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

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

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

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

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

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

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

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

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

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

fense"); People v. Zerillo, 219 Mich. 635, ___, 189 N.W. 927, 929 (1922) ("to possess a revolver for the legitimate defense of their person and property"); State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 100 (1980) ("includes a right to possess certain arms for defense of person and property"); Commonwealth v. Ray, 218 Pa. Super. 72, ___, 272 A.2d 275, 278-79 (1970), vac. on other grounds, 448 Pa. 307, 292 A.2d 410 (1972) ("to bear arms in defense of themselves, their property and the State"); State v. Duke, 42 Tex. 455, 459 (1875) ("such arms as are commonly kept . . . and are appropriate for open and manly use in self-defense"); State v. Rosenthal, 75 Vt. 295, 297, 55 A. 610 (1903) ("The people of the State have a right to bear arms for the defense of themselves"); Carfield v. State, 649 P.2d 865, 871 (Wyo. 1982) (the right extends to "defending the State or himself").

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

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

143. State v. Reid, 1 Ala. 612, [illegible] (1840).

144. *Id.* at [illegible].

145. *Id.* at 617. [illegible] the common law [illegible] The common law did not prevent the [illegible] Rep. [illegible] (1686).

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

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

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

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

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

148. *See, e.g.*, Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1369 (Ind. App. 1980) (where "self-defense" is asserted as a reason for desiring a license to carry a pistol the license cannot be withheld); Watson v. Stone, 4 So. 2d 700, 703 (1941). In narrowly construing a statute the right to bear arms was kept in mind: "It cannot be said that it [the pistol] is placed in the car or automobile for unlawful purposes, but on the other hand it was placed therein exclusively for defensive or protective purposes. These people, in the opinion of the writer, should not be branded as criminals in their effort of self preservation and protection, but should be recognized and accorded the full rights of free and independent American citizens."

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

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

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

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

was not designed to protect a man "who is prone to load his stomach with liquor and his pockets with revolvers or dynamite, and make of himself a dangerous nuisance to society." Carlton v. State, 64 Fla. 1, ___, 58 So. 486, 488 (1912). This dictum, however, was unnecessary because the Florida guarantee provides "the manner of bearing arms may be regulated by law." FLA. CONST. art. I, § 8.

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

152. State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1369 (Ind. App. 1980); Rabbitt v. Leonard, 36 Conn. Supp. 148, 413 A.2d 489 (1979).

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

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

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

156. Jennings v. State, 3 Tex. Crim. App. 295 (Tex. Crim. App. 1878).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

168. Since the people had the right to carry arms concealed when the constitution was adopted that right cannot be infringed under the guise of mere regulation. Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822). The constitution was subsequently changed to allow a ban on concealed carrying. Ky. Const. Bill of Rights § 1, para. 7. Concealed carrying without a license was sanctioned in State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903), and concealed carrying with a license was sanctioned in Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980), based on the intent of the Framers. In Pennsylvania an effort by some Framers to protect only open carrying (it would have read "openly [illegible]") was rejected by a 51 to 23 vote. 7 [illegible] of the Convention to [illegible] the [illegible] Press 258-61 (1873).

169. G. [illegible], The [illegible] of Weapons of the American Revolution 15 [illegible] (19[illegible]).

170. [illegible] *Jefferson's* [illegible] Am. Rifleman, Dec. 1969, at 17.

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

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

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

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

172. *See* note 104 *supra*.

173. *See* note 105 *supra*.

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

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

176. "[N]ot making applications available at the chief's office effectively denied residents of the community the opportunity to obtain a gun permit and bear arms for their self-defense." Motley v. Kellogg, 78 Ind. Dec. 316, ___, 409 N.E.2d 1207, 1210 (Ind. App. 1980). A Silver Spring, Maryland man was murdered after being denied a license to carry a pistol because the state police felt there was a lack of sufficient evidence presented to justify fear. Alders, *Years of Pleading Set Scene for Murder*, The Montgomery Journal, May 29, 1981, A1, at col. 1. In ordering the police to issue a carrying license one court brushed aside arguments that the applicant "has not yet been the victim of a crime" with the comment that "one such incident may render him forever the applicant." Matter of Maglocco, 181 N.Y.L.J. 4 (N.Y. Co. Sup. Ct. Aug. 11, 1978).

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

Defense of Self, Home, Property and State Purpose

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

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

178. *See supra* notes 50, 101.

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

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

180. *See supra* notes 93-97. *See also* People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (1936) (shotgun); State v. Keet, 269 Mo. 296, ___, 190 S.W. 573, 576 (1916) ("rifle on his shoulder, his hunting knife on his belt"); State v. Shelby, 90 Mo. 302, ___, 2 S.W. 468, 469 (1886) ("a revolving pistol does within the description of such arms as one may carry for the purposes designated in the constitution ...") Taylor v. McNeal, 524 S.W.2d 148 (Mo. Ct. App. 1975) (pistols and ammunition clips); State v. Nickerson, 126 Mont. 151, 247 P.2d 188 (1952) (revolver).

