

[Copyright © 1982 Oklahoma City University Law Review. Originally published as 7 OKLA. CITY U. L. REV. 177-241 (1982). "The undersigned, being the Editor in Chief of the OKLAHOMA CITY UNIVERSITY LAW REVIEW (REVIEW) hereby consent to the reprinting of the article, Robert Dowlut and Janet A. Knoop, State Constitutions and the Right to Keep and Bear Arms, 7 OKLA. CITY U. L. REV. 177-241 (1982), for use at website www.2ndlawlib.org. The undersigned further warrants and represents that he has full authority to execute this Consent on Behalf of the REVIEW. Christin V. Adkins". For educational use only. The printed edition remains canonical. For citational use please obtain a back issue from www.okcu.edu/law/lrissue.htm]

## ARTICLE

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

Robert Dowlut\*

Janet A. Knoop\*\*

#### I. INTRODUCTION

Guarantees of individual liberties under federalism have two components: the federal Constitution and state constitutions. The constitutions of thirty-nine (39) states guarantee a right to arms.<sup>1</sup> By comparison to the second amendment of the United States Constitution the textual content of most (pg.178) state constitutions effects broader rights. Presently only five states track the language of the second amendment.<sup>2</sup> Since the Supreme Court has not specifically held that the second amendment applies to the states,<sup>3</sup> state guarantees on arms serve as an important bulwark against

---

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

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

<sup>1</sup> See the Appendix. California, Delaware, Iowa, Maryland, Minnesota, Nebraska, New Jersey, New York, North Dakota, West Virginia, and Wisconsin do not have a specific guarantee to arms in their constitutions. However, six of those states guarantee to all persons the natural or inalienable right to self-defense. CAL. CONST. art. I, §1; DEL. CONST. preamble; IOWA CONST. art. I, §1; N.J. CONST. art. I, §1; N.D. CONST. art. I, §1; W. VA. CONST. art. III, §1. Two other states consider the right to life an inherent right. NEB. CONST. art. I, §1; WIS. CONST. art. I, §1. The natural right to defend one's life is usually not effectively exercised with bare hands. This right can only be given force and effect if its guarantee includes a right to own arms commonly possessed for defensive purposes. In *Commonwealth v. Ray*, 218 Pa. Super. 72, \_\_\_, 272 A.2d 275, 278-79 (1970), *vacated on other grounds*, 448 Pa. 307, 292 A.2d 410 (1972), the court held that, under the Pennsylvania Constitution, the right to self-defense and the right to bear arms each serves as an independent guarantee for a right to bear arms. However, the court acknowledged that such right is not unlimited.

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

<sup>3</sup> See *Miller v. Texas*, 153 U.S. 535 (1894) (The second and fourth amendments only protect against infringement by national government); and *Presser v. Illinois*, 116 U.S. 252 (1886) (The second amendment restricts only the national government). *But see* *State v. Anonymous*, 179 Conn. 516, 519, 427 A.2d 403, 405 (1980); *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (en banc) (Buford, J., concurring); *Nunn v. State*, 1 Ga. (1 Kelly) 243 (1846); *In re Brickley*, 8 Idaho 597, 70 P. 609 (1902); *People v. Liss*, 406 Ill. 419, 94 N.E.2d 320, 323 (1950); *State v. Chandler*, 5 La. Ann. 489, 490 (1850); *McKeller v. Mason*, 159 So. 2d 700, 702 (La. Ct. App. 1964), *aff'd*, 245 La. 1075, 162 So. 2d 571 (1964); *State v. Nickerson*, 126 Mont. 157, 247 P.2d 188, 192 (1952). The second amendment has generated considerable commentary: Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960); Sprecher, *The Lost Amendment*, (pts. 1 & 2) 51 A. B. A. J. 554 (1965), 51 A. B. A. J. 665 (1965); Olds, *The Second Amendment and the Right to Keep and Bear Arms*, 46 MICH. ST. B.J., Oct. 1967, at 15, Comment, *The Right to Keep and Bear Arms: A Necessary Constitutional Guarantee or an Outmoded Provision of the Bill of Rights?*, 31 ALB. L. REV. 74 (1967); Levine & Saxe, *The Second Amendment: The Right to Bear Arms*, 7 HOUS. L. REV. 1 (1969); McClure, *Firearms and Federalism*, 7 IDAHO L. REV. 197 (1970); Hardy & Stompoly, *Of Arms and the Law*, 51 CHI.-KENT L. REV.

infringement,<sup>4</sup> for "it is the state courts at all levels, not the federal courts, that finally determine the overwhelming number of the vital issues of life, liberty and property that trouble countless human beings of (pg.179) this Nation every year."<sup>5</sup>

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

In our constitutional system, governments derive their powers from the people. As John Marshall stated: "The state governments did not derive their powers from the general government; but each government derived its powers from the people, and each was to act according to the powers given it."<sup>9</sup> A state constitution is adopted by the people in order to harmonize the need to guarantee individual rights with the need for effective state government with plenary authority.<sup>10</sup> Thus the purpose of a state constitutional guarantee "is to place the life, liberty and property of the citizen beyond the control of legislation, and to prevent either legislators or courts from any interference with, or deprivation of, the rights therein declared and guaranteed ...."<sup>11</sup> To fulfill this purpose, "a constitutional guaranty should be interpreted in a broad and liberal (pg.180) spirit."<sup>12</sup>

---

62 (1974); Weiss, *A Reply to Advocates of Gun-Control Law*, 52 J. URB. LAW 557 (1974); Whisker, *Historical Development and Subsequent Erosion of the Right to Keep and Bear Arms*, 78 W. VA. L. REV. 171 (1976); Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976); Caplan, *Handgun Control: Constitutional or Unconstitutional?* 10 N.C. CENT. L.J. 53 (1978); Cantrell, *The Right to Bear Arms: A Reply*, 53 WIS. B. BULL. Oct. 1980, at 21; Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON L. REV. 1 (1981); Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N. KY. L. REV. 13 (1982); Gardiner, *To Preserve Liberty: A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982); Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 DET. C. L. REV. 789; Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982); Dowlut, *The Right To Arms: Does The Constitution or the Predilection of Judges Reign?* 36 OKLA. L. REV. 65 (1983); Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition* (1983) (to be published in 10 HASTINGS CONST. L.Q.).

<sup>4</sup> Since the second amendment protects against federal infringement, "the absence of such a guarantee in the state Constitution leaves the Legislature entirely free to deal with the subject." *Ex Parte Rameriz*, 193 Cal. 633, \_\_\_, 226 P. 914, 922 (1924).

<sup>5</sup> Brennan, *Introduction: Chief Justice Hughes and Justice Mountain*, 10 SETON HALL xii (1979).

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

<sup>7</sup> N.Y. Times, Nov. 4, 1976, at 23, col. 3.

<sup>8</sup> Wash. Post, Nov. 9, 1982, at A6, col. 1.

<sup>9</sup> 3 J. ELLIOT'S *Debates on the Federal Constitution* 419 (1836).

<sup>10</sup> One court stated: "The constitution is not a grant of power but a limitation on the exercise thereof. While generally the legislature may exercise all those powers inherent in the people which are not delegated to another branch of gov't it cannot enact laws which will supersede constitutional provisions adopted by the people." *Kirkpatrick v. Superior Court*, 105 Ariz. 413, \_\_\_, 466 P.2d 18, 20-21 (1970). Cf. *Lemons v. Noller*, 144 Kan. 813, \_\_\_, 63 P.2d 177, 180 (1936) (constitution limits rather than confers power on legislature).

<sup>11</sup> *People ex rel. Decatur & S.L. Ry. Co. v. McRoberts*, 62 Ill. 38, 41 (1871).

<sup>12</sup> *Wolfson v. Avery*, 6 Ill. 2d 78, 94, 126 N.E.2d 701, 710 (1955). A constitutional right should not be impaired by any narrow or technical construction of the language used. *People v. Spain*, 307 Ill. 283, 289-90, 138 N.E. 614, 617 (1923). All provisions of the Constitution designed to safeguard the liberty and security of the citizen should be liberally construed. See, *Randle v. Winona Coal Co.*, 206 Ala. 254, \_\_\_, 89 So. 790, 792 (1921); *Salter v. State*, 2 Okla. Cr. 464, \_\_\_, 102 P. 719, 725 (1909).

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

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

## II. HISTORICAL REASONS FOR A RIGHT TO ARMS

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

A. The link between the creation of standing armies and the rise of absolutist governments has ancient roots in English history. The citizen militia is associated with liberty. Blackstone notes "that king Alfred first settled a national militia in this kingdom, and by his prudent discipline made all the subjects of his dominion soldiers...."<sup>15</sup> In a land of liberty to (pg.181) make the military a distinct order and to maintain a standing army are dangers to liberty. "In absolute monarchies this is necessary for the safety of the prince, and arises from the main principle of their constitution, which is that of governing by fear...."<sup>16</sup>

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

---

<sup>13</sup> See generally J. ELY, *DEMOCRACY AND DISTRUST* 1 (1980). Noninterpretivism is the approach in which courts go beyond that set of references in the written constitution and enforce norms that cannot be discovered within the four corners of the document.

<sup>14</sup> *State v. Kessler*, 289 Or. 359, \_\_\_, 614 P.2d 94, 97 (1980). The people are guaranteed the right "to possess arms for their own personal defense, for the defense of their states and nation, and for the purpose of keeping their rulers sensitive to the rights of the people." Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982).

<sup>15</sup> 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*409-10.

<sup>16</sup> *Id.* at \*408.

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

<sup>18</sup> A discussion of this period of English history is found in *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 156-58 (1840). The *Aymette* court erred in stating that "private defence" was not protected by the English Declaration of Rights. The Recorder of London in 1780 wrote: "The right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable.... The lawful purposes, for which arms may be used, (besides immediate self-defence) are, the suppression of violent and felonious breaches of the peace, the assistance of the civil magistrate in the execution of the laws, and the defence of the kingdom against foreign invaders." W. BLIZARD, *DESULTORY REFLECTIONS ON POLICE: WITH AN ESSAY ON THE MEANS OF PREVENTING CRIMES & AMENDING CRIMINALS* 59, 63 (London 1785). A detailed discussion of the right to arms and the English Civil War, the Interregnum, and the Restoration is found in MALCOLM, *DISARMED: THE LOSS OF THE RIGHT TO BEAR ARMS*

The Declaration of Independence criticizes the king and Parliament for keeping "in times of peace, Standing Armies without the Consent of our Legislature," rendering "the Military independent of and superior to the Civil Power," and "transporting large armies of foreign mercenaries to compleat (pg.182) the works of death, desolation and tyranny...."<sup>19</sup>

B. The foundation of an Englishman's security, "the security without which every other would have been insufficient," was neither Magna Charta nor Parliament but "the power of the sword."<sup>20</sup>

James Madison believed that "the advantage of being armed" was a condition "the Americans possess over the people of almost every nation." The despotisms of Europe were charged with being "afraid to trust the people with arms."<sup>21</sup> An armed citizenry serves as a deterrent to governmental oppression because the people have the latent and implicit power to "rise up to defend their just rights, and compel their rulers to respect the laws."<sup>22</sup> Totalitarian governments of the left and right in the twentieth century consider an armed people a threat and seek to disarm them.<sup>23</sup> (pg.183)

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

---

IN RESTORATION ENGLAND (Bunting Institute of Radcliffe College 1980) (Reprinted by National Rifle Ass'n., Wash., D.C.); *See also* Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, (1983) (to be published in 10 HASTINGS CONST. L.Q.).

<sup>19</sup> The Declaration of Independence para. 1 (U.S. 1776).

<sup>20</sup> 1 T. MACAULAY, CRITICAL AND HISTORICAL ESSAYS, CONTRIBUTED TO THE EDINBURGH REVIEW 163 (London 1885).

