

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672

5120 HSTA SJR 15

69

SJR

15

HOUSE STATE AFFAIRS COMMITTEE

NEXT COMMITTEE: JUDICIARY

BILL: SJR 15

CURRENT VERSION: HCR CS SJR 15 (SA)

SCHEDULED:

SPONSOR: RODEY

PHONE NO: 3793

CONTACT FILE: \LLSA\SJR15.DBF

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

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

AFFECTED AGENCIES:

<u>DEPARTMENT</u>	<u>CONTACT/PHONE</u>	<u>COMMENT</u>
ELECTIONS	LINDA EDGEWORTH/4611	
LAW	STAPHANIE JOANVIDES/3'28	
P.S.	HORETSKI/4322	

FISCAL NOTES

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

ACTION

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

7. Rup Andrews  
Alaska Field Representative  
National Rifle Association  
Juneau, AK  
789-7422  
Supports SJR 15
10. Glenn Herbs  
Chief of Police  
City of Dillingham  
Box 869  
Dillingham, AK 99576  
842-5354  
Send minutes
3. Stephanie Joannides  
Department of Law  
P.O. Box KC  
Juneau, AK 99811  
465-3428  
Provided background on SJR 15
11. Carrie D. Longoria  
STAR  
3925 Reka Drive  
Anchorage, AK  
276-7279
6. Senator Pat Rodey  
P.O. Box V  
Juneau, AK 99811  
465-3793  
Prime sponsor of SJR 15
9. Rep. C.E. Swackhammer  
P.O. Box V  
Juneau, AK 99811  
465-2689  
Testified on SJR 15
2. Jerry Gertner  
Juneau Rifle & Pistol Range  
8409 Nugget Drive  
Juneau, AK 99801  
789-6904(W) or 789-4676(H)
4. Gayle Horetski  
Deputy Commissioner  
Department of Public Safety  
P.O. Box N  
Juneau, AK 99811  
465-4322
1. Ed Kalwara  
State President  
Alaska Peace Officers Ass'n.  
2760 Sherwood Lane  
Juneau, AK 99801  
789-2165(W) or 789-0036(H)  
Opposed to SJR 15
12. Captain Kevin O'Leary  
Anchorage Police Department  
Anchorage, AK  
786-8758
8. Ron Somerville  
Alaska Outdoor Council  
3780 McGinnis Drive  
Juneau, AK 99801  
789-2399  
Supports SJR 15
5. Duane Udland  
Vice President  
Alaska Chief of Police Ass'n.  
P.O. Box 2499  
Soldotna, AK 99669  
262-4455  
Opposed to SJR 15; send tape

STATE OF ALASKA  
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY  
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May, 1988

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

Mary Van Nimwegen

House State Affrs:

2/17/88

2/29/88

3/02/88

3/09/88



Official Business

# Alaska State Legislature

## House

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

### STATE AFFAIRS COMMITTEE

SJR 15

#### FILE CONTENTS

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2. LETTER TO REPRESENTATIVE ULMER FROM GOVERNOR'S CRIMINAL JUSTICE WORKING GROUP, DATED JANUARY 14, 1988
- 2A. "KIDS: DEADLY FORCE," NEWSWEEK MAGAZINE, JANUARY 11, 1988
- 2B. LETTER TO REPRESENTATIVE ULMER FROM ED KALWARA, ALASKA PEACE OFFICERS ASSOCIATION, DATED FEBRUARY 15, 1988
- 2C. LETTER TO REPRESENTATIVE ULMER FROM ALAN KRAFT, ANCHORAGE POLICE DEPARTMENT EMPLOYEES ASSOCIATION
3. COMMENTARY ON PROPOSED AMENDMENT TO ALASKA RIGHT TO BEAR ARMS GUARANTEE
4. PACKET PROVIDED BY RUPE ANDREWS, ALASKA FIELD REPRESENTATIVE, NATIONAL RIFLE ASSOCIATION (NRA)
5. ALASKA FIREARMS LAWS, COMPILED BY NATIONAL RIFLE ASSOCIATION (NRA) INSTITUTE FOR LEGISLATIVE ACTION
6. STATE CONSTITUTIONAL GUARANTEES ON THE RIGHT TO KEEP AND BEAR ARMS, PROVIDED BY THE NATIONAL RIFLE ASSOCIATION (NRA)
7. LETTER TO SENATOR KERTTULA FROM RUPE ANDREWS, ALASKA FIELD REPRESENTATIVE, NATIONAL RIFLE ASSOCIATION
8. LETTER TO JOE GELDHOF FROM ROBERT DOWLUT, DEPUTY GENERAL COUNSEL, NATIONAL RIFLE ASSOCIATION
9. OKLAHOMA CITY UNIVERSITY LAW REVIEW, STATE CONSTITUTIONS AND THE RIGHT TO KEEP AND BEAR ARMS, WRITTEN BY ROBERT DOWLUT AND JANET KNOOP

#### FISCAL NOTE

- A. DIVISION OF ELECTIONS: \$2,200

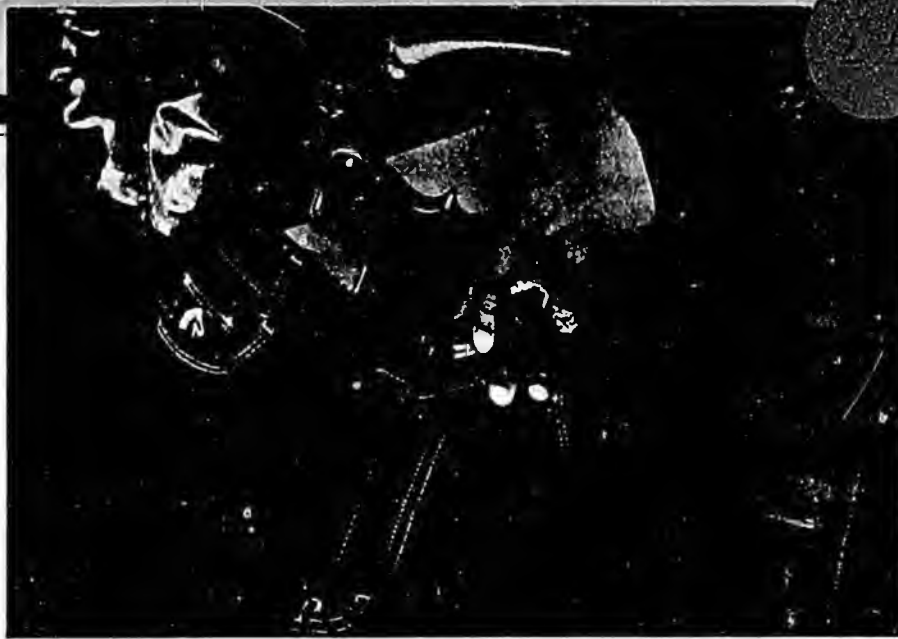
ing in stealth tactics, night rescues and infiltration. "We need to teach these high-school graduates with their football letters from East Cupcake, Neb., a little bit about being streetwise," he barks. From now on, all Marine sentries will carry loaded rifles—one way to possibly avoid a recurrence of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

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

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

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

RICHARD SANDZA at Cherry Point, N.C.



MARTY KATZ

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

## Kids: Deadly Force

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

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

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

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

These were not isolated incidents. All across America, the number of kids using—and being harmed by—guns is rising at an alarming rate. According to the U.S. Department of Justice, more than 27,000 youths between 12 and 15 were handgun victims in 1985 (the most recent figures), up from an average of 16,500 for each of the three previous years. But officials admit that as grim as those statistics are, they grossly understate the extent of the problem. In recent years, city streets have become flooded with unregistered and untraceable handguns, available to anyone of any age with a bit of cash. In New York,

revolvers can be bought on street corners for as little as \$25. Some dealers are even willing to "rent" a gun for an evening, deferring payment until the teen can raise money through muggings and robberies. Youth gangs in Los Angeles protect their turf with black-market Uzi submachine guns and Russian-made AK-47 assault rifles, easily financed by the crack trade. Children who live outside urban areas have an even cheaper source of firearms: dad's closet. In California, 38 percent of all households contain a gun. Often, parents don't realize that their .357 magnum or shotgun is missing. "Guns seem to be enjoying a new chic," says handgun expert Garen Wintemute, a Sacramento physician. "The increased prevalence of gun carrying among students is reflective of an increased general interest in guns in this country."

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

Cities with far fewer gun incidents than



MARK RICHARDS—PICTURE GROUP



MARK RICHARDS—PICTURE GROUP

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



Trying to teach a lesson: Baltimore poster

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

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

Much of the increase in gun use stems from urban crack trade. "These [crack]

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

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

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

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

# ALASKA PEACE OFFICERS ASSOCIATION

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



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M. James Messick

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February 15, 1988

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

Dear Fran:

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

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

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

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

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

The Honorable Fran Ulmer  
February 15, 1988  
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If you have any further questions, please contact me.

Sincerely,

*Ed Kalwara*

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

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

Governor's Criminal Justice Working Group

January 14, 1988

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

Dear Representative Ulmer:

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

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

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

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

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

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

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

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

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

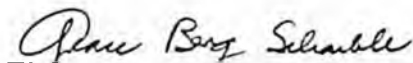
As a general rule, a statute or constitutional provision will be interpreted according to the plain meaning of the language on its face. If the intent behind the adoption of the amendment were to later become an issue, it is the intent of the voters who adopted the measure, rather than the intent of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

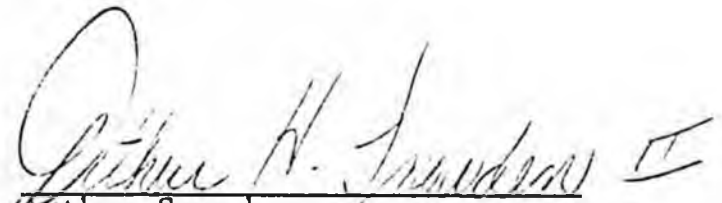
Principles of both common sense and responsible draftsmanship dictate that a well-drafted statute or constitutional provision should reduce the need for disputes about

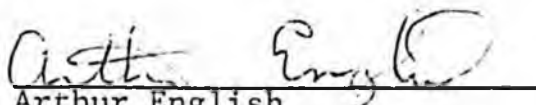
interpretation. Statements of "legislative intent" are not an adequate substitute for clear, unambiguous language in the proposed constitutional amendment. A more precisely drafted amendment would minimize the possibility that, should the proposed constitutional amendment be adopted, a criminal defendant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


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

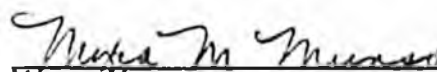
Sincerely yours,


  
\_\_\_\_\_  
Grace Berg Schaible  
Attorney General

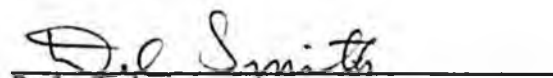
  
\_\_\_\_\_  
Arthur Snowden  
Administrative Director  
Alaska Court System

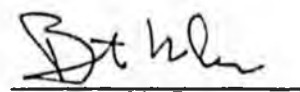
  
\_\_\_\_\_  
Arthur English  
Commissioner  
Department of Public Safety

  
\_\_\_\_\_  
Dana Fabe  
Public Defender

  
\_\_\_\_\_  
Myra Munson  
Commissioner  
Department of Health &  
Social Services

