

2000

Utah v. Clay Hamilton Petty : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Utah v. Petty*, No. 20001038 (Utah Court of Appeals, 2000).

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
Plaintiff/Appellee,)	
)	
v.)	Case # 20001038-CA
)	Priority # 2
CLAY HAMILTON PETTY,)	
Defendant/Appellant.)	
)	

BRIEF OF APPELLANT

Appeal from the decision of the Honorable Lyle R.
Anderson, Seventh Judicial District Court, Grand County.

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FILED
Utah Court of Appeals

MAY 17 2001

Paulette Stagg
Clerk of the Court

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES	3
STATEMENT OF THE CASE, NATURE OF THE CASE	4
STATEMENT OF FACTS	5
SUMMARY OF ARGUMENT	6
ARGUMENT:	
I. THE TRIAL COURT ERRED IN PERMITTING PETTY TO REPRESENT HIMSELF	7
II. THE ABSENCE OF AN ACCURATE ELEMENTS INSTRUCTION REQUIRES A NEW TRIAL.	15
CONCLUSION	26
ADDENDA	
I. Judgment and Commitment, dated November 8, 2000.	
II. Verdict, dated September 27, 2000.	
III. Intruction Nos. 1, 3 and 6 to members of the jury.	
IV. Transcripts pages 13 through 16.	
V. State Constitutions Right to Bear Arms references.	
VI. House Debate on Senate Joint Resolution No. 2 (replaced by Senate Joint Resolution No. 3), March 7, 1983.	
VII. Senate Debate on Senate Joint Resolution No. 3, March 28, 1984.	
VIII. House Debate on Senat Joint Resolution No. 3, March 29, 1984.	
IX. Constitutional Revision Commission, May 25-26, 1984, Page 2.	
X. Proposition No. 5, Right to Bear Arms Amendment, Utah Voter Information Pamphlet, General Election, November 6, 1984.	
XI. "The Individual Right to Bear Arms; An Illusory Public Pacifier?" 1986 Utah L.Rev. 751.	

TABLE OF AUTHORITIES

Caselaw:

<u>Manning v. Sevier County</u> , 517 P.2d 549 (Utah 1973)	23,24
<u>McKaskle v. Wiggins</u> , 465 U.S. 168 (1984)	9,19,25
<u>Ryan v. Gold Cross Servs., Inc.</u> , 903 P.2d 423 (Utah 1995)	3
<u>State v. Archambeau</u> , 820 P.2d 920 (Utah App. 1991)	24
<u>State v. Carruth</u> , 947 P.2d 690 (Utah App. 1997), aff'd 1999 UT 107, 993 P.2d 869.	2
<u>State v. DeMille</u> , 756 P.2d 81 (Utah 1988)	25
<u>State v. Eldredge</u> , 773 P.2d 29 (Utah), cert. denied, 493 U.S. 814 (1989)	2,19,25
<u>State v. Elton</u> , 680 P.2d 727 (Utah 1984)	15,16
<u>State v. Frampton</u> , 737 P.2d 183 (Utah 1987)	2,10,11,12
<u>State v. Gibbons</u> , 740 P.2d 1309 (Utah 1987)	2,19,25
<u>State v. Harmon</u> , 712 P.2d 291 (Utah 1986)	17
<u>State v. Heaton</u> , 958 P.2d 911 (Utah 1998)	12,13,14,15
<u>State v. Jameson</u> , 800 P.2d 798 (Utah 1990)	2,19,20,25
<u>State v. Jones</u> , 823 P.2d 1059 (Utah 1991)	16,19
<u>State v. Larocco</u> , 794 P.2d 460 (Utah 1990)	25
<u>State v. McDonald</u> , 922 P.2d 776 (Utah App. 1996)	2,13,15
<u>State v. Reedy</u> , 681 P.2d 1251 (Utah 1984)	17
<u>State v. Roberts</u> , 711 P.2d 235 (Utah 1985)	16
<u>State v. Vlacil</u> , 645 P.2d 677 (Utah 1982)	21,24
<u>United States v. Lindsay</u> , 184 F.3d 1138 (10th Cir.), cert. denied, 145 L.Ed 343 (1999)	2,25

Constitutions and Statutes:

CONSTITUTION OF UNITED STATES, AMENDMENT X	23
CONSTITUTION OF UTAH, ARTICLE 1, SECTION 6 (2000)	3,26
CONSTITUTION OF UTAH, ARTICLE 1, SECTION 26	22
CONSTITUTION OF UTAH, ARTICLE V, SECTION 1	22
UTAH CODE ANN. 76-2-101	16
UTAH CODE ANN. 76-2-102 (2000)	3,16
UTAH CODE ANN. 76-10-503 (1999)	4,15,18,20
UTAH CODE ANN. 78-2A-3(2) (E)	1

Other:

L.J. Arrington and D. Bitton, <u>The Mormon Experience</u> , pp. 161-184	24
Preamble to the Utah Rules of Professional Conduct	26

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

CLAY HAMILTON PETTY,

Defendant/Appellant.

:

:

:

: **Case No. 20001038-CA**

: **Priority No. 2**

STATEMENT OF JURISDICTION

Utah Code Ann. §78-2a-3(2)(e) provides this Court's jurisdiction over this third degree felony conviction from a court of record.

The trial court signed the judgment, sentence and conviction on November 8, 2000 (R. 148-49).

Trial counsel signed the notice of appeal on November 14, 2000, and the clerk filed it on December 1, 2000 (R. 159-60).

STATEMENT OF ISSUES, STANDARDS OF REVIEW AND PRESERVATION¹

¹ To the extent that any issue raised herein was not properly preserved at trial, counsel relies on the plain error and exceptional circumstances doctrines to raise the issues on appeal.

The plain error doctrine requires a showing that an obvious and harmful error occurred which prejudiced the defendant's substantial rights, although the

1. Did the trial court err in permitting Petty to represent himself absent an adequate colloquy?

This issue presents an application of law to fact, with some deference to the trial court and legal conclusions to be reviewed for correctness. See, e.g., State v. McDonald, 922 P.2d 776, 780-81 (Utah App. 1996).

This issue was preserved when the trial court ruled that Petty could represent himself (e.g. T. 7/19/2000). See State v. Frampton, 737 P.2d 183, 187-88 (Utah 1987)(placing burden on trial courts to fully assess propriety of criminal defendant's request to represent himself).

2. Does the absence of a proper elements instruction require a new trial?

This Court reviews the adequacy of jury instructions for correctness. See, e.g., State v. Carruth, 947 P.2d 690, 692 (Utah App. 1997), aff'd, 1999 UT 107, 993 P.2d 869.

obviousness prong may be relaxed when a highly prejudicial error occurred which is more obvious in hindsight than it likely was before the trial court. See, e.g., State v. Eldredge, 773 P.2d 29, 35 and n.8 (Utah), cert. denied, 493 U.S. 814 (1989).

Constitutional errors are particularly appropriate for correction under the plain error doctrine. See, e.g., United States v. Lindsay, 184 F.3d 1138, 1140 (10th Cir.), cert. denied, 145 L.Ed.2d 343 (1999).

Courts will also reach issues raised for the first time on appeal when there are exceptional circumstances, such as serious procedural defects, which require the courts to act to prevent manifest injustices. See, e.g., State v. Gibbons, 740 P.2d 1309, 1311 (Utah 1987) (incomplete trial procedures and change of appellate counsel constituted exceptional circumstances); State v. Jameson, 800 P.2d 798, 802 (Utah 1990)(serious procedural defects may constitute exceptional circumstances).

Petty relies on the plain error and exceptional circumstance doctrines in raising the issue. See n.1, *supra*..

3. Did the trial court err in refusing to dismiss this case because prosecuting Petty for possession of a firearm violated his constitutional right to bear arms?

This constitutional issue is reviewed for correctness. See, e.g., Ryan v. Gold Cross Servs., Inc., 903 P.2d 423, 424 (Utah 1995).

This issue was preserved when Petty moved to dismiss (e.g. R. 162 at 141-42).

To the extent that the issue was not fully preserved, Petty relies on the plain error and exceptional circumstances doctrines in raising the issue. See n.1, *supra*.

CONSTITUTIONAL PROVISION AND STATUTES

The following constitutional provision and statutes are central to this appeal:

Constitution of Utah, Article I § 6 (2000)

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

Utah Code Ann. § 76-2-102 (2000)

Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility. An offense shall involve strict liability if the statute defining the offense clearly indicates a legislative purpose to impose criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state.

Utah Code Ann. § 76-10-503 (1999)

....

(3) (a) A person may not purchase, possess, or transfer any handgun described in this part who:

(i) has been convicted of any felony offense under the laws of the United States, this state, or any other state;

....

(b) Any person who violates this Subsection (3) is guilty of a third degree felony.