<sup>21</sup> THE FEDERALIST No. 46, at 299 (J. Madison)(C. Rossiter ed. 1961). Noah Webster thought that "[b]efore a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people perceive to be just and constitutional; for they will possess the *power*, and jealousy will instantly inspire the *inclination* to resist the execution of a law which appears to them unjust and oppressive." PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES at 51, 56 (P. Ford ed. 1888) (emphasis in original). In our system of checks and balances, the people are also a factor. Freedoms of speech, press, petition, and the private keeping and bearing of arms have a common purpose, namely a safeguard against abuse of powers by government.

Richard Henry Lee thought that "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them...." LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 124 (W. Bennett ed. 1978).

<sup>22</sup> *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 157 (1840).

<sup>23</sup> "The surrender of guns and other implements of war has been ordered by special proclamation." R. LEMKIN, AXIS RULE IN OCCUPIED EUROPE 591 (1944).

"Anybody posting a placard the Germans didn't like would be liable to immediate execution, and a similar penalty was provided for those who failed to turn in firearms or radio sets within twenty-four hours." W. SHIRER, THE RISE AND FALL OF THE THIRD REICH 1027 (1959).

The Nazis seized Albert Einstein's bank account for a weapons violation: the possession of a common knife in his home. 1 J. TOLAND, ADOLPH HITLER 325 (1976). "The repression continued with issuance of a series of harsh edicts ... such as the one to surrender all arms immediately or be shot." Hitler, however, during the early stages of his climb to power, got a pistol permit from the sympathetic police. *Id.* at 86-87, 120.

"Owning a pistol meant an obligatory conviction for terrorism...." 1 A. SOLZHENITZYN, THE GULAG ARCHIPELAGO 195 (1974). The right to have firearms or other weapons is forbidden and self-defense is also curtailed. 2 A. SOLZHENITZYN, THE GULAG ARCHIPELAGO 431-32.

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

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

This English tradition is reflected in early state constitutions<sup>25</sup> and American commentaries.<sup>26</sup> American case law echoes these sentiments.<sup>27</sup> Furthermore, there is no social interest (pg.184) in preserving the lives and well-being of criminal aggressors at the cost of those of their victims. The only defensible policy society can adopt is one that will operate as a sanction against unlawful aggression.

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

### III. THE POLICE POWER

---

<sup>24</sup> M. FOSTER, CROWN CASES 273-74 (London 1776). Cases of justifiable self-defense include "[w]here a known felony is attempted upon the person, be it to rob or murder ..., [a] woman in defence of her chastity ..., [and] arson or burglary in the habitation." *Id.* at 274. Other English commentators also supported self-defense, including Blackstone. 3 W. BLACKSTONE, COMMENTARIES \*4.

<sup>25</sup> "That the people have a right to bear arms for the defence of themselves and the State ...." PA. DECLARATION OF RIGHTS art. XIII (1776) and VT. CONST. ch. I, art. XV (1777). In America, "the requirements for self-defense and food-gathering had put firearms in the hands of nearly everyone." D. BOORSTIN, THE AMERICANS—THE COLONIAL EXPERIENCE 352-53 (1958).

<sup>26</sup> "The right of self-defence in these cases is found in the law of nature, and is not, and cannot be superseded by the law of society." 2 J. KENT, COMMENTARIES ON AMERICAN LAW 12 (N.Y. 1827). "The right of self defence is the first law of nature." 1 *St. Geo. Tucker's* BLACKSTONE COMMENTARIES 300 app. (Phil. 1803).

<sup>27</sup> See *Parrish v. Commonwealth*, 81 Va. 1, 12 (1884); see also *State v. Hardy*, 60 Ohio App. 2d 325, 397 N.E.2d 773 (1978).

<sup>28</sup> *Warren v. District of Columbia*, 444 A.2d 1 (D.C. App. 1981); *Weiner v. Metro Transp. Auth.*, 55 N.Y.2d 175, 448 N.Y.S.2d 141 (1982). *Contra* *Yingst v. Pratt*, 139 Ind. App. 695, \_\_\_, 220 N.E.2d 276, 280 (1966)(en banc). "It is the right and duty of a private person to apprehend one who has committed a felony in his presence, either at the time of its commission or upon immediate pursuit" (quoting 5 AM. JUR. 2d, *Arrest* § 35). Other cases in accord include *Suell v. Derricott*, 161 Ala. 259, \_\_\_, 49 So. 895, 900 (1909); *Pond v. People*, 8 Mich. 149, 178 (1860). In 1981, police in California justifiably killed sixty-eight persons; civilians justifiably killed 126 persons. HOMICIDE IN CAL., 1981, at 74 (Cal. Dept. of Justice). Chief Justice Cardozo noted that, under the controlling law, not only did a citizen have a duty to aid a commanding policeman in specific circumstances, but this duty to prevent crime may even extend to the use of "whatever implements and facilities are convenient and at hand." *Babington v. Yellow Taxi Corp.*, 250 N.Y. 14, 16-17, 164 N.E. 726, 727 (1928) (implies state can compel people to own arms).

"Private citizens inevitably play an important role in controlling crime. By limiting their exposure to risk, investing in locks and guns, ... private citizens affect the overall level of crime, and the distribution of the benefits and burdens of policing." We should not "forget that private policing was the only form of policing for centuries ...." Those who think of private enforcement as evidence of "dangerous vigilantes forget the value of private crime-control efforts, and the crucial difference between vigilantes and responsible citizens playing their traditional role in crime control." The legitimate role of private citizens is to "limit their functions to deterrence and, occasionally, apprehension; they neither judge guilt nor mete out punishment." Moore & Kelling, "To Serve and Protect": *Learning From Police History*, 70 THE PUBLIC INTEREST 49, 59 (1983).

The state has the authority to train its able-bodied men so that they may perform military or constabulary duties when called upon. *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 260 (1934), *reh'g denied*, 293 U.S. 633 (1935).

<sup>29</sup> *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

Limitations on the right to keep and bear arms stem from a state's police power<sup>30</sup> and, in eighteen (18) states, from permissive (pg.185) language enunciated in the constitutional guarantee,<sup>31</sup> although the permissive language does not preclude the enactment of regulations outside the scope of the permissive language.<sup>32</sup> On the other hand, the constitution is not a grant of power but a limitation on the exercise of power. While generally the legislature may exercise all those powers inherent in the people which are not delegated to another branch of government, the legislature cannot enact laws which will supersede constitutional provisions adopted by the people.<sup>33</sup> The police power cannot "violate some positive mandate of the constitution."<sup>34</sup> In other words a "governmental body ... cannot under the guise of the police power enact unreasonable and oppressive legislation or that which is in violation of the fundamental law."<sup>35</sup>

The framers of the arms guarantee may be assumed to have been aware of crime. Nevertheless, they balanced the interests (pg.186) and decided to secure a right to keep and bear arms in the face of any possible problems such a right might entail. For example, the colonies were not free from crime. In 1630, John Billington was hanged by the pilgrims at Plymouth colony for murdering John Newcomen with a blunderbuss. In 1678, Thomas Hellier was hanged in Westover, Virginia, for hacking three people to death. Thomas Lutherland was hanged February 23, 1691, in New Jersey for murdering John Clark, a boat trader, and stealing his supplies. Alexander White was hanged at Cambridge, Massachusetts, on November 18, 1784, for murder and piracy.<sup>36</sup> The Framers apparently felt that crime must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional right.

---

<sup>30</sup> "The conflicting rights involved here are the individual's rights 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....

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

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

<sup>31</sup> Proscribing, organizing, maintaining, or employing an armed body of men: ARIZ. CONST. art. 2, § 26; WASH. CONST. art. I, § 24. Proscribing concealed carry: COLO. CONST. art. II, § 13; IDAHO CONST. art. I, § 11; KY. CONST. Bill of Rights, § 1, para. 7; LA. CONST. art. I, § 11; MISS. CONST. art. 3, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; N.M. CONST. art. II, § 6; N.C. CONST. art. I, § 30. Manner of bearing arms may be regulated: FLA. CONST. art. I, § 8; GA. CONST. art. I, § 1 para. 5; OKLA. CONST. art. 2, § 26; TENN. CONST. art. I, § 26; TEX. CONST. art. I, § 23. The right may be regulated: UTAH CONST. art. I § 6. The right is subject to the police power: ILL. CONST. art. I, § 22. Besides proscribing concealed carrying, the Idaho guarantee also allows minimum sentences for crimes committed while in possession of a firearm, and allows punishment for misuse of arms and possession by convicted felons.

<sup>32</sup> *State v. Dawson*, 272 N.C. 535, \_\_\_, 159 S.E.2d 1, 10-11 (1968) (permissive language inserted as a matter of "superabundant caution").

<sup>33</sup> *Kilpatrick v. Super Ct. of Maricopa County*, 105 Ariz. 413, 466 P.2d 18, 20-21 (1970).

<sup>34</sup> "The only limitations upon the legislature in the exercise of its police power is that the statute must reasonably tend to correct some evil or promote some interest of the State and not violate some positive mandate of the constitution." *People v. Warren*, 11 Ill. 2d 420, 424, 143 N.E.2d 28, 31 (1957).

<sup>35</sup> *Junction City v. Mevis*, 226 Kan. 526, 535, 601 P.2d 1145, 1152 (1979) (quoting *Delight Wholesale Co. v. City of Overland Park*, 203 Kan. 99, 453 P.2d 82 (1969)) (gun ordinance in *Mevis* voided as being overly broad).

<sup>36</sup> J. NASH, BLOODLETTERS AND BADMEN 55, 255, 345, 606 (1973). "[A]rguments of policy must give way to a constitutional command ...." *Payton v. N.Y.*, 445 U.S. 573, 602 (1980). In Maryland, police stopped 2,000 cars over one weekend in a drunk driving campaign. They arrested four drivers. *Wash. Post*, Dec. 30, 1982, A 1, col. 4, at A 7, col. 1. Rights cannot be swept aside or ignored simply to make it convenient for the state to get at a small criminal element. Such an approach would render nugatory the benefits of a written constitution.

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

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

The collective right view claims that while all of the people have a right, the individual person has no right.<sup>38</sup> This essentially (pg.187) means that the right to bear arms protects no one and guarantees nothing, for regardless of how draconian and unconstitutional a law may be, no individual would have standing to challenge such a law.<sup>39</sup>

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

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

---

<sup>37</sup> 2 J. TUCKER, THE CONSTITUTION OF THE U.S. 688 (1899)

<sup>38</sup> *City of Salina v. Blaksley*, 72 Kan. 230, 83 P. 619, 620 (1905) (In interpreting a provision of the Kansas Constitution, which stated that "The people have the right to bear arms for their defense and security," the Supreme Court of Kansas stated that it "refers to the people as a collective body.... Individual rights are not considered in this section.").

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

<sup>40</sup> *People ex rel. Cosentino v. Adams County*, 82 Ill. 2d 565, 413 N.E.2d 870, 871 (1980).

<sup>41</sup> *Burke v. Snively*, 208 Ill. 328, 340, 70 N.E. 327, 329 (1904) (Words "shall be given the meaning which they bear in ordinary use among the people").

<sup>42</sup> *People v. Stevenson*, 281 Ill. 17, 25-26, 117 N.E. 747, 750 (1917).

<sup>43</sup> KAN. CONST. Bill of Rights, §2.

<sup>44</sup> *Id.* §3.

<sup>45</sup> *Id.* §15.

<sup>46</sup> *Id.* §4.

<sup>47</sup> *Kirkpatrick v. King*, 228 Ind. 236, \_\_\_, 91 N.E.2d 785, 789 (1950). "[T]he term 'people,' as used in the [state] constitution, is broad and comprehensive, and comprises generally all of the individual inhabitants of the state." *State v. Kofines*, 33 R.I. 211, \_\_\_, 80 A. 432, 437 (1911).

<sup>48</sup> 72 Kan. 230, 83 P. 619 (1905). Restricting the right to bear arms to a collective right has been specifically rejected by other courts. *See, e.g., People v. Nakamura*, 99 Colo. 262, 62 P.2d 246 (en banc 1936); *State v. Dawson*, 272 N.C. 535, \_\_\_, 159 S.E.2d 1, 9 (1968).

