have a right to keep and bear arms for the common defense. And as, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the

civil authority, and be governed by it." MASS. CONST. pt. I, art. XVII.

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

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

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

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

Nevada: "Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes." NEV. CONST. art. I, § 11(1).

New Hampshire: "All persons have the right to keep and bear arms in defense of themselves, their families, their property, and the State." N.H. CONST. pt. I, art. 2a.

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

North Carolina: "A well regulated militia being necessary to be the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weap-

Iorth Dakota

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

)elaware

\ person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use. Article I, Section 20.

Vest Virginia

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

ons, or prevent the General Assembly from enacting penal statutes against that practice." N.C. CONST. art. I, § 30.

Ohio: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power." OHIO CONST. art. I, § 4.

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

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

Pennsylvania: "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned." PA. CONST. art. I, § 21.

Rhode Island: "The right of the people to keep and bear arms shall not be infringed." R.I. CONST. art. I, § 22.

South Carolina: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law." S.C. CONST. art. I, § 20.

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

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

Texas: "Every citizen shall have the right to keep and

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

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

Utah voters in the 1984 elections will decide whether to amend Art. I § 6 to read as follows: The individual right of the people to keep and bear arms for defense of themselves, their families, their property, and the state, and for lawful hunting, recreational use and all other lawful purposes, shall not be infringed; but this provision shall not prevent passage of laws to govern the carrying of concealed weapons; nor prevent legislation providing penalties for the possession of firearms by convicted felons, minors, mental incompetents or illegal aliens; nor shall any law permit the confiscation of firearms, except those used in the commission of a felony.

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

Virginia: "That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power." VA. CONST. art. I, § 13.

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

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

STATES WITHOUT CONSTITUTIONAL PROVISIONS:

Eleven (11) states do not have a constitutional provision on arms: California, Delaware, Iowa, Maryland, Minnesota, Nebraska, New Jersey, New York, North Dakota, West Virginia, and Wisconsin.

ANNOUNCEMENT

We have purchased the
entire back stock and
reprint rights of

OKLAHOMA CITY UNIVERSITY
LAW REVIEW

Complete sets to date
are now available. We
can also furnish single
volumes and issues.

WILLIAM S. HEIN CO., INC.
1285 Main Street
Buffalo, New York 14209

Call Toll-free 1-800-828-7571

Alaska State Legislature

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

committee on SJR 15 bill/subject, dated 4-20-88.

The Alaska Association of Chief's of Police has been opposed to this resolution since it's introduction. Our position on the committee substitute at this time is that we haven't had enough time to poll our membership on the new version, it's late in the session and we don't feel there is enough time left to resolve the issues to everyone's satisfaction. At the present time there are no attempts to infringe on individual rights to keep and bear arms, therefore we don't see any need for urgency in passage right now.

Signed: Dan Anslinger [signature]
Testifier

Ketchikan P.D. & A.A.C.O.P.
Representing (Optional)

361 Main St Ketchikan
Address

225-6631
Phone No.

9/88 Legislative Information Office

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: SHIRLEY WARNER/APOA
TITLE: VICE PRESIDENT
ADDRESS: 7800 LOTUS DRIVE
CITY: ANCHORGE, ALASKA ZIP: 99502
PHONE: 786-8851
BILL NO: SJR 15
SUBJECT: RIGHT TO KEEP AND BEAR ARMS
MESSAGE: THE APOA STRONGLY OPPOSES THIS BILL. THE ALASKA CONSTITUTION AS IT IS WRITTEN WORKS WELL FOR LAW ENFORCEMENT. THERE ARE SOME POTENTIAL PROBLEMS WITH WHAT THE NRA WANTS. IF IT WORKS FINE IT SHOULD BE LEFT ALONE. PLEASE REMEMBER GUNS IN BARS AND ON SCHOOLGROUNDS. KEEP IN MIND RHEA VEGA.

POMID: 03171430
DATE: 05/03/88
TIME: 17:14:30
LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES

GRUENBERG
BARNES
COTTEN
NAVARRE
TAYLOR
ULMER

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: ROBERTA ROGERS
TITLE:
ADDRESS: 7310 MARCH COURT #2
CITY: ANCHORAGE, ALASKA ZIP: 99504
PHONE: 333-9485
BILL NO: HB 348
SUBJECT: MEMBERSHIP OF MEDICAID RATE COMMISSION
MESSAGE: I VOTE FOR YOU NOT TO TAKE CHIROPRACTIC OFF MEDICAID.