STATEMENT OF THE CASE

NATURE OF THE CASE. COURSE OF PROCEEDINGS AND DISPOSITION

The State charged Petty with one count, restricted person in possession of a dangerous weapon, a third degree felony, in violation of Utah Code Ann. § 76-10-503(3)(a) (i), for an event which occurred on or about August 17, 1999 (R. 1).

Petty requested appointed counsel, and Judge Lyle R. Anderson appointed Happy J. Morgan to represent Petty (R. 9, 14).

Judge Anderson acted as magistrate in presiding over the preliminary hearing, and ordered Petty bound over as charged (R. 27, 30).

Petty pled not guilty at arraignment (R. 27).

On July 19, 2000, Ms. Morgan informed Judge Bryner, who was serving in Judge Anderson's absence, that Mr. Petty wanted her to withdraw from representing him, and Judge Bryner ordered Morgan to act as standby counsel, after asking Petty why he wanted to represent himself and informing him that he was doing himself a disservice (R. 40).²

² The full colloquy and ruling are in Addendum 1 to this brief.

At trial, Judge Anderson limited the activities of standby counsel, describing her appointed role to the jury as follows:

I – I – as an assistance to him and as is routine in such cases, I have assigned, ah, the Public Defender to sit with him at counsel table as what we call standby counsel. She can answer his questions and help him understand the procedures that are being followed in the courtroom, but it is not her responsibility to represent him. She is not to represent him. She's not to ask questions. She's not to speak for him. She's there as a resource to help him.

(R. 162 at 11).

The trial court instructed the jury that they could convict Petty for possession or transference of the gun (R. 109), but did not require the jurors to specify which factual theory supported their general conviction (R. 123).

Following a jury trial, the jury convicted Petty as charged (R. 123).

Prior to sentencing, Petty requested the appointment of counsel, and Judge Anderson appointed Ms. Morgan to act as counsel for Petty (R. 139).

Judge Anderson sentenced Petty to a term of zero to five years in prison (R. 148).

Counsel filed a timely notice of appeal (R. 159).

STATEMENT OF FACTS

Because the issues to be raised on appeal do not require an assessment of evidentiary prejudice, a truncated statement of facts will suffice.

On August 17, 1999, Petty signed and thumb printed a pawn ticket at a pawnshop indicating that he pawned a Norinco 45 pistol at B&G Pawn (e.g. R. 162 at 52-56).

Petty maintained at trial that the gun belonged to his wife, and that he pawned it for her because she did not have her identification with her at the pawnshop (e.g. R. 162 at 113).

The pawnshop owner testified that Petty had discussed pawning his gun repeatedly in the past, because the gun was too big for his wife and he was trying to find a smaller one (R. 162 at 63-64, 72)

Petty's father-in-law testified that Petty showed him this gun on a prior occasion and referred to it as a gun that he or they had, but did not identify it as belonging to Petty's wife (R. 162 at 77).

Petty testified that he did not touch the gun itself, but brought the gun to his father-in-law in a bag from his wife's car and referred to it as theirs because it made him feel "cool" (R. 162 at 114-116).

He maintained that he knew, as a convicted felon, that he could not have a gun, and that he did not know that his actions with his wife's gun constituted a violation of the law (e.g. R. 162 at 113-114).

SUMMARY OF ARGUMENT

The record fails to establish that Petty made a knowing and voluntary waiver of counsel. The trial court's colloquy improperly focused primarily on Petty's legal training, rather than on what he was giving up in representing himself.

The elements instruction for the gun possession charge in this case was devoid of any *mens rea* element.

The gun possession statute does not expressly create a strict liability offense, or specify any particular *mens rea*, thus requiring proof of a knowing or intentional, or

perhaps reckless mental state.

Under well-established Utah law, the defective elements instruction requires a new trial.

The trial court erred in refusing to dismiss the case because the gun possession statute violates Petty's right to bear arms.

ARGUMENT

L The Trial Court Erred in Permitting Petty to Represent Himself.

On July 19, 2000, Ms. Morgan informed Judge Bryner, who was substituting for Judge Anderson, that Mr. Petty wanted her to withdraw from representing him (R. 40).

The full questioning and ruling by the court on this matter were as follow:

THE COURT: All right. Now, Mr. – Mr. Petty, you're proposing to represent yourself; is that correct?

MR. PETTY: Yes, sir.

THE COURT: Why are you making that choice?

MR. PETTY: The direction I'd like my questioning in my trial to go –

THE COURT: And you –

MR. PETTY: – and the questioning that I personally would like asked, the line of questioning in order to draw out the evidence that I would like drawn out.

THE COURT: All right. Let me ask you this. Have you been to law school?

MR. PETTY: No, sir.

THE COURT: You've not attended law school.

MR. PETTY: No, sir.

THE COURT: Have you received – received any legal training?

MR. PETTY: No, sir.

THE COURT: Have you studied law in any manner?

MR. PETTY: Not formally, no sir.

THE COURT: Have you studied law informally?

MR. PETTY: Yes, sir. I have.

THE COURT: And what has that consisted of?

MR. PETTY: Um, lots of reading of law books and the rules, um, of trial; lots of the evidence area rules of what can be brought forth, what can't be brought forth. Um, specifically, in my case as a parolee, I was on parole. I'm no longer on parole. But I studied my rights, I guess I would say, as someone who was on parole by the State of Utah. And those are issues that are going to be in my trial, so the background that I did before as the case even came up – (Inaudible) – with the relevant study I've done on it.

THE COURT: All right. Are you familiar with the UTAH RULES OF EVIDENCE?

MR. PETTY: Some. That's why I would like Mz. Morgan to stay with me as my backup or whatever.

MZ. MORGAN: Standby.

MR. PETTY: Standby. If, ah, if, in our preparatory manner, whatever we get ready to do, she can tell me if I can or can't do that before the trial.

THE COURT: All right. And are you familiar with the UTAH RULES OF CRIMINAL PROCEDURE?

MR. PETTY: No, sir.

THE COURT: All right. Well, Mr. Petty, it would be the Court's opinion in this matter that, ah, you're doing yourself a disservice by attempting to represent yourself. Ms. Morgan has graduated from college four years and then after that she went to three years of law school. How many hears of college have you had?

MR. PETTY: Three-and-a-half.

THE COURT: All right. Well she's– she has three-and-a-half more than you do and three years have concentrated on the study of law, where I'm sure yours that you had has not concentrated on the study of law.

MR. PETTY: Yes, sir.

THE COURT: So you're entitled to represent yourself, if you wish, but I just caution you that you're going to be going up against a prosecutor who's been to law school and, ah, it's his duty to see that justice is done.

MR. PETTY: Yes, sir.

THE COURT: And he's going to prosecute this and attempt to

prove you guilty, beyond a reasonable doubt.

MR. PETTY: Yes, sir.

THE COURT: So you would be doing yourself a disservice, in this Court's opinion, by trying to represent yourself, even though you have Mz. Morgan as backup counsel. Now with that in mind do you still want to go ahead and represent yourself?

MR. PETTY: Yes, sir. I do.

COURT RULING

THE COURT: All right. Well the Court's going to allow you to represent yourself and the Court will allow Mz. Morgan to remain on as backup counsel – or standby counsel. We will set this for Jury Trial then to begin on September 27th at 9:00 o'clock a.m.

[Sic](T. 7/19/2000 at 5-8).

Judge Anderson later limited the activities of standby counsel significantly, describing her appointed role to the jury as follows:

I – I – as an assistance to him and as is routine in such cases, I have assigned, ah, the Public Defender to sit with him at counsel table as what we call standby counsel. She can answer his questions and help him understand the procedures that are being followed in the courtroom, but it is not her responsibility to represent him. She is not to represent him. She's not to ask questions. She's not to speak for him. She's there as a resource to help him.

(R. 162 at 11).³

The trial court's error in permitting Petty to represent himself can be appreciated by reference to Utah case law establishing the trial courts' duties to insure that when people opt to represent themselves in criminal cases, they waive their right to counsel in a knowing and voluntary fashion.

³ Compare McKaskle v. Wiggins, 465 U.S. 168, 179-81 (1984)(the Court indicated that pro se defendants may waive right to self-representation by acquiescence; as long as standby counsel do not substantially interfere with the defendant's fundamental control of his defense, it is acceptable for them to ask questions and make motions and objections in aid of the defendant's position).

For instance, in State v. Frampton, 737 P.2d 183, 187-88 (Utah 1987), the court explained,

It has long been settled that the right to assistance of counsel is personal in nature and may be waived by a competent accused if the waiver is "knowingly and intelligently" made. Such waiver must of course be voluntary. It follows therefrom that an accused's decision to defend himself is a waiver of the right to assistance of counsel. However, it is the trial court's duty to determine if this waiver is a voluntary one which is knowingly and competently made.