(pg.188) within the city "while under the influence of intoxicating liquor."<sup>49</sup> The conviction could have been sustained simply because such conduct is outside the boundaries of the guarantee.<sup>50</sup> The court chose "to treat the question [of bearing arms] as an original one."<sup>51</sup> It misread *In re Brickey*<sup>52</sup> by claiming that the case sanctioned the carrying of concealed weapons on constitutional grounds. *Brickey* struck down a statute which forbade the carrying of a pistol in town in any manner. The *Brickey* court specifically held that forbidding the carrying of concealed weapons would be a valid regulation of the arms right. The court also misread *Commonwealth v. Murphy*<sup>53</sup> by claiming that *Murphy* strongly supported the court's position. *Murphy* upheld a conviction for unauthorized parading by armed men. The *Murphy* court merely cited *Presser v. Illinois*,<sup>54</sup> which involved an unlicensed armed parade, in upholding the conviction.

The *Blaksley* court's claim that a Bill of Rights guarantee merely insures the people collectively a narrow right to bear arms only in the organized militia or any military organization provided by law<sup>55</sup> lacks other jurisprudential support. The Kansas Constitution defines the militia as all able-bodied citizens between twenty-one and forty-five years of age.<sup>56</sup> The Kansas Constitution also authorizes the legislature to organize, (pg.189) equip and discipline the militia.<sup>57</sup> This demonstrates that any collective right to bear arms in the militia is adequately covered by the militia article of the Kansas Constitution.<sup>58</sup>

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

The collective right theory suffers from a logical defect. It is conceptually difficult to see how something can exist in a whole without existing in any of its parts. The collectivists essentially claim

---

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

<sup>50</sup> Carrying a gun while drunk is outside the protected boundaries of the right to bear arms. *People v. Garcia*, 197 Colo. 550, 595 P.2d 228 (1979)(en banc); *State v. Shelby*, 90 Mo. 302, 2 S.W. 468 (1886). The right to arms is subject to regulations to promote the peace, order and security of society, "provided they do not nullify the constitutional right or materially embarrass its exercise." E. FREUND, *THE POLICE POWER* 90-91 (1904). "A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional." *State v. Reid*, 1 Ala. 612, 616 35 Am. Dec. 46 (1840). The prevailing view is that prohibiting concealed carrying of weapons does not infringe the private right to bear arms. "Any one, carrying a weapon for a laudable purpose, will not desire to conceal it." C. TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE U.S.* 13-14, 503 (1886).

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

<sup>52</sup> 8 Ida. 597, 70 P. 609 (1902).

<sup>53</sup> 166 Mass. 171, 44 N.E. 138 (1896).

<sup>54</sup> 116 U.S. 252 (1886).

<sup>55</sup> 72 Kan. 230, \_\_\_, 83 P. 619, 620-21 (1905).

<sup>56</sup> KAN. CONST. art. VIII, §1.

<sup>57</sup> *Id.* §2.

<sup>58</sup> *Id.* §§ 1-4.

<sup>59</sup> *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 16-17 (1820). This reflects John Marshall's view that the states had retained their powers over the militia. 3 J. ELLIOT, *DEBATES ON THE FEDERAL CONSTITUTION* 419-21 (1836).

<sup>60</sup> *Luther v. Borden*, 48 U.S. (7 How.) 1, 45 (1849).

<sup>61</sup> *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 260 (1934).



that there is a nebulous entity that exists somewhere between the individual and the state which is so important that the Framers protected it with a constitutional guarantee. The respected Judge Cooley rejected the collective right view:

It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment [sic] of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of (pg.190) law for the purpose. But this enables the government to have a well regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.<sup>62</sup>

Kansas history of the nineteenth century demonstrates that the people were undoubtedly concerned with personal defense.<sup>63</sup> The guarantee to arms of the 1859 Kansas Constitution<sup>64</sup> is an exact copy of Ohio's 1851 constitutional guarantee,<sup>65</sup> and Ohio courts have interpreted their provision to secure an individual right to self-defense.<sup>66</sup> Thus the independent clause, containing command language, that "[t]he people have a right to bear arms for their defense and security" was undoubtedly intended to include a personal right to bear arms to protect one's person, family, or property against unlawful injury and to secure from unlawful interruption the enjoyment of life, limb, family or property. The autonomy of the right to arms clause is not undermined by the presence in the same section of independent clauses dealing with standing armies and the subordination of the military to the civil power, for arms guarantees in other states have similar clauses and their courts have found an individual right to bear arms for self-defense.<sup>67</sup> Hence, any claim that the arms guarantee is inextricably (pg.191) linked and strictly limited to military matters rests

---

<sup>62</sup> T. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 298-99 (3rd ed. 1898).

<sup>63</sup> *Parman v. Lemmon*, 119 Kan. 323, \_\_\_, 244 P. 227, 231 (1925) (Dawson, J., dissenting), *rev'd on rehearing*, 120 Kan. 370, 244 P. 232 (1926). The dissent was, in effect, adopted as the opinion of the majority on rehearing.

<sup>64</sup> KAN. CONST. Bill of Rights, §4.

<sup>65</sup> OHIO CONST., art. I, §4.

<sup>66</sup> *Mosher v. City of Dayton*, 48 Ohio St. 2d 243, \_\_\_, 358 N.E.2d 540, 543 (1976) ("the right of an individual to bear arms" may be regulated in a "reasonable manner"); *City of Akron v. Dixon*, 36 Ohio Misc. 133, 303 N.E.2d 923, 924 (Akron Mun. Ct. 1972) ("the right secured by the Constitution ... speaks of the citizen's self defense and security and to his right to attain those ends by bearing arms."); *State v. Hogan*, 63 Ohio St. 202, \_\_\_, 58 N.E. 572, 575 (1900) (individual right "for defense of self and property").

<sup>67</sup> N.C. CONST. art. I, §30; *State v. Dawson*, 272 N.C. 535, 159 S.E.2d 1 (1968); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921); OHIO CONST. art. I, §4. *See* note 66, *supra*; OR. CONST. art. I, §27; *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980); VT. CONST. ch. I, art. 16; *State v. Rosenthal*, 75 Vt. 295, 55 A. 610 (1903).

on a foundation of quicksand. The *Blaksley* decision disingenuously turns a constitutional guarantee into an intangible abstraction.

No attempt will be made to examine textual differences based solely on whether plural terms, such as people or citizens, or singular terms, such as person or citizen, are used because only one state, Massachusetts, has followed *Blaksley*.<sup>68</sup>

The collectivists' argument should not be followed by the courts because it has no historical support, no case law support prior to the Kansas decision, and is illogical since the very concept of a right is individual. The principle of rigid *stare decisis* has no application to an unconstitutional law or to even a course of action taken by the courts. "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."<sup>69</sup> On one occasion, the U.S. Supreme Court branded a whole line of decisions it had pursued for nearly a century "an unconstitutional assumption of power by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."<sup>70</sup>

The term "people" should be interpreted to include individuals. However, all individuals are not guaranteed the right to keep and bear arms. The Framers were mindful that certain groups are not protected because they fall into a traditional high-risk category. Thus it matters not that the Framers used in the arms guarantee the term people, citizens, person or citizen. Felons, persons of tender years, idiots and lunatics are classes that have almost universally been excluded from the arms guarantee.<sup>71</sup> (pg.192)

---

<sup>68</sup> Commonwealth v. Davis, 369 Mass. 886, 343 N.E.2d 847 (1976).

<sup>69</sup> Powell v. McCormack, 395 U.S. 486, 546-47 (1969).

<sup>70</sup> Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Holmes, J., dissenting in Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 533 (1928)). See also Monell v. Department of Social Services, 436 U.S. 658 (1978); cf. Brown v. Board of Ed., 347 U.S. 483 (1954) with Plessy v. Ferguson, 163 U.S. 537 (1896).

<sup>71</sup> At common law a felony is such crime as occasions a forfeiture of all the offender's lands or goods and often subjects him to capital punishment. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*94. While at common law usually only the most serious offenses were felonies and the wrongful act had to be accompanied by a guilty mind, the modern trend is to make some felonies a strict liability offense, even though for the most part such offenses are *mala prohibita* and not *mala in se*. For example, the mere possession of an unregistered rifle with a barrel under 16 inches is punishable by 10 years and a \$10,000 fine. 26 U.S.C.A. §§ 5845 (a) (3), 5861 (d), 5871 (1980). To prevent the people from being disarmed by the expedient of classifying regulatory offenses as felonies, the disqualification for felons should be restricted to common law felonies and their modern equivalents and to offenses requiring some state of mind above strict liability which are inherently inimical to life and property. The harshness of a felony conviction for a regulatory offense requiring no criminal intent was acknowledged in United States v. Ruisi, 460 F.2d 153, 157 (2d Cir. 1972) ("application for a Presidential pardon would seem to be justified.") Congress has already recognized a narrow exception to the felony disqualification by exempting antitrust violations, unfair trade practices, restraint of trade, or other similar offenses relating to the regulation of business practices. 18 U.S.C.A. §921 (a) (20) (1976). For a list of disqualifications involving felons see Doe v. Webster, 606 F.2d 1226, 1233-34 (D.C. Cir. 1979); State v. Noel, 3 Ariz. App. 313, \_\_\_, 414 P.2d 162, 164 (1966).

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

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

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

So it is, if a lunatike person killeth another during his lunacie; (*Cok.* 4. 125.) for all acts done by him in his lunacie, are as the actes of an Ideot.... But an infant of such tender yeares, as that he hath no discretion or intelligence, if he kill a man, this is no felony in him.

M. DALTON, THE COUNTRY JUSTICE 216-17, 223, 224 (London 1622).

## V. CONSTITUTIONALLY PROTECTED ARMS

A textual analysis of state constitutions reveals that two separate categories of arms are protected: (A) those suitable (pg.193) (not indispensable) for militia use, and (B) those suitable for personal defense. In addition, two states also protect arms suitable "for hunting and recreational use and for other lawful purposes."<sup>72</sup> Arms suitable for deterrence against oppression are not treated as a separate category because an armed citizenry, regardless of the armament kept, serves as a latent and implicit deterrent to oppression.<sup>73</sup>

A. Colonial militia laws reveal that smoothbore shoulder arms, carbines, rifles, pistols, ammunition, swords, bayonets, (pg.194) pikes, and lances are arms suitable for militia use.<sup>74</sup> To this list

---

That not all people were included in the arms guarantee can be established by viewing early arms laws relating to freed blacks and American Indians. "Free persons of color have never been recognized as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office." *Cooper v. Savannah*, 4 Ga. 68, 72 (1848). *See also* *State v. Newsom*, 27 N.C. 203 (1844). The sale of firearms to American Indians was prohibited. 2 Stat. 139 ch. 13 (1802) and 2 Stat. 283 ch. 38 (1804).

Some early constitutional guarantees on arms were restricted to "free white men." FLA. CONST. art. I, §21 (1838); TENN. CONST. art. I, § 26 (1834); LA. CONST. tit. III, art. 60 (1845). The passage of the thirteenth and fourteenth amendments means that, except felons, the mentally infirm, and person of tender years, all of the people are guaranteed the right to arms. *See also* T. COOLEY, *A TREATISE ON CONSTITUTIONAL LIMITATIONS* 57 (7th ed. 1903).

<sup>72</sup> NEV. CONST. art. I, § 11, para. 1; N.M. CONST. art. II, § 6. In addition, the majority report of the Illinois Bill of Rights Committee indicates an intent to protect under ILL. CONST. art. I, § 22 "arms that law-abiding persons commonly employ for purposes of recreation or the protection of person and property." VI 6th Ill. *Const. Convention, Record of Proceedings* (1969-1970) at 87. In adopting the Virginia Bill of Rights, § 13, the interests of "the sportsmen of this State" and the right "to have arms in their homes, and they think that this will give them some protection" were also cited as reasons. *Proceedings & Debates of Virginia Senate Pertaining to Amendment of Constitution* 393 (Apr. 3, 1969) (Sen. Long).