POMID: 03172411
DATE: 05/03/88
TIME: 17:24:11
LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES

BARNES
COTTEN
GRUENBERG
NAVARRE
TAYLOR
ULMER

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: JIM WEIDNER
TITLE: PRES. ASSOC. FOR PROTECTTION OF PF
ADDRESS: 5479 CHEAN HOT SPRINGS ROAD
CITY: FAIRBANKS ZIP: 99701
PHONE: 488-6366
BILL NO: SJR 25
SUBJECT: USE OF INCOME FROM PERMANENT FUND
MESSAGE: THIS ALSO PERTAINS TO HJR48. LET US NOT FORGET THESE IMPORTANT BALLOT PROPOSITIONS. URGE THAT THE CONCEPTS OUTLINED IN THESE RESOLUTIONS BE PLACED ON THE BALLOT. HJR 48'S TEXT SEEMS MOST REASONABLE, BUT SJR 25 IS ALL RIGHT TOO. EOM-FZ

POMID: 07091632
DATE: 05/04/88
TIME: 09:16:32
LIONAME: FAIRBANKS LIO

COPIES: REPRESENTATIVES

REPRESENTATIVES	REPRESENTATIVES
ADAMS	BARNES
BOUCHER	BOYER
BROWN	CATO
COLLINS	COTTEN
DAVIDSON	DAVIS
DONLEY	ELLIS
FRANK	FURNACE
GOLL	GRUENBERG
GRUSSENDORF	HANLEY
HERRMANN	HOFFMAN
HUDSON	KOPONEN
LARSON	MARTIN
MENARD	MILLER
NAVARRE	PEARCE
PETTYJOHN	PHILLIPS
POURCHOT	RIEGER
SHULTZ	SPRINGER
SWACKHAMMER	TAYLOR
ULMER	WALLIS
ZAWACKI	

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: DUANE UDLAND
TITLE: PRES.ALASKA CHIEFS OF POLICE
ADDRESS: BOX 2499
CITY: SOLDOTNA ZIP: 99669
PHONE: 262-4455
BILL NO: SJR 15
SUBJECT: RIGHT TO KEEP AND BEAR ARMS
MESSAGE: THE CHIEFS OF POLICE HAVE NOT CHANGED THEIR POSITION ON SJR15. WE DO NOT BELIEVE A CONSTITUTIONAL AMMENDMENT IS NECESSARY. THE RIGHTS OF ALASKANS ARE ALREADY WELL PROTECTED UNDER OUR PRESENT CONSTITUTION. IF LEGISLATION MUST BE PASSED WE PREFER THE VERSION AS WRITTEN BY REP. ULMER'S COMMITTEE.

JA

POMID: 13092431
DATE: 05/04/88
TIME: 09:24:31
LIONAME: SOLDOTNA LIO

COPIES: REPRESENTATIVES

BARNES
COTTEN
GRUENBERG
NAVARRE
TAYLOR
ULMER

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

02–576(2/77)

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: SHIRLEY WARNER/APOA
TITLE: VICE PRESIDENT
ADDRESS: 7800 LOTUS DRIVE
CITY: ANCHORGE, ALASKA ZIP: 99502
PHONE: 786-8851
BILL NO: SJR 15
SUBJECT: RIGHT TO KEEP AND BEAR ARMS
MESSAGE: THE APOA STRONGLY OPPOSES THIS BILL. THE ALASKA CONSTITUTION AS IT IS WRITTEN WORKS WELL FOR LAW ENFORCEMENT. THERE ARE SOME POTENTIAL PROBLEMS WITH WHAT THE NRA WANTS. IF IT WORKS FINE IT SHOULD BE LEFT ALONE. PLEASE REMEMBER GUNS IN BARS AND ON SCHOOLGROUNDS. KEEP IN MIND RHEA VEGA.

POMID: 03171430
DATE: 05/03/88
TIME: 17:14:30
LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES

GRUENBERG
BARNES
COTTEN
NAVARRE
TAYLOR
ULMER

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: ROBERTA ROGERS
TITLE:
ADDRESS: 7310 MARCH COURT #2
CITY: ANCHORAGE, ALASKA ZIP: 99504
PHONE: 333-9485
BILL NO: HB 348
SUBJECT: MEMBERSHIP OF MEDICAID RATE COMMISSION
MESSAGE: I VOTE FOR YOU NOT TO TAKE CHIROPRACTIC OFF MEDICAID.

POMID: 03172411
DATE: 05/03/88
TIME: 17:24:11
LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES

BARNES
COTTEN
GRUENBERG
NAVARRE
TAYLOR
ULMER

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: JIM WEIDNER
TITLE: PRES. ASSOC. FOR PROTECTTION OF PF
ADDRESS: 5479 CHEAN HOT SPRINGS ROAD
CITY: FAIRBANKS ZIP: 99701
PHONE: 488-6366
BILL NO: SJR 25
SUBJECT: USE OF INCOME FROM PERMANENT FUND
MESSAGE: THIS ALSO PERTAINS TO HJR48. LET US NOT FORGET THESE IMPORTANT BALLOT PROPOSITIONS. URGE THAT THE CONCEPTS OUTLINED IN THESE RESOLUTIONS BE PLACED ON THE BALLOT. HJR 48'S TEXT SEEMS MOST REASONABLE, BUT SJR 25 IS ALL RIGHT TOO. EOM-FZ

POMID: 07091632
DATE: 05/04/88
TIME: 09:16:32
LIONAME: FAIRBANKS LIO

COPIES:

REPRESENTATIVES	REPRESENTATIVES
ADAMS	BARNES
BOUCHER	BOYER
BROWN	CATO
COLLINS	COTTEN
DAVIDSON	DAVIS
DONLEY	ELLIS
FRANK	FURNACE
GOLL	GRUENBERG
GRUSSENDORF	HANLEY
HERRMANN	HOFFMAN
HUDSON	KOPONEN
LARSON	MARTIN
MENARD	MILLER
NAVARRE	PEARCE
PETTYJOHN	PHILLIPS
POURCHOT	RIEGER
SHULTZ	SPRINGER
SWACKHAMMER	TAYLOR
ULMER	WALLIS
ZAWACKI	

