ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7287 HOUSE STATE AFFAIRS

The 1882 statutory provision was interpreted by this Court in State v. Workman, 35 W. Va. 367, 14 S.E. 9 (1891). The Court in Workman considered several issues regarding the right to bear arms, including the constitutional right to self-defense, the constitutionality, under the due process clause, of the weapons statute in effect in West Virginia at that time and the definition of the term "arms" in the context of the second amendment to the United States Constitution.[5]

(Footnote Continued)

> defendant shall prove to the satisfaction of the jury that he is a quiet and peaceable citizen, of good character and standing in the community in which he lives, and at the time he was found with such pistol, dirk, razor or bowie knife, as charged in the indictment, he had good cause to believe and did believe that he was in danger of death or great bodily harm at the hands of another person, and that he was, in good faith, carrying such weapon for self defense and for no other purpose, the jury shall find him not guilty. But nothing in this section contained shall be so construed as to prevent any officer charged with the execution of the laws of the state from carrying a revolver or other pistol, dirk or bowie knife.

(emphasis added) We need not address the implications of the impermissible burden shifting to the defendant regarding the possession of arms for self-defense purposes. See syl. pt. 4, State v. Kirtley, 162 W. Va. 249, 252 S.E.2d 374 (1978) (once there is sufficient evidence to create a reasonable doubt that the killing resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense); see also Bowman v. Leverette, 169 W. Va. 589, 595, 289 S.E.2d 435, 439 (1982).

[5]The second amendment to the United States Constitution provides: "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Despite language embodied in § 7 of the 1882 weapons statute which on its face appeared to grant the right of self-defense only to persons of "good character," see note 4, supra, the Court in Workman found that there was a constitutional right to self-defense guaranteed to all persons under both the due process clause of the fourteenth amendment to the United States Constitution and article III, section 1 of the West Virginia Constitution. 35 W. Va. at 370-71, 14 S.E. at 10-11.

After recognizing a constitutional right to self-defense, the Court addressed the general intent of the second amendment to the United States Constitution and determined that it involved the protection of keeping and bearing arms as a popular or collective right.[6] 35 W. Va. at 372-73, 14 S.E. at 11. The Court concluded that "to regulate a conceded [constitutional] right is not necessarily to infringe the same." Id at 372, 14 S.E. at 11. In so holding, the Court compared a state's regulation of the right to keep and bear arms to the regulation of the freedoms guaranteed under the first amendment to the United States Constitution. Thus, the Court implied that s

---

[6]We note that the Court in Workman interpreted the second amendment as though it was a restriction upon state as well as federal legislation. Id. at 372, 14 S.E. at 11. Of course, since our Court's holding in Workman, the Supreme Court of the United States has determined that the second 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, 813 (1894). "Workman does not stand for the proposition that the second amendment extends to the states, but is rather a decision assuming, but not holding, that the second amendment did apply to the states." McNeely, supra at 1130 n. 29.

constitutional guarantee or right to keep and bear arms would subject laws regulating protected arms to the same standard of scrutiny given laws regulating first amendment freedoms. McNeely, supra at 1130.

Significantly, the Court in Workman defined the term "arms" in a second amendment context as follows:

> [I]n regard to the kind of arms referred to in the [second] amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets--arms to be used in defending the State and civil liberty--and not to pistols, bowie-knives, brass knuckles, billies, and other weapons as are usually employed in brawls, street fights, duels and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the State.

35 W. Va. at 373, 14 S.E. at 11. Clearly, with this definition, the Court refused to include pistols as a constitutionally protected weapon pursuant to its second amendment analysis.

However, it is important to note that the definition of "arms" presented in Workman focuses on the "well regulated militia" language of the second amendment. No parallel language appears in our state constitutional amendment. Because the second amendment does not operate as a restraint upon the power of states to regulate firearms, supra note 6, the definition of "arms" set forth in Workman is not particularly helpful in the case now before us. Moreover, the broad language embodied in our current Right to Keep and Bear Arms Amendment makes any further reexamination of the Workman definition unnecessary.

In several cases where courts have considered the constitutionality of statutes and ordinances in light of constitutional provisions guaranteeing a right to bear arms for defensive purposes, proscriptive laws infringing on that constitutionally protected right have been voided. See, e.g., City of Lakewood v. Pillow, 180 Colo. 20, 23, 501 P.2d 744, 745-46 (1972) (ordinance prohibiting possession of dangerous or deadly weapon unconstitutionally overbroad where it prohibited activities which under police power could not be reasonably classified as unlawful); In Re Brickey, 8 Idaho 597, 599, 70 P. 609, 609 (1902) (statute prohibiting carrying of weapons in any manner in cities, towns or villages was unconstitutional); People v. Zerillo, 219 Mich. 635, 642, 189 N.W. 927, 929 (1922) (statute prohibiting possession of pistol by unnaturalized foreign born resident unconstitutional because of broad term "person" in the constitutional provision); State v. Delgado, 298 Or. 395, 403-04, 692 P.2d 610, 614 (1984) (constitutional right to bear arms violated by statute prohibiting mere possession and mere carrying of a switchblade knife); State v. Blocker, 291 Or. 255, 261-62, 630 P.2d 824, 827 (1981) (statute prohibiting possession of billy club in public unconstitutional infringement of right to bear arms); State v. Kessler, 289 Or. 359, 372, 614 P.2d 94, 100 (1980) (statute prohibiting possession of billy club in home unconstitutional infringement of right to bear arms); State v. Rosenthal, 75 Vt. 295, 299, 55 A. 610, 611 (1903) (ordinance prohibiting carrying dangerous concealed weapon without written permission of mayor or police chief unconstitutional).

The language embodied in art. III, § 22 of our State Constitution is sweeping, and we look to the well established rules of constitutional construction in order to ascertain its meaning.

At the outset we note that "[t]he fundamental principle in constitutional construction is that effect must be given to the intent of the framers of [the constitutional amendment] and of the people who ratified and adopted it." State ex rel. Brotherton v. Blankenship, 157 W. Va. 100, 108, 207 S.E.2d 421, 427 (1973); see also syl. pt. 4, State ex rel. Smith v. Kelly, 149 W. Va. 381, 141 S.E.2d 142 (1965); syl. pt. 4, State ex rel. Morgan v. O'Brien, 134 W. Va. 1, 60 S.E.2d 722 (1948). Unfortunately, no real statement of legislative intent is before us.

Questions of constitutional construction are governed by the same general rules as those applied in statutory construction. State ex rel. Brotherton v. Blankenship, 157 W. Va. 100, 108, 207 S.E.2d 421, 427 (1973). It is a well established principle of constitutional construction that "[w]here a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed." Syl. pt. 3, State ex rel. Smith v. Gore, 150 W. Va. 71, 143 S.E.2d 791 (1965). See also Ray v. McCoy, ___ W. Va. ___, ___, 321 S.E.2d 90, 92 (1984).

Moreover, a cardinal rule of statutory construction, which of course applies to the construction of constitutional provisions as well, is that a statute, or in this case a constitutional amendment, must be considered in its entirety, with effect given, if possible, to every word

or phrase within the provision. Diamond v. Parkersburg-Aetna Corp., 146 W. Va. 543, 553-54, 122 S.E.2d 436, 443 (1961). A constitutional amendment will supersede any inconsistent portions of antecedent constitutional or statutory provisions, as "'the highest expression of the will of the people.'" State ex rel. Kanawha County Building Commission v. Paterno, 160 W. Va. 195, 203, 233 S.E.2d 332, 337 (1977). (citation omitted)

Because the constitutional provision in the case before us is clear and unambiguous, this Court must apply the amendment rather than construe it. See discussion supra. Thus, the meaning of a phrase or terms would generally be sought in the plain and ordinary meaning of the words themselves. State ex rel. Dunbar v. Stone, 159 W. Va. 331, 334-35, 221 S.E.2d 791, 793 (1976) (and cases cited therein).

W. Va. Code, 61-7-1 [1975] is written as a total proscription of the carrying of a dangerous or deadly weapon without a license or other authorization. W. Va. Code, 61-7-1 [1975] thus prohibits the carrying of weapons for defense of self, family, home and state without a license or statutory authorization. Article III, section 22 of the West Virginia Constitution, however, guarantees that a person has the right to bear arms for those defensive purposes. Thus, the statute operates to impermissibly infringe upon this constitutionally protected right to bear arms for defensive purposes. See City of Lakewood v. Pillow, 180 Colo. at 23, 501 P.2d at 745. We discuss infra the legislature's power to reasonably regulate the exercise of the right to bear arms; however, W. Va. Code, 61-7-1

[1975] prohibits the exercise of this right by infringing upon the constitutional right to bear arms for the defensive purposes guaranteed in the amendment. See In Re Brickey, 8 Idaho at 599, 70 P. at 609.

In considering the constitutionality of a particular statutory proscription against the possession of a certain weapon in public in light of the right to bear arms amendment of the state, the Supreme Court of Oregon determined that the statute was overbroad and therefore unconstitutional. State v. Blocker, 291 Or. 255, 261, 630 P.2d 824, 827 (1981). The court's insightful discussion of the overbreadth doctrine is applicable in this case:

> An 'overbroad' law, as that term has been developed by the United States Supreme Court, is not vague, or need not be. Its vice is not failure to communicate. Its vice may be clarity. For a law is overbroad to the extent that it announces a prohibition that reaches conduct which may not be prohibited. A legislature can make a law as 'broad' and inclusive as it chooses unless it reaches into constitutionally protected ground. The clearer an 'overbroad' statute is, the harder it is to confine it by interpretation within its constitutionally permissible reach.

Id.

Based upon the foregoing, we conclude that the language embodied in W. Va. Code, 61-7-1 [1975] sweeps so broadly as to infringe a right that it cannot permissibly reach, in this case, the constitutional right of a person to keep and bear arms in defense of self, family, home and state, guaranteed by art. III, § 22. Accordingly, W. Va. Code, 61-7-1 [1975], the statutory proscription against carrying a dangerous or deadly weapon, is overbroad and violative of article III, section 22 of the West Virginia

Constitution, known as the "Right to Keep and Bear Arms Amendment." It infringes upon the right of a person to bear arms for defensive purposes, specifically, defense of self, family, home and state, insofar as it prohibits the carrying of a dangerous or deadly weapon for any purpose without a license or other statutory authorization.

The question remains whether the State may reasonably regulate the right of a person to keep and bear arms in this State.[7]

---

[7]The principal statute involved in this portion of our discussion is W. Va. Code, 61-7-2 [1988], which delineates the procedures to obtain a license. W. Va. Code, 61-7-2 [1988] provides in pertinent part:

> (a) Any person desiring to obtain a state license to carry any such weapon as is mentioned in the first section of this article, within one or more counties in this state, shall first publish a notice setting forth his name, residence and occupation, and that on a certain day he will apply to the circuit court of his county for such state license. Such notice shall be published as a Class I legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the county in which such person resides. Such notice shall be published at least ten days before such application is made. After the publication of such notice and at the time stated in such notice, upon application to such court, it may grant such license to such person, in the following manner, to wit:
>
> (b) The applicant shall file with such court his application in writing, duly verified, which application shall show, as basic qualifications, as follows:
>
> (1) That such applicant is a

(Footnote Continued)

We stress that our holding above in no way means

(Footnote Continued)
citizen of the United States of America;

(2) That the applicant has been a bona fide resident of this state for at least one year next prior to the date of such application, and of the county sixty days next prior thereto;

(3) That the applicant is over eighteen years of age; that he is a person of good moral character, of temperate habits, not addicted to intoxication, not addicted to the use of any controlled substance, and has not been convicted of a felony or of any offense involving the use on his part of such weapon in an unlawful manner, and shall prove to the satisfaction of the court that he is gainfully employed in a lawful occupation and has been so engaged for a period of five years next preceding the date of his application;

(4) The purpose or purposes for which the applicant desires to carry such weapon, the necessity therefor, and the county or counties in which such license is desired to be effective; and

(5) That the applicant has qualified under minimum requirements for handling and firing such firearms. These minimum requirements are those promulgated by the department of natural resources and attained under the auspices of the department of natural resources: Provided, That the court may waive this requirement in the case of a renewal applicant who has previously qualified.

(c) Upon the hearing of such application the court shall hear evidence upon all matters stated in such application and upon any other matter deemed pertinent by the court, and if such court be satisfied from the proof that there is good reason and cause for such person to carry such weapon, and all of the other conditions of this article be complied with, the court, or

(Footnote Continued)

that the right of a person to bear arms is absolute. See cases cited infra at pp. 15-16. Other jurisdictions concluding that state statutes or municipal ordinances have violated constitutional provisions guaranteeing a right to bear arms for defensive purposes, though not specific in what ways this is to be done, have recognized that a government may regulate the exercise of the right, provided the regulations or restrictions do not frustrate the guarantees of the constitutional provision. See, e.g., In Re Brickey, 8 Idaho 597, 599, 70 P. 609, 609 (1902); City of Las Vegas v. Moberg, 82 N.M. 626, 627, 485 P.2d 737, 738 (Ct. App. 1971). Particularly, on three occasions, the Supreme Court of Oregon, in striking statutes as violative of the state's constitutional right to bear arms, has repeatedly stressed

---

(Footnote Continued)
the judge thereof in vacation, may grant such license for such purposes, and no other, as such court, or the judge in vacation, may set out in the license (and the word 'court' as used in this article shall include the circuit judge thereof, acting either in term or vacation); but, before such license shall be effective such person shall pay to the sheriff, and the court shall so certify in its order granting the license, the sum of fifty dollars, and shall also file a bond with the clerk of such court, in the penalty of five thousand dollars, with good security, signed by a responsible person or persons, or by some surety company, authorized to do business in this state, conditioned that such applicant will not carry such weapon except in accordance with his application and as authorized by the court, and that he will pay all costs and damages accruing to any person by the accidental discharge or improper, negligent or illegal use of such weapon or weapons.

that the court's holdings should not be construed to mean that an individual has an "unfettered right" to possess or use constitutionally protected arms in any way they choose. The Oregon court has consistently emphasized that the legislature may regulate such possession and use. State v. Delgado, 298 Or. at 403, 692 P.2d at 614; State v. Blocker, 291 Or. at 259, 630 P.2d at 826; State v. Kessler, 289 Or. at 370; 614 P.2d at 99.