<sup>73</sup> Some cases equate arms "effective as a weapon of war" with arms suitable "to resist oppression." *Fife v. State*, 31 Ark. 455, 458, 461 (1876); *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840). Other cases make no such equation. Arms suitable for militia use or self-defense are included in the term "arms" and both categories serve as a deterrent to oppression because historically "the arms used by the militia and for personal protection were basically the same weapons." *State v. Kessler*, 289 Or. 359, \_\_\_, 614 P.2d 94, 99 (1980).

The wellspring for a right to have arms for hunting is the Dec. 12, 1787, minority proposal in the Pennsylvania convention: That the people have a right to bear arms for the defence of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power.

PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, 422 (1888).

The Pennsylvania minority was the first to propose an extensive Bill of Rights and their seminal ideas found their way into the Bill of Rights and became the first, second, fourth, fifth, sixth, eighth, and tenth amendments of the United States Constitution. E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 50-56 (1957). The Pennsylvania minority proposal reveals an intent to guarantee the traditional uses of the times: for militia use, for self-defense, and for hunting. The reference to hunting was probably an effort to prevent the enactment of game laws designed to disarm the people. It also demonstrates that the common understanding of "to bear arms" was not restricted solely to militia purposes. In the 18th century "bear" meant "To convey or carry." S. JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE (UNPAGINATED)* (1979 reprint of 1755 ed.) The arms provision in LA. CONST. tit. III, art. 60 (1845), used the term "carry arms."

<sup>74</sup> The arms and equipment a New York militiamen was required to furnish himself included a "muskett or fuzee ... pike ... Sword ... Lance ... pistoll ... case of good pistols ... rapier ... carabine ... powder ... bullets ...." 1 *THE COLONIAL LAWS OF NEW YORK FROM 1664 TO THE REVOLUTION* 232 (1894).

In Virginia the list included "a firelock, muskets or fusee well fixed, a good sword and cartouch box, and six charges of powder ... at his place of abode two pounds of powder and eight pounds of shott ... holsters ... a case of pistols well fixed, sword ... carabine ...." 3 *LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEG. in 1619* at 338 (W. Hening ed. 1823). Virginia also required "that every man be provided with a good Rifle if to be had, or otherwise with a common firelock ... [and] that every horseman be provided with a good horse, bridle, saddle with pistols and Holsters, a carbine or other short firelock ...." 1 *THE PAPERS*

may also be added the shotgun.<sup>75</sup> Since all those weapons are constitutionally protected arms, all stand on an equal footing. A constitutionally protected arm cannot be singled out for abridgement, for no authority exists for the proposition that one form of constitutionally protected conduct may be prohibited because alternative forms of constitutionally protected conduct are available.<sup>76</sup> (pg.195)

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

---

OF THOMAS JEFFERSON 160-61 (J. Boyd ed. 1950).

In Connecticut the arms included "sword, case of pistols and holsters ...." "Our horsemen are armed with pistols and carbines." 3 THE PUBLIC RECORDS OF THE COLONY OF CONN. 12 & 295 (H. Trumbull ed. 1859). In Rhode Island the arms included "carbine and pistol ...." 3 RECORDS OF THE COLONY OF R.I. & PROVIDENCE PLANTATIONS IN NEW ENGLAND 433 (J. Bartlett ed. 1856). In New Jersey the arms included "musket or Fusee, well fixed, and a Bayonet fitted to it, a cutting Sword or Cutlace, ... Holsters, a Case of Pistols ...." 6 DOCUMENTS RELATING TO COLONIAL HISTORY OF N.J. 192-93 (W. Whitehead ed. 1888).

<sup>75</sup> In the New World the shotgun was used for hunting, self-defense, and military purposes. T. SWEARENGEN, THE WORLD'S FIGHTING SHOTGUNS 1-3 (1978). "In 1621, Plymouth colony advised prospective newcomers to bring fowlers with them for use in obtaining food and for defense against possible Indian attacks." *Id.* at 2. "British General Sir John Burgoyne, of American Revolutionary War fame, raised a Light Dragoon Regiment in 1781, and caused it to be equipped with the blunderbuss." *Id.* at 2. "During the Revolution, General Washington took cognizance of shotgun effectiveness. He encouraged troops to load their [smoothbore] muskets with buck and ball, or with plain buckshot to compensate for the poor long range accuracy of the single musket ball. There is evidence that Americans found such multiple-projectile ammunition quite effective against the British. Its use became widespread, except in rifled arms. General Washington referred to the shot as 'swan drops.'" *Id.* at 3. The shotgun is still used by the military. SMALL ARMS MATERIAL AND ASSOCIATED EQUIPMENT 29-31 (U.S. ARMY TECHNICAL MANUAL 9-2200; Oct. 1956).

<sup>76</sup> "We have not been cited to any authority nor are we aware of any that would permit the total abridgement of one form of constitutionally protected communication simply because there are alternative means of communication possibly available." N.Y. Public Interest Research Group, Inc. v. Roslyn Estates, 498 F.Supp. 922, 932 (E.D.N.Y. 1979).

<sup>77</sup> State v. Kessler, 289 Or. 359, \_\_\_, 614 P.2d 94, 99 (1980). Older cases have held that only large pistols are constitutionally protected arms. *See* Fife v. State, 31 Ark. 455, 460-61 (1876) (not pocket pistols but only "repeaters, which, in recent warfare, have generally superseded the old-fashioned holster, used as a weapon in the battles of our forefathers"); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 187 (1871) ("We know there is a pistol of that name which is not adapted to the equipment of the soldier, yet we also know that the pistol known as the repeater is a soldier's weapon—skill in the use of which will add to the efficiency of the soldier"). Modern metallurgy and smokeless powder have reduced the size of pistols suitable for militia use. A survey of military pistols from Argentina to Yugoslavia reveals that most have a barrel length of about four inches. W. SMITH, SMALL ARMS OF THE WORLD passim (11th ed. 1977). However, a significant number have barrel lengths over three inches but under four inches. *Id.* at 215, 318, 382, 407, 433. While all of these pistols are centerfire, both the U.S. and U.S.S.R. employ .22 caliber rimfire pistols for training purposes. *Id.* at 476, 528.

The U.S. military's arsenal of self-loading pistols and revolvers includes the .38 caliber revolver with a 2-inch barrel. It is usually carried in a holster. PISTOLS AND REVOLVERS 99-106 (U.S. Army Field Manual 23-35; Feb. 1953); SMALL ARMS MATERIAL AND ASSOCIATED EQUIPMENT 7-13 (U.S. ARMY TECHNICAL MANUAL 9-2200; OCT. 1956); PISTOLS AND REVOLVERS 109 (U.S. Army Field Manual 23-35; July 1960). The U.S. military also purchased "a few thousand" Colt .25 caliber self-loading pocket pistols. R. SUTHERLAND & R. WILSON, THE BOOK OF COLT FIREARMS 425 (1971).

The various weaponry used by the Patriots during the Revolutionary War has led writers to comment that as a practical matter the people carried whatever weapons they had into battle. C. COLBY, REVOLUTIONARY WAR WEAPONS 12 (1963); Nunn v. State, 1 Ga. 243 (1846) (the right belongs to the individual and is not restricted to militia arms). As a practical matter many of the arms commonly possessed by the people (rifles, shotguns, and pistols) and suitable for militia use are also employed by the organized military.

<sup>78</sup> State v. Kessler, 289 Or. 359, \_\_\_, 614 P.2d 94, 98-99 (1980). "To him the rifle, the musket, the shotgun, and the pistol are about the only arms which he would be expected to 'bear,' and his right to do this is that which is guaranteed by the Constitution." To suggest "the Constitution intended" that deadly gases, cannon, submarines, and bombs are arms "would be mockery." State v. Kerner, 181 N.C. 574, \_\_\_, 107 S.E. 222, 224 (1921).

A distillation of case law indicates that arms suitable for militia use are those which are commonly possessed and which make up the usual arms of the people, those within the people's means, those historically used for such purposes and (pg.196) their modern equivalents, or those in ordinary use and effective as weapons of war.<sup>79</sup>

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

The term "militia" has been defined as all citizens or all males capable of bearing arms.<sup>81</sup> The militia is thus more than the National Guard.<sup>82</sup> The sophisticated organization, equipment, (pg.197) and training of the National Guard would indicate that it has undergone a metamorphosis from being an inclusive militia comprised of the people to being almost exclusively troops, and the states may be prevented in times of peace from keeping troops.<sup>83</sup>

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

The importance of guaranteeing to the people the right to keep and bear arms having militia utility was demonstrated during this century. In the Second World War the militia proved a successful substitute for the National Guard, which was federalized and activated for overseas duty.<sup>85</sup> Members of the militia, many of whom belonged to gun clubs and whose ages varied from sixteen

---

<sup>79</sup> Fife v. State, 31 Ark. 455, 460-61 (1876); State v. Kerner, 181 N.C. 574, \_\_\_, 107 S.E. 222, 224-25 (1921); State v. Kessler, 289 Or. 359, \_\_\_, 614 P.2d 94, 98-99 (1980); Andrews v. State, 50 Tenn. (3 Heisk) 165, 179 (1871).

<sup>80</sup> Andrews v. State, 50 Tenn. (3 Heisk) 165, 178 (1871). See also Halbrook *infra* note 167. Of the thirty-nine states with a guarantee to arms, fourteen guarantee only the right to bear arms, as opposed to the right to keep and bear arms. ALA. CONST. art. I, § 26; ARIZ. CONST. art. II, § 26; CONN. CONST. art. I, § 15; IND. CONST. art. I, § 32; KAN. CONST. Bill of Rights, § 4; KY. CONST. Bill of Rights, § I para. 7; OHIO CONST. art. I, § 4; OR. CONST. art. I, § 27; PA. CONST. art. I, § 21; S.D. CONST. art. VI, § 24; UTAH CONST. art. I, § 6; VT. CONST. ch. I, art. 16; WASH. CONST. art. I, § 24; and WYO. CONST. art. I, § 24. This distinction is of no significance because courts and commentators agree that a guarantee to bear arms includes the guarantee to keep arms. See, e.g., State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980) (keeping of a club in one's home); Photos v. City of Toledo, 19 Ohio Misc. 147, \_\_\_, 250 N.E.2d 916, 927 (1969) ("No law abiding citizen, free from the city's disqualifications, has been or will be precluded from purchasing, keeping or bearing arms."). "[T]o bear arms implies something more than the mere keeping." COOLEY, *supra* note 62.

<sup>81</sup> Burroughs v. Peyton, 57 Va. 470, 482 (1864) ("the militia embraces the whole arms bearing population ..."); *Ex Parte McCants*, 39 Ala. 107, 113 (1863). Numerous state constitutions reflect this view. E.g., "A militia shall be provided and shall consist of all persons over the age of seventeen ..." IND. CONST. art. XII, § 1; "The State militia consists of all able-bodied persons residing in the State ..." ILL. CONST. art. XII, § 1. "[A]ll able-bodied citizens of the state ..." are the militia. MONT. CONST. art. VI, § 13 (2). The antifederalist view was that "A militia, when properly formed, are in fact the people themselves ..." and that "the constitution ought to secure a genuine and guard against a select militia ..." by having the militia include "all men capable of bearing arms ...." 2 THE COMPLETE ANTI-FEDERALIST 341 (H.J. Storing ed. 1981). The U.S. Supreme Court has also defined the militia in this broad manner. *United States v. Miller*, 307 U.S. 174, 179 (1939).

<sup>82</sup> The terms "militia" or "militiamen" comprehend every citizen-soldier who in time of war or emergency forsakes his civilian pursuits for temporary military duty and are not restricted to the National Guard. *State ex rel. McGaughey v. Grayton*, 349 Mo. 700, \_\_\_, 163 S.W.2d 335, 337 (en banc 1943). The militia is classified into the organized militia and the reserve militia. *Id.* at \_\_\_, 163 S.W.2d at 340. See also *People ex rel. Leo v. Hill*, 126 N.Y. 497, 504, 27 N.E. 789, 790 (1891).