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: DUANE UDLAND
TITLE: PRES.ALASKA CHIEFS OF POLICE
ADDRESS: BOX 2499
CITY: SOLDOTNA ZIP: 99669
PHONE: 262-4455
BILL NO: SJR 15
SUBJECT: RIGHT TO KEEP AND BEAR ARMS
MESSAGE: THE CHIEFS OF POLICE HAVE NOT CHANGED THEIR POSITION ON SJR15. WE DO NOT BELIEVE A CONSTITUTIONAL AMMENDMENT IS NECESSARY. THE RIGHTS OF ALASKANS ARE ALREADY WELL PROTECTED UNDER OUR PRESENT CONSTITUTION. IF LEGISLATION MUST BE PASSED WE PREFER THE VERSION AS WRITTEN BY REP. ULMER'S COMMITTEE.

POMID: 13092431
DATE: 05/04/88
TIME: 09:24:31
LIONAME: SOLDOTNA LIO

COPIES:

REPRESENTATIVES
BARNES
COTTEN
GRUENBERG
NAVARRE
TAYLOR
ULMER

JAN 26 1988

Governor's Criminal Justice Working Group

January 14, 1988

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

Dear Representative Ulmer:

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

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

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

SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The [A WELL-REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right of the people to keep and bear arms shall not be infringed.

The stated purpose of the proposed amendment is to establish that the right to keep and bear arms under the state constitution is an individual right, rather than a collective one. We are concerned that the present language, if adopted by the voters at the next election, might allow later constitutional challenge to some existing state statutes. Present law, for example, prohibits a convicted felon from possessing a concealable firearm, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shotguns,

prohibits possession of a firearm while intoxicated, the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.61.200-11.61.220.)

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

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

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

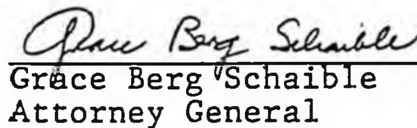
As a general rule, a statute or constitutional provision will be interpreted according to the plain meaning of the language on its face. If the intent behind the adoption of the amendment were to later become an issue, it is the intent of the voters who adopted the measure, rather than the intent of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

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

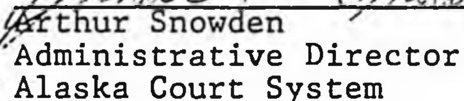
interpretation. Statements of "legislative intent" are not an adequate substitute for clear, unambiguous language in the proposed constitutional amendment. A more precisely drafted amendment would minimize the possibility that, should the proposed constitutional amendment be adopted, a criminal defendant would later be able to argue that a criminal weapons misconduct statute is unconstitutional because it violates his right to keep and bear arms under art. I, sec. 19 of the state constitution.

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

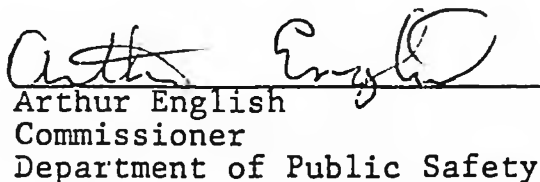
Sincerely yours,



Grace Berg Schaible
Attorney General

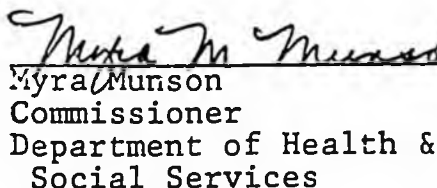


Arthur Snowden
Administrative Director
Alaska Court System

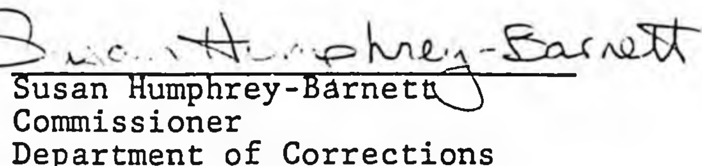


Arthur English
Commissioner
Department of Public Safety

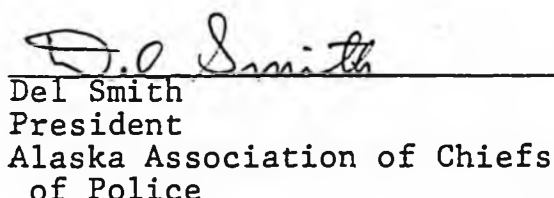
Dana Fabe
Public Defender



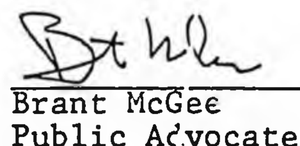
Myra Munson
Commissioner
Department of Health & Social Services



Susan Humphrey-Barnett
Commissioner
Department of Corrections

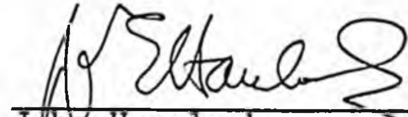


Del Smith
President
Alaska Association of Chiefs of Police



Brant McGee
Public Advocate

Harold M. Brown
Executive Director
Alaska Judicial Council



John Havelock
Consultant on Criminal
Justice Planning

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

The CITY OF LAKEWOOD, a municipal corporation of the State of Colorado, Petitioner,

v.