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

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

oppression.[184]

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

defense"), People v. Nakamura, 99 Colo. 362, 364, 62 P.2d 246, 247 (1936) ("cannot disarm any class of persons or deprive them of the right guaranteed under section 13, article 2 of the Constitution, to bear arms in defense of home, person and property"); Taylor v. McNeal, 521 S.W.2d 148, 150 (Mo. Ct. App. 1975) ("every citizen has the right to keep and bear arms in defense of his home, person and property . . ."); State v. Nickerson, 126 Mont. 151, 247 P.2d 168 (1952) (defense of home, person, or property).

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

184. See *supra* note 141.

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

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

187. See *supra* note 184 at 262-63. Despite the Oklahoma court's apparent attempt to hold that a pistol is not a constitutionally protected arm, the *Andrews*, *Fife*, *Fenlock*, and *Hill* cases it cites all hold that larger pistols or horse pistols are militia arms and are thus constitutionally protected. The court's citation of *Blakeley* is puzzling, for that case held that the people collectively have a narrow right to bear arms only in the organized militia or any military organization provided by law. See *supra* note 78-79 for a criticism of *Blakeley*. In any event, the Oklahoma guarantee, adopted after resort to *Blakeley*, uses the singular term *citizen*, thus preventing a militia right interpretation. A case interpreting constitutional language similar to that in *Blakeley* and explicitly holding that a pistol is a protected arm was overlooked. *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902) (Idaho prohibiting carrying

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

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

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

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

pistol in town in any manner voided).

188. See *supra* note 183, at 262; State v. Duke, 42 Tex. 455, 459 (1875) (overruling *English*'s holding that only militia arms are guaranteed).

189. Okla. Const. art. II, § 26.

190. Salter v. State, 2 Okla. Crim. 464, ___, 102 P. 719, 725 (1909). Nevertheless, in Pierce v. State, 12 Okla. Crim. 272, ___, 275 P. 393, 395 (1929), the court not only upheld a conviction for the peaceful unconcealed carrying of a .38 caliber Colt pistol within the curtilage of defendant's own premises but went so far as to say the legislature "also has the power to even prohibit the ownership or possession of such arms" as are not "used for purposes of war." This came about by ignoring the "defense of his home, person, or property" purpose in the constitution, a good portion of the other commonly possessed, constitutionally protected. One hopes that an Oklahoma court in the future will pay attention to the mandate of the clear language in the constitution, and in light of this recommendation and opinions from states with similar guarantees will put to rest the present unintended and restrictive interpretation.

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

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

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

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

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

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

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

195. *See supra* note 194.

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

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

198. Patterson v. State, 251 Miss. 165, ___, 170 So. 2d 645, 699 (1965) (art. III, § 12 cited in reversing conviction).

199. *See supra* note [illegible].

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

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

Security and Defense Purpose

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

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

201. *See supra* notes 50, 102.

202. KAN. CONST. BILL OF RIGHTS, § 4; NEV. CONST. art. 1, § 11, para. 1; N.M. CONST. art. II, § 6; OHIO CONST. art. I, § 4; UTAH CONST. art. I, § 6. This guarantee is similar to the defense of self and state guarantees. State v. Vlacil, 645 P.2d 677, 682 (Utah 1982) (Oaks, J., concurring). The view of Kansas courts that only a collective right to serve in the militia and bear arms in the militia is protected has been criticized in notes 35-71 *supra* and accompanying text. Whether the Kansas court has obliquely retreated from this position is raised by Junction City v. Mevis, 226 Kan. 526, 601 P.2d 1145 (1979), where the court found a gun control ordinance too broad. It cited City of Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744 (en banc 1972), where a gun ordinance was struck down because it was too broad and reached beyond permissible limits to impinge on the Colorado guarantee to bear arms.

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

203. *See supra* notes 71, 7[illegible], 77, 79.

204. *See supra* notes [illegible]. *See also* Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737, 738 (N.M. App. 1971) ([illegible]); *In re* Brickey, 8 Idaho 597, 598, 70 P. [illegible] (1902) ("loaded revolver" [illegible] the guarantee that was for "security and defense").

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

The dimensions of this right have been summarized as follows:

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

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

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205. Lopez v. Chewiwie, 51 N.M. 421, 186 P.2d 512 (1947) (protection of home); State v. Hogan, 64 Ohio St. 202, ___, 58 N.E. 572, 575 (1900) ("to afford the citizen means for defense of self and property"). When the Idaho guarantee was for "security and defense" it was construed to protect personal self-defense. Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971) (self-defense); State v. Hart, 66 Idaho 217, ___, 157 P.2d 72, 73 (1945); City of Akron v. Dixon, 36 Ohio Misc. 133, ___, 303 N.E.2d 924, 925 (Mun. Ct. 1972) ("if engaged in the defense of his security or that of his family [one] is entitled to possess them [pistols]").