  
\_\_\_\_\_  
Susan Humphrey-Barnett  
Commissioner  
Department of Corrections

  
\_\_\_\_\_  
Del Smith  
President  
Alaska Association of Chiefs  
of Police

  
\_\_\_\_\_  
Brant McGee  
Public Advocate

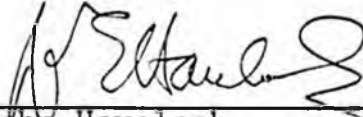
The Honorable Fran Ulmer  
Chair, State Affairs Committee

January 14, 1988  
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Harold M. Brown  
Executive Director  
Alaska Judicial Council



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John Havelock  
Consultant on Criminal  
Justice Planning

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

30

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

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

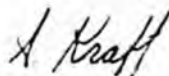
Dear Representative Ulmer,

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

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

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

Sincerely,



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

JY:lgd

**DEPARTMENT OF LAW**

OFFICE OF THE ATTORNEY GENERAL

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

May 8, 1986

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

Dear Representative Miller:

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

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

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

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

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

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

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

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

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

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

The courts may also consider the history of legislative action taken on a given measure when determining legislative intent. Generally, the rejection of a proposed amendment indicates that the legislature did not intend the bill to include the provisions embodied in the rejected amendment. Lapina v. Williams, 232 U.S. 78, 58 L.Ed. 515, 34 S.Ct. 196 (1914); United States v. Great Northern Railway Co., 287 U.S. 144, 155, 77 L.Ed. 223, 53 S.Ct. 28 (1932); 2A C. Sands, Sutherland Statutory Construction § 48.04 at 302, § 48.18 at 341 (4th ed. 1984). Thus, a reviewing court may well conclude that if the legislature had intended to allow the continued regulation by law of some aspects of a person's right to possess arms it would have adopted the language proposed by Senator Fischer during the Senate's consideration of the resolution. See, e.g., North Slope Borough, 585 P.2d at 541; Wilson, 669 P.2d at 1.

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

The Honorable M. Mike Miller  
Alaska State Legislature

May 8, 1986  
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guidance for interpretation. 2A C. Sands, Sutherland Statutory Construction § 48.04 at 301, § 48.19 at 345 (4th ed. 1984); State v. Lewis, 559 P.2d 630, 637-638 (Alaska 1977), cert. denied, 97 S.Ct. 2943, 432 U.S. 901, 53 L.Ed.2d 1073.

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

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

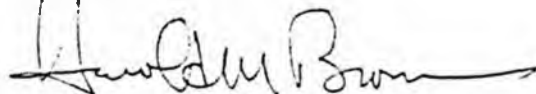
Principals of both common sense and responsible draftsmanship dictate that a well-drafted statute or constitutional provision should reduce the need for disputes about interpretation. 2A C. Sands, Sutherland Statutory Construction § 45.02 at 5 (4th ed. 1984). Statements of "legislative intent" are not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

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Harold M. Brown", with a long horizontal flourish extending to the right.

Harold M. Brown  
Attorney General

STATE OF ALASKA  
THE LEGISLATURE

HOLBY STATE CENTER  
JUNEAU ALASKA 99801  
907 465 1800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

April 30, 1986

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

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

FROM: Richard A. Bradley  
Legislative Counsel

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

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

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

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

SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The [A WELL REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right of each citizen of the state [THE PEOPLE] to keep and bear arms for lawful defense of self, family, property, and the state and for lawful hunting, recreation, and other lawful purposes, shall not be infringed by the state or by a borough or city of the state.

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

Representative M. Mike Miller  
Page 2  
April 30, 1986

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.

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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

Representative M. Mike Miller

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April 30, 1986

think it is fair to say that the amendment has a meaning and an understanding that is larger than 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:

Representative Mike Miller

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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  
m:5/046

STATE OF ALASKA  
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

HOUSE OF REPRESENTATIVES  
OFFICE OF THE CLERK  
1000 EAST BROADWAY  
ANCHORAGE, ALASKA 99501

MEMORANDUM

May 9, 1986

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

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

FROM: Richard A. Bradley  
Legislative Counsel

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

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

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

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

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

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

Rep. M. Mike Miller  
Page 2  
May 9, 1936

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

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

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

Sec. 15.58.020. CONTENTS OF PAMPHLET. Each election pamphlet shall contain

\* \* \*

(6) for each ballot proposition submitted to the voters by initiative or referendum petition or by the legislature,

\* \* \*

(C) a neutral summary of the proposition prepared by the Legislative Affairs Agency:

\* \* \*

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

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

If I may be of further assistance, please advise.

PAB:mi  
091 mi

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

February 25, 1936  
Page 2

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

constitutional clauses relating to arms from the thirty-seven states which have such constitutional language are as follows:

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

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

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

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

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

→ Connecticut: Every citizen has a right to bear arms in defense of himself and the state. CONN. CONST. art. I, § 15.

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

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

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

Idaho: The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation

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

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

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

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

Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: ...The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons. KY. CONST. § 1.

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

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

Massachusetts: The people have a right to keep and bear arms for the common defence. And as, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it. MASS. CONST. pt. 1, art. 17.

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

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

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

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

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

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

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

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

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

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

South Carolina: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner not in time of war but in the manner prescribed by law. S.C. CONST. art I, § 20.

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

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

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

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

Vermont: That the people have a right to bear arms for the defence of themselves and the State-and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should b kept under strict subordination to and governed by the civil power. VT. CONST. ch. 1, art. 16.

Virginia: That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the

people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that all cases the military should be under strict subordination to, and governed by, the civil power. VA. CONST. art. I, § 13.

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

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

In addition, thirteen states do not have express constitutional provisions related to the right to keep and bear arms.

I would be happy to discuss this matter with you in more detail.

Sincerely,



Norman C. Gorsuch  
Attorney General

NCG:ml

Distribution of

identical letter: The Honorable Jalmar M. Kerttula  
Alaska State Senate

The Honorable Rick Halford  
Alaska State Senate

The Honorable Don Bennett  
Alaska State Senate

# STATE OF ALASKA

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL

221 Skiffed, Clever

BOUCHER - STATE CAPITOL  
JUNEAU, ALASKA 99801  
PHONE: (907) 463-0000

March 26, 1986

RECEIVED

MAR 26 1986

Dept. of Law  
Administration

The Honorable Vic Fischer  
Alaska State Legislature  
P.O. Box 7  
Juneau, Alaska 99811

Re: S.J.R. 39

Dear Senator Fischer:

You have asked for the Department of Law's comments upon the current language of S.J.R. 39, a resolution proposing an amendment to Article I, sec. 19 of the state constitution, relating to a citizen's right to keep and bear arms. As I understand it, S.J.R. 39, as amended on the Senate floor yesterday, provides that art. I, sec. 19 of the Alaska Constitution will be amended to read:

SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The [A WELL-REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right of each citizen of the state [THE PEOPLE] to keep and bear arms for lawful defense of self, family, property, and the state and for lawful hunting, recreation, and other lawful purposes, shall not be infringed by a state or by a borough or city of the state.

We are concerned that the language presently contained in S.J.R. 39 might allow later constitutional challenge to some existing state statutes. Present law, for example, prohibits a convicted felon from possessing a concealable firearm, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shot guns, prohibits possession of a firearm while intoxicated, or the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.51.200-.220.)

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

The Honorable Vic Fischer

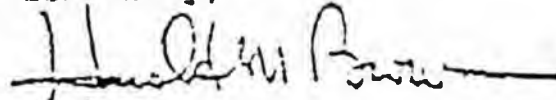
March 26, 1986  
Page -2-

those statutes unenforceable, nor to foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds, for example), than the legislature's intent to continue to allow reasonable regulation by law should be made clear. The possibility that the language proposed in S.J.R. 39 could be interpreted as invalidating some portions of Alaska's present criminal code is a real one. See, for example, State v. Kessler, 614 P.2d 94 (Ore. 1980), and State v. Balzano, 692 P.2d 310 (Ore. 1984).

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

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

Sincerely,



Harold M. Brown  
Attorney General

EMD:GMI:gb-12

Municipality  
of  
Anchorage



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

TONY KNOWLES,  
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

May 6, 1986

Members of the House Judiciary Committee

Re: SJR 39

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

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

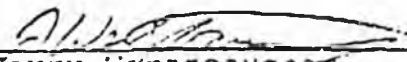
These statutes [that would be invalidated by SJR 39] serve an important public safety function by carefully regulating the possession of especially dangerous weapons or weapons

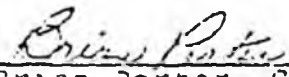
May 6, 1986  
Page 2

carried in an especially dangerous manner or place. If the legislature does not intend to render these statutes unenforceable, nor to foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds for example), then the legislatures intent to continue to allow a reasonable regulation by law should be made clear.

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

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

  
\_\_\_\_\_  
Jerry Hertzbauger  
Municipal Attorney

  
\_\_\_\_\_  
Brian Porter, Chief  
Anchorage Police Department

# Alaska State Legislature

## Committees:

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



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

## REPRESENTATIVE FRAN ULMER

March 30, 1988

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

Dear Duane:

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

Sincerely,

A handwritten signature in cursive script that reads "Fran".

Fran Ulmer  
Representative

# Soldotna Police Department

P. O. Box 2499  
Soldotna - Alaska 99669



Duane Udland  
Chief of Police

March 24, 1988

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

Dear Representative Ulmer

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

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

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

Good luck for the rest of the session and thanks.

Sincerely,

A handwritten signature in cursive script that reads "Duane S. Udland".

Duane S. Udland  
Chief of Police

# Alaska State Legislature

## Committees:

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



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

**REPRESENTATIVE FRAN ULMER**

March 30, 1988

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

Dear Del:

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

Sincerely,

A handwritten signature in cursive script that reads "Fran".

Fran Ulmer  
Representative

# Alaska Association Chiefs of Police



March 16, 1988

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

Dear Representative Ulmer,

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

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

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

Sincerely,

Del Smith, President  
Alaska Chiefs of Police Association

S.J.R. 15

March 11, 1988

Representative Ulmer:

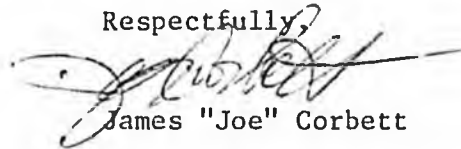
As a member of this community and a volunteer Hunter Safety Firearms Instructor for the State of Alaska, I recommend that you support the Constitutional Amendment -- S.J.R. 15.

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

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

As your constituent I urge you to please reconsider.

Respectfully,



James "Joe" Corbett

Box 211288

Auke Bay, Alaska

99821

March 15, 1988

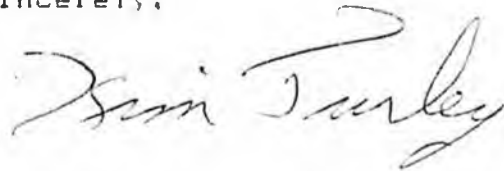
Representative Fran Ulmer  
102 Capitol  
P.O. Box V  
Juneau, Alaska 99811

Dear Representative Ulmer:

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

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

Sincerely,

A handwritten signature in cursive script that reads "Kim Turley". The signature is written in dark ink and is positioned below the word "Sincerely,".