In making this determination, the defendant "should be made aware of the dangers and disadvantages of, self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Generally, this information can only be elicited after penetrating questioning by the trial court. Therefore, a colloquy on the record between the court and the accused is the preferred method of ascertaining the validity of a waiver because it insures that defendants understand the risks of self-representation. Moreover, it is the most efficient means by which appeals may be limited.

Even absent such a colloquy, however, this Court, will look at any evidence in the record which shows a defendant's actual awareness of the risks of proceeding pro se. In this regard, whether a knowing and intelligent waiver has been made turns upon the particular facts and circumstances surrounding each case.

Although a defendant's background is relevant to his ability to waive his right to counsel, that background is not relevant to show whether a sensible, literate, and intelligent defendant possesses the necessary information to make a meaningful decision as to waiver of counsel. The fact that a defendant is well educated, can read, or has been on trial previously is not dispositive as to whether he understood the relative advantages and disadvantages of self-representation in a particular situation.

In the absence of a colloquy, the record must somehow otherwise show that the defendant understood the seriousness of the charges and knew the possible maximum penalty. The record should also show that the defendant was aware of the existence of technical rules and that presenting a defense is not just a matter of telling one's story.

Id. at 187-88 (footnotes omitted).

The suggested plea colloquy set forth in footnote 12 of Frampton is as follows:

An accused has a constitutional right to represent himself if he chooses to do so. A defendant's waiver of counsel must, however, be knowing and voluntary. This means that you must make clear on the record that the defendant is fully aware of the hazards that he faces and the disadvantages of self-representation.

When a defendant states that he wishes to represent himself, you should therefore ask questions similar to the following:

(a) Have you ever studied law?

(b) Have you ever represented yourself or any other defendant in a criminal action?

(c) You realize, do you not, that you are charged with these crimes: (Here state the crimes with which the defendant is charged.)

(d) You realize, do you not, that if you are found guilty of the crime charged in Count I, the court . . . could sentence you to as much as years in prison and fine you as much as \$? (Then ask him a similar question with respect to each other crime with which he may be charged in the indictment or information.)

(e) You realize, do you not, that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another?

(f) You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case.

(g) Are you familiar with the . . . Rules of Evidence?

(h) You realize, do you not, that the . . . Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?

(i) Are you familiar with the . . . Rules of Criminal Procedure?

(j) You realize, do you not, that those rules govern the way in which a criminal action is tried in . . . court?

(k) You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.

(l) (Then say to the defendant something to this effect): I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent

yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the Rules of Evidence. I would strongly urge you not to try to represent yourself.

(m) Now, in light of the penalty that you might suffer if you are found guilty and in light of all the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?

(n) Is your decision entirely voluntary on your part?

(o) If the answers to the two preceding questions are in the affirmative, you should then say something to the following effect: "I find that the defendant has knowingly and voluntarily waived his right to counsel. I will therefore permit him to represent himself."

(p) You should consider the appointment of standby counsel to assist the defendant and to replace him if the court should determine during trial that the defendant can no longer be permitted to represent himself.

Frampton at 177 n.12 (citation omitted).

Frampton was cited recently in a case reversed for inadequate proof of a knowing waiver of counsel, State v. Heaton, 958 P.2d 911 (Utah 1998). In

Heaton, the court described the duties of trial courts as follows:

The right to have the assistance of counsel in a criminal trial is a fundamental constitutional right which must be jealously protected by the trial court. The United States Supreme Court has stated:

The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused-- whose life or liberty is at stake-- is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.

Because of the importance of the right to counsel and the heavy burden placed upon the trial court to protect this right, there is a presumption against waiver, and doubts concerning waiver must be resolved in the defendant's favor.

When a trial court is confronted with a defendant who either refuses to proceed to trial with appointed counsel or insists on proceeding pro se, the court must carefully consider the defendant's right to self-representation with his right to counsel. Nevertheless, before the court may

permit the defendant to proceed without the assistance of counsel, the court must conduct a thorough inquiry of the defendant to fulfill its duty of insuring that the defendant's waiver of counsel is knowingly, intelligently, and voluntarily made.

In making this determination, the court must advise the defendant of the dangers and disadvantages of self-representation "so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" In addition, the trial court should (1) advise the defendant of his constitutional right to the assistance of counsel, as well as his constitutional right to represent himself; (2) ascertain that the defendant possesses the intelligence and capacity to understand and appreciate the consequences of the decision to represent himself, including the expectation that the defendant will comply with technical rules and the recognition that presenting a defense is not just a matter of telling one's story; and (3) ascertain that the defendant comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case.

Heaton at 917-918 (citations omitted).

As this Court has repeatedly informed the trial courts, the focus of the inquiry is not to be on the "irrelevant" issue of legal training, but is to be on "whether the defendant understands the traditional benefits of representation by counsel that he or she is giving up by choosing self representation." State v. McDonald, 922 P.2d 776, 783 (Utah App. 1996).

In the instant matter, the trial court repeatedly focused on the legal training Petty did not have, and compared it to the legal training appointed counsel and the prosecutor had. But see, e.g., McDonald. The trial court did not ask whether or find that Petty's waiver was voluntary. He did not discuss the charge or potential penalty Petty faced. He did not inform Petty that he would be required to follow the rules of evidence and rules of criminal procedure, despite his lack of

familiarity with the rules. The court did not inform Petty that the court would not assist Petty in defending himself, and did not explain the procedural impact of self-representation on his own testimony. The court did not discuss Petty's constitutional right to be represented, or point out the dangers of self-representation in any specific way. Cf. Heaton, 958 P.2d at 919 ("The court's cursory recommendation to Heaton to rely on defense counsel did not apprise Heaton in any way of the constitutional significance of the right to counsel and the consequences of waiver. . . . While the court's advice [to permit counsel to cross-examine the witnesses] was certainly appropriate, it addressed only one of the disadvantages of self-representation--i.e., not having experience and expertise in cross-examining witnesses. Moreover, the trial court had already determined that Heaton had decided to represent himself. As we have previously mentioned, before a trial court may permit a defendant to proceed pro se, the court must determine whether the defendant competently waived counsel at the time of waiver, not after.").

The trial court did not inquire about Petty's experience representing himself in, or even experiencing or witnessing a criminal trial. When Petty explained that his contemplation of his rights as a parolee provided the necessary knowledge to conduct his defense in this case, that in itself should have informed the trial court that Petty did not have an understanding of the value of trained counsel to defend him in a felony trial. Cf. Heaton.

The trial court's errors in permitting Petty to represent himself are not ameliorated by the appointment of standby counsel, because the trial court so limited her service to Petty. Cf. McDonald at 785 ("Therefore, although defendant was not specifically told the court would not assist him during the trial, the court appointed Mr. Albright as standby counsel and made it clear to defendant that Mr. Albright would assist defendant during the trial whenever defendant asked.").

The trial court's error in permitting Petty to represent himself absent proof of a knowing, intelligent, and voluntary waiver of counsel requires a new trial. See, e.g., Heaton, supra.

II. The Absence of an Accurate Elements Instruction Requires a New Trial.

It is axiomatic that the prosecution must prove *mens rea* for each element of any offense charged, unless the offense involves strict liability. See e.g., State v. Elton, 680 P.2d 727, 728-29 (Utah 1984).

Because the gun possession statute does not indicate by its language that it creates a strict liability offense,⁴ and does not specify a *mens rea*, proof of an intentional or knowing or perhaps reckless mental state will satisfy the statute.

⁴Compare Utah Code Ann. § 76-10-503(3)(a)(i) (1999) ("A person may not purchase, possess, or transfer any handgun described in this part who: has been convicted of any felony offense under the laws of the United States, this state, or any other state;)" with Elton at 729 (statute reading "A person commits unlawful sexual intercourse if that person has sexual intercourse with a person, not that person's spouse, who is under sixteen years of age." did not "even impliedly indicate a legislative purpose to impose strict liability.").

This is confirmed by reference to Utah Code Ann. § 76-2-102, which provides,

Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility. An offense shall involve strict liability if the statute defining the offense clearly indicates a legislative purpose to impose criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state.

See also Elton, 680 P.2d at 727 and n.3 (discussing limited circumstances in which strict liability offenses may be found); Utah Code Ann. § 76-2-101.⁵

This absence of an accurate elements instruction requires reversal of the conviction under basic Utah law. See, e.g., State v. Jones, 823 P.2d 1059, 1061 (Utah 1991). In Jones, the court reversed an aggravated kidnaping conviction for the absence of an elements instruction on that offense, stating,

The law in this state is that an information instruction is not a substitute for an elements instruction. In State v. Roberts, 711 P.2d 235 (Utah 1985), we stated, "The general rule is that an accurate instruction upon the basic elements of an offense is essential. Failure to so instruct constitutes reversible error." Id. at 239 (Utah 1985) (citing Laine, 618

⁵This statute provides,

No person is guilty of an offense unless his conduct is prohibited by law and:

- (1) He acts intentionally, knowingly, recklessly, with criminal negligence, or with a mental state otherwise specified in the statute defining the offense, as the definition of the offense requires; or
- (2) His acts constitute an offense involving strict liability.