206. State v. Hogan, 64 Ohio St. 202, ___, 58 N.E. 572, 575 (1900) ("protection of the country").

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

208. State v. Hogan, 64 Ohio St. 202, ___, 58 N.E. 572, 575 (1900) (tramp law upheld where tramp threatened an injury).

209. *See supra* notes 50 & 102. In State v. Montoya, 91 N.M. 262, ___, 572 P.2d 1270, 12[illegible] (N.M. App. 1977) the court hinted that it would uphold a law prescribing carrying a gun into a licensed liquor establishment, a fourth degree felony, where the right to bear arms was raised by "[a]nyone in defendant's hand." *See supra* note 71, for criticism of making a regulatory offense a felony.

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

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

> I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied. We have no statistics available, but it is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute. It is also a safe guess to say that not more than 5% of the men in Florida who own pistols and repeating rifles have ever applied to the Board of County Commissioners for a permit to have the same in their possession and there has never been, within my knowledge, any effort to enforce the provisions of this statute as to such people because it has been generally conceded to be in contravention of the Constitution and non enforceable if contested.

211. *See supra* note 105. An ordinance prohibiting the unconcealed carrying of arms was voided in Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971). *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902), struck down a statute prohibiting the carrying of firearms in town. At the time, the Idaho guarantee was for "security and defense." On the other hand, in State v. Mead, 641 P.2d 652 (Utah 1982), a conviction for possession of a firearm by a convicted felon under the U.S. was upheld. The court noted the arms guarantee states [illegible] The Legislature may regulate the exercise of this right by law." Three separate [illegible] were written to affirm the conviction in view of cases where such arms in possession [illegible] were voided on right to bear arms grounds. People v. Nakamura, [illegible] 2 P.2d 20 (1st Dist. Ct. App. 1931) and People v. Zerillo, 219 Mich. 635, [illegible] (1922), it appears that the majority was swayed by the fact that the [illegible] and that it was used for the apprehension [illegible] rather than for self-defense. Mc

No Specific Purpose Assigned.

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

sher v. Dayton, 48 Ohio St. 213, 358 N.E.2d 540 (1976); invoked the police power to uphold an ordinance mandating obtaining an identification card to demonstrate lack of disabilities, such as being a convicted felon, and to show entitlement to possess a pistol. The dissent argued legislation must be reasonable and necessary which seeks to restrain "one of the fundamental civil rights." *Id.* at ___, 358 N.E.2d at 541 (Celebrezze, J., dissenting). An ordinance forbidding the employment of special guards during a strike was voided on grounds of right to bear arms for "defense and security" (art. I, § 4) and "defending life and protecting property" (art. I, § 1). *In re* Reilly, 11 Ohio Dec. 364, 367-68 (1891).

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

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

214. *See supra* notes 14, 31-32.

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

216. McKellar v. Mason, 120 So. 2d 700, 702 (La. App. 1960), *aff'd* 240 La. 1065, 126 So. 2d 371 (1961). This was when the Louisiana Constitution tracked the second amendment. In 1974 it was amended to the present guarantee.

217. Commonwealth v. Davis, 369 Mass. ___, 41 N.E.2d 847 (1976); Porter v. State, 42 Okla. Crim. 272, 275 P. 393 (1929); City of Salina v. Blaksley, 72 Kan. 230, 83 P. 619 (1905).

limit the guaranteed right only to the purpose stated.

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

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

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

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

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

220. *See supra* notes 105, 197, 211. Strickland v. State, 137 Ga. 1, 72 S.E. 260 (1911) (upheld statute requiring license to carry pistol away from home or place of business) People v. Williams, 60 Ill. App. 3d 726, 377 N.E.2d 265 (1978) (upheld statute forbidding carrying of loaded gun in vehicle or in city, unless at home, place of business, or upon own land); State v. Storms, 112 R.I. 121, 309 A.2d 463 (1973) (upheld statute prohibiting carrying a pistol without a license except in home, place of business, or upon possessed land) A constitution should not be read with the prolixity of a civil code. However, the hostile treatment that the right to bear arms has been given by some courts prompted the 1978 amendment to Ida. Const. art. I, § 11 to specifically forbid licensing, registration, or special taxation, or confiscation, except for commission of a felony.

221. *See supra* note 104.

222. In Strickland v. State, 137 Ga. 1, 72 S.E. 260 (1911), the court relied on previous Georgia constitutions, with a militia reason, to assign a militia purpose to the present one and to imply that only pistols suitable for militia use are constitutionally protected. The court trivialized the decision of the Framers to omit reference to the militia in the arms guarantee by stating that reference to the militia was already made in article 10, the militia article, "and it was doubtless deemed unnecessary to reiterate them in both connections." *Id.* at ___, 72 S.E. at 261. In Carson v. State, 241 Ga. 622, ___, 247 S.E.2d 68, 73 (1978), the court seems to recognize the absence of the militia reason. Other courts have paid careful attention to the language of the text. For example, the Indiana Constitution covers bearing arms in Art. I, § 32 and the militia in art. 12, § 1, but the court held the right to arms was not restricted to militia arms or purposes. Schubert v. DeBard, 403 Ind. Dec. 540, 398 N.E.2d 1339 (Ind. App. 1980).

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

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

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

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

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

224. *See supra* notes 31 & 212.