Numerous statutes make the distinction between the militia and the National Guard. See, e.g., 10 U.S.C.A. § 311 (1975); 46 West's Cal. Mil. Code § 121 (1955); CONN. GEN. STAT. ANN. § 27-2 (West 1975); and R.I. GEN. LAWS § 30-1-4 (1969).

<sup>83</sup> U.S. CONST. art. 1, § 10, cl. 3.

<sup>84</sup> *State v. Dawson*, 272 N.C. 535, \_\_\_, 159 S.E.2d 1, 9 (1968). Disarmed people could not serve as a deterrent to oppression. *State v. Kerner*, 181 N.C. 574, \_\_\_, 107 S.E. 222, 225 (1921).

<sup>85</sup> U.S. HOME DEFENSE FORCES STUDY at 32, 34 (Office of Sec. of Defense, Mar. 1981).

to sixty-five, served without pay and provided their own arms.<sup>86</sup> Their mission was to serve as a local early warning and intelligence source for regular troops and as a delaying force. Their training stressed guerilla tactics, patrolling, demolitions, and roadblock techniques. The firepower of some units was impressive.<sup>87</sup>

The Maryland National Guard, for example, was activated for overseas service. Governor Herbert R. O'Connor then called on men "of all ages and stations in life" to volunteer for the manning of home guard stations for the task of "repelling invasion forays, parachute raids and sabotage uprisings in the state." Before the end of 1943, 15,000 Maryland Minute Men, as these men were designated, manned home guard stations. These men were expected to bring their own arms—rifles, shotguns, pistols—for training and used those arms on guard (pg.198) duty. At a time when Nazi submarines were sinking American ships off the Atlantic coast, apprehension was very real.<sup>88</sup>

In Virginia, the National Guard was also activated for overseas duty. It thus became necessary to call upon the local armed citizenry to perform militia duties. They were called the Minute Men, the home guard, or the reserve militia. The shortage of arms prompted members of the militia to borrow twenty-two caliber guns from youngsters. Sportsmen were especially sought after for recruitment in the militia. "Since its personnel would have to furnish its own weapons and ammunition, its membership campaign leaned heavily on sportsmen of the state."<sup>89</sup>

All over the country individuals armed themselves in anticipation of threatened invasion.<sup>90</sup> A manual distributed *en masse* by the War Department recommended the keeping of "weapons which a guerilla in civilian clothes can carry without attracting attention. They must be easily portable and easily concealed. First among these is the pistol."<sup>91</sup>

Historically, militia formations were most effective when responding to obvious threats close to home. They were to harass and impede the enemy wherever possible and to support friendly formations. Consisting of small tactical formations armed with a wide variety of weapons, the militia had actually taken the field against the soldiers of George III and defeated them. The lessons of Vietnam, Nicaragua, Africa, and the Soviet intervention into Afghanistan illustrate the limitations of push-button warfare against dispersed small units fighting in their own territory. The militia's critics tend to ignore this strength and concentrate only on the militia's weakness.<sup>92</sup>(pg.199)

---

<sup>86</sup> *Id.* at 58, 62-63.

<sup>87</sup> *Id.* at 58, 60.

<sup>88</sup> BAKER, *I Remember—The "Army" With Men From 16 to 79* [Baltimore] Sun Magazine, Nov. 16, 1975, at 46; 3 STATE PAPERS & ADDRESSES OF GOV. O'CONNOR 616-20 (Mar. 10, 1942). On file with the law review is a copy of an honorable discharge certificate from the World War II Maryland Minute Men and an affidavit from a former member swearing that he performed militia duties armed with his own rifle and pistol.

<sup>89</sup> M. SCHLEGEL, VIRGINIA ON GUARD—CIVILIAN DEFENSE AND THE STATE MILITIA IN THE SECOND WORLD WAR 45, 131 (1949).

<sup>90</sup> *To Arms*, TIME, Mar. 30, 1942, at 1.

<sup>91</sup> B. LEVY, GUERRILLA WARFARE 55 (Penguin Books & Infantry Jour. 1942); B. LEVY, GUERRILLA WARFARE 56 (Panther Publications 1964).

<sup>92</sup> LANE, *The Militia of the U.S.*, MILITARY REVIEW 13, 16 (Mar. 1982). One British officer mistakenly described the Patriots as "a mob without order or discipline, and very awkward at handling their arms." THE SPIRIT OF 'SEVENTY-SIX 150 (H. Commager & R.B. Morris eds. 1967). The Patriots were also described as "skillful enough in the use of musket or rifle ... [and] ... better suited to frontier warfare against the Indians than to the discipline of an army camp." *Id.* at 151-52.

Therefore, a well-regulated militia means one that has had some training or at least is composed of people who have had some training. This is to prevent the militia from becoming a disorderly mob, dangerous not to the enemy but to its own state and country. In its obsolete form pertaining to troops, *regulated* is defined as "properly disciplined." 7 THE OXFORD ENGLISH DICTIONARY 380 (1933). Moreover, *discipline* in relation to arms is defined as "training in the practice of arms." 3 THE OXFORD ENGLISH

B. Arms guaranteed for personal defense are those weapons commonly kept by the people today, and those commonly kept at the time the constitution was adopted and their modern equivalents.<sup>93</sup> The protected arms would include "hand-carried weapons commonly used by individuals for personal defense."<sup>94</sup> Examples of such arms would be "hunting muskets or rifles, hatchets, swords, and knives ... [and] billy club;"<sup>95</sup> modern firearms "such as semi-automatic shotguns, semi-automatic pistols and rifles,"<sup>96</sup> and "ordinary guns, swords, revolvers, or other weapons usually relied upon by good citizens for defense or pleasure."<sup>97</sup> (pg.200)

## VI. TEXTUAL DIFFERENCES

### *Militia Purpose*

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

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

---

DICTIONARY 416 (1933). The framers intended that this "training in the practice of arms" for potential militia duty would be advanced, if not ensured, by the right of the people to keep and bear their own arms.

<sup>93</sup> State v. Kessler, 289 Or. 359, \_\_\_, 614 P.2d 94, 98-99 (1980); Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972); People v. Brown, 253 Mich. 537, \_\_\_, 235 N.W. 245, 246-47 (1931).

<sup>94</sup> State v. Kessler, 289 Or. 359, \_\_\_, 614 P.2d 94, 100 (1980).

<sup>95</sup> *Id.* at \_\_\_, 614 P.2d at 98, 100.

<sup>96</sup> Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972).

<sup>97</sup> People v. Brown, 253 Mich. 537, \_\_\_, 235 N.W. 245, 247 (1931). There is an effort to ban pistols. However, the people understand the term "arms" to include the pistol because of its presence in our culture. In Shakespeare's *Twelfth Night* (circa 1601), Act. II, scene V, line 34, the "pistol" is mentioned. Thus both old cases, State v. Shelby, 90 Mo. 302, 2 S.W. 468, 469 (1886) ("a revolving pistol comes within the description of such arms as one may carry for the purposes designated in the constitution...."), and new cases, Schubert v. DeBard, 398 N.E.2d 1339 (Ind. App. 1980) ("handgun"), recognize the pistol as a constitutionally protected arm. This understanding prompted a court to state: "We are of the opinion, however, that 'pistol' *ex vi termini* is properly included within the word 'arms,' and that the right to bear such arms cannot be infringed. The historical use of pistols as 'arms' of offense and defense is beyond controversy." State v. Kerner, 181 N.C. 574, \_\_\_, 107 S.E. 222, 224, (1921) (law requiring obtaining permit and posting bond to carry pistol unconcealed voided). A pistol is an arm which serves many lawful purposes. Commonwealth v. McHarris, 246 Pa. Super. 488, 371 A.2d 941 (1977).

<sup>98</sup> ALASKA CONST. art. I, § 19; HAWAII CONST. art. I, § 15; N.C. CONST. art. I, § 30; S.C. CONST. art. I, § 20; VA. CONST. art. I, § 13. These guarantees track the language of the U.S. CONST. amend. II.

<sup>99</sup> See notes 74, 75, 77, 79 *supra*. VA. CONST. art. I, § 1 guarantees a right to self-defense. Thus in Virginia arms for personal defense are also guaranteed. See notes 93-97 *supra*.

<sup>100</sup> State v. Kerner, 181 N.C. 574, \_\_\_, 107 S.E. 222, 225 (1921). The right to self-defense was assumed by the Framers. State v. Dawson, 272 N.C. 535, \_\_\_, 159 S.E.2d 1, 9 (1968). See also Nunn v. State, 1 Ga. 243 (1846).

The arms must be carried openly, and the object is "the right to acquire and retain a practical knowledge of the use of fire arms."<sup>101</sup> That end would not be frustrated by a prohibition of carrying deadly weapons while drunk, or to a church, polling place, court, or public assembly, or in a manner calculated to inspire terror.<sup>102</sup> Echoing this view is an early case (pg.201) from Georgia upholding a conviction for being armed in court, which stated:

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

The boundaries of this right are such that the possession and carrying in one's home may be either open or concealed, for (pg.202) one's home is a castle.<sup>104</sup> The open peaceful carrying in one's business

---

<sup>101</sup> State v. Kerner, 181 N.C. 574, \_\_, 107 S.E. 222, 225 (1921). LA. CONST. Bill of Rights, art. 3 (1879) tracked the language of the second amendment. "When we see a man with a musket to shoulder, carbine slung on back, or pistol belted to his side, or such like, he is bearing arms in the constitutional sense." State v. Bias, 37 La. Ann. 259, 260 (1885).

<sup>102</sup> State v. Dawson, 272 N.C. 535, \_\_, 159 S.E.2d 1, 10 (1968); State v. Kerner, 181 N.C. 574, \_\_, 107 S.E. 222, 225 (1921); Hill v. State, 53 Ga. 473 (1874) (GA. CONST. art. I, § 1, para. 14 tracked the second amendment.). In Rex v. Dewhurst, 1 State Trials, New Series 529, 601 (1820), the trial judge instructed the jury: "A man has a clear right to arms to protect himself in his house. A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business. But I have no difficulties in saying you have no right to carry arms to a public meeting, if the number of arms which are so carried are calculated to produce terror and alarm ...."

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

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

Furthermore, keeping a gun in the home is a "liberty which was allowed by the common law." Rex v. Gardiner, 95 Eng.



place, vehicle, or on a public street in the ordinary course of one's travels also cannot be prohibited.<sup>105</sup> (pg.203)

### *Common Defense Purpose*

The constitutions of four states guarantee the right to keep and bear arms for "common defense."<sup>106</sup> Protected arms under this guarantee are those suitable for militia use.<sup>107</sup> In interpreting this guarantee, the objective for which the right to keep and bear arms is secured, that is, for the common defense, figures prominently in a court's analysis.<sup>108</sup> Because the (pg.204) right is secured only

---

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

<sup>105</sup> At common law the mere public carrying of arms was no offense under the Statute of Northampton, 2 Edw. III, c.3 (1328); *Judy v. Lashley*, 50 W. Va. 628, 41 S.E. 197, 200 (1902). To sustain a conviction proof was required that the accused had gone armed "malo animo" (with evil intent) or "to terrify the King's subjects." *Rex v. Knight*, 87 Eng. Rep. 75, 90 Eng. Rep. 330 (K.B. 1686) (the accused was acquitted).

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

M. DALTON, *THE COUNTRY JUSTICE* 31 (London 1622).

Note, that it is properly no Affray, unlesse there be some weapons drawn, or some stroke given, or offered to be given, or other attempt to such purpose: for if men shall contend only in hote words, this is no affray, neither may the Constable for words only lay hands upon them, unlesse they shall threaten to kill, beat, or hurt one another; & then may the Constable arrest such persons (to go before some Justice of peace, to find sureties for the keeping of the peace) and yet such threatening is no affray.

*Id.* at 29.

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

<sup>106</sup> ARK. CONST., art. II, § 5; ME. CONST. art. I, § 16; MASS. DECL. OF RIGHTS, part I, art XVII; TENN. CONST. art I, § 26.