These standards of criminal responsibility shall not apply to the violations set forth in Title 41, Chapter 6, unless specifically provided by law.

P.2d at 35). See also State v. Harmon, 712 P.2d 291, 292 (Utah 1986) (per curiam); State v. Reedy, 681 P.2d 1251, 1252 (Utah 1984).”). Thus, the failure to give this instruction can never be harmless error.

Jones at 1061.

In the instant matter, the elements instruction omitted all mention of *mens rea*, stating

In order to obtain a conviction, the state must prove each element of the offense beyond a reasonable doubt. Those elements are as follows:

1. That on or about August 17, 1999;
2. Defendant had been convicted of a felony; and
3. Possessed or transferred a handgun.

If you believe that the state has proved each of these elements beyond a reasonable doubt, you should find defendant guilty. If the state has failed to prove any one of those elements beyond a reasonable doubt, you should find defendant not guilty.

(R. 109).

While the jurors were instructed in a separate instruction that the State had the burden to prove that Petty acted knowingly or intentionally (R. 112),⁶ neither

⁶ Instruction 6 read,

The state must show that defendant acted intentionally or knowingly. A person acts intentionally if he has a conscious objective or desire to act or to cause a result. A person acts knowingly when he is aware of his conduct, aware of the circumstances, or aware of the likely results of his conduct.

Intent or knowledge are states of mind not usually proved by direct evidence. You may infer intent or knowledge from acts, conduct, statements and circumstances.

(R. 112).

the elements instruction (R. 109) nor the information instruction⁷ required the jurors to adjudicate this basic element of the offense.⁸

While the absence of an accurate elements instruction constitutes a structural error which cannot be considered harmless, e.g., Jones, *supra*, it appears that the error may have been harmful in this case, in which the jurors may well have acquitted Petty if they had been properly instructed on the *mens rea* element, given Petty's testimony that he did not know he was acting unlawfully, when he signed his own name and put his own thumb print on the pawn ticket (e.g. R. 162 at 113-14).

Because Petty did not raise this issue in the trial court, he asserts the plain error and exceptional circumstances doctrines on appeal.

The plain error doctrine requires a showing that an obvious and harmful error occurred which prejudiced the defendant's substantial rights, although the

⁷ Instruction 1 read,
MEMBERS OF THE JURY:

The defendant, Clay Hamilton Petty, is accused by the Grand County Attorney of committing the following crime:

Felon in Possession of Handgun, in violation of section 76-10-503, Utah Code Annotated, 1953 as amended, in that said defendant, on or about August 17, 1999, at Grand County, State of Utah, a person who has been convicted of any felony offense under the laws of the United States, this State, or any other state did possess or transfer a handgun.

(R. 107).

⁸ The relevant jury instructions are included in Addendum 2 to this brief.

obviousness prong may be relaxed when a highly prejudicial error occurred which is more obvious in hindsight than it likely was before the trial court. See, e.g., State v. Eldredge, 773 P.2d 29, 35 and n.8 (Utah), cert. denied, 493 U.S. 814 (1989).

Utah courts recognize that the absence of an accurate elements instruction constitutes plain error. See Jones; Laine, supra.

Courts will also reach issues raised for the first time on appeal when there are exceptional circumstances, such as serious procedural defects, which require the courts to act to prevent manifest injustices. See, e.g., State v. Gibbons, 740 P.2d 1309, 1311 (Utah 1987) (incomplete trial procedures and change of appellate counsel constituted exceptional circumstances); State v. Jameson, 800 P.2d 798, 802 (Utah 1990)(serious procedural defects may constitute exceptional circumstances).

The procedural history of this case is exceptional in that the trial court permitted Petty to represent himself without insuring that his waiver of counsel was knowing and voluntary, appointed standby counsel, and then expressly forbade counsel from representing Petty or speaking for him (R. 162 at 11), when the law places no such limitations on the role of standby counsel. See, e.g., McKaskle v. Wiggins, 465 U.S. 168, 179-81 (1984)(the Court indicated that as long as standby counsel do not substantially interfere with the defendant's fundamental control of his defense, it is acceptable for them to ask questions and

make motions and objections in aid of the defendant).

In the exceptional circumstances of this case, the Court should order a new trial. See, e.g., Jameson, supra.

III.
The Trial Court Should Have Dismissed
on the Basis of
The Unconstitutionality of the Gun Possession Statute.

Awkwardly and repeatedly, Mr. Petty, acting *pro se*, objected to the overall prosecution, asserting his constitutional right to possess the handgun (R. 162 at 131-32, 141). The trial court pointed out Petty's ignorance and eventually denied him relief (R. 162 at 132, 141-42).⁹

The statute underlying Petty's conviction, Utah Code Ann. § 76-10-503 (1999), states,

....
(3) (a) A person may not purchase, possess, or transfer any handgun described in this part who:

(i) has been convicted of any felony offense under the laws of the United States, this state, or any other state;

....
(b) Any person who violates this Subsection (3) is guilty of a third degree felony.

The statute purports to penalize mere possession of weapons regardless of the purpose of the possession, and does not purport to proscribe the use of weapons. This violates the plain language of Article I section 6 of the Utah

⁹ Petty's arguments and the trial court's ruling are in Addendum 3 to this brief.

Constitution, which provides,

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

This state constitutional provision provides greater protection for the individual right to keep and bear arms than is provided by most state constitutions. See Addendum 4 to this brief, containing several other state constitutional provisions.

Article I section 6 was amended by the legislature and the people of Utah to provide greater protection than was provided by the previous state constitutional provision, which provided,

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.¹⁰

The comparative strength of the amended language, and the legislative history demonstrate that the legislature and the people of Utah intended to provide great protection for the right to keep and bear arms. The language of the amendment was passed by a strong majority of the Utah legislature after years of study, revision and negotiation. See “The Individual Right to Bear Arms: An

¹⁰ In State v. Vlacil, 645 P.2d 677 (Utah 1982), decided prior to the state constitutional amendment, Justices Howe and Stewart noted that the constitutionality of the gun possession statute was open to question. Id. at 683.

Illusory Public Pacifier?,” 1986 Utah L.Rev. 751, 753-54 nn. 12 and 13.¹¹

The Utah Constitution expressly provides that its terms are to be construed literally. Article I section 26 of the Utah Constitution provides, "All provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

Allegiance and adherence to the plain language of the Utah Constitution is further required by the State Constitution's express requirement of separation of governmental powers. Article V section 1 of the Utah Constitution provides,

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

The relationship between the separation of powers doctrine and adherence to the plain language of the law is explained in § 46.03 of Sutherland,

Statutory Construction, as follows:

The preference for literalism in determining the effect of a statute is based on the constitutional doctrine of separation of powers. The courts owe fidelity to the will of the legislature. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature. The Rhode Island Supreme Court has captured this idea in the following language: "It is an elementary proposition that courts only determine by construction the scope and intent of the law when the law itself is ambiguous or doubtful. If a law

¹¹ This article and the legislative history preceding the amendment are in Addendum 5 to this brief.

is plain and within the legislative power, it declares itself and nothing is left for interpretation. It is as binding upon the court as upon every citizen. To allow a court, in such a case, to say that the law must mean something different from the common import of its language, because the court may think that its penalties are unwise or harsh would make the judicial superior to the legislative branch of the government, and practically invest it with the lawmaking power. The remedy for a harsh law is not in interpretation but in amendment or repeal."

(citation omitted).

Basic tenets of federalism call on this Court to recognize and enforce the plain language of the state constitution. The United States of America is a federation of state governments. The states preceded the federation and hold general, residual powers to govern, which are limited only by the state and federal constitutions. In contrast, the federal government's powers are limited to those enumerated in the federal constitution. See e.g., Constitution of United States, Amendment X. This federalist form of government is based on historical distrust, fear and confinement of centralized government, and historical trust and empowerment of local government to represent and serve the citizens of each state. See e.g. Manning v. Sevier County, 517 P.2d 549, 553–554 (Utah 1973)(Justices Crockett, Ellett and Henriod in a concurring opinion). Federalist reliance on local government and limitation of centralized government is reflected in the differences between state and federal constitutions. State constitutions are tailored to the regions they govern; they are detailed and specific; they are dynamic. On the other hand, the federal constitution is uniform general and

unchanging. Federalism is a concept historically cherished by the people of this state. E.g. L.J. Arrington and D. Bitton, The Mormon Experience, 161-184. Our state supreme court was perhaps the last state court to accept "incorporation" of provisions of the federal Bill of Rights. See, e.g., Manning v. Sevier County, 517 P.2d 549, 553 (Utah 1973)(concurring opinion of three justices characterizing federal incorporation doctrine as disingenuous, violative of principles of federalism, and expressing the view that the first amendment does not apply to state actors). Particularly where the federal constitution provides no protection to individuals in the context of the right to possess weapons, e.g. State v. Vlacil, 645 P.2d 677, 679 (Utah 1982),¹² it is appropriate to decide this question of state law under the state constitution.