225. Carson v. State, 241 Ga. 622, 247 S.E.2d 63 (1978); State v. Storms, 112 R.I. 121, 308 A.2d 463 (1973).

226. Strickland v. State, 137 Ga. 1, ___, 72 S.E. 260, 262 (1911); People v. Williams, 60 Ill. App. 3d 726, 377 N.E.2d 285 (1978); Rawlings v. Department of Law Enforcement, 73 Ill. App. 3d 267, 391 N.E.2d 759 (1979) (applicant for gun license was mental patient within statutory five years of application).

227. The majority report of the Committee on Bill of Rights reported "the 'arms' involved are not limited by the armaments or needs of the state militia or other military body. The substance of the right is that a citizen has the right to possess and make reasonable use of arms that law-abiding persons commonly employ for purposes of recreation or the protection of person and property. Laws that attempted to ban all possession or use of such arms, or laws that subjected possession or use of such arms to regulations or taxes so onerous that all possession or use was effectively banned, would be invalid." 6 SIXTH ILL. CONST. CONVENTION, RECORD OF PROCEEDINGS 87 (1969-1970) (hereinafter referred to as ILL. PROCEEDINGS). The committee cited People v. Brown, 253 Mich. 537, 235 N.W. 245 (1931) and State v. Duke, 42 Tex. 455 (1875), to demonstrate that arms include rifles, shotguns and pistols. *Id.* at 87 n.7. It also cited *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902); People v. Zerillo, 219 Mich. 603, 189 N.W. 927 (1922); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921), for examples of invalid regulation. *Id.* at 87 n.8.

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

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

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

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

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

T. COOLEY, CONSTITUTIONAL LIMITATIONS 101-102 (7th ed. 1903).

The contrasting views expressed during the debates in the convention on the right to keep and bear arms give credence to Judge Cooley's admonition that debates generally should not be considered.

The first floor debate occurred on June 10, 1970, and focused on the majority report, which favored a right to bear arms and included the handgun as a protected arm.[232] The right to bear arms was considered "controversial," and delegates were "all a little punchy at this stage," there were "empty seats," and concern was expressed that "I am not sure that we would get a full and reflective view of this body if we voted on anything at this point."[233]

The final debate occured on June 11, 1970, and focused on the minority report, which opposed the inclusion of a right to bear arms in the constitution,[234] although it was noted that there were several members who wanted to be heard when they adjourned the last evening.[235] A spokesman for the minority argued against a right to bear arms because the majority report revealed it "would prevent a complete ban of hand guns . . . ."[236] One delegate cited the right to keep arms as a deterrent against governmental oppression.[237] Another cited a case from the majority report, in support of the right to arms.[238] The delegate on whom the court relied so heavily went so far as to claim that not only could handguns be forbidden but in Cook County (Chicago) "all firearms whatsoever" could be banned.[239] There is also evidence that attention to the debates was less than complete,[240] and that they

232 *See supra* note 227.

233 3 Ill. Proceedings 1666 (Mr. Lennon).

234 6 Ill. Proceedings 165

235 3 Ill. Proceedings 1691-92 (President Witwer).

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

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

238 *Id.* at 1707 (Mr. Huttmacher). He cited People v. Zerillo, 219 Mich. 643, 189 N.W. 927 (1922), which held that even an alien could not be deprived of possessing a pistol. That case was cited in the majority report and reveals that delegates were cognizant of the report and its views. 6 Ill. Proceedings 87 n.8. One delegate who admitted owning "two shotguns and a pistol" supported the right to bear arms for protection and sporting purposes. He felt that everybody should not be punished for the misconduct of a few, and that the proposed guarantee would prevent confiscation. *Id.* at 1712-13 (Mr. Hendren)

239 3 Ill. Proceedings 1710 (Mr. Foster). Such a broad statement could not be taken seriously. It was made probably in an effort to play down the scope of the right and to secure undecided votes for its passage. Regarding the arms guarantee, he also stated "I wish I'd never seen this thing." *Id.* at 1721

240 *Id.* at 1701. "Let's pay attention to the debates please. People that have to have conversations, will you kindly take them outside?" (President Witwer). *Id.* at 1704. "May we have quiet in the room so that we can hear what Father Lawlor has to say?" (President Witwer). *Id.* at 1705. "I think if we are going to be in session, we ought to be in session and listen to the debate. And it's a simple matter for those who do not want to hear it to go out in the hall." (President Witwer).

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

> Rather, I view the language of the debates as acknowledging that this subject was a controversial issue which the delegates were reluctant to face . . . .*** It was the vote of the People which was required to bring this constitution into existence. I am therefore concerned only with what the voters intended when they voted for adoption of the constitution, and that intent must be gathered from the clear and specific language of the instrument. I am not concerned with the intent of the delegates to the convention, because I fear that their intention was to evade this controversial issue and to be less than candid with the electorate.[243]

These debates presented the court with a plethora of statements and to choose one as the consensus over others violates principles of constitutional interpretation and demonstrates intellectual shortcomings. The court's approach that a municipality may exercise its police power to prohibit a constitutionally protected arm contravenes the essential nature of the constitutional guarantee. It supplants a constitutional right with a mere statutory privilege which might be withheld simply on the basis that a firearm commonly possessed by the people, such as a rifle, shotgun, or pistol is perceived to be