The State, through exercise of its police power, is vested with the authority to enact laws, within constitutional limits, to promote the general welfare of its citizenry. See generally State ex rel. Appalachian Power Co. v. Gainer, 149 W. Va. 740, 143 S.E.2d 351 (1965); syl. pt. 5, Farley v. Graney, 146 W. Va. 22, 119 S.E.2d 833 (1960). In syllabus point 5 of Gainer, this Court defines the State's police power as follows:

> The police power is the power of the state, inherent in every sovereignty, to enact laws, within constitutional limits, to promote the welfare of its citizens. The police power is difficult to define precisely, because it is extensive, elastic and constantly evolving to meet new and increasing demands for its exercise for the benefit of society and to promote the general welfare. It embraces the power of the state to preserve and to promote the general welfare and it is concerned with whatever affects the peace, security, morals, health and general welfare of the community. It cannot be circumscribed within narrow limits nor can it be confined to precedents resting alone on conditions of the past. As civilization becomes increasingly complex and as advancements are made, the police power must of necessity evolve, develop and expand, in the public interest, to meet such conditions.

See also Security National Bank & Trust Co. v. First W. Va. Bancorp., Inc., 166 W. Va. 775, 780, 277 S.E.2d 613, 616 (1981).

Our research has revealed that courts throughout the country have recognized that the constitutional right to keep and bear arms is not absolute, and these courts have uniformly upheld the police power of the state through its legislature to impose reasonable regulatory control over the state constitutional right to bear arms in order to promote the safety and welfare of its citizens. See, e.g., Bristow v. State, 418 So. 2d 927, 930 (Ala. Crim. App.), cert. denied (Ala. 1982); People v. Blue, 190 Colo. 95, 102-03, 544 P.2d 385, 390-91 (1975); State v. Rupp, 282 N.W.2d 125, 130 (Iowa 1979); In re Atkinson, 291 N.W.2d 396, 399 (Minn. 1980); State v. Angelo, 3 N.J. Misc. 1014, 1015, 130 A. 458, 459 (1925); State v. Dees, 100 N.M. 252, 254-55, 669 P.2d 261, 263-64 (Ct. App. 1983); Commonwealth v. Ray, 218 Pa. Super. 72, ___, 272 A.2d 275, 279 (1970); Carfield v. State, 649 P.2d 865, 871 (Wyo. 1982). We stress; however, that the legitimate governmental purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved. City of Lakewood, supra.

At least forty-two jurisdictions have constitutional provisions guaranteeing a right to bear arms; however, most are distinguishable from art. III, § 22 either in their failure to specifically recognize the right to self-defense, or in their express recognition that the constitutional provision is subject to legislative regulation. See R. Dowlut & J. Knoop, State Constitutions and

the Right to Keep and Bear Arms, 7 Okla. City U.L. Rev. 177, 236-240 (1982). The State, in the appendix to its brief, cites thirteen states which, like art. III, § 22, grant a rather broad, unrestrictive right to bear arms for the defense of self and the state.[8] With the exception of

---

[8]The following is a list of the jurisdictions with constitutional provisions, quoted below, guaranteeing a right to bear arms, which are worded similarly to West Virginia's amendment. Of particular note is the Delaware constitutional provision which is nearly identical to West Virginia's constitutional guarantee, except for the insertion of the word "lawful" before the word "hunting" in the West Virginia amendment.

> Alabama: "That every citizen has a right to bear arms in defense of himself and the state." Ala. Const. art. I, § 26.
>
> 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.
>
> Connecticut: "Every citizen has a right to bear arms in defense of himself and the state." Conn. Const. art. I, § 15.
>
> Delaware: "A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use." Del. Const. art. I, § 20.
>
> Indiana: "The people shall have a right to bear arms, for the defense of themselves and the State." Ind. Const. art. I, § 32.
>
> Michigan: "Every person has a right to keep and bear arms for the defense of himself and the state." Mich. Const. art. I, § 6.

(Footnote Continued)

Vermont, which imposes no significant regulation, the

(Footnote Continued)

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. 1, art. 2-a.

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

Pennsylvania: "The right of the citizens to bear arms in defence [sic] of themselves and the State shall not be questioned." Pa. Const. art. I, § 21.

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.

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 other lawful purposes shall not be infringed; nothing herein shall prevent the legislature from defining the lawful use of arms." Utah Const. art. I, § 6.

Vermont: "That the people have a right to bear arms for the defence [sic] 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. 1, art. 16.

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

(Footnote Continued)

remaining jurisdictions regulate the ownership and use of arms in general, particularly handguns.[9]

Again excluding Vermont, certain statutory regulations are common to most of the jurisdictions having constitutional provisions comparable to West Virginia's. For instance, the prohibition against the possession or ownership of handguns by persons previously convicted of a felony or other specified crime is widely accepted.[10] Four states prohibit the open or concealed carrying of handguns without a license or permit; several others specifically prohibit carrying a concealed handgun without a license, while at least one of these jurisdictions, namely, Arizona, further prohibits carrying a handgun in public establishments or certain specified public places.[11]

(Footnote Continued)
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.

[9]Although Vermont imposes no significant restriction on the carrying of handguns, it nevertheless has regulations prohibiting the possession or carrying of handguns and other deadly weapons with intent to injure another person. Vt. Stat. Ann. tit. 13, § 4003 (1974).

[10]Ala. Code § 13A-11-72 (1982); Conn. Gen. Stat. Ann. § 29-29 (West 1975); Ind. Code Ann. § 35-47-2-3 (Burns 1985); Mich. Comp. Laws Ann. § 28.422 (West Supp. 1988); N.H. Rev. Stat. Ann. § 159:3 (1981); Or. Rev. Stat. § 166.270 (1987); Pa. Stat. Ann. tit. 18, § 6105 (Purdon 1983); S.D. Codified Laws Ann. § 23-7-7.1 (Supp. 1987); Utah Code Ann. § 76-10-513 (Supp. 1987); Wash. Rev. Code Ann. § 9.41.040 (West 1988); Wyo. Stat. § 6-8-104 (1977, 1986).

[11]See, e.g., Ala. Code § 13A-11-52, 13A-11-73 (1982); Ariz. Rev. Stat. Ann. § 13-3102 (Supp. 1987); Conn.
(Footnote Continued)

West Virginia does not regulate the carrying of a weapon on one's own premises nor prohibit the carrying of such weapon to and from places where they may be lawfully used, i.e., target-shooting clubs and hunting grounds. W. Va. Code, 61-7-3 [1987].[12] Pursuant to W. Va. Code,

---

(Footnote Continued)
Gen. Stat. Ann. § 29-35 (West Supp. 1988); Ind. Code Ann. § 35-47-2-1 (Burns Supp. 1988); Mich. Comp. Laws Ann. § 28.422, § 750.227 (West Supp. 1988); N.H. Rev. Stat. Ann. § 159:4 (1977); Or. Rev. Stat. § 166.250 (1987); Pa. Stat. Ann. tit. 18, § 6106 (Purdon 1983 and Supp. 1988); S.D. Codified Laws Ann. § 22-14-9 (Supp. 1987); Utah Code Ann. § 76-10-513 (Supp. 1987); Wash. Rev. Code Ann. § 9.41.050 (1988); Wyo. Stat. § 6-8-104 (1977, 1986).

Alabama, Connecticut, Indiana and Michigan are the four jurisdictions which prohibit the unconcealed (or open) or concealed carrying of handguns without a license or permit.

[12] W. Va. Code, 61-7-3 [1987] provides in pertinent part:

> Nothing in this article shall prevent any person from carrying any such weapon as is mentioned in the first section of this article, in good faith and not having felonious purposes, upon his own premises; nor shall anything herein prevent a person from carrying any such weapon, unloaded, from the place of purchase to his home or residence, or to a place of repair and back to his home or residence; . . . nor shall anything herein prevent any member of a properly organized target-shooting club authorized by law to obtain firearms by purchase or requisition from this state, or from the United States for the purpose of target practice, from carrying any revolver or pistol mentioned in this article, unloaded, from his home or place of residence to a place of target practice, and from any such place of target practice back to his home or residence, for using any such weapon at such place of target practice in training and improving his skill in the use of such weapons[.]

61-7-2 [1988], any person desiring to obtain a license to carry a weapon must meet the following requirements: (1) is a citizen of the United States: (2) has been a resident of West Virginia for at least one year next prior to the date of application; (3) is an adult of good moral character and temperate habits; (4) has not been convicted of any felony or handgun offense; (5) has been employed for five years; (6) is qualified to handle handguns; (7) has "good reason and cause" to carry such weapon, and (8) must post a $5000 surety bond.

The regulatory requirements, embodied in W. Va. Code, 61-7-2 [1988], rather than being unique, are for the most part found in the fourteen states with similar constitutional provisions.[13] Of the three states whose constitutional provisions most closely resemble our own, Connecticut, Indiana, and Michigan, two require the licenses to be a United States citizen and resident of the state;[14] all three require that the licensee be of good character or a "suitable person;"[15] two require that the licensee be an

---

[13] See, e.g., Ala. Code §§ 13A-11-72 to -75, as amended; Conn. Gen. Stat. Ann. §§ 29-28,-29,-33, as amended; Ind. Code Ann. §§ 35-47-2-3, 35-47-1-7, as amended; Mich. Comp. Laws Ann. §§ 28.422,-.426, as amended; N.H. Rev. Stat. Ann. §§ 159:3,-:6, as amended, Or. Rev. Stat. §§ 166.270,-290, as amended; Pa. Stat. Ann. tit. 18, §§ 6105, 6109, as amended; S.D. Codified Laws Ann. § 23-7-7.1 (Supp. 1987); Utah Code Ann. § 76-10-513 (Supp. 1987); Wash. Rev. Code Ann. § 9.41.070 (1988); Wyo. Stat. § 6-8-104 (1977, 1986).

[14] See Conn. Gen. Stat. Ann. §§ 29-33 and -28, as amended, respectively, and Mich. Comp. Laws Ann. § 28.422 (West Supp. 1988).

[15] Conn. Gen. Stat. Ann. § 29-28 (West 1975); Ind. (Footnote Continued)

adult;[16] all three prohibit possession by persons convicted of a felony;[17] two require that the licensee demonstrate good cause or proper reason to carry a weapon;[18] and one requires that a licensee not be addicted to drugs or alcohol.[19]

It is important to note that the state of Delaware recently adopted a constitutional amendment strikingly similar to our West Virginia provision, see Del. Const. art. I, § 20, quoted in note 8, supra. The Delaware weapons statute, Del. Code Ann. tit. 11, § 1441 (1987) is analogous to our weapons regulations in that it requires an applicant to obtain a license in order to carry a concealed weapon. Similar to W. Va. Code, 61-7-2 [1988], the statute further provides that an applicant be of "full age, sobriety and good moral character" as well as demonstrate that the carrying of such a weapon is necessary for the protection of the applicant himself, his property or both in order to be so licensed.

(Footnote Continued)
Code Ann. § 35-47-2-3 (Burns 1985); Mich. Comp. Laws Ann. § 28.426 (West Supp. 1988).

[16] Ind. Code Ann. § 35-47-2-3 (Burns 1985); Mich. Comp. Laws Ann. 28.422 (West Supp. 1988).

[17] See note 10, supra.

[18] Ind. Code Ann. § 35-47-2-3 (Burns 1985); Mich. Comp. Laws Ann. § 28.426 (West Supp. 1988).

[19] Ind. Code Ann. § 35-47-1-7 (Burns 1985).

We further note that Utah, like West Virginia, requires applicants for a weapon license to have an employment history. Utah Code Ann. § 76-10-513 (Supp. 1987).

Thus, our research reveals that the only requirement unique to West Virginia is that the licensee post a $5000 surety bond.

Based upon the foregoing, we conclude that the right to keep and bear arms guaranteed by W. Va. Const. art. III, § 22 is not unlimited. The individual's right to keep and bear arms and the State's duty, under it police power, to make reasonable regulations for the purpose of protecting the health, safety and welfare of its citizens must be balanced. See People v. Blue, 190 Colo. 95, 102-03, 544 P.2d 385, 390-91 (1975). Accordingly, the West Virginia legislature may, through the valid exercise of its police power, reasonably regulate the right of a person to keep and bear arms in order to promote the health, safety and welfare of all citizens of this State, provided that the restrictions or regulations imposed do not frustrate the constitutional freedoms guaranteed by article III, section 22 of the West Virginia Constitution, known as the "Right to Keep and Bear Arms Amendment." However, a governmental purpose to control or prohibit certain activities, which may be constitutionally subject to state regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the realm of protected freedoms, such as the right to keep and bear arms guaranteed in our State Constitution. See City of Lakewood v. Pillow, 180 Colo. 20, 23, 501 P.2d 744, 745 (1972).

For the foregoing reasons, we answer the first certified question in the negative and the second in the affirmative and remand this action to the Circuit Court of Mercer County for further proceedings consistent with this opinion.

Having answered the certified questions, this case is dismissed from the docket of this Court.

Certified questions answered.

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

State of Nebraska, Appellant,
v.
Charles A. Comeau, Appellee.

State of Nebraska, Appellant,
v.
Larry L. Rush, Appellee.

Case Caption

State v. Comeau

Filed December 1, 1989. Nos. 89-186, 89-187.