Charles Edward PILLOW, Respondent.

No. C-164.

Supreme Court of Colorado, En Banc.

Oct. 10, 1972.

Defendant was convicted in Municipal Court of violation of city ordinance making it unlawful to possess dangerous or deadly weapon, and he appealed. The District Court, Jefferson County, Christian D. Stoner, J., reversed and declared ordinance invalid, and certiorari was granted. The Supreme Court, Hodges, J., held that the ordinance was unconstitutionally overbroad, where it would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on substantial part of their business, it appeared to prohibit individuals from transporting guns to and from such places of business, it made it unlawful for person to possess firearms in vehicle or in place of business for purpose of self-defense, and several of such activities were constitutionally protected and, depending upon circumstances, might be entirely free of criminal culpability.

Affirmed.

1. Weapons ⚷3

City ordinance prohibiting possession of dangerous or deadly weapon was unconstitutionally overbroad, where it would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on substantial part of their business, it appeared to prohibit individuals from transporting guns to and from such places of business, it made it unlawful for person to possess firearm in vehicle or in place of business for purpose of self-defense, and several of such activities were constitutionally protected and, depending upon circumstances, might be entirely free of criminal culpability. 1965 Perm.Supp., C.R.S., section 40-11-1; Const. art. 2, § 13.

2. Constitutional Law ⚷81

Governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under police power, may not be achieved by means which sweep unnecessarily broad and thereby invade area of protected freedoms.

3. Constitutional Law ⚷83(1)

Even though governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

Raymond C. Johnson, Lakewood, for petitioner.

Theodore P. Koeberle, Boulder, for respondent.

HODGES, Justice.

On petition of the City of Lakewood, we granted certiorari to review the district court's declaration that a Lakewood ordinance is invalid.

The respondent Pillow was convicted in municipal court of a violation of this ordinance which makes it unlawful to possess a dangerous or deadly weapon. He appealed to the district court which reversed the conviction on the basis of a finding that there was a failure of proof before the municipal court and on the further ground that the ordinance was invalid. The district court's declaration of invalidity was premised on its finding that the subject matter of the ordinance is a matter of statewide concern and is therefore preempted by a state statute pertaining to the carrying of a concealed weapon. This state statute is 1965 Perm.Supp., C.R.S. 1963, 40-11-1.

We affirm the district court's reversal of the respondent's conviction but do so on the ground that the Lakewood ordinance is

D.Ct. conv. reversed on overbreadth grounds, not rt to bear arms.

unconstitutionally overbroad. It is therefore unnecessary to discuss the failure of proof issue; moreover, this case is not a suitable vehicle for a consideration of the preemption issue. Our decision to resolve this case in this manner was prompted to some degree by statements made by counsel for the City of Lakewood during oral argument. He conceded that the ordinance lacked specificity in certain respects and that a replacing ordinance was in the process of preparation.

The subject Lakewood ordinance is numbered 0-70-47, Sec. 3-9 and is set forth in full as follows:

> "*Unlawful to Possess, Carry or Use Dangerous or Deadly Weapons.* (a) It shall be unlawful for any person to have in his possession, except within his own domicile, or to carry or use, a revolver or pistol, shotgun or rifle of any description, which may be used for the explosion of cartridges, or any air gun, gas operated gun or spring gun, or any bow made for the purpose of throwing or projecting missiles of any kind by any means whatsoever; provided that nothing in this section shall prevent use of any such instruments in shooting galleries or ranges under circumstances when such instruments can be fired, discharged or operated in such manner as not to endanger persons or property and also in such manner as to prevent the projectile from traversing any grounds or space outside the limits of such gallery or range; and provided further, that nothing herein contained shall be construed to prevent the carrying of any type of gun, when unloaded, or any bow, to or from any range, gallery or hunting areas. (b) Nothing in this section shall prevent the possession or use of any of said instruments by persons duly licensed for such purpose by the City of Lakewood. (c) Nothing in this section shall prevent the use of or possession of any said instrument by law enforcement personnel."

[1] An analysis of the foregoing ordinance reveals that it is so general in its scope that it includes within its prohibitions the right to carry on certain businesses and to engage in certain activities which cannot under the police powers be reasonably classified as unlawful and thus, subject to criminal sanctions. As an example, we note that this ordinance would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on a substantial part of their business. Also, the ordinance appears to prohibit individuals from transporting guns to and from such places of business. Furthermore, it makes it unlawful for a person to possess a firearm in a vehicle or in a place of business for the purpose of self-defense. Several of these activities are constitutionally protected. Colo.Const. art. II, § 13. Depending upon the circumstances, all of these activities and others may be entirely free of any criminal culpability yet the ordinance in question effectively includes them within its prohibitions and is therefore invalid. Shuttlesworth v. Birmingham, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965); Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948); People of the City of Detroit v. Sanchez, 18 Mich.App. 399, 171 N.W.2d 452 (1969).

[2,3] A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1963); NAACP v. Alabama, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964). Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Aptheker v. Sec-

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

Judgment affirmed.

Minnie May CUNNINGHAM, Plaintiff-Appellant,

v.

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

No. 72-068.

(Supreme Court No. 24727.)