241 *Id.* at 1701. "We have a lot of absentees now. I hope the people in the lounge will come up and share the load." (President Witwer). At one point Witwer had the sergeant at arms bring out a cot so he could go to sleep. *Id.* at 1712

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

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

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

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

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

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

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

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

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

terror.[248]

CONCLUSION

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

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

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

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

248. See supra notes [illegible]

and will contribute to the growing perception that courts are not expounding the law, but are handing down social policy in judicial dress to suit the perceived needs of the moment. A recent decision echoes this view:

> We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.[249]

There should be no hesitancy in striking down a law which encroaches on the protected boundaries of the right to keep and bear arms, for on at least seventeen reported occasions courts have struck down laws which encroached on that right.[250]

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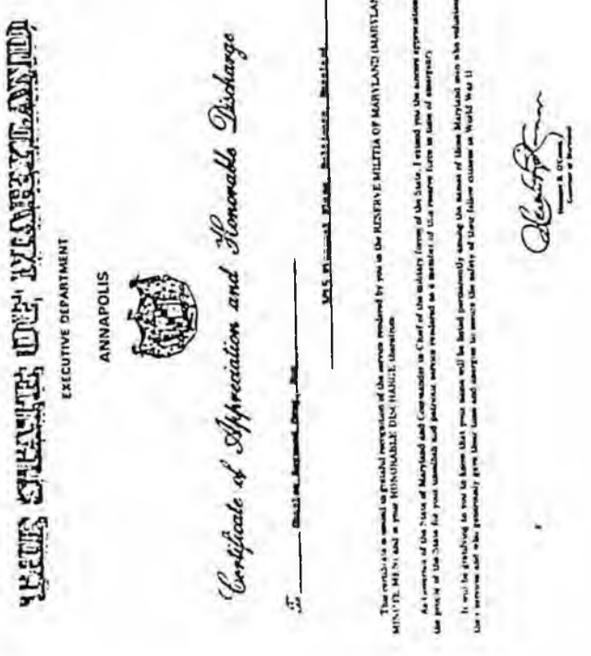
249 State v. Kessler, 289 Or. 359, ___, 614 P.2d 94, 95 (1980).

250 Wilson v. State, 33 Ark. 557, 34 Am. Rep. 52 (1878); City of Lakewood v. Pillow, 180 Colo. 20, 23, 501 P.2d 744, 745 (en banc 1972); People v. Nakamura, 99 Colo. 362, 62 P.2d 246 (en banc 1936); Nunn v. State, 1 Ga. (1 Kelly) 243 (1846); *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 13 Am. Dec. 251 (1822); People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922); State v. Kerner, 181 La. 574, 160 S.E. 222 (1931); *In re* Reilly, 31 Ohio Dec. 364 (C.P. 1919); State v. Blocker, 201 Or. 255, 270 P.2d 824 (1954); State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 9 Am. Rep. 8 (1871); Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928); Smith v. Liberator, 41 Tenn. (1 Cold.) 214, 217 (1860); State v. Rosenthal, 75 Vt. 225, 54 A. 610 (1903); City of Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971); Jennings v. State, 5 Tex. Crim. App. 298 (1878).



District of Columbia)
) ss:
City of Washington)

Affidavit

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

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

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

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

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

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

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

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

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

Further affiant saith not.

Charles Raymond Gray

Subscribed and sworn to before me this 2nd day of November, 1981.

Notary Public

My commission expires: November 30, 1983

APPENDIX

STATE CONSTITUTIONAL PROVISIONS ON THE RIGHT TO KEEP AND BEAR ARMS

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

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

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

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

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

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

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

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

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

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

Idaho: "The people have the right to keep and bear arms, which right shall not be abridged, but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony." IDAHO CONST. art. I, § 11.

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

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

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

Kentucky: 'All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons." KY. CONST. § 1, para. 7.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATES WITHOUT CONSTITUTIONAL PROVISIONS:

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

CONSTITUTIONAL AMENDMENTS FOR THE RIGHT TO KEEP AND BEAR ARMS

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

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

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

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

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

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

COMMENTARY ON PROPOSED AMENDMENT TO ALASKA

RIGHT TO BEAR ARMS GUARANTEE

Article I, Section 19 of the Constitution of Alaska ~~would be amended to read as follows:~~

> SECTION 19. Right to keep and bear arms. The (A well-regulated militia being necessary to the security of a free state, the) right of the people to keep and bear arms shall not be infringed.

This proposal guarantees a broad individual right and explicitly protects the traditional rights that gun owners in Alaska always assumed were guaranteed. The Alaska proposal is a blending of the New Mexico, Nevada, New Hampshire, North Dakota, Colorado, Mississippi, Missouri, Montana, Oklahoma, and Utah guarantees.

I.
TO WHOM THE RIGHT BELONGS

This guarantee would belong to the citizen of the state. Citizenship includes the full enjoyment of all rights and privileges. The full enjoyment of all rights and privileges is obviously not enjoyed by certain groups, including the following: convicted felons, lunatics, and illegal aliens. This principle of law is so well established that commentators only mention it briefly in passing. See Dowlut & Knoop, State Constitutions and the Right to Keep and Bear Arms, 7 Okl. City Univ. L.Rev. 177, 191 (1982). See also State v. Kessler, 289 Or. 359, 614 P.2d 94, 99 (1980).