While Mr. Petty did not specifically raise a state constitutional argument, this Court should nonetheless decide the case on the merits under the state constitution for the reasons stated above.¹³

The Utah Supreme Court has made state constitutional law on the basis of

¹² The federal constitutional provision is interpreted narrowly as providing a collective federal right relating to militias, and as providing no protection for individuals. Vlacil.

¹³ In State v. Archambeau, 820 P.2d 920 (Utah App. 1991), this Court refused to address the merits of a similar argument, finding that there was no plain error. This case is distinguishable from Archambeau because Mr. Archambeau was represented by counsel at trial, who did not raise the issue.

In the instant matter, Mr. Petty was acting *pro se*, and brought the matter to the trial court's attention, to the best of his abilities.

arguments raised for the first time on appeal. See, e.g., State v. Larocco, 794 P.2d 460 (Utah 1990)(interpreting Article I § 14 of the Utah Constitution); State v. DeMille, 756 P.2d 81 (Utah 1988)(interpreting Article I § 4 of the Utah Constitution).

Given the plain language of the state constitutional provision, this Court should strike the gun possession statute under the plain error doctrine. See, e.g., State v. Eldredge, 773 P.2d 29, 35 and n.8 (Utah), cert. denied, 493 U.S. 814 (1989)(plain error doctrine permits appellate Courts to correct plain and prejudicial errors).

Assuming *arguendo* that the error should not have been plain to the trial court, this Court can surely see in hindsight that the error is definitely prejudicial to Mr. Petty, who should not be imprisoned on the basis of the unconstitutional statute. See id. (recognizing that errors which are plain in hindsight may still be corrected on appeal if they are sufficiently prejudicial).

Constitutional errors are particularly appropriate for correction under the plain error doctrine. See, e.g., United States v. Lindsay, 184 F.3d 1138, 1140 (10th Cir.), cert. denied, 145 L.Ed.2d 343 (1999).

Courts will also reach issues raised for the first time on appeal when there are exceptional circumstances, such as serious procedural defects, which require the courts to act to prevent manifest injustices. See, e.g., State v. Gibbons, 740 P.2d 1309, 1311 (Utah 1987) (incomplete trial procedures and change of

appellate counsel constituted exceptional circumstances); State v. Jameson, 800 P.2d 798, 802 (Utah 1990)(serious procedural defects may constitute exceptional circumstances).

Here again, the unique procedural history of this case, wherein the trial court permitted Petty to represent himself without insuring that his waiver of the right to counsel was knowing and voluntary, appointed standby counsel, and then restricted his access to her assistance, calls for appellate intervention. When trial courts permit people to represent themselves, they should not chide them for their legal ignorance and limit the service of standby counsel. See e.g., McKaskle, supra.


Rather, they should “support, obey and defend” the Utah Constitution, as they are sworn to do as members of the Utah State Bar. See Preamble to the Utah Rules of Professional Conduct (quoting the oath).

Given the exceptional circumstances of this case, this Court should rule on the merits that the gun possession statute violates Article I § 6 of the Utah Constitution.

CONCLUSION

This Court should reverse Petty’s conviction, and order the case dismissed, or at a minimum order a new trial.

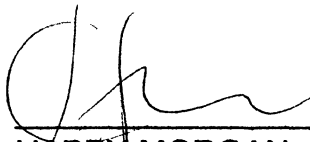
DATED this 17 day of MAY, 2001.



HAPPY MORGAN
Counsel for Mr. Petty

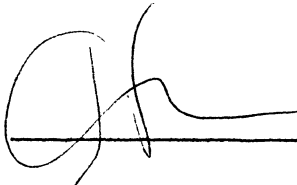
CERTIFICATE OF DELIVERY/MAILING

I hereby certify that I have caused to be served two true and correct copies of the foregoing to Utah Attorney General Mark Shurtleff, 236 State Capitol, Salt Lake City, Utah 84114, this 17 day of MAY, 2001.



HAPPY MORGAN
Counsel for Mr. Petty

I hereby certify that I hand-delivered/mailed, first class postage pre-paid, two true and correct copies of the foregoing to Utah Attorney General Mark Shurtleff, 236 State Capitol, Salt Lake City, Utah 84114, this 17 day of MAY, 2001.



Addendum I

SEVENTH DISTRICT COURT
Grand County

FILED NOV - 8 2000

BY CLERK OF THE COURT
Deputy

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR GRAND COUNTY, STATE OF UTAH

Criminal No. 0017-159

Held in the Courtroom of said Court, at Moab, Grand
County, State of Utah, on November 8, 2000, present the Honorable
Lyle R. Anderson, District Court Judge.

THE STATE OF UTAH,

Against: CLAY HAMILTON PETTY,
DOB: 09/29/68

JUDGMENT AND COMMITMENT TO UTAH STATE PRISON

William L. Bengé for Plaintiff

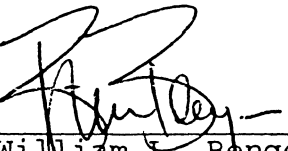
Happy Morgan for Defendant

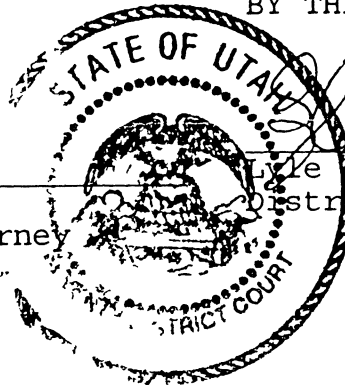
This being the day and hour fixed for pronouncing
judgment in this case, and the defendant being present in Court
and represented by counsel, Happy Morgan, and defendant having
heretofore been found guilty by a jury of the offense of:
FELON IN POSSESSION OF HANDGUN, a Third Degree Felony,
and the defendant stating to the Court that there is no legal
reason to advance why judgment should not be pronounced, the
Court now pronounces the judgment and sentence of the law as
follows, to-wit: That you, CLAY HAMILTON PETTY, be imprisoned in
the UTAH STATE PRISON for a term NOT TO EXCEED FIVE (5) YEARS.

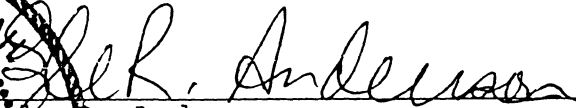
You, CLAY HAMILTON PETTY, are hereby REMANDED to the custody of the Sheriff or other proper officer of the Grand County Jail for transfer to the custody of the Utah State Prison.

DATED this 8th day of November, 2000.

BY THE COURT:


William L. Bengtson
Grand County Attorney




Kyle R. Anderson
District Court Judge

CERTIFICATE OF DELIVERY

I hereby certify that on the 8th day of November, 2000, I hand delivered or mailed, postage prepaid, a true and correct copy of the above to Happy Morgan, Attorney for Defendant, 8 South 100 East, Moab, Utah 84532; Department of Corrections, Adult Probation and Parole, 1165 S. Hwy. 191, St. 3, Moab, Utah 84532; Grand County Sheriff, 125 E. Center, Moab, Utah 84532. *Utah State Prison, P.O. Box 250, Draper, UT 84020*





Addendum II

FILED SEP 27 2000

[Handwritten signature]

In The Seventh Judicial District Court Of Grand County
State of Utah

THE STATE OF UTAH,

Plaintiff,

vs.

CLAY HAMILTON PETTY,

Defendant.

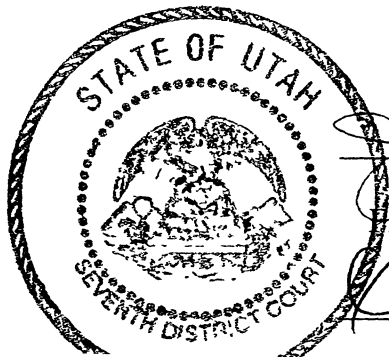
VERDICT

Case No. 9917-159

We, the Jurors in the above case, find the defendant:

Guilty of Felon in Possession of Handgun

DATED this 27 day of SEPTEMBER, A.D., 2000.



[Handwritten signature] Foreman
JOSEPH M. LEKARCZYK

[Handwritten signature] Clerk

Lyle D Anderson *[Handwritten signature]*

Addendum III

SEVENTH DISTRICT COURT
GRAND COUNTY

FILED SEP 27 2000

INSTRUCTION NO. 1

CLERK OF THE COURT

MEMBERS OF THE JURY:

The defendant, Clay Hamilton Petty, is accused by the Grand County Attorney of committing the following crime(s):

Felon in Possession of Handgun, in violation of section 76-10-503, Utah Code Annotated, 1953 as amended, in that said defendant, on or about August 17, 1999, at Grand County, State of Utah, a person who has been convicted of any felony offense under the laws of the United States, this State, or any other state did possess or transfer a handgun.

