THE RIGHT TO KEEP AND BEAR ARMS IN STATE BILLS OF RIGHTS AND JUDICIAL INTERPRETATION

By Robert Dowlut*

INTRODUCTION

Guarantees of individual liberties under federalism have two components: the Federal Constitution and state constitutions. Reliance should first be placed on a state's bill of rights, or declaration of rights, because the United States Supreme Court has explicitly acknowledged each state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[1] The constitutions of forty-three states guarantee a right to arms.[2]

The textual content of most state bills of rights provides greater protection of the right to arms than does the Second Amendment. Presently only five states track the language of the Second Amendment[3] and only three are linked exclusively to the common defense.[4] Reliance on state bills of rights also avoids the necessity of convincing a court that the Second Amendment applies to the states directly or through the Fourteenth Amendment.[5]

Of the seven states that do not have an explicit constitutional guarantee to arms, three guarantee a right to self-defense[6] and one considers the right to life an inherent right.[7] The natural right to defend one's life is usually not effectively exercised with bare hands. In addition, neither the state nor the (pg.154) police owe a duty to protect the individual. The right to self-defense can only be given force and effect if its guarantee includes the right to own arms for defensive purposes.[8] Thus an implicit right to arms flows from the fundamental right to self-defense.[9]

INTERPRETATION

The Federal Constitution is a grant of limited power and its Bill of Rights is a further restriction on governmental power. The legislature of a state, unlike Congress, does not depend on a constitution for an expressed grant of legislative power. Its powers are plenary unless otherwise restrained. A state's bill or declaration of rights is a restriction on governmental power. It must be examined to ascertain the restraints which the people have imposed upon the state legislature, not to determine the powers they have conferred.

Although many judges have a reflexive bias against the right to keep and bear arms, case law involving the interpretation of state guarantees indicates that state courts offer the most promise in protecting this individual liberty.

State courts do not utilize a uniform test to determine if a law is an unconstitutional infringement on the right to bear arms or to keep arms. One test is to see if the law sweeps so broadly that it stifles the exercise of a right where the governmental purpose can be more narrowly achieved.[10] Another approach is to see if the enactment is arbitrary, discriminatory, capricious or unreasonable, and whether it bears a real and substantial relation to health, safety, morals or general

welfare of the public.[11] Courts have also scrutinized legislation simply to determine if all arms have been banned.[12] The practical effect of this test is to render the arms guarantee lifeless on account of the police power becoming supreme rather than a constitutional right. This analysis makes no serious effort to harmonize the police power with a constitutional right, something that courts face frequently.

A guarantee is placed in a bill of rights because it is deemed peculiarly important and peculiarly exposed to invasion. Therefore, a rational basis standard of review is too weak to protect the constitutional guarantee. Americans departed from the English system by having a written constitution. Judges should utilize interpretivism in deciding constitutional (pg.155) issues. This rule requires judges to confine themselves to enforcing norms that are stated clearly or implicitly in the written constitution. Balancing tests and other vague, policy-oriented standards destroy the bill of rights as a document of law and make it a policy vehicle. Even an intent standard liberates judges from the text of the constitution. Noninterpretivism is where courts go beyond the written document and enforce norms that cannot be discovered within the four corners of the document. That approach should only be used to resolve a genuine ambiguity.

In the area of bearing arms, courts often use the following standard: are arms to be borne in such a manner as to render them wholly useless for the purposes guaranteed in the constitution?[13] The right to keep arms, as opposed to the right to bear arms, is often construed by using a two-step process: (1) does the person come under the protection of the constitutional guarantee, and (2) does the arm enjoy constitutional protection.[14] The right to keep and bear arms also includes "the right to load them and shoot them and use them as such things are ordinarily used."[15] It likewise "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."[16]

A modern case establishing a test to determine which arms[17] come under the constitution's umbrella is State v. Kessler. It held that a guarantee to bear arms for self-defense protects hand carried weapons commonly used for defense. If the guarantee to bear arms is for defense of the state, the arms protected are modern equivalents of arms used by colonial militiamen. The court, however, held that weapons of mass destruction used exclusively by the military are not constitutionally protected.