Appeals from the District Court for Lincoln County: John P. Murphy and Donald E. Rowlands II, Judges. Exceptions sustained, and causes remanded for further proceedings.

Robert M. Spire, Attorney General, and William L. Howland, and Kent D. Turnbull, Lincoln County Attorney, and John H. Marsh for appellant.

Kent E. Florom, Lincoln County Public Defender, for appellees.

Robert I. Eberly and Robert Dowlut for amici curiae National Rifle Association of America and Nebraska Rifle and Pistol Association.

Jerry Soucie for amicus curiae Nebraska Criminal Defense Attorneys Association.

STATE V. COMEAU

NOS. 89-186, 89-187 - filed December 1, 1989.

1. Constitutional Law: Statutes: Presumptions: Proof. A statute is presumed to be constitutional, and the burden of establishing unconstitutionality is on the party attacking its validity.

2. Constitutional Law: Statutes: Proof. Unconstitutionality must be clearly established before a statute will be declared void.

3. Constitutional Law: States: Statutes. The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and generally for the public welfare.

4. Constitutional Law. The constitutional right to keep and bear arms is not absolute.

5. Constitutional Law: Statutes. The constitutional right to keep and bear arms is subject to reasonable regulation by statute if the statute does not frustrate the guarantee of the constitutional provision.

6. ____: ____. Neb. Rev. Stat. § 28-1206 (Reissue 1985) is held not to be invalid as in conflict with article I, § 1, of the Constitution of Nebraska.

7. ____: ____. Neb. Rev. Stat. § 28-1207 (Reissue 1985) is held not to be invalid as in conflict with article I, § 1, of the Constitution of Nebraska.

Hastings, C.J., Boslaugh, White, Caporale, Shanahan, Grant, and Fahrnbruch, JJ.

BOSLAUGH, J.

These cases involve an interpretation and application of the "Right to Bear Arms" amendment to the Nebraska Constitution, which was proposed by the initiative process and adopted at the general election on November 8, 1988. Article I, § 1, of the Constitution of Nebraska, as amended, now provides as follows:

> All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.

In case No. 89-186, the defendant, Charles A. Comeau, was charged with possessing a firearm from which the manufacturer's identification marks or serial numbers had been removed, defaced, altered, or destroyed. The defendant filed a "demurrer" which alleged that the information failed to state a crime because Neb. Rev. Stat. § 28-1207 (Reissue 1985), under which the defendant was being prosecuted, was now unconstitutional. Treating the demurrer as a motion to dismiss, the trial court sustained it and dismissed the information.

In case No. 89-187, the defendant, Larry L. Rush, was charged, as a habitual criminal, with being a felon in possession of a

defendant filed a "demurrer" which alleged that the information failed to state a crime because Neb. Rev. Stat. § 28-1206 (Reissue 1985), under which the defendant was being prosecuted, was now unconstitutional. Treating the demurrer as a motion to dismiss, the trial court sustained it and dismissed the information.

The State then commenced proceedings under Neb. Rev. Stat. § 29-2315.01 (Reissue 1985) to review the orders dismissing the informations. In this court the cases have been consolidated for briefing and argument.

It is fundamental that a statute is presumed to be constitutional, and the burden of establishing unconstitutionality is on the party attacking its validity. In re Guardianship and Conservatorship of Sim, 225 Neb. 181, 403 N.W.2d 721 (1987). Unconstitutionality must be clearly established before a statute will be declared void. State v. Copple, 224 Neb. 672, 401 N.W.2d 141 (1987).

Essentially, the question presented by these appeals is whether the amendment prevents the Legislature from passing any laws regulating the possession of firearms.

The defendants contend that the amendment must be read literally and that the language which states that the right to keep and bear arms is "inalienable" and shall not be "infringed" by state statute or local ordinance prevents any regulation by the Legislature of the right to possess arms. The defendants concede that the use of weapons may be regulated, but argue that mere possession may not be.

The State contends that the plain meaning of the amendment is that the right to keep and bear arms is limited to "lawful

purposes." Lawful purposes are not defined in the amendment except as "for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes . . . ." The State argues that in the exercise of the police power, the Legislature may define what purposes are lawful purposes.

The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and generally for the public welfare. Finocchiaro, Inc. v. Nebraska Liq. Cont. Comm., 217 Neb. 487, 351 N.W.2d 701 (1984).

There are very few rights which are absolute, and this is of necessity. In every phase of everyday experience, there are extremes beyond which some restraint or regulation is necessary for the common good.

Even in those cases where statutes have been held to be invalid because in conflict with a constitutional provision concerning the right to keep and bear arms, many courts have recognized that the right is not absolute. In City of Princeton v. Buckner, 377 S.E.2d 139 (W. Va. 1988), in which the Supreme Court of Appeals of West Virginia held a statute requiring a license to carry certain weapons invalid, the court said:

> The question remains whether the State may reasonably regulate the right of a person to keep and bear arms in this State.
>
> We stress that our holding above in no way means that the right of a person to bear arms is absolute. See cases cited infra at p. 146. Other jurisdictions concluding that state statutes or municipal ordinances have violated constitutional

provisions guaranteeing a right to bear arms for defensive purposes, though not specific in what ways this is to be done, have recognized that a government may regulate the exercise of the right, provided the regulations or restrictions do not frustrate the guarantees of the constitutional provision. See, e.g., In Re Brickey, 8 Idaho 597, 599, 70 P. 609, 609 (1902); City of Las Vegas v. Moberg, 82 N.M. 626, 627, 485 P.2d 737, 738 (Ct.App.1971). Particularly, on three occasions, the Supreme Court of Oregon, in striking statutes as violative of the state's constitutional right to bear arms, has repeatedly stressed that the court's holdings should not be construed to mean that an individual has an "unfettered right" to possess or use constitutionally protected arms in any way he chooses. The Oregon court has consistently emphasized that the legislature may regulate such possession and use. State v. Delgado, 298 Or. at 403, 692 P.2d at 614; State v. Blocker, 291 Or. at 259, 630 P.2d at 826; State v. Kessler, 289 Or. at 370; 614 P.2d at 99.

. . . .

Our research has revealed that courts throughout the country have recognized that the constitutional right to keep and bear arms is not absolute, and these courts have uniformly upheld the police power of the state through its legislature to impose reasonable regulatory control over the state constitutional right to bear arms in order to promote the safety and welfare of its citizens. See, e.g., Bristow v. State, 418 So.2d 927, 930 (Ala.Crim.App.), cert. denied (Ala.1982); People v. Blue, 190 Colo. 95, 102-03, 544 P.2d 385, 390-91 (1975); State v. Rupp, 282 N.W.2d 125, 130 (Iowa 1979); In re Atkinson, 291 N.W.2d 396, 399 (Minn.1980); State v. Angelo, 3 N.J.Misc. 1014, 1015, 130 A. 458, 459 (1925); State v. Daes, 100 N.M. 252, 254-55, 669 P.2d 261, 263-64 (Ct.App.1983); Commonwealth v. Ray, 218 Pa.Super. 72, 79, 272 A.2d 275, 279 (1970); Canfield v. State, 649 P.2d 865, 871 (Wyo.1982). We stress, however, that the legitimate governmental purpose in regulating the right to bear arms

[illegible] the exercise

of this right where the governmental purpose can be more narrowly achieved. City of Lakewood, supra.

At least forty-two jurisdictions have constitutional provisions guaranteeing a right to bear arms; however, most are distinguishable from art. III, § 22 either in their failure to specifically recognize the right to self-defense, or in their express recognition that the constitutional provision is subject to legislative regulation. See R. Dowlut & J. Knoop, State Constitutions and the Right to Keep and Bear Arms, 7 Okla. City U.L.Rev. 177, 236-240 (1982). The State, in the appendix to its brief, cites thirteen states which, like art. III, § 22, grant a rather broad, unrestrictive right to bear arms for the defense of self and the state. With the exception of Vermont, which imposes no significant regulation, the remaining jurisdictions regulate the ownership and use of arms in general, particularly handguns.

Again excluding Vermont, certain statutory regulations are common to most of the jurisdictions having constitutional provisions comparable to West Virginia's. For instance, the prohibition against the possession or ownership of handguns by persons previously convicted of a felony or other specified crime is widely accepted. Four states prohibit the open or concealed carrying of handguns without a license or permit; several others specifically prohibit carrying a concealed handgun without a license, while at least one of these jurisdictions, namely, Arizona, further prohibits carrying a handgun in public establishments or certain specified public places.

. . . .

Based upon the foregoing, we conclude that the right to keep and bear arms guaranteed by W.Va. Const. art. III, § 22 is not unlimited. The individual's right to keep and bear arms and the State's duty, under it [sic] police power, to make reasonable regulations for the purpose of protecting the health, safety and welfare of its citizens must be balanced. See People v. Blue, 190 Colo. 95, 102-03, 544 P.2d 385, 390-91 (1975). Accordingly, the West Virginia legislature may,

> through the valid exercise of its police power, reasonably regulate the right of a person to keep and bear arms in order to promote the health, safety and welfare of all citizens of this State, provided that the restrictions or regulations imposed do not frustrate the constitutional freedoms guaranteed by article III, section 22 of the West Virginia Constitution, known as the "Right to Keep and Bear Arms Amendment."

(Emphasis supplied.) 377 S.E.2d at 145-49.

If the use of arms is subject to regulation, then regulation of the right to possession may be the only practical way to make an effectual regulation of the use. For example, if the use of arms by persons of unsound mind is to be prohibited, probably the only effectual way to prevent their use is to prohibit the possession of arms by such persons.

USE / POSSESSION

It is well known that the identification and tracing of a weapon is an important factor in solving crimes involving the use of a weapon. It is for that reason that identifying marks are sometimes removed from weapons. It would be of little use to prohibit the use of weapons from which identifying marks have been removed if the possession of such weapons is lawful. The most effective way to prevent the use of such weapons is to prohibit their possession. Similarly, the most effective way to prevent the use of handguns by felons is to prohibit the possession of handguns by felons.

We think the better view is that reasonable regulation of the possession of arms is not prohibited by the amendment.

In People v. Blue, 190 Colo. 95, 544 P.2d 383 (1975), the Supreme Court of Colorado held that a statute prohibiting

possession of guns by persons convicted of a felony was not invalid under a constitutional provision guaranteeing the right to bear arms. The Colorado constitutional provision was as follows:

> 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.

The Colorado court said:

> It is argued that the statute, which prohibits possession, use, and carrying of a weapon, is a blanket proscription that cannot be reconciled with the literal constitutional language. A felon is a "person" within the meaning of Article II, Section 13, the argument runs, and once he has served his term he is reinstated to the full rights of citizenship, Colo. Const. Art. VII, Sec. 10, including the absolute right to bear arms.
>
> However, not all constitutional rights are absolute. Mosgrove v. Town of Federal Heights, 190 Colo. 1, 543 P.2d 715; Stapleton, Jr. v. Dist. Ct., 179 Colo. 187, 499 P.2d 310; Anderson v. People, 176 Colo. 224, 490 P.2d 47, cert. denied, 405 U.S. 1043, 92 S.Ct. 1316, 31 L.Ed.2d 583; United States v. Akeson, 290 F. Supp. 212 (D. Colo. 1968); Sigma Chi Fraternity v. Regents of the University of Colorado, 258 F. Supp. 515 (D. Colo. 1966). When rights come into conflict, one must of necessity yield. The conflicting rights involved here are the individual's right to bear arms and the state's right, indeed its duty under its inherent police power, to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people. Cottrell v. Teets, 139 Colo. 558, 342 P.2d 1016; Denver v. Denver & Rio Grande Co., 63 Colo. 574, 167 P. 969, aff'd 250 U.S. 241, 39 S.Ct. 450, 63 L.Ed. 958; The People v. Hupp, 53 Colo. 80, 123 P. 651.

We do not read the Colorado Constitution as granting an absolute right to bear arms under all situations. It has limiting language dealing with defense of home, person, and property. These limitations have been recognized by the General Assembly in the enactment of section 18-12-105, C.R.S. 1973, which restricts the right to bear arms in certain circumstances, while permitting in other circumstances tha carrying of a concealed weapon in defense of home, person, and property, and also when specifically authorized by written permit.

In our view, the statute here is a legitimate exercise of the police power.

"* * * To limit the possession of firearms by those who, by their past conduct, have demonstrated an unfitness to be entrusted with such dangerous instrumentalities, is clearly in the interest of the public health, safety, and welfare and within the scope of the Legislature's police power." People v. Trujillo, 170 Colo. 147, 497 P.2d 1.

See also People v. Trujillo, 184 Colo. 387, 524 P.2d 1379. To be sure, the state legislature cannot, in the name of the police power, enact laws which render nugatory our Bill of Rights and other constitutional protections. Lakewood v. Pillow, supra; People v. Hinderlider, 98 Colo. 505, 57 P.2d 894; Platte Etc., C. & M. Co. v. Dowell, 17 Colo. 376, 30 P. 68, appeal dismissed, 154 U.S. 512, 14 S.Ct. 1150, 38 L.Ed. 1079. But we do not read this statute as an attempt to subvert the intent of Article II, Section 13. The statute simply limits the possession of guns and other weapons by persons who are likely to abuse such possession.

190 Colo. at 102-03, 544 P.2d at 390-91.

In State v. Ricahill, 415 N.W.2d 481 (N.D. 1987), the Supreme Court of North Dakota held that a statute prohibiting possession of firearms by convicted felons did not violate that state's constitutional guarantee of the right to keep and bear arms.

The constitutional provision was as follows:

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

N.D. Const. art. I, § 1.