II.
WHAT CONSTITUTES ARMS

Constitutionally protected arms are those arms that are commonly kept by the people. The people of Alaska commonly keep and bear rifles, shotguns, pistols, revolvers, edged weapons, hatchets, and clubs. They do not possess weapons that are exclusively used by the military or weapons of mass destruction. Therefore, bombs, poison gas, or cannons do not come under the umbrella of the constitutional guarantee.

III.
THE RIGHT TO KEEP AND BEAR ARMS

Arms may be kept or borne for defensive, recreational, and other traditional lawful purposes. Alaska's frontier tradition is to carry arms openly. See Nunn v. State. 1 Ga. (1 Kel.) 243 (1846); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921); Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928); City of Las Vegas v. Moberg, 485 P.2d 737 (N.M. App. 1971); City of Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744 (1972). The concealed carrying of arms may be prohibited in a public place. The state may require the obtaining of a license to carry an arm concealed. However, a concealed carrying license statute would have to be equitably administered. See Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980).

The constitutional purpose for bearing arms would not be frustrated by a prohibition on carrying arms while drunk, to a polling place, court, public assembly, or in a manner calculated to inspire terror. The keeping or bearing of arms in the home or

place of business may be either open or concealed, keeping the castle doctrine in mind and the purpose of protecting a place of business.

IV.
THE RIGHT SHALL NOT BE INFRINGED BY THE STATE OR ANY SUBDIVISION THEREOF

Neither the State nor any subdivision of the state could prevent the people from keeping or bearing constitutionally protected arms within the perimeters of the constitutional guarantee. Laws forbidding the sale of arms or ammunition, or preventing the repair, bearing, or keeping of constitutionally protected arms, laws requiring a license to possess or acquire arms, or the payment of special taxes, or requiring registration would be an infringement on the right to keep and bear arms. The guarantee would also provide for uniformity throughout the state. This would be a form of preemption. Units of local government could only enact legislation which was absolutely necessary and uniquely necessary for a unit of local government. Therefore, a city or village could regulate the discharge of firearms within its boundaries without infringing the right to keep and bear arms.

V.
CONCLUSION

The proposal guarantees the fundamental right of a citizen to keep and bear arms for traditional purposes. This right may not be infringed. The misuse of arms falls outside the boundaries of the constitutional guarantee. The types of

misconduct that the legislature may forbid and punish are well-known and self-evident; examples include using arms to rob, harass, intimidate, or recklessly endanger someone, shooting in an unsafe place or manner, and poaching. Therefore, this proposal will not hinder the legislature in performing its duty to punish the misuse of arms.

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

ANCHORAGE, ALASKA

RESOLUTION NO. AR 87-___

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

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

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

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

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

_____
Chairman

ATTEST:

_____
Municipal Clerk

FD/lf

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

1986 NRA-ILA STATE LEGISLATIVE ISSUE BRIEF

ISSUE: Constitutional Amendment

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

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

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

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

DISCUSSION:

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

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

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

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

HOUSE JOINT RESOLUTION NO. 18

(By Delegate J. Martin and Delegate Carmichael)

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

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

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

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

ARTICLE III. BILL OF RIGHTS.

§22. Right to keep and bear arms.

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

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

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

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

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

OFFICE OF THE
GENERAL COUNSEL

December 28, 1987

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

Dear Mr. Geldhof:

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

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

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

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

Sincerely,

Robert Dowlut

Robert Dowlut
Deputy General Counsel

RD:sep

STATE of Maine

v.

Dennis Eugene FRIEL.

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

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

Affirmed.

1. Weapons ⇐1

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

2. Weapons ⇐1

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

3. Weapons ⇐1

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

4. Searches and Seizures ⇐193

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

5. Criminal Law ⇐394.6(4)

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

6. Searches and Seizures ⇐121

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

7. Criminal Law ⇐414

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

8. Constitutional Law ⇐266(4)

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

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

9. Criminal Law ⇐369.2(1)

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

10. Criminal Law ⇐1172.1(3)

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

11. Criminal Law ⇐38

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

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

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

Before NICHOLS, ROBERTS, WATHEN and GLASSMAN, JJ.

GLASSMAN, Justice.

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

I

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

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

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

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

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

The jury found the defendant guilty on both counts.

II.

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

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

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

argument, the court denied the motion to suppress.

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

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

IV.

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

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

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

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

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

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

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

V.

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

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

VI.

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

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

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

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

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

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

The entry is:

Judgment affirmed.

All concurring.