INSTRUCTION NO. 3

In order to obtain a conviction, the state must prove each element of the offense beyond a reasonable doubt. Those elements are as follows:

1. That on or about August 17, 1999;
2. Defendant had been convicted of a felony; and
3. Possessed or transferred a handgun,

If you believe that the state has proved each of these elements beyond a reasonable doubt, you should find defendant guilty. If the state has failed to prove any one of those elements beyond a reasonable doubt, you should find defendant not guilty.

INSTRUCTION NO. 6

The state must show that defendant acted intentionally or knowingly. A person acts intentionally if he has a conscious objective or desire to act or to cause a result. A person acts knowingly when he is aware of his conduct, aware of the circumstances, or aware of the likely results of his conduct.

Intent or knowledge are states of mind not usually proved by direct evidence. You may infer intent or knowledge from acts, conduct, statements and circumstances.

Addendum IV

1 instructions up. They should be ready about now. I have to
2 review those with them and then make any changes that are
3 agreed upon with their comments and then get copies made for
4 everyone. So I would suggest that if we're going to be
5 practical about this, it's probably going to be 2:00 o'clock
6 before I can have those ready to read to you. That's a
7 half-hour from now.

8 So I'm going to excuse you for the next half-hour.
9 During this time period don't discuss the case with anyone.
10 Don't allow anyone to discuss it in your presence. Don't make
11 up your mind as to any issue until it's finally submitted to
12 you for decision. Please be back here at 2:00 o'clock. By
13 3:00 o'clock you should--or sooner, you should be starting
14 your deliberations. Okay?

15 All right. Mr. Petty, Mr. Benge, I'll have the
16 clerk bring those up to you just as soon as they're ready.
17 And as soon as you've had a chance to review, tell the clerk
18 and I'll come in here and discuss any concerns with you.

19 (Jury left courtroom.)

20 MR. PETTY: Your Honor, I have something I'd like to
21 discuss.

22 THE COURT: Okay.

23 PROCEEDINGS CONTINUED OUTSIDE PRESENCE OF JURY

24 MR. PETTY: Your Honor, I'd like to state for the
25 record that it is my federal constitutional right to own and

possess a firearm by--(Inaudible). Um, whether the State supersedes that or has its stipulations regarding that, I'd like the record to show that I am voicing that.

THE COURT: Under the 4th Amendment?

MR. PETTY: Well, no. One that says I can have a right to bear arms.

THE COURT: Okay.

MR. PETTY: I know that I'm allowed to by a document signed by Thomas Jefferson, yes, sir.

THE COURT: Thomas Jefferson?

MR. PETTY: Yeah. He was involved in writin' it or something. I don't know. I don't know my facts on the thing. I just know that I'm allowed to own and right--I have the right to bear arms. I know it's in the Constitution, whether the State of Utah agrees with it or not.

THE COURT: Okay. Well you need to go back and take a history class, maybe a law class or two. Um, you got several facts wrong.

MR. PETTY: Okay.

THE COURT: And all you've done is--

MR. PETTY: As long as the record shows that I am voicing that the Constitution shows that I may have a right to bear arms, that's what I--(Inaudible).

1 particular point with Mr. Petty and I am fairly comfortable
2 telling the Court that there is no Utah case on point.

3 THE COURT: Nor any U.S. Supreme Court case on
4 point, as far as you know; right?

5 MR. BENGE: As far as I know, there isn't, Your
6 Honor. I'll send it.

7 THE COURT: Okay. That--that request is denied.
8 I'm not sure it's even timely enough to justify consideration
9 raised at the end of the trial without any authority, without
10 any analysis, just the bare citing of the constitutional
11 provision. But for what it's worth, you've said what you've
12 said and I deny your request for dismissal.

13 I'll have these changes made, get copies for
14 everybody, and be back up here.

15 (Recess)

16 **PROCEEDINGS CONTINUED WITH JURY PRESENT**

17 THE COURT: Okay. Let's bring the jury in.

18 (Bailiff summonsed jury from outside the courtroom.)

19 Seven out of eight isn't bad, but we can't go ahead
20 without eight.

21 I've done extensive studies on how long it takes to
22 get the jury instructions ready and the only thing I've found
23 is that it always takes 15 minutes longer than you think it
24 will take. It doesn't matter how much you try to plan,
25 Murphy's Law applies to this and it applies in a way that

THE COURT: So you don't get that one.

MR. PETTY: Okay. Um, and then one more thing. I'd like to renew my objection and ask for relief. The reason I objected before was cause I feel I have a constitutional right to bear an arm--(Inaudible)--and I'd like the Court to dismiss the case because the Constitution says so. Federally I can.

THE COURT: Do you have any authority for that proposition?

MR. PETTY: To ask for a dismissal?

THE COURT: Um-hm.

MR. PETTY: As counsel for myself, as a citizen of the United States under the bearing of the Constitution I feel I have authority.

THE COURT: That's it?

MR. PETTY: I don't know.

THE COURT: A case?

MR. PETTY: Is there a list that I can--

THE COURT: A case?

MR. PETTY: I don't have a case number at this time, no.

THE COURT: Do you know the text of the constitutional provision you're referring to?

MR. PETTY: Nope.

Addendum V

Alabama, Article I, section 26

That every citizen has a right to bear arms in defense of himself and the state.

Alaska, Article I, section 19

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.

Arizona, Article 2, section 26

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.

Arkansas, Article 2, §5

The citizens of this State shall have the right to keep and bear arms for their common defense.

Colorado, Article II, section 13

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.

Connecticut, Article I, section 15

Every citizen has a right to bear arms in defense of himself and the state.

Florida, Article I, section 8

(a) 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.

(b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at

retail of any handgun. For the purposes of this section, "purchase" means the transfer of money or other valuable consideration to the retailer, and "Handgun" means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.

(c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.

(d) This restriction shall not apply to a trade in of another handgun.

Georgia, Article I, section 1, Paragraph VIII

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.

Hawaii, Article I, section 17

A well regulated militia being necessary to the security of a free state, the right of the people to keep and ear arms shall not be infringed.

Idaho, Article I, section 11

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

Illinois, Article 1, section 22

Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.

Indiana, Article I, section 32

The people shall have a right to bear arms, for the defense of themselves and the State.

Kansas Bill of Rights, § 4

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.

Kentucky, Bill of Rights, section 1

All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

.... The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.

Louisiana, section 11

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.

Maine, Article I, §16

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

Massachusetts, XVII

The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the Legislature; and the military power shall always be held in an exact subordination to the Civil authority, and be governed by it.

Michigan, Article I, section 6

Every person has a right to keep and bear arms for the defense of himself and the state.

Mississippi Article 3, section 12

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

Montana, Article II, section 12

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.

Nevada Article I, section 11

1. 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.

2. The military shall be subordinate to the civil power; No standing army shall be maintained by this State in time of peace, and in time of War, no appropriation for a standing army shall be for a longer time than two years.

New Hampshire, Part I, Article 2, 3

All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state.

New Mexico, Article II, Section 6

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.

North Carolina, Article I section 30

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

Ohio, Article I, section 4

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.

Oklahoma, Article 2, section 26

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.

Oregon, Article I, section 27

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.

Pennsylvania, Article 1, section 21

The right of the citizens to bear arms in defence of themselves and the State shall not be questioned.

Rhode Island, Article I, section 22

The right of the people to keep and bear arms shall not be infringed.

South Carolina section 20

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. And 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 and in time of war but in the manner prescribed by law.

South Dakota, Article VI, section 24

The right of the citizens to bear arms in defense of themselves and the state shall not be denied.

Tennessee, Article I, section 26

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

Texas, Article I, section 23

Every citizen shall have the right to keep and bear arms in the lawful defense 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.

Utah, Article I, section 6

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

Vermont, Chapter I, Article 16th

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.

Washington, Article I, section 24

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.

Wyoming, Article I, section 24

The right of citizens to bear arms in defense of themselves and of the state shall not be denied.

Addendum VI

HOUSE DEBATE ON
SENATE JOINT RESOLUTION NO. 2
(replaced by Senate Joint Resolution No. 3)

March 7, 1983

MR. SPEAKER: Representative Dahl.

REP DAHL: Thank you, Mr. Speaker.

?: This is Senate Joint Resolution No. 2 that was repealed in favor of Senate Joint Resolution 3.

MR. SPEAKER: Opposed.

BODY: No.

MR. SPEAKER: The motion carries. We'll read the bill.

?: Senate Joint Resolution No. 2, Right to Bear Arms, by Senator Jack M. Bangerter. Be it resolved by the Legislature of the State of Utah, two-thirds of all members elect _____.