<sup>107</sup> See notes 74, 75, 77, 79 *supra*. Maine and Massachusetts guarantee a right to self-defense. ME. CONST. art. I, § 1; MASS. DECL. OF RIGHTS, part I, art. I. Thus in Maine and Massachusetts arms for personal defense are also guaranteed. See notes 93-97 *supra*.

<sup>108</sup> *Fife v. State*, 31 Ark. 455, 461, 25 Am. Rep. 556 (1876); *Commonwealth v. Davis*, 369 Mass. 886, \_\_\_, 343 N.E.2d 847, 848-49 (1976); *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840). Claims are made that a guarantee for the "common defense" and the guarantee of the second amendment are essentially the same. *Fife*, 31 Ark. at 458; *Aymette*, 21 Tenn. at 157. These claims overlook the United States Senate's rejection of an attempt to limit the right to bear arms by adding the term "common defense" to the second amendment. 1 HISTORY OF THE SUPREME COURT OF THE U.S. 450 (J. Goebel, Jr. ed. 1971); 2 B. SCHWARTZ,

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

The people "have the unqualified right to keep" arms suitable for militia use. "But the right to bear arms is not of that unqualified character."<sup>110</sup> It is permissible to "regulate the mode of wearing war arms, and no doubt the occasions of wearing such arms ...."<sup>111</sup> In maintaining the validity of legislative restrictions on the mode of carrying war arms, courts have held that the right is not infringed by a statute requiring the carrying of a pistol, uncovered and in the hand, when not upon one's own premises or upon a journey, as "the habitual carrying does not seem essential to 'common defense,' [and as the "essential objects" of the right are preserved] (pg.205) ... if every citizen may keep arms in readiness upon his place, may render himself skillful in their use by practice, and carry them upon a journey without let or hindrance...."<sup>112</sup> Similarly, a landowner charged with unlawful hunting and possession of a shotgun on a game preserve "could not possibly come within the constitutional rights of the respondent in bearing arms for the common defense while, on the other hand, if possession was not a part of the act of hunting, the constitutional rights of the respondent could be involved."<sup>113</sup> However, a prohibition against a citizen "wearing or carrying a war arm, except upon his own premises or when on a journey travelling through the country with baggage, or when acting as or in aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear

---

THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1153-54 (1971). This rejection was an apparent response to fears in Massachusetts that a guarantee for the common defense might be too restrictive. "[T]hat the people have a right to keep and bear Arms for their Own and the Common defence" was urged as a better choice. THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASS. CONVENTION OF 1780, at 624 (O. & M. Handlin eds. 1966). Thus state courts in interpreting their constitutions with second amendment type language have not given their guarantees a restrictive interpretation. See notes 100, 101, 103 *supra*.

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

<sup>110</sup> Aymette v. State, 21 Tenn. (2 Hum.) 154, 160 (1840).

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

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

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

arms."<sup>114</sup> The court noted that crime "must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege."<sup>115</sup> The case involved the carrying of an army pistol to kill wild hogs. Likewise, a city ordinance absolutely forbidding the carrying of "any sort of pistol in any sort of manner" is void,<sup>116</sup> and any attempt "to disarm (pg.206) the people by legislation" would be void under the arms guarantee.<sup>117</sup>

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

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

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

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

---

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

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

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

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

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

<sup>117</sup> *Smith v. Ishenhour*, 43 Tenn. (3 Cold.) 214, 217 (1866).

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

<sup>119</sup> *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 178 (1871).

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

<sup>121</sup> 369 Mass. 886, 343 N.E.2d 847 (1976).

as the militia "is now equipped and (pg.207) supported by public funds."<sup>122</sup> In effect the court judicially repeals a constitutional guarantee found in the people's declaration of rights. What is left is a purposeless hollow shell. In achieving this end the court ignored or overlooked well-established principles of law. The *Davis* opinion cannot be aligned with the intent of the Framers.

All decisions from sister states interpret the arms guarantee for the common defense as an individual right guaranteed to the citizen and not the soldier.<sup>123</sup> Current English arms statutes serve as no support because the British lack a written constitution,<sup>124</sup> and Parliament may abrogate all rights.<sup>125</sup> Americans adopted a written constitution in response to abuses under the English system.<sup>126</sup> The purpose of a written guarantee to keep and bear arms is to place that right beyond the reach of the legislature.<sup>127</sup> When the 1780 Massachusetts Constitution was adopted concern was voiced that the arms guarantee mentioned common defense but failed to mention self-defense.<sup>128</sup> In an apparent effort to satisfy this concern an (pg.208) individual guarantee to self-defense was adopted.<sup>129</sup> This demonstrates that the Framers also intended that arms be kept for self-defense. Thus a right enjoyed since colonial days and placed in a written declaration of rights cannot be destroyed by the passage of a mere statute or be judicially repealed.<sup>130</sup>

---

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

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

<sup>124</sup> *Powell v. McCormack*, 395 U.S. 486, 523 n.46 (1969).

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

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

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

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

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, *the people are confirmed by the next article in their right to keep and bear their private arms.* (emphasis added). *The Federal Gazette*, and *Philadelphia Evening Post*, June 18, 1789, No. 68 Vol. II, at 2, col. 1. Tench Coxe in a letter to Madison admitted being the author. 12 PAPERS OF JAMES MADISON 241 n.1 (1979).

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

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

The boundaries of the right dictate that the *keeping* of arms suitable for militia use in one's home, place of business or premises cannot be infringed. The purpose of such keeping is to have arms available for possible militia use, for deterrence (pg.209) against oppression, and for personal defense. The object of the purpose is that the people "shall become familiar with their use in times of peace, that they may the more efficiently use them in times of war; then the right to keep arms for this purpose involves the right to practice their use in order to attain this efficiency."<sup>131</sup> To achieve this end, the boundaries of the right to *bear* arms dictate that arms may be carried openly to and from activities where the constitutional goal is carried out. These activities include lawful target shooting and hunting, moving one's goods to a new home or place of business, going upon a journey, and going to a place of arms purchase or repair.<sup>132</sup> While "habitual carrying does not seem essential to 'common defense,'" the requirement that a pistol "be carried uncovered in the hand" is not only "a very inconvenient mode of carrying them habitually"<sup>133</sup> but is only marginally safe. The more prudent approach would be carrying in a pistol case or holster. Since the home is one's castle, carrying in one's home may be either open or concealed.<sup>134</sup>

### *Self-Defense and Defense of State Purpose*

The right to keep and bear arms for personal defense and defense of the state is guaranteed in fourteen state constitutions.<sup>135</sup> This guarantee protects arms that are (1) suitable for militia use,<sup>136</sup> and (2) also protects arms suitable for personal defense.<sup>137</sup> The plain meaning of the text leads courts

---

following:

The modern fighting shotgun is a direct descendent of two of the world's most famous smoothbore firearms. One is the Birding Piece or Long Fowler, which was the father of modern sporting shotguns. The other is the Blunderbuss, accepted as the first true fighting shotgun; and the weapon credited with establishing the basic missions and configurations for shotguns still being used after some 400 years.... *Id.* at 2.

[I]n the American West ... sawed-off shotguns were substituted for the blunderbuss. *Id.* at 2.

The modern short-barrel riot-type shotgun still possesses the same basic characteristics and performs the same missions that occupied the blunderbuss. *Id.* at 3.

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

<sup>131</sup> Andrews v. State, 50 Tenn. (3 Heisk.) 165, 178 (1871).

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

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

<sup>134</sup> See note 104 *supra*.

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

<sup>136</sup> See *supra* notes 74, 75, 77, 79.

<sup>137</sup> See *supra* notes 93-97; see *infra* notes 180, 204.

to conclude that two separate and distinct categories of arms are (pg.210) protected.<sup>138</sup> Some courts, however, have overlooked or ignored this distinction.<sup>139</sup>

These guarantees protect a right to keep and bear arms for militia use,<sup>140</sup> as a deterrent against oppression,<sup>141</sup> and for defense of self, home and property.<sup>142</sup> Some courts delving (pg.211) into the historical reasoning behind the inclusion of the guarantee were searching for precedent to be used in allowing the legislature to regulate what was textually an unconditional right.<sup>143</sup> The conclusion that the constitution "has neither expressly nor by implication, denied to the Legislature, the right

---

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

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

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

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

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

<sup>142</sup> Rabbitt v. Leonard, 36 Conn. Super. 108, \_\_\_, 413 A.2d 489, 491 (1979) ("has a fundamental right to bear arms in self-defense, a liberty interest"); Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972) ("for hunting purposes or for the protection of their persons and property"); Davis v. State, 146 So. 2d 892, 893-94 (Fla. 1962) ("to secure to the people the right to carry weapons for their protection"); Watson v. Stone, 4 So. 2d 700, 701, 702-3 (Fla. 1941) ("sense of security afforded by the knowledge of the existence of a pistol in the pocket of an automobile in which they are traveling"); Motley v. Kellogg, 78 Ind. Dec. 316, 409 N.E.2d 1207, 1210 (Ind. App. 1980) ("not making applications available at the chief's office effectively denied members of the community the opportunity to obtain a gun permit and bear arms for their self-defense"); Schubert v. Debard, 398 N.E.2d 1339, 1341 (Ind. App. 1980) ("our constitution provides our citizenry the right to bear arms for their self-defence"); People v. Zerillo, 219 Mich. 635, \_\_\_, 189 N.W. 927, 929 (1922) ("to possess a revolver for the legitimate defense of their person and property"); State v. Kessler, 289 Or. 359, \_\_\_, 614 P.2d 94, 100 (1980) ("includes a right to possess certain arms for defense of person and property"); Commonwealth v. Ray, 218 Pa. Super. 72, \_\_\_, 272 A.2d 275, 278-79 (1970), *vac. on other grounds* 448 Pa. 307, 292 A.2d 410 (1972) ("to bear arms in defense of themselves; their property and the State"); State v. Duke, 42 Tex. 455, 458 (1875) ("such arms as are commonly kept ... and are appropriate for open and manly use in self-defense"); State v. Rosenthal, 75 Vt. 295, 297, 55 A. 610 (1903) ("The people of the State have a right to bear arms for the defense of themselves"); Carfield v. State, 649 P.2d 865, 871 (Wyo. 1982) (the right extends to "defending the State or himself").

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

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

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

to enact laws in regard to the manner in which arms shall be borne"<sup>144</sup> was reached by focusing on the qualifying language in the English Bill of Rights "that the subjects which are Protestants may have arms for their Defence, suitable to their Conditions and as allowed by law.... We have taken this brief notice of the English statute, as it may serve to aid us in the construction of our constitutional provision."<sup>145</sup> In upholding a concealed carrying statute, one court nevertheless recognized that in this country the Constitution and not the legislature is supreme:

We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretense of regulating, amounts to (pg.212) a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional.<sup>146</sup>

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

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

---

<sup>144</sup> *Id.* at 616.

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

<sup>146</sup> *State v. Reid*, 1 *Ala.* at 616-17, 35 *Am. Dec.* 47 (1840).

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

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

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

<sup>150</sup> *Carfield v. State*, 649 *P.2d* 865, 871 (*Wyo.* 1982) (felon possessing gun offense affirmed because no evidence existed he was "defending the State or himself"). In a murder case involving the killing of two deputy sheriffs trying to arrest men who were drunk, carried a pistol concealed, and breached the peace by shooting it off, the court brushed aside a right to bear arms claim with a terse comment that the right was not designed to protect a man "who is prone to load his stomach with liquor and his pockets with revolvers or dynamite, and make of himself a dangerous nuisance to society." *Carlton v. State*, 63 *Fla. 1.* \_\_\_, 58 *So.* 486, 488 (1912). This dictum, however, was unnecessary because the Florida guarantee provides "the manner of bearing arms may be regulated by law." *FLA. CONST.* art. I, § 8.