The Kessler test avoids the application of emotion laden labels, such as gangster weapon or assault weapon, to be used as a vehicle for outlawing arms. For example, the term "assault weapon" has become so elastic that it has been applied to a revolving firearm and even a single shot firearm.[18] In this area precise definitions are helpful. The military definition of an assault rifle is as follows: "Assault rifles are short, compact, selective-fire, weapons that fire a cartridge intermediate in power between submachinegun and rifle cartridges. Assault rifles have mild recoil characteristics and, (pg.156) because of this, are capable of delivering effective full automatic fire at ranges up to 300 meters."[19] This is in contradistinction to a submachinegun, which is a full automatic or selective fire firearm chambered for a pistol cartridge, and an automatic rifle, which is a full automatic or selective fire rifle chambered for a full power rifle cartridge. Machine pistols differ from submachine guns only in size. They are quite compact.[20]

An automatic is a firearm design that feeds cartridges, fires and ejects cartridge cases as long as the trigger is fully depressed and there are cartridges available in the feed system. It is also called full auto and machine gun. A semiautomatic, on the other hand, is a repeating firearm requiring a separate pull of the trigger for each shot fired, and which uses the energy of discharge to perform a portion of the operating or firing cycle (usually the loading portion).[21] The political advantage of

mislabeling a semiautomatic firearm as a full automatic firearm is obvious. However, a debate in which misinformation prevails can only lead to bad policy.

State guarantees to arms offer the most promise in protecting individual liberty because numerous state courts have taken the right seriously and have on at least twenty reported occasions found arms laws to be unconstitutional.[22] This has occurred even in states with a common defense or militia purpose.

In addition, state courts consider the right to bear arms to be a civil right[23] and consider such right to protect a liberty and property interest.[24] This has allowed plaintiffs to the use the Federal Civil Rights Act to sue state officials for violating a state created property or liberty interest to keep and bear arms.[25] State courts have also kept the right to bear arms in mind so as to prevent tort law from being used to destroy this right.[26]

THE ARIZONA EXPERIENCE

Article II, section 26 of the Arizona Constitution guarantees the following: "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."(pg.157)

This guarantee should be interpreted according to rules of construction established by the Arizona Supreme Court. A right explicitly guaranteed in Arizona's Declaration of Rights is deemed to be fundamental.[27] A constitutional right must be construed liberally to carry out the purposes for which it was adopted.[28] Every doubt about the sweep of a constitutional guarantee must be resolved in favor of a right or liberty.[29] When the words of the constitutional guarantee are clear, judicial constructions [are] neither required nor proper.[30] Courts are not at liberty to impose their views of the way things ought to be, otherwise no recorded word, no matter how explicit, could be saved from judicial tinkering.[31] In the event of an ambiguity, records of the Arizona constitutional convention are given great weight.[32] The rules are clear.

Nevertheless, Arizona courts have paid no attention to these well-established rules when construing Arizona's guarantee to possess or bear arms. Despite Arizona's clear guarantee to bear arms for self-defense, the Court of Appeals held that only arms used in civilized warfare are protected.[33] Theoretically, this means a person may not possess an oriental club but may possess a bazooka. The court's narrow interpretation of the term "arms" has been criticized.[34]

A page of history is worth more than a volume of idle speculation or even logic. The adoption of Arizona's guarantee to bear arms is well documented. The records of the 1910 Constitutional Convention reveal the framers intended that a ban on the concealed carrying of arms would constitute an impairment. Besides the proposal adopted, five other proposals surfaced in the convention. The alternative proposals would have allowed the state to regulate the wearing of arms to prevent crime or to ban concealed carrying. They were not adopted. The framers specifically voted down two efforts to amend the present guarantee in such a fashion that the concealed carrying of arms could be banned. This was done in the face of impassioned pleas from a former Chief Justice of the Territorial Supreme Court (who initially wanted no guarantee to arms) and a former Speaker of the Territorial House of Representatives that six-shooters and knives should not be worn under the shirt or under the coat.

The concealed carrying of arms was even described as a vile and pernicious practice. The arguments were not heeded. The arguments in those debates sound like a typical modern-day (pg.158) argument over the right to bear arms. To ignore the clear intent of the framers would be the

equivalent of ignoring the Federalist and Elliott's Debates when construing the national Constitution. The records of the Arizona Constitutional Convention clearly reveal that the framers envisioned a broad[35] right to bear arms.

Nevertheless, the Court of Appeals in Dano v. Collins[36] held that Arizona's statute forbidding the concealed carrying of arms did not impair the right to bear arms. The plaintiffs in that case were two private detectives and process servers. Since arms may be carried in only two ways, openly or concealed, a 50% destruction of a right certainly constitutes impairment. Unfortunately, the court made no attempt to decipher the meaning of the word "impair" in the arms guarantee. The records of the Arizona Constitutional Convention, which are to be given great weight, were also ignored. In the event of an ambiguity about the scope of the arms right, they make it clear that the broad ban on concealed carrying, especially by plaintiffs with quasi police powers, would constitute impairment. Following oral arguments before the Supreme Court, the court decided to vacate the order granting the petition for review as being improvidently granted, and denied the petition for review. This result will undoubtedly gladden the hearts of some. However, such rejoicing should be tempered by the realization that if judges are free to ignore well-established principles of constitutional construction in a right to bear arms case, there is nothing to prevent them from ignoring those principles in other cases. A precedent, even if it lies dormant, is always available to be used at will.