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

March 11, 1988  
9139 Parkwood Drive  
Juneau AK 99801

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

Dear Representative Ulmer:

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

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

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

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

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

Sincerely yours,



Howard G. Beaver

789-3205

cc: Editor, The Juneau Empire

HGB/hb

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

March 7, 1988

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

Dear Rep. Ulmer:

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

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

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

Sincerely,

*Richard Goto*

RICHARD GOTO

11, MARCH 1988

Dear F. Ulmer,

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

Thank You

*PH 789-3366 work*  
*8212 Dogwood Ln*  
*JUNEAU AK, 99801*  
*Daniel J Hymer*

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

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

Dear Representative Ulmer,

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

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

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

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

Sincerely,  
Ron Hagerup

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

Box 188  
Douglas, Alaska, 99825  
Phone 364-2111 Days  
364-3406 Evenings  
March 8, 1986

Dear Representative Ulmer

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

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

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

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

Thanks

Respectfully

Jan C. Jell



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

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

Dear NRA Member:

February 25, 1988

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

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

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

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

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

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

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

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

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

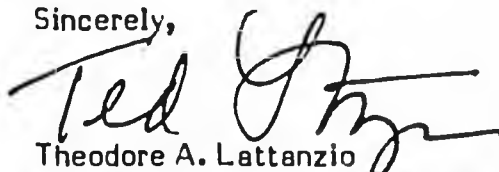
By acting today, you can help ensure the future of your firearms freedom in Alaska. By failing to take action, you will be giving a nod to the anti-gunners that your rights are open for attack. And you can be sure that the anti-gunners will seize every opportunity to harass Alaska sportsmen.

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

- ✓ **TELEPHONE STATE REPRESENTATIVE FRAN ULMER today**, urging her to allow a vote on S.J.R. 15. Follow-up in writing. Explain that you are a constituent and let her know that Alaska sportsmen need -- and deserve -- passage of S.J.R. 15 to ensure that your right to to keep and bear arms is not infringed. Representative Ulmer's address and phone number at home are: 1700 Angus Way, Juneau 99801; 5486-6523. Her address and phone number at the Capitol are: 102 Capitol, P.O. Box V, Juneau 99811; 465-4947.
- ✓ **WHILE TALKING TO REPRESENTATIVE ULMER**, remind her that the NRA has documented numerous court decisions pointing out that reasonable regulations will not be invalidated by S.J.R. 15. (Contact NRA State Liaison Brian Judy at (916) 446-2455 or NRA Field Representative Rupe Andrews at (907) 789-7422 if you would like to know more specific details.)
- ✓ **RECRUIT YOUR FAMILY, FRIENDS AND FELLOW SPORTSMEN** to join you in this critical effort and help send a clear message to Representative Ulmer that Alaska's gun owners are solidly in support of this bill.

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

Sincerely,



Theodore A. Lattanzio  
Director of State and Local Affairs

6 March 1988

To State Rep. Fran Umer:

Re, S.J.R. 15

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

The NRT has documented  
numerous court decisions point-  
ing out that reasonable regulations  
will not be invalidated by  
S.J.R. 15.

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

Thank you, I remain  
Your constituent  
Frank E Brown  
P.O. Box 32879  
Juneau AK 99803  
789-5552

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

3-7-88

Rep From Ulmer

Bx V, June 99811

Re: SJR 15

Dear Representative Ulmer,

1. See attached from NRA.
2. Pass SJR 15.
3. NRA maintains APOA held a position to you on a mistaken belief. Order them to appear before the committee and explain.
4. As an aside I'm really surprised (and afraid) of the AG's opinion - as stated in the last PT of pg 1. Rectify my fear by passing SJR 15.

Sincerely

Ronald G. Hansen



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

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

Dear NRA Member:

February 25, 1988

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

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

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

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

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

wow!

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

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

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

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

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

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

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

Sincerely,



Theodore A. Lattanzio  
Director of State and Local Affairs



# Alaska State Legislature

## House

Official Business

COMMITTEE ON STATE AFFAIRS

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

March 10, 1988

Jan Still  
Box 188  
Douglas, AK 99824

Dear Jan:

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

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

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

March 10, 1988

This does not constitute "bottling up" a resolution in committee. On the contrary, it should demonstrate to you my sincere interest in being fair to all those who would like to testify.

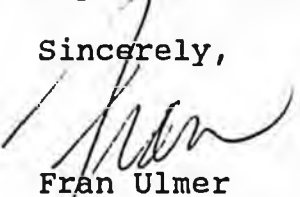
At the conclusion of the last hearing, I assured the sponsor I would bring the resolution back before the committee as soon as I could obtain some compromise language. We worked out an amendment and yesterday, March 9, the State Affairs Committee passed out a House Committee Substitute for CS SJR 15 which accommodates the concerns of law enforcement officials. I have enclosed a copy for your information, along with the letter from the Alaska Criminal Justice Working Group.

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

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

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

Sincerely,



Fran Ulmer  
Representative

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

6. Sue Arthur  
P.O. Box 32662  
Juneau, AK 99803
7. Bruce Bowler  
P.O. Box 244  
Juneau, AK 99802  
789-2582
3. Jay Davis  
4118 Aspen Avenue  
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789-6255(w) or 789-7688(h)  
Wants vote on SJR 15
2. Kelly Feathers  
P.O. Box 210743  
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16. Jan Still  
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Supports SJR 15
1. Mark Bellinger  
8453 Valley Avenue  
Juneau, AK 99801  
APOA member; no concealed weapons
15. Frank Brown  
P.O. Box 32879  
Juneau, AK 99803  
789-5552
10. Harry Day  
Box 021082  
Juneau, AK 99802
11. Dennis Grawcock  
P.O. Box 210831  
Auke Bay, AK 99821  
780-4334
12. Chuck Haywood  
P.O. Box 21566  
Juneau, AK 99801
5. Joe Merrill  
Box 465  
Douglas, AK 99824  
586-1447
4. Cliff Towle  
P.O. Box 33524  
Juneau, Ak 99803  
789-4600
8. Kevin Weir  
Box 494  
Douglas, AK 99824



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

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

Dear NRA Member:

February 25, 1988

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

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

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

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

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

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

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

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

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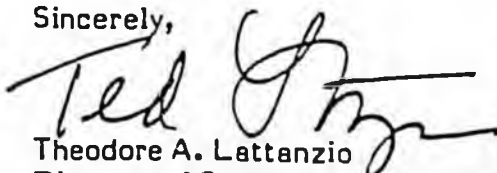
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Sincerely,



Theodore A. Lattanzio  
Director of State and Local Affairs

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

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

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

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

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

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

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

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

L.O. Bracken, 13910 Glacier Hwy., -Juneau, AK 99801  
(My typist is in Brett's Memorial today)



# OKLAHOMA CITY UNIVERSITY LAW REVIEW

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# OKLAHOMA CITY UNIVERSITY LAW REVIEW

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NUMBER 2

## ARTICLE

### STATE CONSTITUTIONS AND THE RIGHT TO KEEP AND BEAR ARMS

Robert Dowlut\*

Janet A. Knoop\*\*

#### I. INTRODUCTION

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

\* Robert Dowlut, B.S., Indiana University, 1975; J.D., Howard University, 1979; Member D.C. Bar.

\*\* Janet A. Knoop, B.A., College of New Rochelle, 1978; Cum Laude Graduate, J.D., Pace University, 1981; Member D.C. and N.Y. Bar.

1. See the Appendix: California, Delaware, Iowa, Maryland, Minnesota, Nebraska, New Jersey, New York, North Dakota, West Virginia, and Wisconsin do not have a specific guarantee to arms in their constitutions. However, six of those states guarantee to all persons the natural or inalienable right to self-defense. CAL. CONST. art. I, §1; IOWA CONST. preamble; IOWA CONST. art. I, §1; N.J. CONST. art. I, §1; N.D. CONST. art. I, §1; W. VA. CONST. art. III, §1. Two other states consider the right to life an inherent right. IOWA CONST. art. I, §1; WIS. CONST. art. I, §1. The natural right to defend one's life is usually not effectively exercised with bare hands. This right can only be given force and effect if its guarantee includes a right to own arms commonly possessed for defense or purposes. In *Commonwealth v. Hey*, 218 Pa. Super. 72, 272 A.2d 275, 276 (1971) (cited in other grounds), 419 Pa. 307, 292 A.2d 410 (1972), the court held that under the Pennsylvania Constitution, the right to self-defense and the right to bear arms each serves as an independent guarantee for a right to bear arms. However, the court acknowledged that such right is not unlimited.

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

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

3. See *Miller v. Texas*, 153 U.S. 535 (1894) (The second and fourth amendments only protect against infringement by national government), and *Presser v. Illinois*, 116 U.S. 252 (1886) (The second amendment restricts only the national government). But see *State v. Anonymous*, 179 Conn. 516, 519, 427 A.2d 403, 405 (1990); *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (en banc) (Buford, J., concurring); *Nunn v. State*, 1 Ga. (1 Kelly) 243 (1816); *In re Brickley*, 8 Idaho 597, 70 P. 609 (1902); *People v. Lisa*, 406 Ill. 419, 94 N.E.2d 320, 323 (1950); *State v. Chandler*, 5 La. Ann. 499, 490 (1850); *McKeller v. Mason*, 159 So. 2d 700, 702 (La. Ct. App. 1964), *aff'd*, 245 La. 1075, 162 So. 2d 571 (1964); *State v. Nickerson*, 126 Mont. 157, 247 P.2d 1eb, 192 (1952). The second amendment has generated considerable commentary. Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 Wis. & Mary L. Rev. 351 (1960); Sprecher, *The Lost Amendment*, 1pts. 1 & 2, 51 A. B. A. J. 554 (1965); 51 A. B. A. J. 665 (1965); Olds, *The Second Amendment and the Right to Keep and Bear Arms*, 46 Mich. St. B.J., Oct. 1967, at 15; Comment, *The Right to Keep and Bear Arms: A Necessary Constitutional Guarantee or an Outmoded Provision of the Bill of Rights?*, 31 Arb. L. Rev. 74 (1967); Levine & Saxe, *The Second Amendment: The Right to Bear Arms*, 7 Hof. L. Rev. 1 (1969); McClure, *Firearms and Federalism*, 7 Idaho L. Rev. 197 (1970); Hardy & Stompolo, *Of Arms and the Law*, 51 Chi. [Kent] L. Rev. 62 (1974); Weiss, *A Reply to Advocates of Gun-Control Law*, 52 J. Urb. Law 557 (1974); Whicker, *Historical Development and Subsequent Erosion of the Right to Keep and Bear Arms*, 78 W. Va. L. Rev. 171 (1976); Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L. J. 41 (1976); Caplan, *Handgun Control: Constitutional or Unconstitutional?*, 10 N.C. CEST. L. J. 53 (1978); Cantrell, *The Right to Bear Arms: A Reply*, 53 Wis. B. Bull. 9 (1950), at 21; Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 Geo. Mason L. Rev. 1 (1981); Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N. Ky. L. Rev. 11 (1982); Gardiner, *To Preserve Liberty: A Look at the Right to Keep and Bear Arms*, 10 N. Ky. L. Rev. 61 (1982); Caplan, *The Right of the Individual to Bear Arms: A Brief Judicial Treatise*, 1982 Det. C. L. Rev. 769; Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. Am. Hist. 599 (1982); Dowd, *The Right To Arms: The Constitution or the Predilection of Judges Reign?*, 36 Okla. L. Rev. 65 (1981); Mitchell, *The Right of the People to Keep and Bear Arms: The Common Law Tradition* (1975) (to be published in 10 HASTINGS CONST. L.Q.).

4. Since the second amendment protects against federal infringement, "the source of such a guarantee in the state constitution leaves the legislature free to deal with the subject." *Ex Parte Rahnitz*, 194 Cal. 631, 226 P. 914 (1924) (24).

this Nation every year."<sup>5</sup>

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

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

5. Brennan, *Introduction: Chief Justice Hughes and Justice Mountain*, 10 SEaton Hall 311 (1979).

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

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

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

9. 3 J. EDGAR'S Debates on the Federal Constitution 419 (1806).