(pg.213) would have no connection with the right to bear arms, the rationale being that a regulation of the manner or place where arms may be borne does not destroy the right when viewed in terms of the purpose. Protection of self or state can be maintained by the open wearing of arms.<sup>151</sup>

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

As with each constitutional guarantee, a balance must be struck between the individual's right to exercise that guarantee and society's right to enact laws that will insure some semblance of order. As these interests will necessarily conflict, the question then becomes which party should accept the encroachment on his right. Courts have allowed the encroachment on an individual's right on several theories. The permissive language in the constitutional guarantee has been used to sanction the requirement of a license to carry repeating rifles (pg.214) or pistols even openly<sup>157</sup> and to restrict the carrying of a pistol to one's premises or place of business, unless the person is traveling with baggage or is confronted with immediate and pressing danger "as to alarm a person of ordinary courage."<sup>158</sup> Other courts label a law as not a prohibition but a mere regulation of the right to bear arms. Thus, laws against concealed carrying<sup>159</sup> or carrying an unconcealed pistol upon premises not his own or under his control have been upheld.<sup>160</sup> Most courts merely invoke the term "police power" in upholding a law. The police power often appears to exist and operate at the will of the legislature and courts with no recognition of constitutional limits. Thus laws proscribing the unlicensed carrying of a pistol in any manner away from the home or fixed place of business,<sup>161</sup> or carrying a loaded rifle

---

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

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

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

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

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

<sup>156</sup> Jennings v. State, 5 Tex. Crim. 298 (Tex. Crim. App. 1878).

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

<sup>158</sup> State v. Duke, 42 Tex. 455 (1875).

<sup>159</sup> State v. Reid, 1 Ala. 612 (1840).

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

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



or shotgun in a vehicle on a public highway have been upheld.<sup>162</sup> Likewise, a sharply divided court upheld a conviction for possessing "a firearm in a public place or within public view under circumstances tending to provoke a breach of the peace," over a right to bear arms claim, where the defendant was peacefully carrying a shotgun in a truck, in the afternoon, in an area where two weeks before a police shooting incident with racial overtones had occurred.<sup>163</sup> An opinion which epitomizes (pg.215) the lack of careful reflection in the use of the term "police power" is *Caswell & Smith v. State*,<sup>164</sup> where the court upheld a confiscatory tax on the sales of pistols, although earlier case law had established that pistols are constitutionally protected arms<sup>165</sup> and cannot even be forfeited for a misdemeanor carrying conviction.<sup>166</sup> The court failed to grasp that the right to purchase arms is included in the right to keep and bear arms guarantee.<sup>167</sup>

The object of this guarantee, to maintain a militia, would not be frustrated by a requirement that arms be carried openly. Arms carried for the purpose of self-defense can likewise be carried openly. However, the traditions of a state and the intent of the Framers may be such that concealed carrying is also protected conduct.<sup>168</sup> At common law the mere carrying of a concealed weapon was no offense. In America, it was considered normal for eighteenth century civilians to carry pocket pistols for protection while traveling.<sup>169</sup> Thomas Jefferson owned a pair of screw-barreled pocket pistols.<sup>170</sup> The following excerpt from a letter written from Falmouth, Virginia, on July 29, 1764, by William Allason, a merchant, to Messrs. Boyle and Scott, merchants in Glasgow, is instructive on the defensive pistol-carrying habits of civilians:(pg.216)

As it is sometimes dangerous in traveling through our wooden Country Particularly at this time when the Planters are pressed for old Ballances, we find it necessary to carry with us some defense Weapons, for that purpose, you'll be pleased to send us by some of the first

---

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

<sup>163</sup> *Hyde v. City of Birmingham*, 392 So. 2d 1226 (Ala. Crim. App. 1980), *cert. denied* 392 So. 2d 1229 (1981) (5 to 4 decision). *Cf. State v. Dobbins*, 277 N.C. 484, 178 S.E.2d 449 (1971). Conviction affirmed for possessing a shotgun and shells off his premises in an area declared a state of emergency and for violating emergency curfew. Although the right to bear arms was not properly raised procedurally, the court hinted that the right was not infringed. *Id.* at \_\_\_, 178 S.E.2d at 461-62.

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

<sup>165</sup> *State v. Duke*, 42 Tex. 455 (1875).

<sup>166</sup> *Jennings v. State*, 5 Tex. Crim. App. 298 (1878).

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

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

<sup>169</sup> G. NEUMANN, *THE HISTORY OF WEAPONS OF THE AM. REVOLUTION* 150-51 (1967).

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

Ships for this River a pair of Pistols about 30/[shillings] Price. Let them be small, for the convenience of carrying in a side Pockett, and as neat as the Price will admit of.<sup>171</sup>

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

Keeping in mind that a law requiring a license to carry a gun is in derogation of the common law,<sup>174</sup> that the purpose of a written constitution is to place rights beyond the reach of the police power,<sup>175</sup> and that licensing officials can be very creative in frustrating applicants,<sup>176</sup> to carry an arm openly (pg.217) should not require a license. "The exercise of a right guaranteed by the Constitution cannot be made subject to the will of the sheriff."<sup>177</sup> The constitutional purpose would not be frustrated by a prohibition of carrying arms while drunk, or to a church, polling place, court, or public assembly, or in a manner calculated to inspire terror.<sup>178</sup>

### *Defense of Self, Home, Property and State Purpose*

The framers of constitutions in six states carefully chose explicit wording so that a broad guarantee would be secured and so that the boundaries of the guarantee would be self-evident.<sup>179</sup> They did not restrict the guarantee to a militia purpose or to a common defense purpose but rather

---

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

<sup>172</sup> See note 104 *supra*.

<sup>173</sup> See note 105 *supra*.

<sup>174</sup> State v. Beaton, 170 Conn. 234, \_\_\_, 365 A.2d 1105, 1108 (1976).

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

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

<sup>177</sup> People v. Zerillo, 219 Mich. 635, \_\_\_, 189 N.W. 927, 928 (1922).

<sup>178</sup> See *supra* notes 50, 101.

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

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

included a guarantee for personal defense and security purposes—defense of "home, person, or property." The textual context dictates that two separate and distinct categories of arms are guaranteed: those suitable for personal defense<sup>180</sup> and those suitable for militia use.<sup>181</sup> The constitutions protect the right of people to use arms for defense of home, person, and property,<sup>182</sup> for militia use,<sup>183</sup> and as a deterrent against (pg.218) oppression.<sup>184</sup>

Despite the clear purposes enunciated in these guarantees, the Oklahoma Supreme Court almost immediately after the passage of the Oklahoma Constitution, in *Ex parte Thomas*,<sup>185</sup> a case involving the concealed carrying of a pistol, disregarded the carefully chosen words of the Framers and held that only arms suitable for militia use are protected and that the purpose behind the guarantee is the "maintenance of an armed militia." The opinion demonstrates inattentiveness to the Framers' precise language and a lack of deliberative precision. The court claimed inability to find a state with a like guarantee, overlooking like guarantees already adopted in Colorado, Mississippi, Missouri, and Montana, as well as a Missouri opinion explaining the right and holding that "a revolving pistol" is constitutionally an arm.<sup>186</sup> The *Thomas* court relied heavily on cases from Arkansas, Tennessee and Georgia, in which the state constitutions, unlike that of Oklahoma, reveal a common defense or militia purpose.<sup>187</sup> In (pg.219) its citation of a Texas case to support a narrow view of the term *arms*, the court failed to mention that the cited case had been overruled.<sup>188</sup>

There was no need to disregard the text of the Oklahoma guarantee on defense of self, home or property to uphold a conviction for the concealed carrying of a pistol because the Oklahoma guarantee specifically provides that "nothing herein contained shall prevent the Legislature from

---

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

<sup>181</sup> See *supra* notes 74, 75, 77, 79.

<sup>182</sup> *City of Lakewood v. Pillow*, 180 Colo. 20, \_\_\_, 501 P.2d 744, 745 (1972) (en banc) ("possess a firearm in a vehicle or in a place of business for the purpose of self-defense"); *People v. Nakamura*, 99 Colo. 262, 264, 62 P.2d 246, 247 (1936) ("cannot disarm any class of persons or deprive them of the right guaranteed under section 13, article 2 of the Constitution, to bear arms in defense of home, person and property"); *Taylor v. McNeal*, 523 S.W.2d 148, 150 (Mo. Ct. App. 1975) ("every citizen has the right to keep and bear arms in defense of his home, person and property ..."); *State v. Nickerson*, 126 Mont. 151, 247 P.2d 188 (1952) (defense of home, person, or property).

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

<sup>184</sup> See *supra* note 141.

<sup>185</sup> 1 Okla. Crim. 210, 97 P. 260 (1908).

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

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

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

regulating the carrying of weapons."<sup>189</sup> The court also failed to heed its own principles on constitutional interpretation that all provisions designed to safeguard the liberty and security of the citizen should be liberally construed and that the courts cannot refuse obedience to constitutional mandates:

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

Except for Oklahoma, in attempts to interpret this guarantee reliance has been placed on the actual words used in the guarantee. It was used as a justification for holding that the right to bear arms allowed the exhibition of arms "in a rude, angry, or threatening manner without fear of successful prosecution when his home or possessions are invaded or his personal (pg.220) safety threatened...."<sup>191</sup> However, "[t]he moment the citizen ceases to act in protection of his home, his person, or his property ... he steps out from under the protection of the Constitution...."<sup>192</sup> He has no right to be an unlawful aggressor. The text has also been characterized as "limiting language" and thus it is not "an absolute right to bear arms under all situations."<sup>193</sup> This analysis and the exercise of the police power have allowed courts to uphold reasonable regulations, such as prohibiting the possession of a firearm while under the influence of intoxicating liquor or narcotic drugs.<sup>194</sup>

Courts have been mindful that "the state legislature cannot, in the name of the police power, enact laws which render nugatory our Bill of Rights and other constitutional protections."<sup>195</sup> Game laws which prohibit possession of a firearm,<sup>196</sup> or firearms ordinances "which sweep unnecessarily broadly and thereby invade the area of protected freedoms"<sup>197</sup> have been struck down because they

---

<sup>189</sup> OKLA. CONST. art. II, § 26.

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

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

<sup>192</sup> *State v. White*, 299 Mo. 599, \_\_\_, 253 S.W. 724, 727 (1923).

<sup>193</sup> *People v. Blue*, 190 Colo. 95, \_\_\_, 544 P.2d 385, 391 (1975) (en banc) (convicted felon can be prevented from owning a gun).

<sup>194</sup> *People v. Garcia*, 197 Colo. 550, 595 P.2d 228 (1979).

<sup>195</sup> *See supra* note 193.

<sup>196</sup> *People v. Nakamura*, 99 Colo. 262, 62 P.2d 246 (1936) (en banc).

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

conflicted with the right to bear arms. Furthermore, cases must be construed with the constitutionally guaranteed right in mind.<sup>198</sup>

The specific boundaries of this right indicate that the open peaceful carrying in one's business place, vehicle, or on a public street in the ordinary course of one's travels cannot be prohibited.<sup>199</sup> The concealed carrying of arms in the home should be protected, especially since the home is specifically mentioned in the guarantees.<sup>200</sup> Obviously the ends to be (pg.221) served by the guarantee would not be defeated or called in question by a prohibition against carrying arms while drunk, or to a polling place, court, church, or public assembly, or in a manner calculated to inspire terror.<sup>201</sup>

### *Security and Defense Purpose*

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

---

<sup>198</sup> Patterson v. State, 251 Miss. 565, \_\_\_, 170 So. 2d 635, 639 (1965) (art. III § 12 cited in reversing conviction).

<sup>199</sup> See *supra* note 105.

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

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

<sup>201</sup> See *supra* notes 50, 102.

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

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

<sup>203</sup> See *supra* notes 74, 75, 77, 79.

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

and (pg.222) bear arms for protection of the person, family, property, and home,<sup>205</sup> for militia use,<sup>206</sup> and for deterrence against oppression.<sup>207</sup>

The dimensions of this right have been summarized as follows:

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

Keeping these dimensions in mind, the constitutional purpose would not be frustrated by a prohibition of carrying arms while drunk, or to a court, polling place, church, or public assembly, or in a manner calculated to inspire terror.<sup>209</sup> (pg.223)

---

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

<sup>206</sup> State v. Hogan, 63 Ohio St. 202, \_\_\_, 58 N.E. 572, 575. (1900) ("protection of his country").