Colorado Court of Appeals.
Div. II.

June 6, 1972.

Rehearing Denied June 27, 1972.

Certiorari Granted Oct. 24, 1972.

Selected for Official Publication.

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

Reversed and remanded for new trial.

1. Trial ⚷9(1)

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

2. Adverse Possession ⚷106(5)

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

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

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

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

ENOCH, Judge.

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

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

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

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

R CURIAM.

: plaintiffs-appellants, Robert J. and :ia A. Luby, allege they were damby the conduct of defendants-appel- CBS Real Estate Company, Madeline y, and Jeannie Neff. The district sustained the demurrer of the de- ıts on the basis that as real estate sionals they were entitled to the pro- of the 2-year period of limitations ble to professionals, embodied in ev.Stat. § 25-222 (Reissue 1985). *Zoucha*, 226 Neb. 476, 412 N.W.2d 87), holds that real estate brokers : professionals within the meaning statute. Accordingly, the judgment listrict court is hereby reversed, and se is remanded for further proceed-

SED AND REMANDED FOR FURTHER INGS.

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

STATE of North Dakota, Plaintiff and Appellee,

v.

Elliot C. RICEHILL, Defendant and Appellant.

Cr. No. 870064.

Supreme Court of North Dakota.

Nov. 19, 1987.

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

Affirmed.

1. Weapons ⇐2

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

2. Weapons ⇐3

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

3. Criminal Law ⇐998(16)

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

4. Criminal Law ⇐1134(3)

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

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

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

VANDE WALLE, Justice.

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

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

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

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

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

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

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

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

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

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

I

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

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

> "All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; *and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.*" [Emphasis added.]

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

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

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

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

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

TREASURY DEPARTMENT LIBRARY

: subpoena, denying Ricehill the testi- of a crucial witness.

I

first consider Ricehill's argument Section 62.1-02-01(1) is unconstitution- cause it violates his right to keep and arms under Article I, Section 1, North ta Constitution. Section 62.1-02-01(1) bits a person previously convicted of a y involving violence or intimidation owning or possessing a firearm for a d of 10 years from the date of convic- or release, whichever is the latter.[2] In case it was alleged that Ricehill pos- d a revolver within 10 years of his se from an Iowa correctional facility hich he had been sentenced on a ge of murder in the second degree.

ticle I, Section 1, of the North Dakota titution contains a guarantee of the to keep and bear arms. This section des:

'All individuals are by nature equally e and independent and have certain lienable rights, among which are se of enjoying and defending life and erty; acquiring, possessing and pro- ting property and reputation; pursu- ; and obtaining safety and happiness; *d to keep and bear arms for the fense of their person, family, proper- and the state, and for lawful hunt- g, recreational, and other lawful pur- ses, which shall not be infringed.*" mphasis added.]

e guarantee of the right to keep and arms was only recently added to the h Dakota Constitution. The empha- l language above was added by means initiated amendment in November of . This case presents the first occasion his court to interpret this provision of North Dakota Constitution.[3]

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

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

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

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

"Right to bear arms. The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons." *Blue*, 544 P.2d at 390, quoting Art. II, § 13, Colo. Const.

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

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

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

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

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

n *State v. Swanson*, 407 N.W.2d 204 (N.D. 7), we considered the dismissal by the trial rt of a criminal complaint charging reckless endangerment on the basis of the right to bear arms. In *Swanson*, we declined to address the constitutional issue because we determined that the trial court erred in dismissing the complaint and that the right-to-bear-arms issue could not be resolved apart from facts which had yet to be determined.

> *ple v. Trujillo,* 178 Colo. 147, 497 P.2d 1 [1978].
>
> "To be sure, the state legislature cannot, in the name of the police power, enact laws which render nugatory our Bill of Rights and other constitutional protections. But we do not read this statute as an attempt to subvert the intent of Article II, Section 13. The statute simply limits the possession of guns and other weapons by persons who are likely to abuse such possession." 544 P.2d at 390–391. [Citations omitted.]

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

[2] Therefore, we hold that Section 62.1–02–01(1) does not violate the right to keep and bear arms in Article I, Section 1, of the North Dakota Constitution.

II

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

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

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

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

TREASURY DEPARTMENT LIBRARY

In the present case, had Publishers made a reasonable inquiry and informed Stevens that the inquiry was in preparation for its purchase of the timberland from Fernandez, then Stevens would have informed Publishers that plaintiffs held a mortgage on the timberland and had a "standard timber restriction" clause covering the land. The discovery of these facts would have immediately informed both parties that Fernandez was defrauding plaintiffs. Publishers is therefore charged with knowledge of the fraud because it would have learned of the fraud had it made a reasonable inquiry. *Murray v. Wiley, supra* at 407.

We therefore conclude that Publishers failed to sustain its burden of proving its affirmative defense. Publishers was not entitled to the status of a bona fide purchaser without notice.

Affirmed.

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Respondent,
v.
RANDY KESSLER,
Petitioner.

(TC DA 160004-7811, CA 14296, SC 26705)

On review from the Court of Appeals.*

Argued and submitted March 4, 1980.

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

W. Benny Won, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief was James A. Redden, Attorney General, and Walter L. Barrie, Solicitor General, Salem.