10. One court stated: "The constitution is not a grant of power but a limitation on the exercise thereof. While generally the legislature may exercise all those powers inherent in the people which are not delegated to another branch of gov't it cannot enact laws which will supercede constitutional provisions adopted by the people." *Kirkpatrick v. Superior Court*, 165 Ariz. 413, 408 P.2d 18, 20 (1965). *O'Leary v. Lemmon v. Noller*, 131 Kan. 810, 104 P.2d 177, 180 (1940) (constitution limits rather than confers power on legislator).

11. *People ex rel. Director & St. Ry. Co. v. McRoberts*, 62 Ill. 39, 41 (1871).

eral spirit."<sup>12</sup>

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

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

## II. HISTORICAL REASONS FOR A RIGHT TO ARMS

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

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

12. *Wilson v. Avery*, 6 Ill. 2d 78, 94, 126 N.E.2d 701, 710 (1955). A constitutional right should not be impaired by any narrow or technical construction of the language used. *People v. Spain*, 307 Ill. 283, 289-90, 139 N.E. 614, 617 (1923). All provisions of the Constitution designed to safeguard the liberty and security of the citizen should be liberally construed. See, *Randle v. Winona Coal Co.*, 206 Ala. 254, \_\_\_ S.W.2d 764, 752 (1921); *Salter v. State*, 2 Okla. Cr. 461, \_\_\_ 102 P. 719, 725 (1900).

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

14. *State v. Fessler*, 289 Or. 359, \_\_\_ 614 P.2d 94, 97 (1980). The people are guaranteed the right "to possess arms for their own personal defense, for the defense of their states and nation, and for the purpose of keeping their rulers sensitive to the rights of the people." Shalhope, *The Ideological Origins of the Second Amendment* 63 J. AM. HIST. 569 (1982).

15. 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*465.

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

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

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

16. *Id.* at \*465.

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

18. A discussion of this period of English history is found in *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 156-53 (1840). The *Aymette* court erred in stating that "private defence" was not protected by the English Declaration of Rights. The Recorder of London in 1769 wrote: "The right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. . . . The lawful purposes, for which arms may be used, (besides immediate self-defence) are, the suppression of violent and seditious breaches of the peace, the assistance of the civil magistrate in the execution of the laws, and the defence of the kingdom against foreign invaders." W. BIRARD, *INSULTORY REFLECTIONS ON POLICE: WITH AN ESSAY ON THE MEANS OF PREVENTING CRIMES & AMENDING CRIMINALS* 59, 60 (London 1785). A detailed discussion of the right to arms and the English Civil War, the Interregnum, and the Restoration is found in MALCOLM, *DISARMED: THE LOSS OF THE RIGHT TO BEAR ARMS IN RESTORATION ENGLAND* (Bunting Institute of Radcliffe College 1980) (reprinted by National Rifle Ass'n., Wash., D.C.); See also Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 1980 (to be published in 10 *HISTORICAL CONSTITUTION* 1-41).

the works of death, desolation and tyranny. . . ."

B. The foundation of an Englishman's security, "the security without which every other would have been insufficient," was neither Magna Charta nor Parliament but "the power of the sword."<sup>19</sup>

James Madison believed that "the advantage of being armed" was a condition "the Americans possess over the people of almost every nation." The despotisms of Europe were charged with being "afraid to trust the people with arms."<sup>20</sup> An armed citizenry serves as a deterrent to governmental oppression because the people have the latent and implicit power to "rise up to defend their just rights, and compel their rulers to respect the laws."<sup>21</sup> Totalitarian governments of the left and right in the twentieth century consider an armed people a threat and seek to disarm them.<sup>22</sup>

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

20. 1 MACAULAY, CRITICAL AND HISTORICAL ESSAYS, CONTRIBUTED TO THE EDINBURGH REVIEW 163 (London 1855).

21. THE FEDERALIST No. 46, at 259 (J. Madison) (C. Rossiter ed. 1961). Noah Webster thought that "[b]efore a standing army can rule, the people must be disarmed, as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword, because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people perceive to be just and constitutional; for they will possess the power, and jealousy will instantly inspire the inclination to resist the execution of a law which appears to them unjust and oppressive." PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES at 51, 56 (P. Ford ed. 1856) (emphasis in original). In our system of checks and balances, the people are also a factor. Freedoms of speech, press, petition, and the private keeping and bearing of arms have a common purpose, namely a safeguard against abuse of power by government.

Richard Henry Lee thought that "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them. . . ." LETTERS FROM THE FEDERAL FARMER TO THE PATRIOT case 133 (W. Bennett ed. 1976).

22. *Aymette v. State*, 21 Tenn. (2 Hum.) 151, 157 (1840).

23. "The surrender of guns and other implements of war has been ordered by special proclamation." R. LEMKE, *Axis Rule in Occupied Europe* 591 (1944).

"Anybody posting a placard the Germans didn't like would be liable to immediate execution, and a similar penalty was provided for those who failed to turn in firearms or radio sets within twenty-four hours." W. SALTER, *The Rise and Fall of the Third Reich* 1027 (1979).

The Nazis seized Albert Einstein's bank account for a week in 1933. The possession of a certain knife in his home in Lausanne, Austria-Hungary (20-01-33). The repression continued with a number of other acts, such as the confiscation

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

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

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

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

"Owning a pistol meant an obligatory conviction for terrorism. . . ." 1 A. SOLZHENITSYN, *The Gulag Archipelago* 155 (1978). The right to have firearms or other weapons is forbidden and self-defense is also curtailed. 2 A. SOLZHENITSYN, *The Gulag Archipelago* 431-32.

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

24. M. FOSTER, *Crown Pleas* 271-74 (London 1764). Cases of justifiable self-defense include "[w]here a man, who felony is attempted upon the person, be it to rob, or murder, . . . [a] woman in defence of her chastity . . . [and] arson or burglary in the habitation." *Id.* at 274. Other English commentaries also supported self-defense, including Blackstone. 1 W. BLACKSTONE, *Commentaries* \*4.

25. "That the people have a right to bear arms for the defence of themselves and the State. . . ." PA. DECLARATION OF RIGHTS art. XIII (1776) and VI; CONN. CH. I, art. XV (1777). In *Amato v. State*, the requirements for self-defense and food gathering had previously been "the burden of nearly everyone." D. HORNSTEIN, *The American Case*, *The Constitution* 17 (1979).

26. "The right of self-defence in these cases is founded in the law of nature, and is not, nor can be, superseded by any law of society." 2 J. KELSO, *Commentaries on American Law* 27 (New York 1805). "The right of self-defence is the first law of nature." 1 *THE PUB. INTEREST*, *Liberalism and Conservatism*, 39 (Fall 1976).

27. See *Barry v. Curtis*, 106 Va. 112, 114 (1904), see also *State v. Hardy*

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

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

### III. THE POLICE POWER

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

<sup>28</sup> Ohio App. 23 325, 327 NE 2d 770 (1974).

<sup>29</sup> *Warren v. District of Columbia*, 441 A.2d 1 (D.C. App. 1981); *Weiner v. Metro Transp. Auth.*, 55 NY 2d 175, 419 NYS2d 141 (1982); *Contra Yngst v. Pratt*, 119 Ind. App. 635, —, 250 NE 2d 276, 280 (1969) (en banc). "It is the right and duty of a private person to apprehend one who has committed a felony in his presence, either at the time of its commission or upon immediate pursuit" (quoting § 5 Art. I, § 23, Arrest § 35). Other cases in accord include *Suill v. Derrick*, 161 Ala. 210, —, 45 So. 825, 90 (1909); *Fund v. People*, 8 Mich. 149, 178 (1869). In 1991, police in California justifiably killed sixty-eight persons, civilians justifiably killed 126 persons. *Homicides in Cal.*, 1991, at 74 (Cal. Dept. of Justice). Chief Justice Cardozo noted that, under the controlling law, not only did a citizen have a duty to aid a commanding policeman in specific circumstances, but this duty to prevent crime may even extend to the use of "whatever implements and facilities are convenient and at hand." *Habington v. Yellow Taxi Corp.*, 250 NY 14, 16-17, 164 NE 726, 727 (1928) (implies state can compel people to own arms).

"Private citizens inevitably play an important role in controlling crime. By limiting their exposure to risk, investing in locks and guns, . . . private citizens affect the overall level of crime, and the distribution of the benefits and burdens of policing." We should not "forget that private policing was the only form of policing for centuries . . . . Those who think of private enforcement as evidence of 'dangerous violations' forget the value of private crime-control efforts, and the crucial difference between vigilantes and responsible citizens playing their traditional role in crime control." The legitimate role of private citizens is to "limit their functions to deterrence and, occasionally, apprehension; they neither judge guilt nor mete out punishment." *Martin & Bellin, "To Serve and Protect": Learning from Police History*, 70 *Ind. Law. J.* 499, 49 (1981).

The state has the authority to train its able bodied men so that they may perform military or non-military duties when called upon. *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 250 (1934) (cited in *U.S. v. Cruikshank*).

<sup>30</sup> *Evans v. De Vito*, 96 F.2d 416, 619 (5th Cir. 1938).

<sup>31</sup> The conflicting rights involved here are the individual's rights to bear arms and the state's duty to protect its citizens under its inherent police power to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people.

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

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

To be sure, the state legislature cannot, in the name of the police power, enact laws which render nugatory our Bill of Rights and other constitutional protections.

But we do not read this statute as an attempt to subvert the intent of Article II, Section 13. The statute simply limits the possession of guns and other weapons by persons who are likely to abuse such possession." *People v. Blue*, 190 Colo. 95, —, 544 P.2d 385, 390-91 (1975) (upholding a felon in possession statute) (citation omitted).

<sup>31</sup> Proscribing organizing, maintaining, or employing an armed body of men: *Ariz. CONST.* art. 2, § 26; *WASH. CONST.* art. 1, § 24. Proscribing concealed carry: *Colo. CONST.* art. II, § 13; *Idaho CONST.* art. 1, § 11; *Ky. CONST.* Bill of Rights, § 1, para. 7; *La. CONST.* art. 1, § 11; *Miss. CONST.* art. 3, § 12; *Mo. CONST.* art. 1, § 23; *Mont. CONST.* art. II, § 12; *N.M. CONST.* art. II, § 6; *N.C. CONST.* art. 1, § 30. Manner of bearing arms may be regulated: *Va. CONST.* art. 1, § 6; *Ga. CONST.* art. 1, § 1 para. 5; *Ill. CONST.* art. 2, § 26; *Tenn. CONST.* art. 1, § 26; *Tex. CONST.* art. 1, § 21. The right may be regulated: *Utah CONST.* art. 1 § 6. The right is subject to the police power: *Ill. CONST.* art. 1, § 22. Besides proscribing concealed carrying, the Idaho guarantee also allows minimum sentences for misuse of arms and possession by convicted felons.

<sup>32</sup> *State v. Dawson*, 272 N.C. 570, —, 159 S.E.2d 1, 10-11 (1968) (permissive language inserts law a matter of "superabundant caution").

<sup>33</sup> *High v. City of Maricopa County*, 105 Ariz. 413, 460 P.2d 18, 20-21 (1970).