The North Dakota court stated:

> Ricehill argues that the right to bear arms is absolute. He argues that the language of the provision states that the right to bear arms "shall not be infringed," and that this means that the Legislature may place no limits on the possession of arms. We disagree with such a broad reading of the provision. Instead, we believe our Constitution's protection of the right to keep and bear arms is not absolute; although it prevents the negation of the right to keep and bear arms, that right nevertheless remains subject to reasonable regulation under the State's police power. As the Michigan Supreme Court stated in construing that State's right to bear arms, "regardless of the basis of the right to bear arms, the State, nevertheless, has the police power to reasonably regulate it." People v. Brown, 253 Mich. 537, 235 N.W. 245, 246 (1931).
>
> In this case the Legislature prohibited the possession of firearms by persons who have previously committed serious crimes. It is patently reasonable for the Legislature to conclude that it is protecting the public welfare by enacting legislation that keeps firearms out of the hands of people who have shown a disposition to harm others. The Louisiana Supreme Court stated, in rejecting a State constitutional right-to-bear-arms challenge to its prohibition against possession of a firearm by a felon under a police-power rationale:

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

415 N.W.2d at 483. The North Dakota court also cited People v. Blue, 190 Colo. 95, 544 P.2d 385 (1975), with approval.

We conclude that the statutes in question are reasonable regulations of the right to keep and bear arms and the judgments dismissing the informations were erroneous. Since the defendants have not been placed in jeopardy, the cause in each case is remanded for further proceedings.

EXCEPTIONS SUSTAINED, AND CAUSES REMANDED FOR FURTHER PROCEEDINGS.

STATE OF MAINE

v.

EDWARD BROWN

Argued January 18, 1990
Decided March 14, 1990

Before McKUSICK, C.J., and ROBERTS, WATHEN, GLASSMAN, CLIFFORD, HORNBY, and COLLINS, JJ.

McKUSICK, C.J.

In 1987 the people of this state voted to amend article I, section 16, of the Maine Constitution to provide that "[e]very citizen has a right to keep and bear arms; and this right shall never be questioned." By their vote the people struck four words, "for the common defense," from the original provision, with the apparent intent of establishing for every citizen the individual right to bear arms, as opposed to the collective right to bear arms for the common defense.[1] The issue on this appeal is the constitutionality, after the 1987 amendment, of the criminal statute prohibiting the possession of a firearm by a convicted felon. That issue raises two questions: 1) Did the amendment create an absolute right to keep and bear arms, and 2) if it did not, does the possession-by-a-felon statute exceed the

[1] From 1819 until its amendment in 1987, Me. Const. art. I, § 16, provided that: "Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned."

permissible bounds of reasonable regulation under the State's constitutional police power. We answer both questions in the negative.

The State appeals from an order entered by the Superior Court (Cumberland County, Perkins, J.) dismissing Count II of a two-count 1988 indictment charging defendant Edward Brown with possession of a firearm by a felon, 15 M.R.S.A. § 393(1) (Class C) (1980).[2] Defendant pleaded not guilty to the possession-by-a-felon charge and moved for its dismissal. On his motion defendant argued that 15 M.R.S.A. § 393(1) is unconstitutional as applied to him because under section 16, as amended, his right to keep and bear arms is absolute and cannot be abridged by reason of his having been previously convicted of what he calls a "nonviolent" felony, operating a motor vehicle at a time when he as an habitual motor vehicle offender had had his license revoked.[3] Although the court ruled that the citizen's right under amended section 16 is not absolute but rather is subject to reasonable police power regulation, it concluded that there is no rational relationship between the possession of a firearm by a person previously convicted of a "nonviolent" felony and a threat to public safety. It therefore held section 393(1)

---

[2] 15 M.R.S.A. § 393(1) provides in pertinent part:

> 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 ... shall own, have in his possession or under his control any firearm, unless such a person has obtained a permit under this section.

[3] Operating after revocation of the license of an habitual motor vehicle offender is classified as a Class C offense, punishable by imprisonment for up to 5 years, 29 M.R.S.A. § 2298(2) (Supp. 1989), and carries a mandatory minimum sentence of 60 days imprisonment, id.

unconstitutional as applied to defendant and dismissed Count II. Only that dismissal is now before us.[4]

For the State to prevail on its appeal from that dismissal, it must persuade us both that, contrary to defendant's contention, the citizen's right to keep and bear arms under amended section 16 is not absolute and that the possession-by-a-felon statute represents a reasonable exercise of the State's constitutional police power. The State does persuade us on both scores, and therefore we vacate the Superior Court's dismissal of the possession-by-a-felon charge against defendant.

Prior to the 1987 amendment the Maine Constitution afforded no absolute right to keep and bear arms and we now hold that no absolute right was created by the amendment. Both prior to and after its amendment, section 16 provided that the right to keep and bear arms "shall never be questioned"; the amendment to section 16 merely deleted the words "for the common defense." Before those four words were deleted, the section 16 right was not absolute, as declared by our prior case law, and the evident purpose of the amendment was merely to transform a collective right to bear arms into an individual right and nothing more.

The procedure for amending the Maine Constitution is prescribed in article X, section 4, with additional implementing provisions provided by statute, 1 M.R.S.A. §§ 351-353 (1989). Pursuant to section 353 the Attorney General, prior to submission of the question to the voters,

---

[4] Count I of the 1988 indictment charges defendant with criminal threatening with a firearm. The Superior Court denied defendant's motion to dismiss that count also, but defendant has not sought review of that ruling.

"shall prepare a brief explanatory statement which shall fairly describe the intent and content of each constitutional resolution or statewide referendum that may be presented to the people." The Attorney General's statement must explain what a yes vote favors and what a no vote opposes. Id. Further, the Attorney General must have his explanation published twice in each daily newspaper in the state, the first time between 45 and 30 days prior to the vote, the second between 10 and 7 days prior to the same. Id.

In 1987 the Attorney General did prepare and publish the required explanation of the proposed amendment to section 16. The explanation provided:

> The proposal would amend the Maine Constitution to establish a new personal right to keep and carry weapons, in place of the existing right to bear arms for the common defense. In proposing the amendment, several legislators formally expressed their understanding and intention that the proposed personal right, like the existing collective right, would be subject to reasonable limitation by legislation enacted at the state or local level. The Attorney General has issued an opinion to the same effect.
>
> The amendment would repeal the collective right of Maine citizens to keep and carry weapons as may be necessary to participate in the defense of the State or community through a broadly based, organized militia. The existing provision, as interpreted by the Maine Supreme Judicial Court in State v. Friel, 508 A.2d 123 (Me. 1986), establishes no constitutional right to bear arms except this collective right of defense.
>
> If approved, the amendment would take effect on the date of the Governor's proclamation of the vote.
>
> A "YES" vote favors establishing a personal constitutional right to keep and carry weapons, subject to reasonable regulation.
>
> A "NO" vote opposes establishment of such a constitutional right.

(Emphasis added) By the legislative resolution proposing the amendment of section 16, the question appearing on the ballot in November 1987 read, "Shall the Constitution of Maine be amended to clarify the rights of citizens to keep and bear arms?" Resolves 1987, ch. 2. That question standing by itself was at best uninformative[5] and required the voter to look elsewhere to learn how the amendment would "clarify" the rights of citizens to keep and bear arms. That necessary information was provided by the statutorily required statement prepared by the Attorney General. After he had discharged his obligations of explanation and publication, "[t]he electorate ... must be held to have had full knowledge of the terms of the amendment. In voting 'yes' on a question so submitted an elector does not vote upon or adopt the question as part of the amendment, but thereby merely expresses his assent to the amendment as proposed." Opinion of the Justices, 125 Me. 529, 532, 133 A. 265, 266 (1926); see also Fellows v. Eastman, 126 Me. 147, 150, 136 A. 810, 811 (1927). In the absence of a challenge to the Attorney General's official explanation of the amendment, we assume that the voters intended to adopt the constitutional amendment on the terms in which it was presented to them, including the interpretation that the individual right created by the amendment, like its predecessor collective right, is not absolute but rather remains subject to reasonable regulation by

---

[5] No issue has been raised here by either a party or an amicus curiae whether the use of the word "clarify" in the ballot question was misleading in describing an amendment that proposed to "establish a new personal right to keep and carry weapons, in place of the existing right to bear arms for the common defense." Attorney General's Explanation of Proposed Amendment to Me. Const. art. I, § 16, quoted above in the text. See Opinion of the Justices, 283 A.2d 234, 236 (Me. 1971) ("an amendment presented to the voters by means of a question which is clearly misleading is void and of no effect").

the legislature.

Our holding that amended section 16 does not vest every citizen with an absolute right to possess firearms also finds support in a common sense view of the context in which the voters of Maine adopted the 1987 amendment. Plainly, the people of Maine who voted for the amendment never intended that an inmate at Maine State Prison or a patient at a mental hospital would have an absolute right to possess a firearm. Once it is apparent, as common sense requires it to be, that amended section 16 does not bar some reasonable regulation of the constitutional right to possess firearms, the only remaining question becomes what are the outer bounds of reasonableness for the regulation of that non-absolute right. All of the case authority from other states likewise rejects the notion that the constitutional right to keep and bear arms is absolute. See, e.g., State v. Smelter, 175 Mich. App. 153, 437 N.W.2d 341 (1989); State v. Smoot, 97 Or. App. 255, 775 P.2d 344 (1989); Gardner v. Jenkins, 116 Pa. Commw. Ct. 107, 541 A.2d 406, alloc. denied, 554 A.2d 511 (1988); City of Princeton v. Buckner, 377 S.E.2d 139 (W. Va. 1988); State v. Hamlin, 497 So. 2d 1369 (La. 1986); State v. Sabala, 44 Wash. App. 444, 723 P.2d 5 (1986); State v. Mak, 105 Wash. 2d 692, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986). See also State v. Friel, 508 A.2d 123, 126 nn.4 & 5 (1986), cert. denied, 479 U.S. 843 (1987).

In his brief and at oral argument defendant's only contention has been that the words of section 16 are unambiguous and unqualified; that in construing this constitutional provision we need not, and indeed must not,

look beyond the bare words. Long ago Justice Holmes urged us to reject such a myopic approach to constitutional construction when he wrote:

> [T]he provisions of the Constitution are not mathematical formulas having their essence in their form .... Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and their line of growth.

Gompers v. United States, 233 U.S. 604, 610 (1913). By way of comparison to our amended section 16, the words of the First Amendment are equally unambiguous and unqualified: "Congress shall make no law ... abridging the freedom of speech, or of the press ...." Yet the United States Supreme Court has "reject[ed] the view that freedom of speech and association ... are 'absolutes' ... in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment."[6] Konigsberg v. State Bar of California, 366 U.S. 36, 49 (1961). The Court has upheld in a variety of contexts[7] "general regulatory statutes, not intended to control the content

---

[6] Interestingly enough for our present purposes, the Supreme Court in declaring the nonabsolute nature of the First Amendment, despite its unqualified commands, referred to the federal counterpart of our section 16:

> In this connection also compare the equally unqualified command of the Second Amendment: "the right of the people to keep and bear arms shall not be infringed." And see United States v. Miller, 307 U.S. 174 [178-82 (1938) (restriction of transportation of sawed-off shotguns in interstate commerce)].

Konigsberg v. State Bar of California, 366 U.S. 36, 49 n.10 (1961).

[7] Despite the "preferred position" accorded First Amendment rights, see Murdoch v. Pennsylvania, 319 U.S. 105, 115 (1943), general regulation limiting the unfettered exercise of those rights has, for example, been upheld in the following contexts: the advocacy of or incitement to imminent lawless action, see Hess v. Indiana, 414 U.S. 105 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969); libel of public and private figures, see Philadelphia Newspapers, Inc., v. Hepps, 475 U.S. 767 (1986); Time, Inc., v. Hill, 385 U.S. 374 (1967); "fighting words" in front of hostile audiences, see Cohen v. California, 403 U.S. 15, reh'g. denied, 404 U.S. 876 (1971); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); obscenity, see Pope v. Illinois, 481 U.S. 497 (1987); Miller v. California, 413 U.S. 15, reh'g denied, 414 U.S. 881 (1973); and time,

of speech but incidentally limiting its unfettered exercise ...." Id. at 50. Those regulations "have been found justified by subordinating valid governmental interests, a pre-requisite to constitutionality which has necessarily involved a weighing of the governmental interest involved." Id. at 51 (emphasis added). In the same way, "by considering their origin and their line of growth," including in particular the way the 1987 amendment was submitted to the voters, we conclude that the words of amended section 16 do not declare absolute rights. Rather, the individual right to keep and bear arms there substituted for the previous collective right is subject to the same reasonable regulation as before in circumstances where regulation is justified by "subordinating valid governmental interests." Review of the constitutionality of that regulation still requires a weighing of the governmental interest involved, and we now turn to the second question before us: Although the new individual right to keep and bear arms is not absolute, is the prohibition of the possession of a firearm by a person convicted of a "nonviolent" felony nonetheless unconstitutional because it is in excess of the State's police power? Our answer is no.

In both its original and amended forms, section 16 appears in the same constitution as article IV, part 3, section 1, giving the legislature "full power to make and establish all reasonable laws and regulations for the

---

place, and manner restrictions on otherwise unrestricted speech, see Greer v. Spock, 424 U.S. 828 (1976); Adderly v. Florida, 385 U.S. 39 (1966), reh'g. denied, 385 U.S. 1020 (1967).