Before Denecke, Chief Justice, and Tongue, Howell, Lent and Peterson, Justices.

LENT, J.

Affirmed in part, reversed in part.

*Appeal from Circuit Court, Multnomah County Philip T. Abraham, Judge 43 Or App 303, 602 P2d 1096 (1979).

STATE v. KESSLER, 289 Or. 359 (1980)

614 P.2d 94

LENT, J.

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

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

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

(a) To whom does the right belong?

(b) What is the meaning of "defense of themselves"?

(c) What is the meaning of "arms," and what, if any, weapons of current usage are included in this term?

The scope of Article I, section 27, has not previously been analyzed by Oregon courts.[3] The decisions construing the second amendment to the United

---

[1] ORS 166.510(1) provides:

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

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

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

[3] In *State v. Robinson*, 217 Or 612, 619, 343 P2d 886 (1959) this court held that ORS 166.270 which prohibits ex-convicts from possessing concealed weapons did not violate Article I, section 27, of the Oregon Constitution. Accord, *State v. Cartwright*, 246 Or 120, 134-137, 418 P2d 822 (1967).

States Constitution are not particularly helpful because the wording of the second amendment differs substantially from our state provision. The second amendment has not yet been held to apply to state limitations on the bearing of arms.[4] The wording of Oregon's right to bear arms provision also differs from many other state constitutional provisions.[5]

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

---

[4] The second amendment to the United States Constitution provides:

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

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

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

I. *The historical background*

The first article of Oregon's constitution of 1859 contains the state's bill of rights. Article I, section 27, regarding the right to bear arms was taken verbatim from sections 32 and 33 of the Indiana Constitution of 1851. C. Carey, *A History of the Oregon Constitution* 469 (1926); Palmer, *The Sources of the Oregon Constitution,* 5 Or L Rev 200, 202 (1926).

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

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

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

James II, a Catholic king, ascended the English throne in 1685 amidst domestic religious controversy between the Catholics and Protestants. James II established a strong standing army which he

---

[6] *See generally,* B. Schwartz, *The Great Rights of Mankind* 1-38 (1977); Feller and Gotting, *The Second Amendment: A Second Look, 61 Northwestern U L Rev* 46, 47-58 (1966).

quartered in private homes. He sought to repeal certain laws of Parliament which barred Catholics from public offices. The Protestants revolted in the "Glorious Revolution" of 1688 and succeeded in deposing James II and bringing to power the king's Protestant daughter, Mary, and her husband, William of Orange. William and Mary were offered the crown in 1689 on condition that they sign the Declaration of Rights. The Declaration was later enacted as a statute, which was divided into two parts, first listing the allegedly illegal actions of James II, then declaring the rights of the people. The first part stated that James II:

> "* * * did endeavor to subvert and extirpate the Protestant Religion and the Laws and Liberties of this Kingdom * * *.
>
> "5. By raising and keeping a Standing army within this Kingdom in Time of Peace without Consent of Parliament and quartering Soldiers contrary to Law.
>
> "6. By causing several good Subjects, being Protestants, to be disarmed at the same Time when Papists were both armed and employed contrary to Law."

The parallel provisions of the declaration of rights provided:

> "* * * 6. That the raising or keeping a Standing Army within the Kingdom unless it be with the Consent of Parliament is against Law.
>
> "6. That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law."[7]

Historians have noted that the early colonial legislatures perceived themselves as descendants of the House of Commons who shared many of the same political experiences of their 17th century English counterparts. See B. Schwartz, *The Great Rights of Mankind* 15, 31-32 (1977). The French and Indian War ending in 1763 brought large numbers of British

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

soldiers to the colonies. King George III maintained and increased these standing armies following that war, and ordered the troops to be quartered in private homes. The colonists who were accustomed to relying on their own citizen militias viewed the standing armies as an unlawful instrument of oppression. *See* Weatherup, *Standing Armies and Armed Citizens; An Historical Analysis of the Second Amendment,* 2 Hastings Const L Q 961, 975-978 (1975). The state constitutions drafted in the revolutionary war era therefore included provisions guaranteeing the right to bear arms and prohibiting standing armies in time of peace. The relevant provisions of the English Bill of Rights of 1689 provided a useful model for the colonial drafters.

II. *The Oregon right to bear arms*

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

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

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

> "Sec. 23. That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned. "Sec. 24. That no standing army shall, in time of peace, be kept up, without the consent of the legislature; and the military shall, in all cases and at all times, be in strict subordination to the civil power."

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

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

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

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

(Continued on following page)

state" appears in the present day constitutions of Oregon, Indiana, and six other states.[9] The language is subject to varying interpretations. It has been suggested that the language includes three separate justifications for a state constitutional right to bear arms: (a) The preference for a militia over a standing army; (b) the deterrence of governmental oppression; and (c) the right of personal defense.[10]

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

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

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

(Continued from previous page)

"That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power."

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

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

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

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

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

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

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

"Defense of themselves" has also been said to include an individual's right to bear arms to protect his person and home. *Schubert v. DeBard*, Ind , 398 NE2d 1339, 1341 (1980) (Indiana constitution provides citizenry the right to bear arms for their personal self-defense). Self-defense has been recognized as a privilege in both civil and criminal law since about 1400 in England and at all times in the United States.[13] Although the right to bear arms for self protection does not appear to have been an important

[12] *See* text accompanying note 7 *supra*.