CONCLUSION

Mankind's oldest right is personal and communal defense. State constitutions, which predate the federal constitution, are a people's reminder that the people are supreme and that the state and its organs shall not have a monopoly on arms. The Constitution is a reminder that judges must be restrained by something more than their own predilections. Legislative bodies also have an obligation to defend constitutional rights. However, ultimately the Constitution restrains legislative bodies, too. Responsible judges will make certain that all constitutional rights are protected, regardless of personal (pg.159) feelings. The constitution of every state contains a mechanism for change should any provision be deemed worthy of change. The process is involved so that change is only accomplished after suitable deliberation. If the integrity of the process for the interpretation of rights is not followed, no right is safe.[37](pg.162)

APPENDIX

THE RIGHT TO KEEP AND BEAR ARMS:
COURT DECISIONS VOIDING RESTRICTIVE
OR PROHIBITIVE ARMS LAWS

Courts have held on at least 20 reported occasions that a restrictive or prohibitive arms law was unconstitutional because it impermissibly infringed the individual right to keep and bear arms.

State ex rel. City of Princeton v. Buckner, 377 5.E.2d 139 (W.Va. 1988) struck **down** a gun carrying law as too restrictive.

Barnett v. State, 72 0r. App. 58,5, 69,5 P.2d 991 (1985) struck **down** prohibition of possession of a black jack.

State v. Delgado, 298 Or. 395, 692 P. 2d 610 (1984) struck **down** prohibition of possession of a switchblade.

State v. Blocker, 291 Or. 255,630 P.2d 824 (1981) struck **down** prohibition of carrying a club.

State v. Kessler, 289 0r. 359,692 P. 2nd 94 (1980) struck **down** prohibition of possession of a club.

City of Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744 (1972)(en banc) struck **down** gun law on sale, possession and carrying as too restrictive.

City of Las Vegas v. Moberg, 82 N.M. 626,485 P. 2d 737 (Ct. App., 1971) struck **down** restrictive gun carrying law.

People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (1936)(en banc) struck **down** prohibitive firearms possession law.

Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 5.W. 2d 678 (192S) struck **down** gun carrying law as too restrictive.

People v. Zerillo, 219 .Mich. 63,5, 189 N.W. 927 (1922) struck **down** restrictive pistol possession law.(pg.163)

State v. Kerner, 181 N.C. 574, 107 5.E. 222 (1921) struck **down** pistol carrying license and bond requirement as too restrictive.

In re Reilly, 31 Ohio Dec. 364 (C.P. 1919) struck **down** law forbidding hiring armed security guards.

State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903) struck **down** pistol carrying ordinance as too restrictive.

In re Brickey, 8 Idaho 597, 70 P. 609 (1902) struck **down** pistol carrying law as too restrictive.

Jennings v. State, 5 Tex. App. 29S (1878) struck **down** law requiring forfeiture of pistol after misdemeanor conviction as unconstitutional.

Wilson v. State, 33 Ark. 557,34 Am. Rep. 52 (1878) struck **down** pistol carrying law as too restrictive.

Andrews v. State, 50 Tenn. (3 Heisk.) 165, 8 Am. Rep. 8 (1871) struck **down** pistol carrying law as too restrictive.

Smith v. Ishenhour, 43 Tenn. (3 Cold.) 214 (1866) struck **down** gun confiscation law as unconstitutional.

Nunn v. State, 1 Ga. (1 Kelly) 243 (1846) struck **down** pistol carrying law as too restrictive.

Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 13 Am. Dec. 251 (1822) struck **down** concealed carrying law involving a sword in a cane as unconstitutional.

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1. *Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

2. *Note, An Analysis of Initiative 403- The Impact on Existing Nebraska Statutes Restricting the Right to Keep and Bear Arms*, 23 Creighton L. Rev. 489, 507 (1990); Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 Univ. Dayton L. Rev. 59, 84 (1989)

3. Alaska Const. Art. I, § 19; Haw. Const. Art. I, § 15; N.C. Const. Art. I, § 30; S.C. Const. Art. I, § 20; Va. Const. Art. I, § 13.

4. Ark. Const. Art. 2, § 5; Mass. Decl. of Rights pt. I, Art. 17; Tenn. Const. Art. I, § 26.

5. Spreeher, *The Lost Amendment*, 51 Am. Bar Assn. J. 554 & 665 (2 parts)(1965); Levinson, *The Embarrassing Second Amendment*, 99 Yale L. J. 637 (1989); S. Halbrook, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (Univ. of New Mex. Press 1984). Nunn v. State, 1 Ga. 243 (1846) (direct application).