... benefit of the people of this State ...."[8] It has long been settled law that the State possesses "police power" to pass general regulatory laws promoting the public health, welfare, safety, and morality. See, e.g., Shapiro Bros. Shoe Co., Inc. v. Lewiston-Auburn S.P.A., 320 A.2d 247, 254 (Me. 1974); State v. Old Tavern Farm, Inc., 133 Me. 468, 470, 180 A. 473, 475 (1935); State v. Mavo, 106 Me. 62, 66, 75 A. 295, 297 (1909). The police powers clause itself requires that the legislature's regulation of constitutional rights be reasonable. As we noted in National Hearing Aid Centers, Inc., v. Smith, 376 A.2d 456 (Me. 1977):

> "Too much significance cannot be given to the word 'reasonable' in considering the scope of the police power in a constitutional sense, for the test used to determine the constitutionality of the means employed by the legislature is to inquire whether the restrictions it imposes on rights secured to individuals by the Bill of Rights are unreasonable, and not whether it imposes restrictions on such rights" ... .
>
> Reasonableness in the exercise of the State's police power requires that the purpose of the enactment be in the interest of the public welfare and that the methods utilized bear a rational relationship to the intended goals. ... The reasonableness of a legislative enactment, however, is presumed.

376 A.2d at 460 (citations omitted). We went on to rule:

> In order to withstand the test of reasonableness the regulatory means must bear a rational relationship to the evil sought to be corrected. ... It is not necessary that the methods adopted by the legislature be the best or wisest choice. No matter how much the court might have preferred some other procedure, if the measure is reasonably appropriate to accomplish the intended purpose we must give it effect. ... Debatable questions regarding the appropriateness of

---

[8] Me. Const. art. IV, pt. 3, § 1, provides in pertinent part: "The Legislature, with the exceptions hereinafter stated, shall have 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, nor to that of the United States."

> enactments should be resolved in the legislature, not in the courts.

376 A.2d at 461 (citations omitted).

Courts throughout the country have repeatedly found a rational relationship between statutes forbidding possession of firearms by any and all convicted felons and the legitimate state purpose of protecting the public from misuse of firearms. See, e.g., State v. Comeau, 233 Neb. 907, 448 N.W.2d 595 (1989); State v. Ricehill, 415 N.W.2d 481 (N.D. 1987); State v. Amos, 343 So.2d 166 (La. 1977); State v. Blue, 190 Colo. 95, 544 P.2d 385 (1975). In Lewis v. United States, 445 U.S. 55 (1980), the Supreme Court upheld the rationality of a provision of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. App. § 1202(a)(1), prohibiting the possession of firearms by a person convicted of any felony, including a "nonviolent" one. Petitioner Lewis, who had been convicted in Florida in 1961 of the felony of breaking and entering, challenged the provision on the basis that the underlying felony conviction might have been invalid. The Court found no conflict between due process and the provision that did not distinguish between violent and nonviolent felonies, finding specifically that "Congress sought to rule broadly -- to keep guns out of the hands of those who have demonstrated that 'they may not be entrusted with a firearm without becoming a threat to society.'" Id. at 63 (quoting Scarborough v. United States, 431 U.S. 563, 572 (1977)). After summarizing the legislative history of the possession provision, the Court declared:

> Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to

> prohibit the possession of a firearm. ... This Court has recognized repeatedly that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm.

Lewis, 445 U.S. at 66 (citations omitted).

Prior to Lewis, the First Circuit had held that an act of Congress barring felons from possessing firearms was rationally related to a legitimate government purpose and so passed constitutional muster. United States v. Harris, 537 F.2d 563 (1st Cir. 1976), rejected Harris's argument that because the felony of which he was convicted was larceny in excess of $100, a "nonviolent" felony, the federal statute prohibiting felons from possessing firearms as applied to him violated the equal protection clause of the Fifth Amendment for lack of a rational relationship to a legitimate state purpose. The First Circuit declared:

> [A] government is not "prevented by the equal protection clause from confining 'its restrictions to those classes of cases where the need is deemed to be clearest,'" and the inclusion of appellant's less extreme, but nonetheless serious offense, does not deprive the statutory classification of "some relevance to the purpose for which the classification is made'" .... "It is not 'without support in reason' ... to conclude that a thief whose crime was a federal felony is an undesirable person to possess firearms; proof of an inescapable relationship between past and future conduct is not requisite."

Id. at 565 (citations omitted).

Statutes such as section 393(1), prohibiting possession of firearms by a felon regardless of the nature of the underlying felony, have never been found constitutionally deficient. These statutes bear a rational relationship to the legitimate governmental purpose of protecting the public from the possession of firearms by those previously found to be in such

serious violation of the law that imprisonment for more than a year has been found appropriate. The habitual motor vehicle offender who drives during his license revocation is a felon, having been recognized by the legislature of this State as having committed a Class C crime, a serious offense punishable by incarceration of up to five years. See State v. O'Neill, 473 A.2d 415, 419 (Me. 1984) ("Maine has a legitimate interest in the use of imprisonment sanctions to deter prospective motor vehicle operators from flouting the civil disability classification of an habitual offender ... to assure maximum safety for all other travelers on the public highways of the State ... regardless of the basis upon which the person was declared ineligible to operate a motor vehicle"). One who has committed any felony has displayed a degree of lawlessness that makes it entirely reasonable for the legislature, concerned for the safety of the public it represents, to want to keep firearms out of the hands of such a person. See State v. Friel, 508 A.2d at 126; State v. Vainio, 466 A.2d 471, 476 (Me. 1983), cert. denied, 467 U.S. 1204 (1984); State v. Myrick, 436 A.2d 379, 383 (Me. 1981); State v. Heald, 382 A.2d 290, 295 (Me. 1978).

Defendant has shown himself to be an individual unable to obey highway safety laws to such an egregious extent that he has served a statutorily prescribed minimum sentence of 60 days imprisonment for his continued flagrant lawlessness. Labeling his preexisting felony status the product of a "nonviolent" crime obscures its seriousness as well as the very real threat to public safety created by his continued misconduct, a threat that might well be aggravated by the availability of a firearm. Defendant has

demonstrated a disregard for the law to such an extent that, as applied to him, a legislative determination that he is an undesirable person to possess a firearm is entirely reasonable and consonant with the legitimate exercise of police power for the public safety.

The entry is:

Dismissal of Count II of the indictment vacated; remanded for proceedings consistent with the opinion herein.

All concurring.

Attorney's for the State:
James A. Tierney, Esq.
Attorney General
Charles K. Leadbetter, Esq. (orally)
Garry Greene, Esq.
Assistant Attorneys General
State House
Augusta, Maine 04333

Attorney for Defendant:
Daniel W. Bates, Esq. (orally)
HERBERT H. BENNETT AND ASSOCIATES, P.A.
121 Middle Street
Portland, Maine 04104-4104

For Amici Curiae:
Jeffrey Jones, Esq.
BEAN, JONES & WARREN
P. O. Box 1270
Scarborough, Maine 04074
Robert Dowlut, Esq.
1600 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(for National Rifle Association of America and Sportsman's Alliance of Maine)

Joel C. Martin, Esq.
Gerald F. Petruccelli, Esq.
PETRUCCELLI, COX & MARTIN
50 Monument Square
P. O. Box 9733
Portland, Maine 04104-5033
(forCenter to Prevent Handgun Violence - Legal Action Project; Michael J. Chitwood, Chief of Police of City of Portland; and Maine Chiefs of Police Association.)

STATE OF ALASKA
THE LEGISLATURE

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3811

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM February 1, 1990

SUBJECT: Summary: State of Nebraska v. Comeau (Work Order No. 6-2001)

TO: Representative Dave Donley

FROM: Richard A. Bradley
Legislative Counsel

Tim Benintendi has asked that we comment on two cases consolidated by the Supreme Court of Nebraska under the name State of Nebraska v. Comeau. The other case analyzed was State of Nebraska v. Rush. The decision of the court was filed December 1, 1989.

I. Constitutional Provision Involved.

At the general election in 1988, the voters of Nebraska adopted a new constitutional provision, by initiative, as art. 1, sec. 1 of the Nebraska Constitution, involving, among other things, the "right to bear arms." The provision was added to the middle of the usual "life, liberty, and the pursuit of happiness" phrase; the analagous location for the amendment in the Alaska Constitution would be art. I, sec. 1. The Nebraska amendment provides:

> All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.

II. The Criminal Charges Involved and the Disposition. Defendant Comeau was charged with possessing a firearm from which the manufacturer's identifying marks or serial numbers had been removed. Defendant Rush was charged in a separate case with being a felon in possession of a weapon with a barrel less than 18 inches in length. Charges were dismissed on "demurrer" in the trial courts; in Nebraska practice, a "demurrer" is the equivalent of the defense in Alaska practice that the complaint "fails to state a crime," in these cases because of the adoption of the amendment to the Constitution. The Supreme Court consolidated the cases for appellate review, reversed them, and sent them back for trial.

III. The Analysis.

The Nebraska Supreme Court started out by using the usual presumption of constitutionality that attaches to legislation.

> Essentially, the question presented by these appeals is whether the amendment prevents the Legislature from passing any laws regulating the possession of firearms.
>
> The defendants contend that the amendment must be read literally and that the language which states that the right to keep and bear arms is "inalienable" and shall not be "infringed" by state statute or local ordinance prevents any regulation by the Legislature of the right to possess arms. The defendants concede that the use of weapons may be regulated, but argue that mere possession may not be.
>
> The State contends that the plain meaning of the amendment is that the right to keep and bear arms is limited to "lawful purposes." Lawful purposes are not defined in the amendment except as "for security or defense of self, family, home, and others, and lawful common defense, hunting, recreational use, and all other lawful purposes . . . ." The State argues that in the exercise of the police power, the Legislature may define what purposes are lawful purposes.

The court stated that there are "very few rights" that are "absolute" and quoted several cases where, though the laws were held invalid under a constitutional provision con-

cerning the right to keep and bear arms, the court had recognized that the right in question was not absolute, citing City of Princeton v. Buckner, 377 S.E.2d 139 (W.Va. 1988) at some length. The case had declared invalid a law requiring a license to carry certain weapons.

While the opinion quotes extensively from the City of Princeton case, it is adequate for this summary that I identify the salient points:

(1) The court stressed that the right granted by the constitutional provision is not absolute.

(2) The Oregon Supreme Court, while it has struck down three laws as infringing that state's constitutional provisions, consistently emphasized that the legislature may regulate possession and use. [The three cases are State v. Delgado, 692 P.2d at 614; State v. Blocker, 630 P.2d at 826; State v. Kessler, 614 P.2d 99.]

(3) The prohibition against the possession or ownership of handguns by persons previously convicted of a felony and other specified crimes are widely accepted. Offenses brought under this rule frequently include prohibitions on the open or concealed carrying of handguns without a permit or in public establishments or other specified places.

(4) Not all (probably very few) constitutional rights are absolute.

Finally, a comment.

The location of the right to bear arms within a provision similar to Alaska Art. I, Sec. 1 may have been thought to be the best place to achieve the section's efficacy. Yet it is clear that this "right to life" does not prevent capital punishment, the "right to liberty" does not prevent imprisonment, and the right to the "rewards of their own industry" does not prevent income taxation. In that context, the location among those phrases of the "right to bear arms" should not be expected to prevent the reasonable exercise of the police power.

If I may be of further assistance, please advise.

RAB:lmb
L9/086

BILL NO: HJR 1

DATE: January 31, 1991

TITLE: Proposing an Amendment to the Constitution...Relating to the Individual Right to Keep and Bear Arms

CONTACT: Gayle A. Horetski
Deputy Commissioner
465-4322

DEPARTMENT OF PUBLIC SAFETY

House Joint Resolution No. 1 proposes an amendment to the Constitution of the State of Alaska relating to the individual right to keep and bear arms. If approved by a two-thirds vote of each house, this proposed constitutional amendment would be placed on the ballot at the next general election. If a majority of the voters adopt the amendment, the language of the State Constitution will be changed.

This amendment apparently is intended to establish that the right to keep and bear arms under the state constitution is an individual right, rather than a collective (militia-related) one. In Alaska, however, the right of the people to bear arms for legitimate purposes is widely recognized, and has never been infringed. Indeed, Alaska and Vermont are the states with the least restrictive firearms laws in the entire United States.

The Department of Public Safety and many other law enforcement agencies in the state are very concerned that if this language appears on the ballot and is approved by the voters, some existing state statutes may be subject to constitutional challenge. HJR 1 states that the legislature may regulate the carrying of concealed weapons and the use or possession of arms by persons convicted of a crime. There are other categories of persons and conduct that do not fall under that language, however. Present law, for example, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shotguns, and prohibits possession of a firearm while intoxicated, possession of a loaded firearm on licensed premises, and possession of a firearm by a minor without parental consent. (See AS 11.61.200 - 11.61.220).

These and other similar statutes serve a critical public safety function by restricting the possession of especially dangerous weapons, or weapons carried in an especially dangerous manner or place. In order to make sure that the proposed amendment does not render these statutes unenforceable, nor foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds, for example), it is essential that the language of any proposed amendment continue to allow reasonable regulation of firearms by law.

As presently drafted, HJR 1 would also prevent municipalities or other political subdivisions of the state from regulating the use or possession of firearms. This authority currently exists, and is used. Last

Continued on Page 2

October, for example, the Anchorage Municipal Assembly unanimously adopted an ordinance making it illegal for school students to carry deadly weapons onto school grounds in Anchorage. This action was taken after two separate incidents in which students had brought loaded handguns onto school grounds. At this time, there is no comparable law statewide.

There is no good reason why Art. I, §19 of the Alaska Constitution should be amended. Since adoption in its present form could seriously endanger the public safety of the state's citizens and visitors, the Department of Public Safety opposes HJR 1.

Richard L. Burton
Commissioner

Alaska Association Chiefs of Police

MAR 14 1991

March 8, 1991

Representative Gene Kubina
House of Representatives
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Dear Representative Kubina,

Attached, you will find our position paper on SJR 1, which addresses the right to keep and bear arms. We would appreciate your careful consideration of our position.

Should you or anyone one your staff have any questions, please call me at 786-8552.

Sincerely,

Duane S. Udland, President
AACOP

Alaska Association Chiefs of Police

POSITION PAPER

Bill No. SJR 1 and HJR 1

Senate Joint Resolution No. 1 and House Joint Resolution No. 1 both propose an amendment to our State Constitution which would address the rights of individuals to keep and bear arms. These same resolutions have been introduced in prior legislative sessions.