<sup>34</sup> "The only limitations upon the legislature in the exercise of its police power is that the statute must be really for the protection, order or promotion of the interest of the State and not violate some positive mandate of the constitution." *People v. Warren*, 11 Ill. 2d 419, 423, 143 N.E.2d 75, 80 (1957).

<sup>35</sup> *Jackson City v. Moore*, 220 Mo. 380, 119 S.W.2d 114, 117 (1938) (quoting *Boyd v. City of Overland Park*, 203 Kan. 59, 151 P.2d 82 (1944)) (quoting *Boyd v. City of Overland Park*, 203 Kan. 59, 151 P.2d 82 (1944)).

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

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

#### IV. COLLECTIVE RIGHT VERSUS INDIVIDUAL RIGHT DEBATE

The collective right view claims that while all of the people have a right, the individual person has no right.<sup>38</sup> This es-

36. J. WASH. BROADCASTERS AND BARMEN 55, 255, 345, 406 (1974). "[A]rguments of policy must give way to a constitutional command . . . . *Payton v. N.Y.*, 445 U.S. 573, 692 (1980). In Maryland, police stopped 2,000 cars over one weekend in a drunk driving campaign. They arrested four drivers. Wash. Post, Dec. 30, 1982, A 1, col. 4, at A 7, col. 1. Rights cannot be swept aside or ignored simply to make it convenient for the state to get at a small criminal element. Such an approach would render nugatory the benefits of a written constitution.

37. T. J. TOOMEY, *The Constitution of the U.S.* 108 (1974).

38. *City of Salina v. Blaksley*, 72 Kan. 240, 81 P. 619, 620 (1906) (in interpreting a provision of the Kansas Constitution, which stated that "The people have the right to bear arms for their defense and security," the Supreme Court of Kansas created the collective right to the people as a collective body. . . . Individual rights are not con-

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

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

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

sidered in this section.").

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

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

41. *Burke v. Saavelle*, 208 Ill. 363, 310, 70 N.E. 327, 329 (1901) (Words "shall be given the meaning which they bear in ordinary use among the people").

42. *People v. Stevenson*, 181 Ill. 47, 25 26, 117 N.E. 747, 750 (1917).

43. *Kan. Const.*, Bill of Rights, 32.

44. *Id.* 11.

45. *Id.* 31.

46. *Id.* 31.

47. *Kirkpatrick v. King*, 225 Ind. 790, 90 N.E.2d 785, 789 (1950). "[T]he term 'people' as used in the [State] Constitution is broad and comprehensive, and comprises generally all of the individual inhabitants of the state." *State v. Kohler*, 11 Ill. 211, 30 A. 10, 137 (1914).

48. 72 Kan. 240, 81 P. 619 (1906). By creating the right to bear arms to a collective right, but having repeatedly rejected the other courts. See, e.g., *People v. Dickinson*, 99 Cal. 262, 34 P. 2d 1000 (1904); *State v. Dawson*, 272 S.W. 505, 120 S.W.2d 941 (1937).

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

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

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

50. Carrying a gun while drunk is outside the protected boundaries of the right to bear arms. *People v. Garcia*, 197 Colo. 550, 595 P.2d 228 (1977) (en banc). *State v. Shelby*, 90 Mo. 302, 2 S.W. 465 (1889). The right to arms is subject to regulations to promote the peace, order and security of society, "provided they do not nullify the constitutional right or materially embarrass its exercise." E. FORTSON, *THE POLICE POWER* 90-91 (1964). "A statute which, under the pretense of regulating, amounts to a destruction of the right, or which regulates arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional." *State v. Real*, 1 Ala. 612, 616-65 Am. Dec. 40 (1810). The prevailing view is that prohibiting concealed carriage of weapons does not infringe the private right to bear arms. "Any one carrying a weapon for a lawful purpose, will not desire to conceal it." C. TRENKLE, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE U.S.* 14-14 (1901) (1920).

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

52. 8 Kan. 107, 70 P. 62 (1902).

53. 100 Mass. 173, 41 N.E. 138 (1896).

54. 110 U.S. 175 (1884).

55. 2 Kan. 230, \_\_\_, 83 P. 619, 620 (1905).

56. KAN. CONST. art. VIII, §1.

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

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

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

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

57. *Id.* 22.

58. *Id.* 55-54.

59. *Houston v. Moore*, 18 U.S. 58, 4 Wheat. 1, 16-17 (1805). This reflects John Marshall's view that the states had retained their power over the militia. J.F. FORTSON, *DEFENSE OF THE FEDERAL GOVERNMENT* 119-21 (1980).

60. *Ex parte Butler*, 18 U.S. 57, 4 Wheat. 1, 16 (1805).

61. *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 270, 290 (1935).

law for the purpose. But this enables the government to have a well regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.<sup>63</sup>

Kansas history of the nineteenth century demonstrates that the people were undoubtedly concerned with personal defense.<sup>64</sup> The guarantee to arms of the 1859 Kansas Constitution<sup>65</sup> is an exact copy of Ohio's 1851 constitutional guarantee,<sup>66</sup> and Ohio courts have interpreted their provision to secure an individual right to self-defense.<sup>67</sup> Thus the independent clause, containing command language, that "[t]he people have a right to bear arms for their defense and security" was undoubtedly intended to include a personal right to bear arms to protect one's person, family, or property against unlawful injury and to secure from unlawful interruption the enjoyment of life, limb, family or property. The autonomy of the right to arms clause is not undermined by the presence in the same section of independent clauses dealing with standing armies and the subordination of the military to the civil power, for arms guarantees in other states have similar clauses and their courts have found an individual right to bear arms for self-defense.<sup>68</sup> Hence, any claim that the arms guarantee is in-

<sup>63</sup> T. COOLEY, *GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 298-99 (3rd ed. 1925).

<sup>64</sup> *Porter v. Louisiana*, 119 Fed. 323, 241 P. 227, 241 (1925) (Dawson, J., dissenting, *see also* *Johnson*, 120 Kan. 370, 241 P. 232 (1926)). The dissent was, in effect, adopted as the opinion of the majority on rehearing.

<sup>65</sup> Kan. Const., Bill of Rights, § 1.

<sup>66</sup> Ohio Const., art. I, § 1.

<sup>67</sup> *Mulhern v. City of Dayton*, 32 Ohio St. 29, 241 P. 227, 241 (1925). (The right of an individual to bear arms "may be regulated in a 'reasonable manner'"). *City of Akron v. Thron*, 36 Ohio Misc. 101, 304 N.E. 2d 923, 924 (Akron Mun. Ct. 1972). (The right secured by the Constitution "speaks of the citizen's self defense and opportunity to be able to obtain these ends by bearing arms"). *State v. Hogan*, 119 Kan. 370, 241 P. 232 (1926). (Individual right "for defense of self and property").

<sup>68</sup> *See* COOLEY, *supra* note 63, at 298; *Stebbins v. Dawson*, 272 N.C. 515, 159 N.E. 2d 1 (1959); *State v. Turner*, 151 N.Y. 773, 19 N.E. 2d 192 (1921); Ohio Const., art. I, § 1. See note 64, *supra*, for a list of other states. *Johnson*, 120 Kan. 370, 241 P. 232 (1926); *V. F. Fessenden*, *supra* note 64, at 366; *Johnson*, 75 N.Y. 295, 56 A. 619 (1890).

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

No attempt will be made to examine textual differences based solely on whether plural terms, such as people or citizens, or singular terms, such as person or citizen, are used because only one state, Massachusetts, has followed *Blaksley*.<sup>69</sup>

The collectivists' argument should not be followed by the courts because it has no historical support, no case law support prior to the Kansas decision, and is illogical since the very concept of a right is individual. The principle of rigid *stare decisis* has no application to an unconstitutional law or to even a course of action taken by the courts. "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."<sup>70</sup> On one occasion, the U.S. Supreme Court branded a whole line of decisions it had pursued for nearly a century "an unconstitutional assumption of power by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."<sup>71</sup>

The term "people" should be interpreted to include individuals. However, all individuals are not guaranteed the right to keep and bear arms. The Framers were mindful that certain groups are not protected because they fall into a traditional high-risk category. Thus it matters not that the Framers used in the arms guarantee the term people, citizens, person or citizen. Felons, persons of tender years, idiots and lunatics are classes that have almost universally<sup>72</sup> been excluded from the arms guarantee.<sup>73</sup>

<sup>69</sup> *Commonwealth v. Davis*, 303 Mass. 456, 210 F.2d 847 (1957).

<sup>70</sup> *Posell v. McCormack*, 325 U.S. 496, 516 (1946).

<sup>71</sup> *Erie RR v. Tompkins*, 304 U.S. 64, 74 (1933) (quoting Holmes, J., dissenting in *Black & White Taxicab Co. v. Brown & York & Tarrish Co.*, 256 U.S. 518, 523 (1921)). See also *Mandell v. Department of Social Services*, 436 U.S. 658 (1978); *Brown v. Board of Ed.*, 347 U.S. 483 (1954); *Pollock v. Oregon*, 161 U.S. 557 (1896).

<sup>72</sup> At common law a felon is prohibited from possessing a firearm of all the offender's funds or goods and other objects of the right of purchase. *FW. BROWN*, *CRIMINAL JUSTICE AND LAW OF ENGLAND* 776. While at common law usually only the male felon is prohibited from possessing a firearm, this prohibition is extended by a statute to include the modern trend of including the female felon's ability

## V. CONSTITUTIONALLY PROTECTED ARMS

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

offense, even though for the most part such offenses are *mala prohibita* and not *mala in se*. For example, the mere possession of an unregistered rifle with a barrel under 18 inches is punishable by 10 years and a \$10,000 fine. 26 U.S.C.A. §§ 5515 (a) (3), 5561 (d), 5571 (1950). To prevent the people from being disarmed by the expedient of classifying regulatory offenses as felonies, the disqualification for felons should be restricted to common law felonies and their modern equivalents and to offenses requiring some state of mind above strict liability which are inherently inimical to life and property. The harshness of a felony conviction for a regulatory offense requiring no criminal intent was acknowledged in *United States v. Ruisi*, 460 F.2d 153, 157 (2nd Cir. 1972) ("application for a Presidential pardon would seem to be justified.") Congress has already recognized a narrow exception to the felony disqualification by exempting antitrust violations, unfair trade practices, restraint of trade, or other similar offenses relating to the regulation of business practices. 18 U.S.C.A. § 921 (a) (20) (1976). For a list of disqualifications involving felons see *Doe v. Webster*, 606 F.2d 1226, 1233-34 (D.C. Cir. 1979), *State v. Noel*, 3 Ariz. App. 313, \_\_\_, 414 P.2d 162, 164 (1966).

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

If one that wanteth discretion, killeth himselfe (as an infant, or a man Non compos mentis) he shall not forfeit his goods, & c. . . .

If one that is Non compos mentis, or an idiot, kill a man, this is no felony, for they have no knowledge of good and evil, nor can have a felonious intent, nor a will or mind to do harme. . . .

So it is, if a lunaticke person killeth another during his lunacie, (Cf. 4 I. 13) for all acts done by him in his lunacie, are as the acts of an Idiot. . . . But an infant of such tender yeares, as that he hath no discretion or intelligence, if he kill a man, this is no felony in him.

M. DODD & THE CONSTITUTIONAL 216-17, 221, 224 (London 1622)

That not all people were included in the arms guarantee can be established by viewing early arms laws relating to freed blacks and American Indians. "Free persons of color have never been recognized as citizens; they are not entitled to bear arms, vote for members of the legislature. . . . [I]f [I] had any civil office." *Cooper v. Savannah*, 4 Ga. 68, 72 (1818). See also *State v. Newson*, 27 N.C. 201 (1811). The sale of firearms to American Indians was prohibited by 2 Stat. 179 (ch. 13) (1802) and 2 Stat. 280 (ch. 33) (1804).