This voting in favor thereof.

MR. SPEAKER: Representative Dahl.

REP. DAHL: Thank you, Mr. Speaker. This is a constitutional resolution that, if this passes, it will be put on the ballot a year from now for the people to vote on to see if they want to put some specific language in the Constitution. And we think that this is very, very important that this be done. And just let me tell you some of that reasoning. Utah has a need for a strong constitutional guarantee because the second amendment to the U.S. Constitution does not protect us against state infringements. And remember that the Constitution is a negative charter. The Constitution is a

instrument in which the people tell government what they can enforce and what they cannot enforce. And so we think this is very important due to some rulings that have been made. So if, what this will do will give us some rights. It will not be limitations. There are, out of 39 states which have constitutional right to keep arms provisions, only 2 of those put some _____ regulatory language in it. One of them is Illinois, which says that this right is subject only to police power. And the other one is Utah, that says that we have the right but the Legislature may regulate the exercise of that right. So this gets very scary to me because in Illinois, there has been statutes ranging from license, owner licensing, firearm registration, the prohibition against firearms outside of a residence, bans on classes of firearms--and they have all been repeatedly upheld as a proper form of police power. And it's very interesting that virtually this same language has been used by the Utah Supreme Court in two recent cases saying that the power of the State to deny ownership to a class of people is ruled as a proper action consistent with the Utah Constitution. Chief Justice Hall has said that the second amendment does not guarantee you and I individual, you and I as individuals to keep and bear arms but only as a collective right such as the militia. And we think that the, this is not consistent with what the people of this state believe and not consistent with what it should be. And so for that reason, that's another one of the many reasons why we think this ought to come before the people to change that constitution. Maybe I'll just submit to any questions that you have and proceed from

there.

MR. SPEAKER: Representative Christensen.

REP. CHRISTENSEN: Thank you, Mr. Speaker. I don't have any questions, but I'd like to give one of my long talks today, if I could.

MR. SPEAKER: We might take back that standing ovation, but you go ahead.

REP. CHRISTENSEN: I'm a loser already, aren't I? I speak in favor of this constitutional revision part. It's essential to the people of Utah. They have nurtured this right since they came here. It's one of the things that they just take for granted. Now we changed some of our _____ last year to make it more agreeable with what we've already done. And that was good. I'd just like to remind you that when the smart people who honored our country, when they made the laws and made the regulations, James Madison, I'd going to say that he'd be awful nervous if he found us nowadays trying to do the things he didn't want done, because he was, as you recall, one of those that wrote the Declaration of Independence. And where they passed this as one of their laws without even a recorded vote. It passed on a _____ years ago. And this is part of America. And, of course, they debated other things an awful lot longer. But when they passed this one, it was, there was no trouble. Everybody agreed with it. It was part of their law. Anyway, to keep it short, like I usually do, vote for this. It's good. Let's keep it up. Let's keep it, make it part of Utah.

MR. SPEAKER: Representative Fullmer. I should add, Representative Christensen, we'll still applaud. Representative Maxfield.

REP. MAXFIELD: Just a question. Are we on the

MR. SPEAKER: We're on the HSJR 2.

REP. MAXFIELD: Not the substitute?

?: No, it's on the golden copy.

REP. MAXFIELD: Well, there's the goldenrod.

?: That's not a substitute. It's just

MR. SPEAKER: The Senate amendment.

?: The Senate amendment.

REP. MAXFIELD: That's all I wanted.

MR. SPEAKER: Representative Hillyard.

REP. HILLYARD: I just rise to state my concern with this constitutional amendment. Not that I'm against the right to bear arms because I think that's an important constitutional right that we have. But I voted against SJR 8 for the reason that I did vote against Representative Taylor's constitutional amendment. As I think that we really need to vote on those things when we're in a budget session just before we take action and put them on the ballot. And, again, I'm concerned when we vote too early and set things on the ballot we may foreclose us of doing other things that may be important then. I just also say, a concern I have is that I've been a member of the Judiciary Committee since I've been a member of this body and interim study. And we've talked about having this thing come before an interim study to look at and review, and it never has. And I'm a little concerned about doing a

bill this significant that affects such a basic constitutional right without having at least the interim study look at it. And we have no problem with having it done and looking at it during the budget session so it can go on the ballot. But I've had at least expressed to me, and I've seen some writings of people that I respect in the area of criminal law who have some concern that this may limit the policeman. And, I know, I've read Senator Hatch's statement, and I've read the contrary. I guess like Representative Merrill says, there are disagreement among lawyers. But I think it would behoove us to not pass this, to look at it during the interim, and look at it during the budget session--or, if the Governor, in fact, is going to have a special session just for constitution amendments, we can then decide which one of those items in that _____ would be the most important to consider.

MR. SPEAKER: Representative Skousen.

REP. SKOUSEN: Thank you, Mr. Speaker. In regard to the statements made by Representative Hillyard, I think the fact that 39 states have made thorough studies of this situation should set our fears at rest. These states have found that the courts have interpreted the United States Constitution where it says that the citizen's right to bear arms shall not be infringed simply means that this is a collective statement. It does not apply to the individual; in other words, the National Guard may bear arms. But they have interpreted that to mean that the private citizen does not have an inalienable right to bear arms. Thirty-nine states have come to the conclusion that, in order to protect their citizens and their right to bear

arms individually, they must have this legislation. So I think the interim studies have been carried on to the extent that we need to study them. The facts are out. I believe we should vote on them now to assure ourselves that some future legislation on the right of the private persons to carry, to have guns in his possession at home, for example, and not have the law state that, from that time on, it is unconstitutional from the State's standpoint.

MR. SPEAKER: Representative Walker.

REP. WALKER: Yes. You know, I certainly support the right to bear arms. And when I read this, I talked to several lawyers whose opinion I respect, and they had some serious questions about what it did, whether we really wanted it as written. And they, there was sufficient doubt in my mind whether we shouldn't look at it further. Certainly I believe in the right to bear arms for the individual. I believe in those rights as the Constitution gives them to us. But I would really, since we can't put it on the ballot this year, I, for one, would like to have the time to really look at it, study it, and come up with some concrete support or objections. I'm not certain whether, in the long run, I would support or reject this. But I would like the time to thoroughly study it myself so that I might know for a certainty whether the questions that were brought up by those I talked to were legitimate or not, and I certainly respect their legal minds because I was seeking advice from those who I felt had, should know. And so, I would urge you to wait on this. We have another chance to vote on it. I believe, at the present time, I'll vote "no." But maybe a year from now, I'll

vote "yes" on exactly the same legislation. But I Do need that time to study it. I Do need the time to get answers to my questions, and I would urge you to do likewise.

MR. SPEAKER: Representative Kromer.

REP. KROMER: Representatives, I urge support of this bill. I think it's very clear the issue. I think all of us have read the impressive study done by Senator Hatch on subcommittee on this issue, on defining militia as the individual citizen right to bear arms. I think we've all looked at history and seen the pitiful sight of a Warsaw ghetto where the people didn't have any arms to defend themselves and are at the mercy of the government. And I'm concerned about the future, that our liberties really lie on the right to defend those liberties. And I think we, that's a basic right for an individual to bear that arm. It doesn't just mean that our security rests in the police force or the National Guard but the individual citizens. And that's the way this country's been. And I think that's where our freedom's preserved. So I urge support of this resolution.

MR. SPEAKER: Representative Moreen.

REP. MOREEN: Thank you, Mr. Speaker. I, too, would like to rise and support this. I think that we do need to do this. This is a basic fundamental right that we've had in this country, and it's important to us that live out in the boondocks. Sometimes we feel a special need for those. And I just hope that you'll support this resolution.

MR. SPEAKER: Representative Karas.

REP. KARAS: I rise in support of this. I find it interesting that we can pass a 177-page banking bill without even reading it--pardon me for making that inference--and then take a simple 2-page resolution like this that's very clear and say that we need to study it more. I think we ought to stand up and be counted and vote for it.

MR. SPEAKER: Representative Harrison, would the sponsor yield a question?

REP. HARRISON: I'll try.

MR. SPEAKER: Would this preclude registration of handguns and Saturday night specials?

REP. HARRISON: Well, I hope, hopefully it wouldn't. My authority over here tells me "no way." Okay, as he points out, this does not specifically address registration. It simply gives us our right to bear arms for the specific things that are addressed in here. And it doesn't preclude legislation concerning concealed weapons or felons or any prohibitive person from being, those rights being taken away from them.

MR. SPEAKER: Would it be permissible for the Legislature, after passage of this constitutional amendment, to then require registration of Saturday night specials?

REP. HARRISON: He says, "Yes, if they wanted to." It was permitted.

MR. SPEAKER: Assuming that the person acquiring the Saturday night special was a law-abiding citizen and had not been convicted of a prior felony, could the Legislature prevent his acquisition of a Saturday night special or any handguns?