The Alaska Association of Chiefs of Police has opposed and will continue to oppose any such amendments to our Constitution. In fact, we consider this to be our highest priority effort. We believe that the proposed legislation would seriously endanger public safety by hamstringing the State and Municipalities in their ability to reasonably regulate firearms.

Backers of the resolutions claim that it is necessary to protect gun owners from the infringement of their right to keep and bear arms. What infringement are we talking about? Alaska has had a long tradition of passing only those laws absolutely necessary to safeguard our citizens. Our state has the least restrictive guns laws anywhere in the country. Alaskans enjoy tremendous freedom in the use of firearms, and there has never been any threat to those freedoms.

Many of our members are firearms enthusiasts themselves. We, like many Alaskans, enjoy the aspects and rewards associated with responsible gun ownership. Yet, we stand united against HJR 1 and SJR 1. We simply cannot support any legislation that would have such sweeping effects on the ability of the State and Municipalities to reasonably regulate firearms.

Changing our Constitution is serious business. Before we endeavor to rewrite this time tested document, there should be some sort of compelling reason for doing so. No such need has been demonstrated. There is absolutely no evidence that the citizens of Alaska are in any danger of losing their right to keep and bear arms. That being the case, there is no reason to adopt SJR 1 or HJR 1.

January 31, 1991

The Honorable Rick Halford
Alaska State Senator
P.O. Box V
Juneau, Alaska 99811

Re: SJR 1, Right to Bear Arms

Dear Senator Halford:

The position of the Department of Law on the resolution to amend the Alaska Constitution to recognize an "individual" right-to-bear-arms (Senate Joint Resolution 1) remains the same as it has been over the past several years during which similar resolutions have been introduced. The department has opposed, and currently opposes, such a change to the constitution, not because it opposes the "individual" right-to-bear-arms, but because the resolution as introduced could invalidate existing laws regulating firearms. This conclusion has been reached after careful and extensive review, over a number of years, of the law in Alaska and other states.

A summary of the Department of Law's prior and current analysis follows:

1. In a wide variety of contexts, the Alaska Supreme Court has interpreted the state constitution as providing broader protection for individual rights than does the federal constitution. We believe that the court would interpret the existing right-to-bear-arms provision in the state constitution in a similarly broad manner and thus satisfy the proponents' concerns about the potential for over-regulation, without the need for the amendment.

2. According to federal authority, Alaska already shares with Vermont the distinction of having the least restrictive firearms laws in the United States.[1] It is common for firearms to be carried openly in all areas of the state, and they may be

---

[1] Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, State Laws and Published Ordinances: Firearms (18th Ed. 1988).

to reasonably regulate firearms, that is, to maintain the status quo concerning firearms laws. As alternatives to the proposed joint resolutions, the Department of Law has previously suggested the following language:

> The individual right to keep and bear arms shall not be denied or infringed by the state or a political subdivision of the state, except that the state or a political subdivision of the state may regulate the manner in which arms may be kept, borne, or used.

or

> except that the exercise of this right may be regulated by law.

or

> except that the exercise of this right may be regulated by law. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms.

A more detailed analysis of this issue, and of the points raised above, which was submitted to the legislature in 1989, is attached to this letter.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: /s/
Dean J. Guaneli
Assistant Attorney General

carried concealed in and around one's home or for protection while engaged in outdoor activity. AS 11.61.220(b). At the same time, dangerous weapons (such as switchblades, machine guns, bombs, and "sawed-off shotguns") are prohibited. Also, felons are prohibited from carrying concealable firearms. AS 11.61.200. In the department's view, there is no compelling reason that has been put forward to change this status quo.

3. No one can predict the full legal effect of the proposed constitutional amendment with any degree of certainty. The one effect of the amendment that can be stated with certainty, however, is that it transfers the power to regulate firearms use, currently held by the legislature, to the judiciary. A similar and well-known example of such a power transfer occurred when the constitution was amended to specifically guarantee the right of privacy; it was followed shortly thereafter by a supreme court opinion, with which the state is still struggling, that protected the right to use marijuana.

4. Because the Alaska courts construe the provisions of our constitution broadly, and because the language of the proposed amendment gives either no or exceedingly little authority to the legislature to regulate firearm use, it is very likely that portions of Alaska's statutes regulating firearms will be declared unconstitutional. Examples of conduct prohibited by existing laws that could be declared unconstitutional under the proposed amendment include the possession of weapons by felons, the possession by anyone of "prohibited weapons" such as machine guns, switchblades or "sawed-off shotguns", the possession of firearms in bars or by intoxicated persons, and the removal of serial numbers. Indeed, the courts of several states have struck down similar firearms laws based on amendments to their state constitutions. Furthermore, the proposed amendment could preclude future Alaska legislatures from adopting additional laws in this area, such as laws prohibiting the possession of firearms on school grounds, in government buildings, or in proximity to oil and gas facilities.

5. The department does not believe that statements of "legislative intent", indicating that the constitutional amendment should not be construed to preclude the reasonable regulation of weapons, are sufficient to avoid current state laws from being struck down. As a general rule, a statute or constitutional provision will be interpreted according to the plain meaning of the language on its face. If the intent behind the adoption of the amendment becomes an issue, it is the intent of the voters who adopted the measure, rather than the intent of the legislators who drafted it, that will be relevant.

If the legislature believes it is necessary to explicitly recognize the "individual" right to bear arms, the amendment should be drafted to also explicitly recognize the legislature's authority

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HJR1

Revision Date: 01/28/91 Department Affected: Office of the Governor - Elections

Title: Admendment to Constitution Right to Keep and Bear Arms BRU: Elections

Component: II - Primary and General Elections

Sponsor: Representative Donley

Requestor: State Affairs **COMPONENT SERIAL NO.** 0 0 2 2

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL		2.2*				
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		2.2*				
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		2.2*				
FEDERAL FUNDS						
OTHER						
TOTAL		2.2*				

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: -0-

ANALYSIS: (Attach a separate page if necessary.) * This figure covers cost of inclusion of information about this issue in the Official Election Pamphlet as required by AS 15.58, and programming for DataVote counting of votes cast on this measure. However, only 4 measures can be printed on a single ballot card. Should this measure require printing an additional ballot card, the fiscal impact would be: 53.4.

Prepared By: Linda Edgeworth, Information Officer Phone: 465-4611

Division: Division of Elections Date: 01/28/91

Approved by Commissioner: Charlotte L. Brickstein

Agency: Division of Elections Date: 1-29-91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HJR 1

Revision Date: _____ Department Affected: Department of Law

Title: "...amendment to the Constitution... BRU: Prosecution
individual right to keep and bear arms." Component: Criminal Justice Litigation

Sponsor: Representative Donley

Requestor: State House Affairs COMPONENT SERIAL NO. | | | 8 | 9 |

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Richard L. Pegues

Prepared By: Richard I. Pegues, Director Phone: 465-3672

Division: Administrative Services Richard L. Pegues /BRL Date: February 11, 1991

Approved by Commissioner: Charles E. Cole, Attorney General

Agency: Department of Law Date: February 11, 1991

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HJR 1

House Joint Resolution No. 1 would place a ballot proposition before the voters at the next general election to amend Article 1, Section 19, of the state's constitution, regarding the right to bear arms. Because the purpose of the resolution is to place a constitutional amendment proposal before the voters, adoption of the resolution by itself will not have a fiscal impact on the Department of Law.

Eventual voter adoption of the amendment might lead to a fiscal impact at some future date; however, determination of such a possible impact, at this time, is speculative at best. No one can predict the full legal effect of the proposed constitutional amendment with any degree of certainty, but it is probable that adoption of the proposed amendment would invalidate most existing state laws regulating firearms. The constitutional amendment proposed by HJR 1 would retain the legislature's authority to regulate firearms related to laws prohibiting concealed weapons and the possession of guns by felons. However, it is doubtful that the legislature would have the authority to enact laws that prohibit possession of certain weapons such as switchblades, fully automatic weapons or sawed-off shotguns, possessing firearms while intoxicated, and removing a firearm's serial number, under the proposed amendment.

Alaska State Legislature

Please enter into the record my testimony to the House Labor & Commerce committee name committee on HJR No. 1 bill/subject, dated March 20, 1991.

My name is Calvin Sweeney, I'm a general contractor here in Kodiak. I'm also a member of Kodiak Island Sportsmans Ass. (I'm also a NRA member) I've lived in Alaska for 11 years now and have seen a lots of use + possession law changes in the United States, I've also seen alot of changes here in Alaska, this is 1991,

I'm in favor of Representative Donley's Amendment, H.J.R. #1 exactly as worded, it's direct and to the point.

Signed: Calvin Sweeney
Testifier

Self
Representing (Optional)

Box 2499 Kodiak, AK 99615
Address

486-3814
Phone No.

Alaska State Legislature

Please enter into the record my testimony to the House Labor & Commerce committee name committee on HJR 1 bill/subject, dated 3-20-91.

I am representing the Kodiak Island sportsmen Association. we currently have 438 members. Our orginization is very strongly in favor of House Joint Resolution no. 1. We feel that the individual right to keep and bear arms is one ~~of~~ of our most important rights. This is the right which guarentees all of the others rights in the constitution.

It also disturbs me that so many Law Enforcement agencies are against this bill. This would indicate to me that the police are getting further and further removed from the general populace.

In summary, we ~~also~~ strongly support this bill.

Signed: Karleton D. Short
Testifier

Kodiak Island sportsmen Association
Representing (Optional)

3314 B Woody Way Loop Kodiak AK 99615
Address

907-486-5854
Phone No.

Alaska State Legislature

Please enter into the record my testimony to the House Labor & Commerce committee name committee on HJR 1 bill/subject, dated 20 MARCH 1991.

I WISH TO SUPPORT THE RIGHT OF THE INDIVIDUAL TO ~~THE RIGHT TO~~ KEEP AND BEAR ARMS. THE RIGHT TO KEEP & BEAR ARMS OF THE INDIVIDUAL IS TO BE OBTAIN & RETAINED, BY ALASKAN LAW.

THE MISUSE OF FIREARMS CAN BE REGULATED NOT THE TOOL ITSELF.

SELF DEFENSE & PROTECTION OF SELF CAN BE REGULATED, THESE LAWS MUST BE REASONABLE AND AUTHORIZED BY THE LEGISLATURE.

Signed: WILLIAM R. RIETH
Testifier

Representing (Optional)

P.O. Box 1398, KODIAK, AK. 99615
Address

486-2504
Phone No.

Alaska State Legislature

Please enter into the record my testimony to the House Labor & Commerce committee name

committee on HJR # 1 bill/subject, dated March 20, 1991.

I am in favor of this Resolution. Recent history shows that areas with laws that restrict ownership of firearms have major crime problems. New York City is a prime example.
I am a 38 year resident of the Territory and State of Alaska. I have a total of 14 years in Law Enforcement, from Armed Services Police, Bozeman Montana PD, Kodiak, Alaska PD, Territorial & Alaska State Police. I am the Charter Chairman of the Public Safety Advisory Board in Kodiak and have been for 8 years.
I disagree that Alaska Law Enforcement agencies in Alaska are against this Resolution. The people I talk to indicate the reverse.
There are current laws about convicted Felons possessing firearms and if this matter is mandated by the Voters of Alaska, this will be enhanced.
Law abiding Citizens should not have to "Jump Through Hoops" created by people who do not like Firearms, in order to own them.
Criminals will ignore the laws anyway, and Law abiding citizens will be subjected to ridiculous requirements to obtain them, or will be accused of breaking the law.

Signed: Tom Brennan
Testifier

SW Self
Representing (Optional)

508 Marine Way, Kodiak, Alaska 99615
Address

(907) 486-3101
Phone No.

C102

Alaska State Legislature

Please enter into the record my testimony to the H. State Affairs committee name

committee on House Joint Res. #1 bill/subject, dated 3-20-91.

My name is David Nease; I have been a resident of the State of Alaska for 40 years. I speak in favor of the resolution to amend the State Constitution to reaffirm the individual's right to own and bear arms.

I feel very strongly that it is my right as an American citizen to possess a firearm. That does not mean that I can abuse that right. This amendment addresses with balance both sides of the issue. The right of honest citizens to keep and bear arms that in other states liberal legislators and courts have attacked.

While the same liberal legislators and courts have allowed, at best, and at worst, not punished criminals that have firearms. That has been against federal law since 1932.

Honest statistics will show that the public has little to fear from honest citizens from firearms. And, criminals would not have them if existing laws were enforced.

Signed: DAVID S. NEASE, JR.
Testifier

Representing (Optional)

Box 787 -Kodiak
Address

486-4912
Phone No.

HOUSE JOINT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE DONLEY

A RESOLUTION

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

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

* Section 1. Article I, sec. 19, Constitution of the State of Alaska, is amended to read:

SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The individual [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 denied or infringed by the State or a political subdivision of the State. This section stands alone and no other provision of this constitution may be used to implement or interpret it.

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

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

WALTER J. HICKEL, GOVERNOR

REPLY TO: MAR 20 1991

☑ *CRIMINAL DIVISION CENTRAL OFFICE*
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-3428

☐ *OFFICE OF SPECIAL PROSECUTIONS AND APPEALS*
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

March 19, 1991

Eugene G. Kubina, Chairman
House State Affairs Committee
P.O. Box V
Juneau, Alaska 99811

Re: HJR 1 (Right to Bear Arms)

Dear Representative Kubina:

I note that HJR 1 is scheduled for hearing before the House State Affairs Committee on Wednesday, March 20, 1991. I will be asking to testify at that hearing to express the Department of Law's concerns with this proposed amendment to Article I, section 19, of the Alaska Constitution. In the meantime, I thought it would be useful for me to share copies with you of my previous letters to Senator Halford and Representative Donley, setting out our concerns.