Some early constitutional restrictions on arms were restricted to "free white men." For example, art. I, § 21 (1777) of the Tenn. Const. art. I, § 26 (1840), La. Const. art. III, art. 10 (1845). The passages in the thirteenth and fourteenth amendments means that except for the mental, age, and person of tender years, all of the people are guaranteed the right to arms. See also J. COOPER, A TREATISE ON CONSTITUTIONAL LIMITATIONS 77 (1763), 190.

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

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

72. N.Y. CONST. art. I, § 11, para. 1; N.M. CONST. art. II, § 6. In addition, the majority report of the Illinois Bill of Rights Committee indicates an intent to protect under Ill. CONST. art. I, § 22 "arms that law-abiding persons commonly employ for purposes of recreation or the protection of person and property." VI 6th Ill. CONST. CONVENTION, *Record of Proceedings* (1969-1970) at 67. In adopting the Virginia Bill of Rights, § 13, the interests of "the sportsmen of this State" and the right "to have arms in their homes, and they think that this will give them some protection" were also cited as reasons. *Proceedings & Debates of Virginia Senate Pertaining to Amendment of Constitution 323* (Apr. 3, 1969) (Sen. Long).

73. Some cases equate arms "effective as a weapon of war" with arms suitable "to resist oppression." *Fife v. State*, 31 Ark. 455, 458, 461 (1876), *Aymette v. State*, 21 Tenn. (2 Hum) 151 (1840). Other cases make no such equation. Arms suitable for militia use or self-defense are included in the term "arms" and both categories serve as a deterrent to oppression because historically "the arms used by the militia and for personal protection were basically the same weapons." *State v. Kessler*, 269 Or. 359, \_\_\_, 614 P.2d 94, 99 (1980).

The wellspring for a right to have arms for hunting is the Dec. 12, 1757, minority proposal in the Pennsylvania convention.

That the people have a right to bear arms for the defence of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals, and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up, and that the military shall be kept under strict subordination to and be governed by the civil power.

PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1757-1789, 422 (1887)

The Pennsylvania minority was the first to propose an extensive Bill of Rights and their seminal ideas found their way into the Bill of Rights and became the first, second, fourth, fifth, sixth, eighth, and tenth amendments of the United States Constitution. E. BENNETT, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 60-66 (1977). The Pennsylvania minority proposal reveals an intent to guarantee the traditional uses of the times for militia use, for self-defense, and for hunting. The reference to hunting was probably an effort to prevent the enactment of game laws designed to disarm the people. It also demonstrates that the common understanding of "to bear arms" was not restricted solely to militia purposes. In the 18th century "bear" meant "to convey or carry." S. JONES, *AN ENCYCLOPEDIA OF THE ENGLISH LANGUAGE AND ITS DERIVATIVES* (1979) reprint of 1755 ed. The arms provision in La. CONST. art. III, art. 10 (1845), used the term "to carry arms."

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

74. The arms and equipment a New York militiaman was required to furnish himself included a "muskett or fuzee . . . pike . . . sword . . . lance . . . pistol . . . case of good pistols . . . rapier . . . carbine . . . powder . . . bullets . . ." 1 THE COLONIAL LAWS OF NEW YORK FROM 1664 TO THE REVOLUTION 232 (1891).

In Virginia the list included "a firelock, muskett or fuzee well fixed, a good sword and cartouch box, and six charges of powder . . . at his place of abode two pound of powder and eight pounds of shot . . . holsters . . . a case of pistols well fixed, sword . . . carbine . . ." 3 LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEG. IN 1629 at 338 (W. Heintz ed. 1823). Virginia also required "that every man be provided with a good fuzee if to be had, or otherwise with a common firelock . . . [and] that every horseman be provided with a good horse, bridle, saddle with pistols and holsters, a carbine or other short firelock . . ." 1 THE PAPERS OF THOMAS JEFFERSON 160-61 (J. Boyd ed. 1950).

In Connecticut the arms included "sword, case of pistols and holsters . . . Our fire-men are armed with pistols and carbines." 3 THE PUBLIC RECORDS OF THE COLONY OF CONN. 12 & 295 (H. Trumbull ed. 1859). In Rhode Island the arms included "carbine and pistol . . ." 3 RECORDS OF THE COLONY OF R.I. & PROVINCIAL PLANTATIONS IN NEW ENGLAND 431 (J. Bartlett ed. 1856). In New Jersey the arms included "muskett or fuzee, well fixed, and a Bayonet fitted to it, a cutting sword or cuttace, . . . holsters, a case of pistols . . ." 6 DOCUMENTS RELATING TO COLONIAL HISTORY OF N.J. 192-91 (W. Whitehead ed. 1889).

75. In the New World the shotgun was used for hunting, self-defense, and military purposes. T. SWANSON, *THE WOMAN'S FIGHTING SHOTGUN* 1-3 (1976). "In 1621, Plymouth colony advised prospective newcomers to bring fowlers with them for use in obtaining food and for defense against possible Indian attacks." *Id.* at 2. "British General Sir John Burgoyne, of American Revolutionary War fame, raised a Light Dragoon Regiment in 1781, and caused it to be equipped with the blunderbuss." *Id.* at 2. "During the Revolution, General Washington took cognizance of shotgun effectiveness. He encouraged troops to load their [smoothbore] muskets with buck and ball, or with plain buck-shot to compensate for the poor long range accuracy of the single market ball. There is evidence that Americans found such multiple projectile ammunition quite effective against the British. Its use became widespread, except in rifle arms. General Washington referred to the shot as 'swan drops.'" *Id.* at 3. The shotgun is still used by the military. SMALL ARMS MATERIAL AND ASSOCIATED EQUIPMENT 29-31 (U.S. Army Technical Manual 9-2200, Oct. 1966).

76. We have no authority to any authority but are we aware of any that would prohibit abridgement of one form of constitutionally protected conduct because there are alternative means of communication possible available. N.Y. Public Interest Research Group, Inc. v. Robyn E. Bates, P.F.F. Supp. 36, 93-1 (D.S.N.Y. 1993).

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

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

77. *State v. Keisler*, 299 Or. 359, \_\_\_, 614 P.2d 94, 99 (1980). (Older cases have held that only large pistols are constitutionally protected arms. See *Fife v. State*, 31 Ark. 455, 460-61 (1876) (not pocket pistols but only "repeaters, which, in recent warfare, have generally superseded the old-fashioned holster, used as a weapon in the battles of our forefathers"); *Andrews v. State*, 59 Tenn. (3 Heisk.) 165, 167 (1871) ("We know there is a pistol of that name which is not adapted to the equipment of the soldier, yet we also know that the pistol known as the repeater is a soldier's weapon—skill in the use of which will add to the efficiency of the soldier"). Modern metallurgy and smokeless powder have reduced the size of pistols suitable for militia use. A survey of military pistols from Argentina to Yugoslavia reveals that most have a barrel length of about four inches. W. SMITH, *SMALL ARMS OF THE WORLD* passim (11th ed. 1977). However, a significant number have barrel lengths over three inches but under four inches. *Id.* at 215, 318, 382, 407, 433. While all of these pistols are centerfire, both the U.S. and U.S.S.R. employ .22 caliber rimfire pistols for training purposes. *Id.* at 476, 528.

The U.S. military's arsenal of self-loading pistols and revolvers includes the .38 caliber revolver with a 2 inch barrel. It is usually carried in a holster. PISTOLS AND REVOLVERS 99-106 (U.S. Army Field Manual 23-35, Feb. 1953); SMALL ARMS MATERIAL AND ASSOCIATED EQUIPMENT 7-11 (U.S. Army Technical Manual 9-2200, Oct. 1976); PISTOLS AND REVOLVERS 100 (U.S. Army Field Manual 23-35, July 1960). The U.S. military also purchased "a few thousand" Colt .25 caliber self-loading pocket pistols. R. SCHERER & R. WILSON, *THE BOOK OF COLT FIREARMS* 425 (1971).

The various weaponry used by the Patriots during the Revolutionary War has led writers to comment that as a practical matter the people carried whatever weapons they had into battle. Cf. *Conry, Revolutionary War Weapons* 12 (1963); *Nunn v. State*, 1 Ga. 213 (1819) (the right belongs to the individual and is not restricted to militia arms). As a practical matter many of the arms commonly possessed by the people (i.e., shotguns and pistols) and suitable for militia use are also employed by the organized military.

78. *State v. Keisler*, 299 Or. 359, \_\_\_, 614 P.2d 91, 98-99 (1980). ("To limit the title to musket, the shotgun and the pistol are about the only arms which he would be expected to own" and his right to do this "that which is protected by the Constitution" is "not the 'cannon or other heavy ordnance' that shells, guns, cannon, submachine guns and bombs are used" would be necessary). *State v. Keisler*, 181 N.W. 571, 107 S.F. 2d 243 (1963).

their modern equivalents, or those in ordinary use and effective as weapons of war.<sup>79</sup>

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

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

79. *Fife v. State*, 31 Ark. 459, 460-61 (1876); *State v. Kerner*, 181 N.C. 574, \_\_\_ 107 S.E. 222, 224-25 (1921); *State v. Fowler*, 259 Or. 359, \_\_\_ 614 P.2d 91, 99-99 (1980); *Andrews v. State*, 50 Tenn. (3 Heisk) 165, 179 (1871).

80. *Andrews v. State*, 50 Tenn. (3 Heisk) 165, 178 (1871). See also *Haltbreck infra* note 107. Of the thirty-nine states with a guarantee to arms, fourteen guarantee only the right to bear arms, as opposed to the right to keep and bear arms. Ala. Const. art. I, § 26; Ark. Const. art. II, § 26; Conn. Const. art. I, § 15; Ind. Const. art. I, § 32; Kan. Const. Bill of Rights, § 4; Ky. Const. Bill of Rights, § 1 para. 7; Minn. Const. art. I, § 4; Or. Const. art. I, § 27; Pa. Const. art. I, § 21; S.D. Const. art. VI, § 24; Utah Const. art. I, § 6; Vt. Const. ch. I, art. 16; West. Const. art. I, § 24, and Wyo. Const. art. I, § 24. This distinction is of no significance because courts and commentators agree that a guarantee to bear arms includes the guarantee to keep arms. See, e.g., *State v. Kessler*, 259 Or. 359, 614 P.2d 91 (1980) (keeping of a club in one's home); *Phelps v. City of Toledo*, 19 Ohio Misc. 147, \_\_\_ 250 N.E.2d 916, 927 (1959) ("No law-abiding citizen, free from the city's disqualifications, has been or will be precluded from purchasing, keeping or bearing arms."); "[T]o bear arms implies something more than the mere keeping." *Cooley*, *supra* note 62.

81. *Barronigha v. Peyton*, 57 Va. 470, 482 (1864) ("the militia embraces the whole arms-bearing population . . ."); *Ex Parte McCants*, 39 Ala. 167, 173 (1863). Numerous state constitutions reflect this view. E.g., "A militia shall be provided and shall consist of all persons over the age of seventeen . . ." Ind. Const. art. XII, § 1; "The State militia consists of all able-bodied persons residing in the State . . ." Ill. Const. art. XII, § 1; "[A]ll able-bodied citizens of the state . . . are the militia. . . ." Miss. Const. art. VI, § 13 (2). The antifederalist view was that "A militia, when properly formed, are in fact the people themselves . . ." and that "the constitution ought to secure a genuine and guard against a select militia . . ." by having the militia include "all men capable of bearing arms . . ." 2 THE CONSTITUTION: ANTI-FEDERALIST 61 (H.J. Storing ed. 1961). The U.S. Supreme Court has also defined the militia in this broad manner. *United States v. Miller*, 307 U.S. 174, 179 (1939).