[13]

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

development in England, the justification for a right to bear arms in defense of person and home probably reflects the exigencies of the rural American experience. *See People v. Brown, supra. Cf., Matthews v. State,* 237 Ind 677, 689-692, 148 NE2d 334, 339-341 (1958) (Emmert, C. J., dissenting) (constitutional guarantee based on historical necessity for personal defense.)[14]

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

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

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

[14] *Compare* the provisions in several state constitutions which guarantee that a person has the right to bear arms "in defense of his home, person and property." Colo Const, Art II, § 13; Miss Const, Art III, § 12; Mo Const, Art I, § 23; Mont Const, Art III, § 13; Okla Const, Art II, § 26; *State v. Nickerson,* 126 Mont 157, 247 P2d 188 (1952) (defendant cannot be convicted of assault if he pointed a loaded gun at a trespasser in his home); *accord, State v. Pleasant,* 356 Mo 90, 195 SW2d 495 (1946).

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

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

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

The constitutional guarantee that persons have the right to "bear arms" does not mean that all individuals have an unrestricted right to carry or use personal weapons in all circumstances. For example,

the danger of firearms was recognized shortly after the development of gunpowder. The English Statute of Northampton in 1327 forbade persons to ride at night carrying a firearm for the purpose of terrifying the people.[15] A 1678 Massachusetts law forbade shooting near any house, barn, garden, or highway in any town where a person may be "killed, wounded, or otherwise damaged."[16] The courts of many states have upheld statutes which restrict the possession or manner of carrying personal weapons. The reasoning of the courts is generally that a regulation is valid if the aim of public safety does not frustrate the guarantees of the state constitution. For example, many courts have upheld statutes prohibiting the carrying of concealed weapons, *see, e.g., State v. Hart,* 66 Idaho 217, 157 P2d 72 (1945); and statutes prohibiting possession of firearms by felons, *see, e.g., State v. Cartwright,* 246 Or 121, 418 P2d 822 (1966).

III. *The present case*

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

The defendant was charged with disorderly conduct, ORS 166.025, and possession of a slugging weapon, ORS 166.510. The matter went to trial with-

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

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

out a jury. The defendant at trial demurred to and moved to dismiss the second charge on the grounds that it failed to state a crime. The motion was denied and the defendant was found guilty as charged on both counts.

The defendant appealed to the Court of Appeals, contending first that his acts did not amount to the crime of disorderly conduct, and second that the statute prohibiting possession of billy clubs, ORS 166.510(1), violates Article I, section 27, of the Oregon Constitution. The Court of Appeals did not consider defendant's first contention because it was not raised at trial.[17] The Court of Appeals held that ORS 166.510(1) was within the reasonable exercise of the "police power" of the state to curb crime. 43 Or App 303, 307, 602 P2d 1096 (1979).

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

The club is considered the first personal weapon fashioned by humans. O. Hogg, *Clubs to Cannon* 19 (1968). The club is still used today as a personal

[17] The general rule in both civil and criminal cases is that a question not raised and preserved in the trial court will not be considered on appeal. *State v. Abel,* 241 Or 465, 467, 406 P2d 902 (1965). Failure to raise an objection in trial court does not automatically preclude appellate review. The defendant's contention that his acts did not constitute the crime of disorderly conduct, however, does not present the exceptional circumstance or manifest error which justifies this court's consideration of such a claim. It follows that defendant's conviction of disorderly conduct is affirmed. Note that this case is not concerned with that aspect of the statute prohibiting disorderly conduct which we held to be unconstitutional in *State v. Spencer,* 289 Or 225, ___ P2d ___ (1980).

weapon, commonly carried by the police. ORS 166.510 prohibits possession of a "billy;" however, ORS 166.520 states that peace officers are not prohibited from carrying or possessing a weapon commonly known as a "blackjack"[18] or "billy."

The statute in this case, ORS 166.510, prohibits the mere possession of a club. The defendant concedes that the legislature could prohibit carrying a club in a public place in a concealed manner, but the defendant maintains that the legislature cannot prohibit all persons from possessing a club in the home. The defendant argued that a person may prefer to keep in his home a billy club rather than a firearm to defend against intruders.

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

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

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

Vol. 80 August 4, 1980 No. 24

COURT OF APPEALS REPORTS

47 OR APP 1 — 108

CASES DECIDED
by the
COURT OF APPEALS

ious that the trial
on in failing to ex-
er Alaska Rule of
gree. We believe
highly probative of
athalyzer reading.
ne that evidence of
tic driving tended
y as a drunk driv-
a portrayal was a
he prosecution in
s not the kind of
Rule 403 seeks to
a jury on grounds
elements of the

it the trial court
he "breathalyzer
record exception
iska Rule of Evi-
nds that Alaska
b)(i–iii) precludes
exception to vali-
the breathalyzer
his argument in
127 at 4–9 (Alaska

upon the decision
ourt in *Wester v.*
aska 1974), *cert.*
Ct. 60, 46 L.Ed.2d
ate, 609 P.2d 555
nized that those
the effective date
, but noted that
repared the com-
iles of Evidence,
ably would have
y under the rule,
ould appear that
with the *Wester*

t that Salzberg's
te his belief that
exception to the
napplicable, the
might be appli-
decision in *Hug-*
on the commen-
retation of the

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

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

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

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

The judgment of the district court is AFFIRMED.