I look forward to meeting you and hope that we are able to share a common viewpoint on this matter.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: Dean J. Guaneli
Dean J. Guaneli
Assistant Attorney General

DJG:MOK:mm-032

March 4, 1991

The Honorable Rick Halford
Alaska State Senator
P.O. Box V
Juneau, Alaska 99811

Re: SJR 1, Right to bear arms

Dear Sen. Halford:

This is a follow-up to my January 31 testimony on SJR 1. During my testimony you asked me about a portion of my January 31 letter to you, in which I indicated we believed the Alaska Supreme Court would interpret the existing right-to-bear-arms provision in the state constitution in a broad manner that would satisfy the proponents' concerns about the potential for over-regulation of firearms. I answered, in essence, by pointing out that when the court interprets rights under the Alaska Constitution, it often bases its opinion upon a historical analysis of how the right has traditionally been exercised in Alaska. I indicated that, because the widespread use of firearms in Alaska has traditionally been accepted as a necessary part of life in a frontier society, the court would likely not sanction overly broad restrictions on the use of ordinary firearms by law-abiding citizens.

Senator Rodey then asked me if I agreed that right-to-bear-arms provisions like the one currently in the Alaska Constitution are generally interpreted as creating a "collective" right to bear arms, rather than as an "individual" right. I indicated I agreed with his conclusion, but that the focus should be on the way the constitutional protection has been implemented by the legislature, and that I had not been pointed to a single instance where a firearms law enacted by the Alaska Legislature was inappropriate.

I would like to expand upon my answers to these questions.

There is no question that the Alaska Supreme Court uses history as a guide in interpreting the intent of the framers of the Alaska Constitution. As the court once held, a "historical perspective is essential to an enlightened contemporary

interpretation of our constitution." Hootch v. Alaska State-Operated School System, 536 P.2d 793, 800 (Alaska 1975). An example of the court applying this type of historical analysis occurs in Baker v. City of Fairbanks, 471 P.2d 386, 400-01 (Alaska 1971), in which the court addressed the right to jury trial for minor offenses as follows: "If, historically, jury trial had always been available on a broad basis in Alaska, it is only reasonable to conclude that the framers thought they were continuing an existing practice."

In addition to using historical analysis as a method of constitutional interpretation, the Alaska Supreme Court also looks to the underlying purposes of a law that is being challenged, and to the societal interest to be furthered by the law. This method of analysis does not depend on the application of descriptive labels often used by other courts or commentators. Thus, we do not believe that the court would find the labels "collective right" or "individual right" to be useful in analyzing the scope of the right to bear arms because, when interpreting other provisions of the state constitution, the court has been reluctant to rely on such rigid formulations. For example, other courts have traditionally applied a two-tiered test for analyzing rights under the constitutional guarantee of equal protection. However, in Isakson v. Rickey, 550 P.2d 359 (Alaska 1976), the Alaska Supreme Court long ago abandoned such a result-oriented analysis, stating:

> In the past this court has applied the traditional tests in analyzing equal protection problems. Thus, previous cases have spoken in terms of the "rational basis" test and the "compelling state interest" test, depending on whether or not the right sought to be regulated was fundamental in a constitutional sense or involved a suspect classification. Too often, however, the label applied preordained the outcome of the case. Because of this fact, recent decisions by this court noted a growing dissatisfaction with the two-tiered test.

550 P.2d at 361. The court instead adopted "a more flexible and more demanding standard," id. at 362, that looks closely at the purpose of legislation to determine if, in the case of a challenge based on the equal protection clause, the legislation unreasonably treats similarly-situated people differently.[1]

---

[1] In subsequent cases, the court has repeatedly affirmed this same type of analysis. See, e.g., Patrick v. Lynden Transport, Inc., 765 P.2d 1375 (Alaska 1988); Keyes v. Humana Hospital Alaska, Inc., 750 P.2d 343, 357 (Alaska 1988) ("Our approach to evaluating

We believe a similar method of analysis would be applied by the court in analyzing the current constitutional right to bear arms. Rather than focusing on the labels of "collective" or "individual" to analyze the right to bear arms, the court would likely apply its "more flexible and more demanding standard" in passing on the constitutionality of a law restricting the use of arms. The court would try to ascertain the purposes of the law, and balance those purposes against the societal interest in controlling arms, keeping in mind the historical exercise of the right to bear arms in our state. In addition, in Alaska the supreme court is also bound to interpret laws in keeping with the explicit right to privacy contained in Art. I, sec. 22, of the Alaska Constitution. This, too, would play a part in any analysis.

Under the current state constitutional provision protecting the right to bear arms, if the court were called upon to review AS 11.61.200(e)(1)(A), which prohibits the possession of quasi-military arms such as rockets, bombs, grenades, and similar devices, we believe the court would grant considerable deference to the legislature. In the context of such a lawsuit, were the court inclined to apply a descriptive label, it might conclude that the right to use such arms is more in the nature of a "collective" right enabling citizens to form a duly-constituted militia, rather than an "individual" right.

On the other hand, under the present constitution, were the legislature to repeal AS 11.61.220(b), which allows concealed weapons to be carried on one's own land or for protection while engaged in outdoor activity, the court might well find that a prosecution for the crime of carrying a concealed weapon under those circumstances to be unconstitutional, given the history of such firearms usage in Alaska. In such a case, were the court to use labels, it might well conclude that the right to carry ordinary firearms on one's own property, or for protection in the wild, is an "individual" right to bear arms. This conclusion, particularly as it applies to carrying firearms on one's own property, is bolstered by principles underlying the right to privacy in the state constitution.

We are unable to offer an exhaustive constitutional analysis of the issues raised by SJR 1, however we hope this letter provides a more detailed explanation of our position on the current right-to-bear-arms provision in the constitution. We firmly believe, as articulated by Senator Collins during the January 31 hearing, that the ever-changing nature of our society (and in

---

challenges brought under Alaska's equal protection clause involves a sliding scale of review ranging from relaxed to strict scrutiny"); Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269-70 (Alaska 1984).

particular of crime in our society) makes it appropriate for the legislature to continue to have broad authority to enact laws relating to the use of arms in Alaska. Legislative action must be tempered by a recognition of the importance of the legitimate and historical usage of firearms in our state, and of the right to privacy, but legislative authority should not be curtailed by an unnecessary constitutional amendment that, in our opinion, unreasonably ties the legislature's hands.

If we can be of further assistance, please let us know.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: /s/
Dean J. Guaneli
Assistant Attorney General

cc: Senate Judiciary Committee members

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LAW

CRIMINAL DIVISION

REPLY TO:

☐ CRIMINAL DIVISION CENTRAL OFFICE
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-3428

☐ OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

March 18, 1991

The Honorable Dave Donley, Chair
House Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: HJR 1 (Right to Bear Arms)

Dear Representative Donley:

Thank you for the opportunity to review the proposed version of a constitutional amendment relating to the right to keep and bear arms that specifically excludes the right to bear arms from the purview of the right to privacy. Under this version, article I, section 19, of the Alaska Constitution would read as follows:

> RIGHT TO KEEP AND BEAR ARMS. The individual right to keep and bear arms shall not be denied or infringed by the state or a political subdivision of the state. Section 22 of this article may not be used to expand the right guaranteed by this section.

You express the hope that this language would keep the Alaska courts from giving amended section 19 an expansive interpretation, and instead would result in the courts recognizing the state's ability to reasonably regulate the right to bear arms.

Although we greatly appreciate your thoughts and efforts, we do not believe that this version will have its desired effect. The legitimate goal of preserving the legislature's ability to reasonably regulate firearms can only be accomplished by a constitutional amendment that says so clearly and explicitly, rather than through an indirect reference to the right to privacy.

Even if courts were precluded from using the right to privacy to expand the right to bear arms, they could still interpret the right to bear arms expansively, as they have expansively interpreted other constitutional provisions. Similarly, even if the amendment kept the courts from using the

right to privacy to expand the right to bear arms, it would still remain true that the power to regulate the use of firearms would be transferred from the legislature to the judiciary.

There are a number of states that have constitutional provisions with the type of language we believe is necessary, i.e., that explicitly recognize the government's ability to regulate the use and possession of firearms. Examples include:

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 1, paragraph 8)

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.**" (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)

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)

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 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)

The constitutions of eight other states (Colorado, Kentucky, Louisiana, Mississippi, Missouri, Montana, Tennessee, and Texas) explicitly recognize the government's ability to regulate the possession and use of concealed weapons. Yet another eight states have constitutional provisions with language limiting the right to bear arms to the defense of the person or of the state (Alabama, Connecticut, Indiana, Michigan, New Hampshire, Pennsylvania, South Dakota, and Wyoming).

Indeed, of the 41 states that have constitutional provisions relating to the right to bear arms, **over three-quarters** contain some limiting language. Of the remaining states, seven have provisions substantially similar to Alaska's existing article I, section 19. Rhode Island alone has a provision that appears to be "absolute" on its face ("The right of the people to keep and bear arms shall not be infringed").

As the attached copies of letters to Senator Halford indicate, we are justifiably concerned that the proposed amendments to article I, section 19, of the Alaska Constitution could invalidate existing laws regulating firearms, as well as tie the hands of future legislatures. We continue to believe that there is no better way to ensure the legislature's continued ability to reasonably regulate the possession and use of firearms than by explicitly recognizing that ability in the amendment.

We suggest that one of the following proposals would best achieve the balance being sought between the individual's right to bear arms and the government's right to reasonably regulate those firearms:

> The individual right to keep and bear arms shall not be denied or infringed by the state or a political subdivision of the state, <u>except that the state or a political subdivision of the state may regulate the manner in which arms may be kept, borne, or used</u>.

or

> The individual right to keep and bear arms shall not be denied or infringed by the state or a political subdivision of the state, <u>except that the exercise of this right may be regulated by law</u>.

or

> The individual right to keep and bear arms shall not be denied or infringed by the state or a political

subdivision of the state, except that the exercise of this right may be regulated by law. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms.

Once again, we truly appreciate your efforts to accommodate the concerns of the law enforcement community and we hope that you can be persuaded to one of our three suggested amendments. If there is any further information that we might be able to provide, please do not hesitate to call upon us.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: /s/
Dean J. Guaneli
Assistant Attorney General

DJG:MOK:mm-031

MAR 20 1991

Alaska State Legislature

Please enter into the record my testimony to the House State Affairs Committee
committee name

committee on HJR 1 , dated March 20, 1991 .
bill/subject

I support House Joint Resolution No. 1. I believe that the right to bear arms is the most important right that we Americans have in that all other rights depend upon it. An armed citizenry is the only safeguard against an oppressive government.

Signed: Giovanni Tallino
Testifier

Representing (Optional)
P.O. Box 4496

Address
486-3043

Phone No.

House State Affairs Committee
Representative Gene Kubina, Chair

DATE: May 17, 1991

PLACE: Capitol, Room 102

SUBJECT OF MEETING:

HJR 1 - Relating to Right to Keep and Bear Arms
SJR 1 - Relating to Right to Keep and Bear Arms

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
Richard L. Burton	Public Safety	P.O. Box N Juneau	99811		465-4322	(Y)	N	HJR-1 SJR-1
Dick Bishop Bishop	AK Outdoor Council A.O.C.	POB 34077 JNU	99803		463-3530	(Y)	N	SJR 1
Dean Guanezi	Dept of Laws	P.O. Box KC Juneau	99811		465-3428	(Y)	N	SJR 2-1
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	

House State Affairs Committee
Representative Gene Kubina, Chair

DATE: Mar. 20, 1991

PLACE: Capitol, Room 102

SUBJECT OF MEETING:
SB 32 - Relating to PERS Benefits for Youth Center Employees
*HB 95 - Relating to AK-Klondike Gold Rush Centennial Commission
*HJR 1 - Relating to the Right to Keep and Bear Arms

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
DAN GUANELI	DEPT. LAW	BOX LC JUNEAU	99811		465-3428	(Y)	N	HJR 1
Rupe Andrews	NRA	9416 Long Run Drive JUNEAU, AK.	99701		789-7422	(Y)	N	HJR-1
STEPHEN BENNETT	JUNEAU RIFLE + PISTOL	Box 20682 L JUNEAU ~~CLUB~~	99802		465-2147	Y	(N)	HJR-1
Ed GRASSER	BOC	Box 34097 JNU	99801		463-3936	(Y)	N	
SCOTT FOSTER	DEPT ED					Y	(N)	HJR-1
GAYLE HORETSKI	D.P.S.	BOX N, JUN.			4322	(Y)	N	HJR-1
Dave Cranmer	JUNEAU RIFLE+PISTOL CLUB	2355 Dot Dr.	99801		789-0453	(Y)	N	HJR-1
BARBARA MIKOS	Council on Dom Viol & Sexual Assault	P.O. Box N Juneau	99801		465-4368	Y	(N)	HJR 27 tonight HJR 1 questions
Jim Manners	NEA	105 Municipal Way #502 Juneau	9980 1		586-3090	(Y)	N	HJR 1
						Y	N	
						Y	N	

House State Affairs Committee
Representative Gene Kubina, Chair

DATE: Mar. 20, 1991

PLACE: Capitol, Room 102

SUBJECT OF MEETING:

*HJR 27 - Relating to Support Fed Act on Violence Against Women

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
JOE POOR	HB95	c/o Greater Juneau Chamber of Commerce	99801		586-6420	Y	N	HB 95
Sherrie Gou	AK. Women's Lobby	P.O. Box 22154 Juneau, AK. 99802	99802		463-6744	Y	N	HJR 27 SUPPORT
Bruce Kendall Sr	CS HB 95	Governors office				Y	N	
JWAN Bell	HB 90	P.O.B 457 Princess Town Skg.	99840		789-5589	Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	

HJR

2

Illinois General Assembly
LEGISLATIVE RESEARCH UNIT
FIRST READING

Volume 5, No. 10 ■ December 1990

Three States Limit Legislative Terms

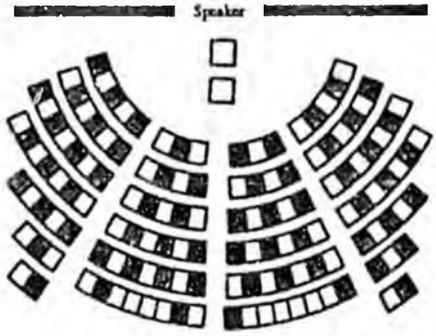
Voters in three western states this fall adopted limits on how long state legislators can serve. A similar grassroots movement is afoot to limit Illinois legislative terms. It would probably fail to meet the requirements for an initiative under the Illinois Constitution.