82. The terms "militia" or "militiamen" comprehend every citizen subject when time of war or emergency befalls his civilian pursuits for temporary military duty and are not restricted to the National Guard. *State ex rel. McGinnis v. Grayson*, 14 Mo. 71, \_\_\_ 160 S.W.2d 175, 187 (en banc 1944). The militia is divided into the organized militia and the reserve militia. *Id.* at \_\_\_ 160 S.W.2d at 179. See also *Free People v. City of New York*, 13 N.Y. 197, 204, 27 N.E. 789, 790 (1891).

See also state statutes making the distinction between the militia and the National

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

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

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

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

Guard. See, e.g., 10 U.S.C.A. § 311 (1975); 36 Wea's Cal. Mil. Code § 121 (1955); Conn. GEN. STAT. ASS. § 27-2 (West 1975); and R.I. GEN. LAWS § 30-14 (1969).

83. U.S. Const. art. I, § 10, cl. 3.

84. *State v. Dawson*, 272 N.C. 506, \_\_\_ 179 S.E.2d 149 (1968). Disarmed people could not serve as a deterrent to oppression. *State v. Kerner*, 181 N.C. 574, \_\_\_ 107 S.E. 222, 225 (1921).

85. U.S. Home Defense Forces Study at 32, 33. Office of Sec. of Defense, Mar. 1961.

86. *Id.* at 30, 62-63.

87. *Id.* at 58, 60.

duty. At a time when Nazi submarines were sinking American ships off the Atlantic coast, apprehension was very real.<sup>85</sup>

In Virginia, the National Guard was also activated for overseas duty. It thus became necessary to call upon the local armed citizenry to perform militia duties. They were called the Minute Men, the home guard, or the reserve militia. The shortage of arms prompted members of the militia to borrow twenty-two caliber guns from youngsters. Sportsmen were especially sought after for recruitment in the militia. "Since its personnel would have to furnish its own weapons and ammunition, its membership campaign leaned heavily on sportsmen of the state."<sup>86</sup>

All over the country individuals armed themselves in anticipation of threatened invasion.<sup>87</sup> A manual distributed en masse by the War Department recommended the keeping of "weapons which a guerilla in civilian clothes can carry without attracting attention. They must be easily portable and easily concealed. First among these is the pistol."<sup>88</sup>

Historically, militia formations were most effective when responding to obvious threats close to home. They were to harass and impede the enemy wherever possible and to support friendly formations. Consisting of small tactical formations armed with a wide variety of weapons, the militia had actually taken the field against the soldiers of George III and defeated them. The lessons of Vietnam, Nicaragua, Africa, and the Soviet intervention into Afghanistan illustrate the limitations of push-button warfare against dispersed small units fighting in their own territory. The militia's critics tend to ignore this strength and concentrate only on the militia's weakness.<sup>89</sup>

85. BAKER, *I Remember—The Army With Men From 16 to 79* [Baltimore] Sun Magazine, Nov. 16, 1972, at 46; 3 STATE PAPERS & ADDRESSES OF GOV. O'CONNOR 116 (Mar. 10, 1942). On file with the law review is a copy of an honorable discharge certificate from the World War II Maryland Minute Men and an affidavit from a former member swearing that he performed militia duties armed with his own rifle and pistol.

86. M. SULLIVAN, *VIRGINIA'S GUARD—CIVILIAN DEFENSE AND THE STATE MILITIA IN THE SECOND WORLD WAR* 15, 141 (1949).

87. *The Virginian Times*, Mar. 30, 1942, at 1.

88. B. LEVY, *GERMANY WALKS* 57 (Penguin Books & Industry Jour. 1942); H. LEVY, *GERMANY WALKS* 72 (Penguin Publications 1944).

89. L. L. LADD, *The Militia of the U.S.*, MICHIGAN REVIEW 13, 16 (Mar. 1952). *See*

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

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

Therefore, a well-regulated militia means one that has had some training or at least is composed of people who have had some training. This is to prevent the militia from becoming a disorderly mob, dangerous not to the enemy but to its own state and country. In its obsolete form pertaining to troops, *regulated* is defined as "properly disciplined." 7 THE OXFORD ENGLISH DICTIONARY 330 (1933). Moreover, *discipline* in relation to arms is defined as "training in the practice of arms." 3 THE OXFORD ENGLISH DICTIONARY 416 (1933). The framers intended that this "training in the practice of arms" for potential militia duty would be advanced, if not ensured, by the right of the people to keep and bear their own arms.

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

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

95. *Id.* at —, 614 P.2d at 98-100.

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

97. *People v. Brown*, 253 Mich. 537, —, 245 N.W. 245, 247 (1931). There is an effort to ban pistols. However, the people understand the term "arms" to include the pistol because of its presence in our culture. In Shakespeare's *Twelfth Night* (circa 1601), Act II, scene V, line 34, the "pistol" is mentioned. Thus both old cases, *State v. Shelby*, 30 Mo. 302, 2 S.W. 468, 469 (1876) ("a revolving pistol comes within the description of such arms as one may carry for the purposes designated in the constitution . . ."), and new cases, *Schubert v. DeHurd*, 394 N.E.2d 1339 (Ind. App. 1980) ("handgun"), recognize the pistol as a constitutionally protected arm. This understanding prompted a court to state: "We are of the opinion, however, that 'pistol' or its *termini* is properly included within the word 'arms,' and that the right to bear such arms cannot be infringed. The historical use of pistols as 'arms' of offense and defense is beyond controversy." *State v. Kessler*, 184 N.W. 574, —, 197 S.E. 222, 224, (1924) (law requiring obtaining permit and posting bond to carry pistol unincarcerated voided). A pistol is an arm which serves many lawful purposes. *Commonwealth v. McHarris*, 246 Pa. Super. 385, 351 A.2d 941 (1975).

## VI. TEXTUAL DIFFERENCES

*Militia Purpose*

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

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

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

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

<sup>99</sup> See notes 74, 75, 77, 79 *supra*. Va. Const. art. I, § 13 guarantees a right to self-defense. Thus in Virginia arms for personal defense are also guaranteed. See note 79 *supra*.

<sup>100</sup> *State v. Kerner*, 181 N.C. 774, 107 S.E. 222, 225 (1921). The right to self-defense was assumed by the Framers. *State v. Dawson*, 272 N.C. 505, 199 S.E.2d 1, 3 (1963). See also *Nunn v. State*, 1 Ga. 243 (1815).

<sup>101</sup> *State v. Kerner*, 181 N.C. 774, 107 S.E. 222, 225 (1921). The Const. Bill of Rights, 1789 tracked the language of the second amendment: "When we are clothed with a mantle to shoulder, calumny, denunciation, or partiality to his side, or generally he is bearing arms in the constitutional sense." *State v. Buss*, 47 La. Ann. 294, 29 (1875).

<sup>102</sup> *State v. Dawson*, 272 N.C. 505, 199 S.E.2d 1, 3 (1963); *State v. Kerner*, 181 N.C. 774, 107 S.E. 222, 225 (1921); *Hoy v. State*, 51 Ga. 174 (1844). The U.S. Const. art. I, § 1, para. 10 tracked the second amendment. In *Re v. Inghurst*, 1 Storr. (1811), 205 S.W. 569 (1874) the trial judge in the trial of the jury "A man

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

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

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

has a clear right to carry a pistol for self-defense. 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 traveling, or going to the market, or to his place of business. But I have no objection 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.

<sup>103</sup> *Hoy v. State*, 51 Ga. 174 (1844). See also *State v. Buss*, 47 La. Ann. 294 (1875); *Alaska* (1911), *Alaska* (1911), *Alaska* (1911), *Alaska* (1911), *Alaska* (1911).

one's home is a castle.<sup>104</sup> 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.<sup>105</sup>

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 home. Open carrying was for militia use and private security while preventing violence and surprise and hence terror on the streets. The "castle doctrine" has a special place in American jurisprudence. Even "possession of obscene matter" in the home cannot be made a crime. *Stanley v. Georgia*, 394 U.S. 557 (1969). Under the Alaska Constitution's right to privacy, mere possession of marijuana in the home is not unlawful. *Ravin v. State*, 517 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 760, 761, *aff'd* 245 La. 1075, 162 So. 2d 575 (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." *Itex v. Gardiner*, 95 Eng. Rep. 386, 388 (K.B. 1733). "[T]he mere having a gun was no offense . . . for a man may keep a gun for the defense of his house and family . . ." *Mallick v. Eastley*, 57 Eng. Rep. 1370, 1374 (K.B. 1741). "[A] gun may be kept for the defense of a man's house." *Wingfield v. Stratford*, 96 Eng. Rep. 767 (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 basis of the political system, around which all legislative, executive and judicial bodies must revolve." *Vanhorne's Exors v. Dorrance*, 2 Dall. 42 (U.S. 1793).

105. At common law the mere public carrying of arms was no offense under the Statute of Northampton, 2 Edw. III, c. 1 (1329); *Judy v. Lashley*, 50 W. Va. 628, 41 S.E. 197, 290 (1902). To sustain a conviction proof was required that the accused had gone armed "in a riotous" (with evil intent) or "in terror to the King's subjects." *Reay Knight*, 67 Eng. Rep. 75, 99 Eng. Rep. 300 (K.B. 1686) (the accused was acquitted). Commentaries of that period were in agreement: "The person had to be armed deliberately 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 Fairs, Markets, or elsewhere by night or by day, in Affray of the Kings people, the Sheriff, and other the Kings officers, and every Justice of Peace upon his own view, or upon complaint there, he 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 Gaol; And the said Justice of Peace also every Constable may seize all their Armes, and their weapons, and shall cause them to be peace'd, and answered to the King as directed, and the Justices of Peace may do by the First Assizes made in this behalf.

See *1 The Complete Statutes of England and Wales* 1623.

See also *1 The Complete Statutes of England and Wales* 1623, where it is noted that the common law of England forbids the carrying of arms in public places, but that this is not an affray, rather

### Common Defense Purpose

The constitutions of four states guarantee the right to keep and bear arms for "common defense."<sup>106</sup> Protected arms under this guarantee are those suitable for militia use.<sup>107</sup> 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.<sup>108</sup> Because the

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

*Id.* at 23.