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

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

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

A Person

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

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

Keep and Bear Arms

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

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

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

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

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

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

Defense of self, family, home

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

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

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

Defense of state

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

Lawful hunting and recreational use

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

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

Conclusion

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

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

HOUSE OF REPRESENTATIVES

133RD GENERAL ASSEMBLY

HOUSE BILL NO. 554 MAY 8 1986

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

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

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

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

SYNOPSIS

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

HD:RA:PK

STATE CONSTITUTIONAL GUARANTEES ON THE RIGHT TO KEEP AND BEAR ARMS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Virginia: That a well regulated militia, composed of the

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

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

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

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

STATES WITHOUT CONSTITUTIONAL PROVISIONS:

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

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

January 6, 1988

Representative Fran Ulmer
1700 Angus Way
Juneau, AK 99801

Dear Representative Ulmer:

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Brian Judy
State Liaison

BJ:bsw

Enclosures

cc: Senator Pat Rodey
Rupe Andrews
Bob Dowlut

NATIONAL RIFLE ASSOCIATION OF AMERICA
INCORPORATED 1871

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

RUFE ANDREWS
FIELD REPRESENTATIVE
ALASKA

9416 LONGRUN DRIVE
JUNEAU AK 99801
907/789-7422

WHY DOES ALASKA NEED A FIREARMS PRE-EMPTION LAW?

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

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

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

Federal Law

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

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

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

The History of Firearms Pre-Emption Legislation

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

The Problem Behind Local Firearms Laws

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

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

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

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

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

How Can Pre-Emption Help?

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

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

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

1986 NRA-ILA STATE LEGISLATIVE ISSUE BRIEF

ISSUE: Firearms Preemption Legislation

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

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

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

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

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

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

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

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

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

BENEFITS:

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

REPRINT

SUBSTITUTE FOR

SENATE BILL NO. 748

(As Passed the Senate June 5, 1986)

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

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. As used in this act:

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

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

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

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

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

GENERAL COUNSEL

DL685/SUB A

JUL 17 1986

4/23/86
PASSED SENATE
32 TO 7

8 6 --S 2646 SUBSTITUTE A

AN ACT

RELATING TO FIREARMS

STATE OF RHODE ISLAND

6/25/86
PASSED HOUSE
68 TO 10

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 1986

AN ACT

RELATING TO FIREARMS

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

Date Introduced: March 4, 1986

Referred To: Senate Committee on Judiciary

It is enacted by the General Assembly as follows:

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

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

SECTION 2. This act shall take effect upon passage.

FIREARMS-RELATED ACCIDENTS

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

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

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

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

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

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

Home Protection and Home Accidents

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

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

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

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

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

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

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

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

Children and Accidents

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

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

In terms of general causes of deaths among the 0-14 age group, handguns (criminal and accidental abuse) rank 16th. (The following table is based on Table 8, Public Health Service's "Advance Report of Final Mortality Statistics, 1984" (Sept. 26, 1986), the National Safety Council's Accident Facts, 1985, the FBI Uniform Crime Report's Crime in the United States, 1984, and supplemental computer printouts from the FBI. All figures are for 1984 -- the latest possible date, and are approximate. They do not vary much from year to year.)

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

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

correctly classified as criminal homicide.)

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

The Safety of the Shooting Sports

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

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

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

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

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

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

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

There are simply no data on accidents in target, trap, and skeet shooting. Most fatal gun-related accidents occur in the home (around 50-60%) and are unrelated to organized sport shooting (10-15%). As a consumer product, guns are involved in 26,000 accidents requiring emergency-room treatment annually (about 40% in the home), one third of which require hospitalization, according to the Consumer Product Safety Commission. Among the sport-related consumer goods which rank ahead of guns are bicycles (574,000 injuries), basketball (458,000), football (433,000), baseball (432,000), skating (183,000), soccer (93,000), volleyball (78,000), fishing (65,000), wrestling (64,000), weight lifting and exercise equipment (56,000), gymnastics (53,000), playground equipment (53,000), skiing (43,000), squash and racquetball (35,000), and tennis (29,000). (CPSC, 1982 data, the last year firearms-related injury data were analyzed.)

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

Anchorage Daily News 7/4/8

p. 2 of 3

Bill of Rights reaffirmed 2 to 1

By AMY BERMAR
Daily News reporter

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

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

But other constitutional protections fared less well.

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

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

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

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

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

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

See Page D-3, BILL

Continued from Page D-1

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

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

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

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

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

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

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

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

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

The forced internment of Japanese-Americans during World War II is another example of "temporarily suspending" the Bill of Rights, according to Dan Hickey, chief prosecutor for the state. (As district attorney, he must assure that defendants get a trial that's speedy, impartial and, if they desire, decided by a jury of their peers — three protections spelled out in the Bill of Rights.)