Oklahoma voters approved a 12-year lifetime limit on legislative service. California voters chose the stricter of two propositions. It limits lifetime service in the state Assembly to 6 years, and in the state Senate or a single statewide elected office to 8 years. Colorado voters approved limits of 8 consecutive years of service for state elected officials, including legislators. A limit on members of Congress from Colorado to 12 consecutive years is likely to be challenged in court.

None of the propositions will remove incumbents from office immediately. The years of service will be counted beginning next January (except for some California senators).

Illinois Attempt

A group called Illinois Forum was started in February 1989 to draft an initiative for the November 1990 ballot. Its founder, Robert S. Redfern of Fairfield, was the 1988 Republican Illinois Senate candidate in the 54th district. The group's proposal would have prevented anyone from serving in the General Assembly more than 10 consecutive years. It proposed the following additions to the Illinois Constitution, art. 4:



A proposal to limit terms of Illinois legislators is expected to be circulated again next spring.

Sec. 1:

No member of the Senate or House of Representatives shall serve for more than ten consecutive years.

Subsec. 2(c):

No person shall be eligible to serve as a member of the General Assembly for more than ten consecutive years.

Subsec. 2(d):

The time of service by a person filling a vacancy in the office of Senator or Representative shall be included in the computation of the maximum service of ten consecutive years as a member of the General Assembly.

Over 250,000 signatures were needed to put the measure on the ballot; only 100,000 were gathered. Illinois Forum plans to circulate petitions next spring to put a similar proposal on the November 1992 ballot.

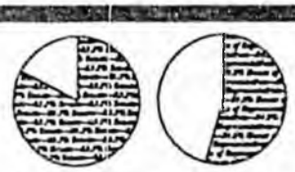
If proponents get enough signatures, a court challenge is likely. The Illinois Constitution allows constitutional amendments by initiative, but restricts their subject matter. They must be "limited to structural and procedural subjects contained in" the legislative article. Illinois courts probably would hold that proposals to limit legislative terms fail this requirement. (See sidebar on p. 3.)

The 1990 proposal would have taken effect in January 1993 when the 88th General Assembly convenes. It had no "grandfather clause" for legislators already serving. Thus in January 1993, legislators who had served 10 or more consecutive years would have had to leave legislative office. The Illinois Forum says its 1991 proposal will have a grandfather clause. It would start counting years of service in January 1993.

The 1990 proposal would have applied to *consecutive* service. It would not have prevented a legislator from resigning, being appointed to fill the vacancy, and then serving another 10 years—although the political consequences of that maneuver could

(continued on p. 2)

Contents



Term Limits

(continued from p. 1)

be severe. It also would have allowed a House member expecting to be elected or appointed to the Senate to resign from the House early to break the consecutive period.

If adopted, the proposed limit would have disqualified over 54% of present House members and 83% of Senate members if they were still in office in January 1993.

Supporters of term limits want more "citizen legislators" who serve a few years, then go home.

Other States' Limits

The overwhelming voter approval of limits on legislative terms in Colorado and Oklahoma was not particularly surprising. Both are maverick states with populist history dating back over 100 years. The Oklahoma legislature also was notoriously unpopular.

California voters' approval of term limits by a slim 51.8% margin is interesting. The *California Journal* reports mixed reaction to term limits enacted 12 years ago in San Mateo county. A statewide poll showed 60% of Californians favoring limits—10 percentage points less than the results of a Gallup poll for the nation generally.

Oklahoma

At its September 1990 election, Oklahoma became the first state to limit state legislative service. The Oklahoma constitution was amended to set a *lifetime* limit of 12 years of legislative service by any person. These years need not be consecutive, and service in either house counts. Service before January 1, 1991 will not be counted. The vote was 67.3% for and 32.7% against.

California

California had two term-limitation measures on the ballot. The more stringent, Proposition 140, was approved. It limits *lifetime* service in the state Assembly to 6 years, and in the state Senate to 8 years (a total of 14 years in the legislature). Service in statewide elected offices is also limited to 8 years. Only service in terms starting after November 1990 will be counted—except that senators now in the middle of a 4-year term can run for only one more term. The other measure, Proposition 131, sought to limit state legislators to 12 *consecutive* years of service, and statewide elected officers to 8 consecutive years. The vote on it was 38.1% for and 61.9% against.

Colorado

Colorado's proposition amended the state constitution to limit state legislators and statewide elected officers to 8 consecutive years in each office. The limits apply to terms starting after 1990. Persons who serve the maximum consecutive time will have to wait 4 years before being eligible to run again. The vote was 70.8% for and 29.2% against.

Colorado's measure also attempts to limit members of Congress from Colorado to 12 years in office. The constitutionality of this provision may be challenged. Legal scholars think states individually cannot limit Congressional terms; thus an amendment to the U.S. Constitution would be required.

Pros and Cons

Term limits have not been recommended by any of several groups that studied legislatures in general, or the Illinois General Assembly in particular. Limits were not among the 87 recommendations by the Commission on the Organization of the General Assembly (COOGA) created by the General Assembly in 1965 to study the Illinois legislature. A limit on the number of terms a legislator could serve was not proposed at the 1970 constitutional convention. An independent study of all state legislatures, published by the Citizens' Conference on State Legislatures in 1971, did not include term limits among 73 recommendations for improving state legislatures generally. Nor are such limits proposed in the National Municipal League's Model State Constitution.

Voters considering term limits may have conflicting motivations. Voters usually like to return long-time legislators to state capitals or Washington, believing such senior legislators can get more state or federal money for their district. But the same voters may resent the power of equally senior legislators elected from *other* districts. Thus, although voters in each district would like to continue electing their own incumbent, voters *as a whole* might vote to prevent all voters from doing that.

Opponents of term limits say voters need the expertise of long-time legislators.

For

Arguments for limiting how long a legislator can serve are based on expanding access to the legislature, and limiting how much power each legislator can accumulate. Supporters tout the idea of "citizen legislators" who would serve several years, then return to whatever they were doing beforehand. They say term limits would refresh legislatures with new ideas and priorities. Limits also would force turnover often enough to prevent individual members from accumulating power. Supporters say limits would help reverse the trend toward reelecting incumbent legislators at both the state and national level.

(continued on p. 12)

Can Legislative Terms Be Limited by Initiative?

The Illinois Constitution allows initiatives to amend its legislative article; they must be limited to "structural and procedural subjects contained in" that article. The constitutional convention proposed this way to change the General Assembly's basic structure and operations, in part because delegates believed the General Assembly would be unlikely to propose such changes itself. It appears unlikely that a proposal to limit legislators' terms would meet the test in this provision.

In 1976 the Illinois Supreme Court held that this provision requires an amendment by initiative to propose changes in *both* the structure and procedures of the General Assembly. The court said the convention committee, in proposing the amendment, decided against a general initiative provision that could amend any part of the Constitution. There was concern that a general initiative could bring a flood of proposals by special-interest groups to add substantive provisions to the Constitution. The court held that proposed amendments to tighten the dual-officeholding restriction, prohibit voting by a legislator who has a "conflict of interest," and prohibit advance payments of salary to legislators were not *both* structural and procedural, and so could not go on the ballot.

In 1980 the court allowed on the ballot a proposal to reduce the number of House seats from 177 to 118 and abolish cumulative voting for representatives. No initiative proposal has been allowed on the ballot since then.

In two later cases the Illinois courts rejected initiative proposals, saying they sought to alter legislative powers. In 1982 the courts held that a proposed amendment to allow voters to pass ordinary statutes by initiative was an attempt to diffuse legislative powers rather than to change the General Assembly's structure and procedures, and thus could not go on the ballot.

In August 1990 the Illinois Supreme Court refused to allow the proposed "Tax Accountability Amendment" on the ballot. It would have amended the Constitution by requiring a three-fifths vote in each house on any bill to increase state revenues, and by changing the operations of each house's revenue committee. The Court did not reach the issue whether this proposed both structural and procedural changes. It held that the proposal would have added, in effect, a substantive provision to the legislative article by increasing the difficulty of raising taxes.

The constitutional convention committee's explanation of the provision on initiative said:

> Any amendment, so proposed, would be required to be limited to subjects contained in the Legislative Article, namely matters of structure and procedure *and not matters of substantive policy.*
>
> . . .
>
> The subject matter contained in this proposed Article pertains only to the *basic qualities* of the legislative branch—namely structure, size, organization, procedures, etc. [empasis added]

In its August 1990 decision the Supreme Court cited these statements as the most significant in showing the intent behind the initiative provision. Supporters of a term limit could argue that it is not a "matter[] of substantive policy" which the committee said initiatives should not address. And they could argue that it *would* change the "basic qualities" of the legislative branch—although none of the committee's examples ("structure, size, organization, procedures, etc.") appears to fit a term limit. Most likely, the courts would hold a term-limit proposal invalid, either because it did not meet the Illinois Supreme Court's 1976 requirement that initiatives propose changes to both legislative structure and procedures, or because a term limit is really a change in the qualifications for legislative office rather than a change in structure or procedure.

Roberta R. Hogan
Staff Attorney

Term Limits

(continued from p2)

A December 1989 Gallup poll found that 70% of the American public favors limits on politicians' terms. Three national groups are working to amend the U.S. Constitution to limit Congressional terms. The *New York Times* reports that resolutions calling for a constitutional amendment to limit members of Congress to 12 years in office have already passed in South Dakota and Utah; 16 other states are expected to consider such resolutions next year.

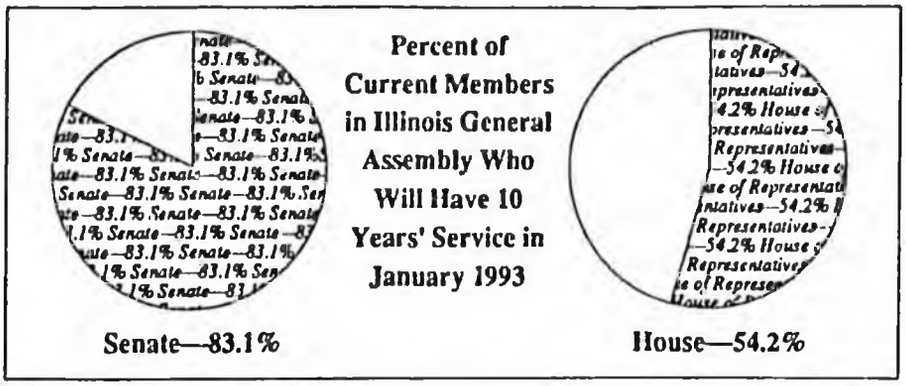
Against

Opponents argue that term limits will deny legislatures the expertise and wisdom accumulated by senior legislators, preventing the development of those who can stand up to lobbyists or the Governor. A noted political scientist, Nelson Polsby, recently argued that support for term limits relies heavily on popular ignorance about what legislators actually do. Polsby said one who takes term limits seriously must believe a legislator's job is relatively simple and easily mastered. Polsby argues that it can take years to accumulate the expertise necessary to discern a good course of action and achieve the power to make one's viewpoint prevail.

Opponents also argue that *some* supporters of limits are motivated by self-interest rather than high-minded principles. For example, an easy way to challenge an incumbent is to argue that the incumbent has been in office too long, and to pledge to support term limits if elected. There has also been at least one situation at a local level (Kansas City) in which term limits allegedly were used to remove a disproportionate number of minority council members.

Karen A. Fahrion
Research Associate

(Further information on this subject is in a Legislative Research Unit Research Response available to legislators.)



FIRST READING

Another Publication from the Legislative Research Unit

Patrick D. O'Grady
Executive Director

Dorothy Nadasdy
Editor

Marilyn Flynn
Composition & Layout

Illinois General Assembly
Legislative Research Unit
222 South College / 3rd Floor / Suite A / Springfield, Illinois 62704

BULK RATE
U.S. POSTAGE
PAID
SPRINGFIELD, IL
PERMIT NO. 721

ADDRESS CORRECTION REQUESTED

Ms. Carol S. Hart
Legislative Research Agency
P.O. Box Y
Juneau, AK 99811-3100

Recycled paper-soybean inks

Printed by Authority of the State of Illinois • Legislative Printing Unit Order 19325 • November 1990 • 1750 copies

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO: HJR 2

Revision Date:
Title: Proposing amendments...limiting the number of...a person may serve in the Legislature...
Sponsor: Representative Navarre
Requestor: House State Affairs

Department Affected: Legislative Affairs Agency
BRU: Legislative Council
Component: Legislators' Salaries & Allowance

COMPONENT SERIAL NO: 776

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER FUND SOURCE						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary)

Zero fiscal impact.

Prepared By: Pamela A. Stoops, Director — Phone: 465-3850
Division: Administrative Services — Date: 2/12/92

Approved By: Warren W. Endicott, Executive Director
Agency: Legislative Affairs Agency — Date: 2/12/92

Distribution (by preparer): Leg [redacted] , & Impacted Agency(ies).