The simple carrying of a "loaded revolver . . . on the public road" is no offense because the indictment failed to "negative lawful occasion, and conclude in *terrorum populi* [to the terror of the populace]." *Itex v. Smith*, 2 Ir. R. 190, 201, 204 (1914). Thus in *Simpson v. State*, 13 Tenn. (5 Yer.) 356, 357 (1833), it was held that merely being armed "in a certain public street and highway" is not an indictable offense. Furthermore, "our constitution has completely abrogated . . ." the Statute of Northampton. *Id.* at 359-60. Regarding any claim that the simple carrying of arms might be unlawful because it may alarm some overly sensitive person, the court concluded that "after so solemn an instrument hath said the people may carry arms, can we be permitted to impute to the acts thus licensed, such a necessarily consequent operation as terror to the people to be incurred thereby, we must attribute to the framers of it, the absence of such a view." *Id.* at 360. "Under Oregon law, the possession of a billy club in a public place is protected." *State v. Blocker*, 291 Or. 257, 639 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. *Elli v. State*, 31 Ark. 455, 461, 25 Am. Rep. 556 (1876); *Commonwealth v. Egan*, 50 Mass. 286, 313 N.E. 2d 647, 649-50 (1976); *Aynette v. State*, 21 Tenn. (2 Hum.) 124, 128 (1849). Claims are made that a guarantee for the "common defense" and the guarantee of the second amendment are essentially the same. *Elli*, 31 Ark. at 456; *Aynette*, 21 Tenn. at 127. 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.* 450-51 (Gabel, Jr. ed. 1971); 2 *H. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 415-24 (1971). This rejection was an apparent response to fears in Massachusetts that a guarantee for the common defense might be too restrictive. "[I]f the people have a right to keep and bear Arms for their Own and the Common Defence" was argued as a fact of choice. THE PAPER SOCIETY OF PORTLAND ANNUAL REPORT AND ADDRESS FOR MASS. CONSTITUTION OF 1780, at 624 (O. & M. Humfrey, eds. 1968). Thus state courts in interpreting their constitutions with second amended right to language have not given their guarantees a restrictive interpretation. See notes 104, 105 *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"<sup>109</sup> 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."<sup>110</sup> It is permissible to "regulate the mode of wearing war arms, and no doubt the occasions of wearing such arms . . ."<sup>111</sup> 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 (1831).

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

111. *Wilson v. State*, 33 Ark. 557, 559, 34 Am. Rep. 52, 54 (1878). An act proscribing concealed carrying is "consistent with the right of the citizen to bear arms." *State v. Johnson*, 16 S.C. 187, 191 (1851) (S.C. Const. art. I, § 29 (1868) guaranteed arms for common defense). Parading with an unauthorized body of armed men may be prohibited. *Commonwealth v. Murphy*, 106 Mass. 171, 44 N.E. 133 (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 seditious practices 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. BAZZARD, *LECTURES ON POLICE, WITH AN ESSAY ON THE MEANS OF PREVENTING CHAOS & ANARCHY*, CLARKE & CO. (London 1785). "The power to regulate does not fairly mean the power to prohibit, on the contrary, to regulate necessarily involves the existence of the thing or act to be regulated." *Andrews v. State*, 50 Tenn. (1 Heisk.) 165, 151, 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. . . ."<sup>112</sup> 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."<sup>113</sup> 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."<sup>114</sup> The court noted that crime "must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege."<sup>115</sup> 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,<sup>116</sup> and any attempt "to disarm

112. *Haile v. State*, 39 Ark. 564, 566-67, 42 Am. Rep. 3, 4-5 (1892).

113. *State v. McKinnon*, 153 Me. —, 133 A.2d 885, 899 (1957). Since Mr. 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 v. State*, 31 Ark. 455, 25 Am. Rep. 556 (1876), and *Haile v. State*, 39 Ark. 564, 41 Am. Rep. 3 (1892), plainly indicate that any implication made in *State v. Buzzard*, 4 Ark. 18 (1842), that the right to arms belongs only to the militia and not to the people has been rejected. Judge Lacy's crude dissent was hoisted.

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 that be the meaning of the Constitution, why give that which is no right in itself, and guarantee a privilege that is useless? This construction, according to the views I entertain, takes the arms out of the hands of the people, and places them in the hands of the Legislature, with no restraint or limitation whatever upon their power, except their own free will and sovereign pleasure.

*Buzzard*, at 35-36. In the final analysis, the court simply allows a citizen to control his carry.

115. *Wilson v. State*, 31 Ark. 455, 25 Am. Rep. 556 (1876).

116. *Glasscock v. City of Chattanooga*, 27 Tenn. 518, 529, 11 S.W. 2d 684 (1928).

the people by legislation" would be void under the arms guarantee.<sup>117</sup>

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.<sup>118</sup>

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,"<sup>119</sup> and thus arms may be used "for his proper defense . . . . He has a right also to protect his own house and family . . . ."<sup>120</sup>

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*.<sup>121</sup> 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. Ithenhour*, 43 Tenn. (3 Cold.) 211, 217 (1866).

118. *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 162-61 (1871). Although the court felt the militia "has, as an organization, passed away in almost every State of the Union, and only remains to us as a memory of the past, probably never to be revived," the court still found "the prohibition of the statute is too broad to be allowed to stand consistently with the views herein expressed." *Id.* at 181, 187. This indicates that the court honored its duty to carry out the intent of the framers rather than judicially repeal a constitutional right, as the court did in *Chambers v. Athy v. Davis*, 109 Mass. 256, —, 341 N.E. 2d 807, 819 (1976). However, the expiration of World War II indicate that the militia is still a viable institution. See *supra* notes 87-91.

119. *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 176 (1871).

120. *State v. Esch*, 96 Tenn. 212, 217, 31 S.W. 1, 241 (1887); *Carroll v. State*, 28 Ark. 39, 101 (1872) (right to bear arms in defense of person and property).

121. 109 Mass. 256, 341 N.E. 2d 817 (1976).

supported by public funds."<sup>122</sup> 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.<sup>123</sup> Current English arms statutes serve as no support because the British lack a written constitution,<sup>124</sup> and Parliament may abrogate all rights.<sup>125</sup> Americans adopted a written constitution in response to abuses under the English system.<sup>126</sup> The purpose of a written guarantee to keep and bear arms is to place that right beyond the reach of the legislature.<sup>127</sup> When the 1780 Massachusetts Constitution was adopted concern was voiced that the arms guarantee mentioned common defense but failed to mention self-defense.<sup>128</sup> In an apparent effort to satisfy this concern an

122. *Id.* at —, 343 N.E. 2d at 819; *Salina v. Blaskey*, 72 Kan. 240, 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 *Blaskey's* collective right holding, see *supra* notes 19-71 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*, 11 Ark. 557, 34 Am. Rep. 52 (1878); *State v. McKinnon*, 153 Me. 15, 133 A.2d 857 (1957); *State v. Johnson*, 16 S.C. 187, 191 (1881); S.C. CONST. art. I, § 26 (1895) (guaranteed the right for the common defense); *Glascock v. City of Chattanooga*, 177 Tenn. 518, 14 S.W.2d 678 (1929).

124. *Powell v. McCracken*, 195 U.S. 496, 523 n.46 (1904).

125. *United States v. Brewster*, 105 U.S. 701, 708 (1872); C. Berman, *The Law of the Last 24*, 267 (1979).

126. *Hedges v. California*, 111 U.S. 222, 233 n.7 (1884); *Grosvenor v. American Press Co.*, 297 U.S. 243, 348 P. (1932). The British Press was subject to licensing. T. W. BARKER, *CONSTITUTIONAL LAW OF ENGLAND* 152.

127. *People v. Zerillo*, 219 Mass. 415, —, 183 N.W. 537, 545 (1922); *Commonwealth v. Ray*, 218 Pa. Super. 72, —, 272 A.2d 277, 279-79 (1970) (right to bear arms pre-created constitution, not created by the legislature, enacted on 1780-1781); *114 Pa. 367, 212 A.2d 119 (1972)*; *Comptroller v. State*, 11 Tenn. (5 Yel.) 376, 380 (1830); *McCray v. State*, 24 Tex. 401, 402 (1856).

128. The *Proclamation of the Framers*, *1787-1791*, *Documents of the Massachusetts Convention of 1780*, 39 (1978). The Framers based on custom and need, the people probably took a "right to keep arms" for all natural purposes including personal defense, a right guaranteed since gun ownership was part of their culture, the recognition of a right to the right to keep arms as well as a constitution in the right. A newspaper article of 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 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individual guarantee to self-defense was adopted.<sup>119</sup> 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 more statute or be judicially repealed.<sup>120</sup>

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

(emphasis added). *The Federal Gazette*, and *Philadelphia Evening Post*, June 18, 1789, No. 68 Vol. II, at 2, col. 1. Trench Cole in a letter to Madison admitted being the author. 12 *Papers of James Madison* 241 n.1 (1979).

119. *Mass. CONST. DECL. OF RIGHTS*, part I, art. I. The constitution should be construed as a whole. *Kilpatrick v. Superior Ct. of Maricopa County*, 195 Ariz. 413, 609 P.2d 19, 24 (1980).

120. In 1778 British General Burgoyne ordered his troops to seize the inhabitants' arms. 1778 muskets, 24 pistols, and thirty eight blunderbusses were surrendered by Bostonians. R. T. Hutchinson, *History of the State of Boston* 95 (6th Ed. 1903). Boston's population of 17,000 declared 7,000 civilians by July 1775. *The Spirit of Seventy Six* 146 (H. Commager & R. B. Merris, eds. 1967). The disarmament of Bostonians would later be listed as one of the grievances justifying the Revolutionary War. *DECLARATION OF INDEPENDENCE* FOR THE FORMATION OF THE UNION OF AMERICAN STATES, H.R. Doc. No. 329, 65th Cong., 1st Sess. 14 (1925). 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. W. Wiswason, *ANTIQUARIAN* 29 (June 1914). *Black's Law Dictionary*, 152 (1969). The miniature shotgun is constitutionally an arm. T. S. SHERMAN, *THE WOMAN'S FRONTIER* 300-305 (1978) observes the following:

The modern fighting shotgun is a direct descendant of two of the world's most famous muzzle-loading 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 dimensions and configurations for shotguns still being used after some 180 years. *Id.* at 2.

If in the American West, muzzle-loading shotguns were substituted for the modern type, the result would be the same. *Id.* at 2.

The modern 12-gauge pump action type of shotgun is precisely the same as the blunderbuss. It provides the same muzzle blast as the blunderbuss. *Id.* at 2.

At one time shotguns were also manufactured in .44 cal. (7 D&K 813).

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."<sup>121</sup> 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.<sup>122</sup> 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"<sup>123</sup> 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.<sup>124</sup>

#### *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.<sup>125</sup> This guarantee protects arms that are (1) suitable for militia use,<sup>126</sup> and (2) also protects arms suitable for personal defense.<sup>127</sup> The plain meaning of the text leads courts to conclude that two separate and distinct categories of arms are

121. *Andrew v. State*, 20 Tenn. (1 Heick) 165, 178 (1871).

122. *Haley v. State*, 18 Ark. 364 (1852); *Wilson v. State*, 34 Ark. 567, 34 Am. Rep. 22 (1874); *Andrew v. State*, 20 Tenn. (1 Heick) 165, 8 Am. Rep. 5 (1871).

123. *Haley v. State*, 18 Ark. 364, 366, 34 Am. Rep. 3 (1852). In Maine and Massachusetts the bearing of arms is also for personal security because the right to self defense is guaranteed. *McCoy v. State*, 143 Me. 505, 506 (1962); *McCoy v. State*, 143 Me. 505, 506 (1962).

124. See note 121 *supra*.

125. Ark. CONST. art. I, § 20; *Ark. CONST. art. II, § 3*; *Calif. CONST. art. I, § 17*; *Del. CONST. art. I, § 20*; *Ill. CONST. art. I, § 26*; *Ind. CONST. art. I, § 31*; *Iowa CONST. art. I, § 13*; *Mo. CONST. art. I, § 32*; *Pa. CONST. art. I, § 21*; *S.D. CONST. art. I, § 24*; *Tex. CONST. art. I, § 7*; *Vt. CONST. art. I, § 16*; *W. Va. CONST. art. I, § 21*; and *Wis. CONST. art. I, § 24*.

126. See note 121 *supra*.

127. See note 121 *supra*.