<sup>207</sup> See *supra* notes 20, 21, & 141.

<sup>208</sup> State v. Hogan, 63 Ohio St. 202, \_\_\_, 58 N.E. 572, 575 (1900) (tramp law upheld where tramp threatened an injury).

<sup>209</sup> See *supra* notes 50 & 102. In State v. Montoya, 91 N.M. 262, \_\_\_, 572 P.2d 1270, 1273 (N.M. App. 1977), the court hinted that it would uphold a law proscribing carrying a gun into a licensed liquor establishment, a fourth degree felony, where the right to bear arms was raised by "[I]nnuendo in defendant's brief." See *supra* note 71, for criticism of making a regulatory offense a felony.

The boundaries of this right would sanction the carrying of arms in the home either openly or concealed.<sup>210</sup> The open peaceful carrying in one's business place, vehicle, or on a public street in the ordinary course of one's travels is also constitutionally sanctioned.<sup>211</sup> (pg.224)

### *No Specific Purpose Assigned.*

Five state constitutions guarantee the right to keep and bear arms without assignment of a specific purpose. Their guarantees are generally worded as the right "to keep and bear arms shall not be infringed" or "abridged."<sup>212</sup> As this guarantee is without assignment of a purpose, it must be assumed the Framers intended at a minimum to protect the basic historical reasons for a right to

---

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

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

<sup>211</sup> See *supra* note 105. An ordinance prohibiting the unconcealed carrying of arms was voided in *Las Vegas v. Moberg*, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971). In *re Brickey*, 8 Idaho 597, 70 P. 609 (1902), struck down a statute prohibiting the carrying of firearms in town. At the time, the Idaho guarantee was for "security and defense." On the other hand, in *State v. Vlacil*, 645 P.2d 677 (Utah 1982), a conviction for possession of a firearm by a non-citizen of the U.S. was upheld. The court noted the arms guarantee stated "The Legislature may regulate the exercise of this right by law." Three separate opinions were written to affirm the conviction. In view of cases where such alien in possession statutes were voided on right to bear arms grounds, *People v. Nakamura*, 99 Colo. 262, 62 P.2d 246 (en banc 1936), and *People v. Zerillo*, 219 Mich. 635, 189 N.W. 729 (1922), it appears that the majority was swayed by the fact that the arm involved was "fully automatic" and that it was used for the aggressive purpose of wounding a man rather than for self-defense. *Moshier v. Dayton*, 48 Ohio St. 243, 358 N.E.2d 540 (1976), invoked the police power to uphold an ordinance mandating obtaining an identification card to demonstrate lack of disabilities, such as being a convicted felon, and to show entitlement to possess a pistol. The dissent argued legislation must be reasonable and necessary which seeks to restrain "one of the fundamental civil rights." *Id.* at \_\_\_, 358 N.E.2d at 544 (Celebrezze, J., dissenting). An ordinance forbidding the employment of special guards during a strike was voided on grounds of right to bear arms for "defense and security" (art. I, § 4) and "defending life and protecting property" (art. I, § 1). In *re Reilly*, 31 Ohio Dec. 364, 367-68 (1919).

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

arms: (a) the right of personal defense;<sup>213</sup> (b) preference for a militia over a standing army;<sup>214</sup> and (c) the deterrence of governmental oppression.<sup>215</sup> One court simply capsulized the reasons for having arms as follows: "The Constitutions of the United States and Louisiana give us the right to keep and bear arms. It follows, logically, that to keep and bear arms gives us the right to use the arms for the intended purpose for which they were manufactured."<sup>216</sup> It can also be inferred that the Framers were aware of the guiding principles of interpretation "*Inclusio Unis Est Exclusio Alterius*" (the inclusion of one is the exclusion of another) and feared that by including or assigning only one of the historical reasons, e.g., militia, the courts would, given their penchant for a restrictive interpretation of the right,<sup>217</sup> (pg.225) limit the guaranteed right only to the purpose stated.

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

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

---

<sup>213</sup> See *supra* notes 14, 24-27.

<sup>214</sup> See *supra* notes 14, 81-92.

<sup>215</sup> See *supra* notes, 14, 19-22.

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

<sup>217</sup> *Commonwealth v. Davis*, 369 Mass. 886, 343 N.E.2d 847 (1976); *Pierce v. State*, 42 Okla. Crim. 272, 275 P. 393 (1929); *City of Salina v. Blaksley*, 72 Kan. 230, 83 P. 619 (1905).

<sup>218</sup> See *supra* notes 74, 75, 77, 79.

<sup>219</sup> See *supra* notes 93-97, 180, 204.

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

<sup>221</sup> See *supra* note 104.

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



Historically, Louisiana courts have interpreted their state constitutional provisions to include defense of self,<sup>223</sup> even (pg.226) though the guarantee before the 1974 Amendment was couched only in terms of a well-regulated militia.

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

A recent Illinois case demonstrates that regardless of how careful the Framers were in spelling out what arms are constitutionally protected,<sup>227</sup> and regardless of the pains they took to spell out permissible exercises of the police power<sup>228</sup> so as to harmonize the police power with the right to keep and bear (pg.227) arms and prevent the police power from turning the right into a hollow shell or an intangible abstraction, a court is willing to ignore the intent of the framers and the understanding of the people. In *Quilici v. Village of Morton Grove*<sup>229</sup> a divided court brushed aside arguments, that included the Illinois guarantee on arms, and upheld an ordinance which in effect banned the possession of handguns, even in the home.<sup>230</sup> The court concluded that although the handgun was intended to be included within the class of constitutionally protected arms, the ban did not violate the state constitution. To support this incongruous conclusion, the court relies chiefly on statements made by a delegate during the floor debates that handguns could be banned. A closer

---

<sup>223</sup> *McKellar v. Mason*, 159 So. 2d 700, 702 (La. App. 1964), *aff'd* 245 La. 1075, 162 So. 2d 571 (1964); *State v. Bias*, 37 La. Ann. 259, 260 (1885) ("musket to shoulder, or carbine slung on back, or pistol belted to his side ... is bearing arms"); *State v. Chandler*, 5 La. Ann. 489, 490, 52 Am. Dec. 599, \_\_, (1850). Under the present guarantee the police power can be exercised to limit the possession of firearms by convicted felons. *State v. Amos*, 343 So. 2d 166 (La. 1977). The dissent noted that except for concealed carrying, the constitution sets out "an individual right in absolute terms." *Id.* at 170 (Calogero, J., dissenting).

<sup>224</sup> *See supra* notes 31 & 212.

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

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

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

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

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

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

reading of the convention debates reveals that the court's reliance on isolated statements was misplaced.<sup>231</sup> (pg.228)

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

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

---

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

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

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

<sup>232</sup> See *supra* note 227.

<sup>233</sup> 3 ILL. PROCEEDINGS 1686 (Mr. Lennon).

<sup>234</sup> 6 ILL. PROCEEDINGS 165.

<sup>235</sup> 3 ILL. PROCEEDINGS 1691-92 (President Witwer).

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

<sup>237</sup> *Id.* at 1699-1700 (Mr. Arrigo).

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

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

complete,<sup>240</sup> and that they (pg.229) were sparsely attended.<sup>241</sup> The majority report spelled the right out, and all efforts to specifically isolate the handgun as a weapon which should be given no constitutional protection were rejected.<sup>242</sup> Thus statements during the debates can hardly be taken as demonstrating consensus. A court aptly observed:

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

These debates presented the court with a plethora of statements and to choose one as the consensus over others violates principles of constitutional interpretation and demonstrates intellectual shortcomings. The court's approach that a municipality may exercise its police power to prohibit a constitutionally protected arm contravenes the essential nature of the constitutional guarantee. It supplants a constitutional right with a mere statutory privilege which might be withheld simply on the basis that a firearm commonly possessed by the people, such as a rifle, shotgun, or pistol is perceived to be (pg.230) troublesome. Constitutional guarantees, including the right to possess arms, apply equally to the entire state.<sup>244</sup>

The people understand the police power to be "the inherent power of a government to exercise reasonable control over persons and property within its jurisdiction in the interest of the general security, health, safety, morals, and welfare *except where legally prohibited*."<sup>245</sup> The people also believe they have a constitutional right to own a gun and oppose a ban on the private ownership of handguns.<sup>246</sup> It is apparent that the voters in Illinois felt that they were adopting a constitutional guarantee, which was subject only to reasonable regulation, and not a hollow promise which could be granted or revoked whenever it suited a legislative body. From a policy consideration, the vast

---

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

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

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

<sup>243</sup> *Board of Education v. Bakalis*, 54 Ill. 2d 448, \_\_\_, 299 N.E.2d 737, 751-52 (1973) (Ryan, J., concurring).

<sup>244</sup> *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981).

<sup>245</sup> WEBSTER'S NEW COLLEGIATE DICTIONARY 889 (1977) (emphasis added).

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

majority of handgun owners present no threat to society and most gun owners will not obey a law banning handguns.<sup>247</sup>

The ends to be secured by guarantees under this heading would not be infringed or abridged by a prohibition against carrying arms while drunk, or to a polling place, court, church, or public assembly, or in a manner calculated to inspire (pg.231) terror.<sup>248</sup>

## CONCLUSION

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

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

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

The right to keep and bear arms is at the forefront of the emotional issues which confront society, especially the legal community. Nevertheless, judges have an obligation to interpret the Constitution so as to carry out the intent of the Framers, regardless of the human sentiments in their hearts. If this obligation is abandoned, the courts will appear to be political institutions, their decisions less rooted in the law than in the personalities and politics of the individual judges, (pg.232) and will contribute to the growing perception that courts are not expounding the law, but are handing down social policy in judicial dress to suit the perceived needs of the moment. A recent decision echoes this view:

We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to

---

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

<sup>248</sup> See *supra* notes 50 & 102.

respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.<sup>249</sup>

There should be no hesitancy in striking down a law which encroaches on the protected boundaries of the right to keep and bear arms, for on at least seventeen reported occasions courts have struck down laws which encroached on that right.<sup>250</sup> (pg.233)

[pg. 233 not reproduced: *photocopy of Maryland certificate of discharge from "Reserve Militia of Maryland (Maryland Minute Men)".*] (pg.234)

[pg. 234-235 not reproduced: *affidavit of Charles Gray attesting to membership in and characteristics of "Maryland Minute Men".*] (pg.235) (pg.236)

## APPENDIX

### STATE CONSTITUTIONAL PROVISIONS ON THE RIGHT TO KEEP AND BEAR ARMS

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

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

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

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

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

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

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

---

<sup>249</sup> State v. Kessler, 289 Or. 359, \_\_\_, 614 P.2d 94, 95 (1980).

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

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

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

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

*Idaho*: "The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not <sup>(pg.237)</sup> prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony." IDAHO CONST. art. I, § 11.

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

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

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

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

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

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

*Massachusetts*: "The people have a right to keep and bear arms for the common defense. And as, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the <sup>(pg.238)</sup> civil authority, and be governed by it." MASS. CONST. pt. I, art. XVII.

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

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

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

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

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

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

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

*North Carolina*: "A well regulated militia being necessary to be the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, <sup>(pg.239)</sup> or prevent the General Assembly from enacting penal statutes against that practice." N.C. CONST. art. I, § 30.

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

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

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

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

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

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

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

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

*Texas*: "Every citizen shall have the right to keep and <sup>(pg.240)</sup> bear arms in the lawful defence of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime." TEX. CONST. art. I, § 23.

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

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

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

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

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

*Wyoming*: "The right of citizens to bear arms in defense of themselves and of the state shall not be denied." WYO. CONST. art. I, § 24.<sup>(pg.241)</sup>

#### STATES WITHOUT CONSTITUTIONAL PROVISIONS:

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