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

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

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

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

Questionnaire garnered 176 responses on 18 Constitutional rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14. Do you think people should or should not be allowed to gather in groups of any size? (Should: 158 Should not: 18)

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

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

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

18. Do you feel people involved in lawsuits where more than $300 is at stake should or should not be allowed to request a jury trial? (Should: 146 Should not: 28)

1984 CONSTITUTIONAL AMENDMENT
ALASKA

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

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

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

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

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

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

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

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

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

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

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

RUPE ANDREWS
NRA FIELD REPRESENTATIVE
8418 LONG RUN DRIVE
JUNEAU, ALASKA 99801

STATE CONSTITUTIONAL GUARANTEES OF THE RIGHT TO KEEP AND BEAR ARMS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Virginia: That a well regulated militia, composed of the

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

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

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

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

STATES WITHOUT CONSTITUTIONAL PROVISIONS:

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

NATIONAL RIFLE ASSOCIATION OF AMERICA
INCORPORATED 1871

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

RUPE ANDREWS
FIELD REPRESENTATIVE
ALASKA

9416 LONGRUN DRIVE
JUNEAU AK 99801
907/789-7422

March 5, 1987

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

Dear Senator Kertulla:

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

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

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

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

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

Sincerely,

Rupe Andrews

Rupe Andrews, Field Representative

CONSTITUTIONAL AMENDMENTS FOR THE RIGHT TO KEEP AND BEAR ARMS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMENTARY ON PROPOSED AMENDMENT TO ALASKA RIGHT TO BEAR ARMS GUARANTEE

Article I, Section 19 of the Constitution of Alaska would be amended to read as follows:

> The right of each citizen of the state to keep and bear arms for personal defense and for the defense of family, property, and the state and for lawful hunting, recreation, and other lawful purposes shall not be infringed by the state or by a borough or city of the state.

This proposal guarantees a broad individual right and explicitly protects the traditional rights that gun owners in Alaska always assumed were guaranteed. The Alaska proposal is a blending of the New Mexico, Nevada, New Hampshire, North Dakota, Colorado, Mississippi, Missouri, Montana, Oklahoma, and Utah guarantees.

I. TO WHOM THE RIGHT BELONGS

This guarantee would belong to the citizen of the state. Citizenship includes the full enjoyment of all rights and privileges. The full enjoyment of all rights and privileges is obviously not enjoyed by certain groups, including the following: convicted felons, lunatics, and illegal aliens. This principle of law is so well established that commentators only mention it briefly in passing. See Dowlut & Knoop, State Constitutions and the Right to Keep and Bear Arms, 7 Okl. City Univ. L.Rev. 177, 191 (1982). See also State v. Kessler, 289 Or. 359, 614 P.2d 94, 99 (1980).

II.
WHAT CONSTITUTES ARMS

Constitutionally protected arms are those arms that are commonly kept by the people. The people of Alaska commonly keep and bear rifles, shotguns, pistols, revolvers, edged weapons, hatchets, and clubs. They do not possess weapons that are exclusively used by the military or weapons of mass destruction. Therefore, bombs, poison gas, or cannons do not come under the umbrella of the constitutional guarantee.

III.
THE RIGHT TO KEEP AND BEAR ARMS

Arms may be kept or borne for defensive, recreational, and other traditional lawful purposes. Alaska's frontier tradition is to carry arms openly. See Nunn v. State. 1 Ga. (1 Kel.) 243 (1846); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921); Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928); City of Las Vegas v. Moberg, 485 P.2d 737 (N.M. App. 1971); City of Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744 (1972). The concealed carrying of arms may be prohibited in a public place. The state may require the obtaining of a license to carry an arm concealed. However, a concealed carrying license statute would have to be equitably administered. See Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980).

The constitutional purpose for bearing arms would not be frustrated by a prohibition on carrying arms while drunk, to a polling place, court, public assembly, or in a manner calculated to inspire terror. The keeping or bearing of arms in the home or

CORRECTION

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The constitutional purpose for bearing arms would not be frustrated by a prohibition on carrying arms while drunk, to a polling place, court, public assembly, or in a manner calculated to inspire terror. The keeping or bearing of arms in the home or

place of business may be either open or concealed, keeping the castle doctrine in mind and the purpose of protecting a place of business.

IV.
THE RIGHT SHALL NOT BE INFRINGED BY THE STATE OR ANY SUBDIVISION THEREOF

Neither the State nor any subdivision of the state could prevent the people from keeping or bearing constitutionally protected arms within the perimeters of the constitutional guarantee. Laws forbidding the sale of arms or ammunition, or preventing the repair, bearing, or keeping of constitutionally protected arms, laws requiring a license to possess or acquire arms, or the payment of special taxes, or requiring registration would be an infringement on the right to keep and bear arms. The guarantee would also provide for uniformity throughout the state. This would be a form of preemption. Units of local government could only enact legislation which was absolutely necessary and uniquely necessary for a unit of local government. Therefore, a city or village could regulate the discharge of firearms within its boundaries without infringing the right to keep and bear arms.

V.
CONCLUSION

The proposal guarantees the fundamental right of a citizen to keep and bear arms for traditional purposes. This right may not be infringed. The misuse of arms falls outside the boundaries of the constitutional guarantee. The types of

misconduct that the legislature may forbid and punish are well-known and self-evident; examples include using arms to rob, harass, intimidate, or recklessly endanger someone, shooting in an unsafe place or manner, and poaching. Therefore, this proposal will not hinder the legislature in performing its duty to punish the misuse of arms.

A

STATE OF ALASKA
1988 LEGISLATIVE SESSION

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

FISCAL NOTE

REQUEST:

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

Agency Affected: Office of the Governor
BRU: Division of Elections
Components: II - Primary & General Elections

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

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

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

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

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

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

Under these circumstances the fiscal note would be:

53.4