ANCHORAGE, A Municipal Corporation, Appellant,

v.

Gregory RICHARDS, Appellee.

ANCHORAGE, A Municipal Corporation, Appellant,

v.

Douglas R. PHILLIPS, Appellee.

ANCHORAGE, A Municipal Corporation, Appellant,

v.

Michael B. PHELPS, Appellee.

ANCHORAGE, A Municipal Corporation, Appellant,

v.

Edward A. KEGLER, Appellee.

Nos. 6387, 6459, 6504 and 6540.

Court of Appeals of Alaska.

Nov. 19, 1982.

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

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

Judgment reversed and remanded.

1. Municipal Corporations ⇐592(1)

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

2. Municipal Corporations ⇐592(1)

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

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

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

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

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

OPINION

SINGLETON, Judge.

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

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

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

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

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

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

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

Article 10, section 11 provides in relevant part:

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

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

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

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

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

Police, NRA Brace for Rematch on Gun Control

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

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

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

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

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

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

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

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

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

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

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

—By Nadine Cohodas

NRA Wants to Lift Ban on Machine Guns

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

—Cornelius J. Behan, Baltimore police chief

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

Battle Preparations

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

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

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

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

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

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

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

Copyright 1987 Congressional Quarterly Inc.
Reproduction prohibited in whole or in part except by editorial clients

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

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

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

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

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

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

New Definitions, New Allies

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

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

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

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

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

The Agenda

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

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

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

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

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

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

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

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

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

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

—James J. Baker,
National Rifle Association

Handgun Fight Less Predictable

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

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

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

Now the police are ready for a rematch on handguns.

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

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

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

Other Firearms Issues

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

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

Copyright 1987 Congressional Quarterly Inc.
Reproduction prohibited in whole or in part except by editorial clients

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

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

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

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

Other firearms issues likely to emerge in this Congress include:

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

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

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

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

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

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

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

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

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

Battles in Local Jurisdictions

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

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

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

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

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

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

Hastings Responds to Charges

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

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

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

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

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

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

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

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

Copyright 1987 Congressional Quarterly Inc
Reproduction prohibited in whole or in part except by editorial clients

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, Coloradò, 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.

SJR 15

STATE CONSTITUTIONAL GUARANTEES ON THE RIGHT TO KEEP AND BEAR ARMS

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

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

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

Arizona: The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. Article 2, Section 26.

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

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

Connecticut: Every citizen has a right to bear arms in defense of himself and the state. Article I, Section 15.

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

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

Hawaii: A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. Article I, Section 15.

Idaho: The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person, nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent passage of legislation providing penalties for the possession of firearms by a convicted

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

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

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

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

Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: *** 7. The right to bear arms in defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons. Kentucky Bill of Rights, Section I, para. 7.

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

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

Massachusetts: The people have a right to keep and bear arms for the common defense. And as, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it. Massachusetts Declaration of Rights, Part I, Article XVII.

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

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

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

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

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

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

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

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

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

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

Ohio: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power. Article I, Section 4.

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

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

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

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

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

South Carolina: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law. Article I, Section 20.

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

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

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

Utah: The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the State, as well as for the other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms. Article I, Section 6.

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

Virginia: That a well regulated militia, composed of the

body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power. Article I, Section 13.

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

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

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

STATES WITHOUT CONSTITUTIONAL PROVISIONS:

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

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

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: 1

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

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

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

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

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

> the drafter intended "arms" to include the hand-carried weapons commonly used by individuals for personal defense. The club is an effective, hand-carried weapon which cannot logically be excluded from this term. We hold that the defendant's possession of a billy club in his home is protected by Article I, section 27, of the Oregon Constitution. [614 P.2d at 100.]

The Delgado case involved possession of a switchblade.

> The appropriate inquiry in the case at bar is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary or postrevolutionary era, or in 1859 when Oregon's consti-

> tution was adopted. In particular, it must be determined whether the drafters would have intended the word "arms" to include the switch-blade knife as a weapon commonly used by individuals for self defense. [692 P.2d at 612.]

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

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

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

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

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

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

III. Elimination of militia concepts.

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

SECTION 19. RIGHT TO BEAR ARMS. The [A WELL-REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right of the people to keep and bear arms shall not be infringed.

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

If I may be of further assistance, please advise.

RAB:mkr
m5/046

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
[illegible]

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 Apr [illegible]0 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 <u>a ballot title and proposition summarizing each proposed amendment</u>, and shall place them on the ballot for the next general election. * * *

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

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

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

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

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

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

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

If I may be of further assistance, please advise.

RAB:ml
095/m5

Municipality of Anchorage

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

TONY KNOWLES,
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

February 25, 1986

TO: Members of the Senate Judiciary Committee

Re: Senate Joint Resolution No. 39

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

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

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

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

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

Very truly yours,

DEPARTMENT OF LAW

Jerry Wertzbaugher
Municipal Attorney

JW:gml

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Bill Sheffield Governor

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

June 27, 1983

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

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

Dear Senator Rodey:

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

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

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

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

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

03-C5LH