6. Cal. Const. Art. I, § 1 Iowa Const. Art., I, § 1; N.J. Const., Art. I, 1.

7. Wisc. Const. Art. I, § 1.

8. *Commonwealth v. Ray*, 218 Pa. Super. 72, 272 A.2d 275, 278-79 (1970); *In Re Reilly*, 31 Oh. Dec. 364, 367-68 (C.P. 1919).

9. *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982) (right to self-defense is fundamental).

10. *State ex rel. City of Princeton v. Bucknet*, 377 S.E. 2d 139, 146 (W. Va. 1988).

11. *State v. Hogan*, 63 Oh. St. 202, 210, 58 N.E. 572, 573 (1900).

12. *Kalodimos v. Village of Morton Grove*, 103 Ill. 2d 483, 511, 470 N.E. 2d 266, 279 (1984).

13. *State v. McAdams*, 714 P.2d 1236, 1237 (Wyo. 1986); *Glasscock v. City of Chattanooga*, 157 Tenn. 518, 11 S.W. 2d 678 (1928); *Hill v. State*, 53 Ga. 473, 480-81 (1874).

14. *State v. Kessler*, 289 Ore. 359, 614 P.2d 94 (1980); *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922).

15. *Hill v. State*, 53 Ga. 473, 480 (1874).

16. *Andrews v. State*, 50 Tenn. 165, 178 (1871).

17. 289 Ore. 359, 614 P.2d 94 (1980).

18. Cal. Penal Code § 12276 (c)(2) & (c)(3) (1991 ed.).

19. Defense Intelligence Agency, United States Department of Defense SMALL ARMS IDENTIFICATION AND OPERATION GUIDE - EURASIAN COMMUNIST COUNTRIES 105 (1976).

20. I. Hogg & J. Weeks, MILITARY SMALL ARMS OF THE 20TH CENTURY (5th ed. 1985), at 11, 13, 31, 40, 53, 67, 69, 78, 158, 159.

21. GLOSSARY OF THE ASSN. OF FIREARMS AND TOOLMARK EXAMINERS (2nd ed. 1985) at pp. 2 & 3.

22. See Appendix.

23. *Williams v. State*, 402 So. 2d 78, 79 (Fla. App. 1981).

24. *Kellogg v. City of Gary*, 562 N.E. 2d 685 (Ind. 1990).

25. Id. See also Dolan, *"Hatcher, city owe thousands - Gary taxpayers face bill for illegal denial of gun permits,"* Gary Post-Tribune, Oct. 18, 1991, p. B1.

26. *Hilberg v. F. W. Woolworth Co.*, 761 P.2d 236, 240 (Colo.)(App. 1988); *Rhodes v. R. G. Industries, Inc.*, 173 Ga. App. 51, 325 S.E.2d 465, 466 (1985); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984); *Lopez v. Chewiwie*, 51 N.M. 421, 186 P.2d 512, 513 (1947).

27. *Bryant v. Continental Conveyor Equipment Company*, 156 Ariz. 193, 753 P.2d 509 (1988).

28. *Logs v. Arnold*, 141 Ariz. 46, 685 P.2d 111 (1984).

29. *Stone v. Stidham*, 96 Ariz. 235, 393 P.2d 923 (1964).

30. *Hudson v. Brooks*, 62 Ariz. 505, 158 P.2d 661 (1945); *Clark v. City of Tucson*, 1 Ariz. App. 431, 403 P.2d 936 (1965).

31. *Kilpatrick v. Superior Court of Maricopa County*, 105 Ariz. 413, 466 P.2d 18 (1970).

32. *Desert Waters, Inc. v. Superior Court*, 91 Ariz. 163, 370 P.2d 652 (1962).

33. *State v. Swanton*, 129 Ariz. 131, 692 P.2d 98 (Ct. App. 1981).

34. *Note, Nunchakus and the Right to Bear Arms in Arizona*, 24 Ariz. L. Rev. 134 (1982).

35. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. State L. J. 1, 83 (1988); Twist & Munsil, *The Double 'threat of Judicial Activism: Inventing New "Rights" in State Constitutions*, 21 Ariz. St. L. J. 1005, 1056 (1989); Twist & Hessinger, *New Judicial Federalism: Where Law Ends and Tyranny Begins*, 3 Emerging Issues in St. Const. Law 173, 181 (1990).

36. 166 Ariz. 322, 802 P.2d 1021 (Ct. App. 1990), rev. denied 167 Ariz. 535, 809 P.2d 960 (1991).

37. Recently restrictions, including a 24-hour waiting period, on the unenumerated right to an abortion have been upheld. *Planned Parenthood v. Casey*, 60 U.S.L.W. 2276 (3rd Cir. 1991).