REP. HARRISON: If they wanted to.

MR. SPEAKER: Good. Thank you. Representative Richards.

REP. RICHARDS: Mr. Speaker and fellow representatives, I'd like to call your attention to a very important body we have, and that's called the Constitution Revision Commission. I've been on that body for six years. The Speaker's been there as well. I think one of their reasons for that commission is that these things of import that would change our constitution comes before us and we get all the input that's given to us by private citizens, by organizations, by elected officers to bring it to our attention in order that we can analyze it and come back to this body with a recommendation. This particular resolution has not been before the Constitution Revision Commission. We have ample time between now and the election of, what, two years from now. We can handle it again with a recommendation from your commission. Now if you don't want a commission, you want to bypass the commission--and certainly every legislator has the right to give us a constitutional amendment--don't forget, once you get those in, they're not amendable. It's quite a bit different than a statute. If you want to make a change later on, then you have to go through the whole process again to amend it. It would be my recommendation--I have no fault with the intent of the sponsor nor Senator Bangerter who is a very able senator--but I think, in this case, they have bypassed the Constitution Revision Commission. And I think it ought to be given back, defeated on this floor now, with no intent other than to have it further studied, and then come out to you as a constitutional

recommendation as we did with Proposition 1, 2, 3 and 4, which all passed successfully because we gave public information and did all that was necessary to make it a good bill. So I would hope that you would keep the order in place of having those people who are interested in constitutional changes to bring it to the Constitution Revision Commission that meets monthly, and, from there, we can decide whether the Legislature wants to enact a bill amending the Constitution which then is not amendable. Thank you.

MR. SPEAKER: Representative Lewis.

REP. LEWIS: Thank you, Mr. Speaker. I'm new to this process, but I, too, would take some exception to bypassing or going around the Constitution Revision Commission that we have in place. I have some concerns about the language that is currently in this resolution. I would feel very good about supporting a resolution and sending it to the vote of the people to amend our constitution to guarantee this right. I do want to see more time and more import from all the parties that are interested into this, but I would especially like to see the Constitution Revision Commission have some time to look at this. And I would like to have something that I can feel very good about supporting. There's no need to be in a rush.

MR. SPEAKER: Representative Brown.

REP. BROWN: I move previous question on the bill as stated.

MR. SPEAKER: The previous question has been called for. All in favor say "aye."

BODY: Aye.

MR. SPEAKER: Opposed.

BODY:

MR. SPEAKER: The motion carries. You may sum up, Representative Dahl.

REP. DAHL: Thank you, Mr. Speaker. I think it's very important that we realize that this, they had two committees, the hold over in the Senate, it was debated very extensively, the Senate passed it 26 to 2. As far as the Constitution Revision Commission, in all due respect to them, they're not a divine body. And next session is a budget session, and this is not a budget item. It ought to be taken care of now because we don't have time to handle these kinds of things in a short budget session. So it ought to be addressed. I can't see anyone opposing this unless they want the Legislature to proceed to make rules against it. It would not prevent us from passing laws for concealed weapons or, as I mentioned before, for those people who are prohibitive and shouldn't be having this. Unless this Legislature someday hopes to enact statutory, statutes that would effectively deprive us of these rights, then there's no reason why we shouldn't support this. And I guess I would just ask for your support. I think it's a very good bill.

MR. SPEAKER: The voting is open. It appears to the Chair that all present have voted. The voting is closed on SJR 2. And having received 61 affirmative, 9 negative votes, passes this House, has been signed by the Speaker, will be returned for the signature of the President.

Addendum VII

SENATE DEBATE ON
SENATE JOINT RESOLUTION NO. 3

March 28, 1984

?: . . . the top of second reading calendar, and I so move.

MR. PRESIDENT: Okay. It's been moved that we move SJR3 to the top of the second reading calendar. All in favor indicate by saying "aye."

BODY: Aye.

MR. PRESIDENT: Are there any opposed? So ordered. Yes, Senator Bangerter.

SEN. BANGERTER: Thank you, Mr. President. This is, SJR3 is a constitutional amendment on the individual right to keep and bear arms.

MR. PRESIDENT: Excuse me just a moment. It needs to be read in.

SEN. BANGERTER: Oh, I make a motion that SJR No. 3 be read in.

SECRETARY: Senate Joint Resolution No. 3, the right to bear arms amendment, by Senator Bangerter.

MR. PRESIDENT: Now go ahead, Senator.

SEN. BANGERTER: Now it's before us. Thank you, Mr. President. As you remember, in 1983, we passed an SJR No. 2. It was the individual right to keep and bear arms to put before the voters in November. It had some anxiety with law enforcement people, and we have spent many, many hours together trying to resolve the problem. At this particular point, you have before you the new language in SJR3, and I'm sure that you have read it several times . . .

Legislature to control the use thereof of guns. If there are any questions, I would submit to those questions. You have, Mr. President, a question on the bill.

MR. PRESIDENT: Okay, and would you like to make that motion?

SEN. BANGERTER: Yes.

MR. PRESIDENT: Oh, yes, we have a question. Yes.

SEN. SWAN: I was still turning to Senator Bangerter. Could you explain very briefly what the change is that's been made from our previous action.

SEN. BANGERTER: We have an amendment in on the previous action that would confiscate and spell out those things the Legislature could and should do. It, they were taken out and basically affixed to therein as the basic concept that you asked for last time, Senator Swan, that we leave those things up to the Legislature and let them allow the use of arms. So basically, that's all there is to it. It's self-explanatory. All the peace officers and everyone has agreed to that, Senator Swan.

SEN. SWAN: The peace officers feel that, by changing the language and not spelling out the things that you mentioned, there's less chance that something will slip through the cracks and that some loophole in law enforcement might be found.

SEN. BANGERTER: I might explain that the peace officers are thrilled with this particular bill because it allows the Legislature that prerogative of placing in statute rather than the constitution the use thereof.

SEN. SWAN: I'm going to vote for the bill, Senator, but I think the, we have to be reminded of the fact that most of us are not that convinced that we've had any problem with the present constitutional language. I think it's more a threat to the future and a worry, and maybe I'm divulging the fact that I'm not a member of NRA. But sometimes the staff and an organization have to have issues, and I think that this is certainly a very jazzy issue for a national organization to work with. And I'm not at all thrilled with some of their past performances. I remember a concealed weapons bill, and Representative Strong in the House was nailed publicly for that, and it was, I thought it was completely inappropriate. So I don't have the greatest love for some of the past performance of some of their staff.

SEN. BANGERTER: Sen. Swan, you're entitled to vote "no" and I understand your concern. Basically, that's what it is.

MR. PRESIDENT: Okay. Senator Black.

SEN. BLACK: Yes. I think we ought to now support this. I think we had some problems with law enforcement really in opposition to what they had, for Bangerter and people from NRA and law enforcement in getting together and working out the problems that they felt that they had. I do know that they did reach agreement, that the national NRA has endorsed the concept of what we have here. And I think that a bill that might have put an amendment on the ballot that would probably, because of the adverse opposition it would have received had it gotten there in its previous form. These problems have been addressed, and I believe that we now have something we can

put to the voters that we can feel good about and support. And I would urge your support for this piece of legislation.

MR. PRESIDENT: Thank you. Any other comment? Seeing none, would you like to make that motion?

SEN. BANGERTER: Mr. President. Under suspension of the rules, I would make a motion that we pass from Senate SJR No. 3 from the second to the third reading calendar up for final passage to the House.

MR. PRESIDENT: Thank you. The motion is that, under suspension of the rules, that Senate Joint Resolution be considered be correct for the second and third time and up for final passage. All in favor indicate by saying "aye."

BODY: Aye.

MR. PRESIDENT: Are there any opposed? So ordered. If you'd please call the roll.

?: Asse--Aye, Bangerter--Aye, Barlow--Aye, Barton--____, Black--Aye, Bullon--Pass, B____--Aye, Carling--Aye, Christensen--____, Cornabee--Aye, Finlansen--Aye, Flann--Aye, Matheson--Aye, McAllister--Aye. Thank you. McMullin--Aye, Monne--Aye, Overson--Aye, Sherry(?) Peterson--Aye, Lowell Peterson--Aye, Pugh--Aye. Thank you. Rogers--Aye. Thank you. Sandberg--____, Snow--Aye, Sowards--Aye, Stratford--____. Thank you. I just can't hear. Swan--Aye, Waymot--Aye, Williams--No. Thank you. Senator Barton.

SEN. BARTON: Thank you. Mr. President. Thank you. Senate Joint Resolution No. 3, having received 26 aye votes, 1 nay vote, and 2

being absent, has received a two-thirds majority and has passed this House and will be referred to the House for its, for further action.

Addendum VIII

HOUSE DEBATE ON
SENATE JOINT RESOLUTION NO. 3

March 29, 1984

MR. SPEAKER: - Representative Dahl.

REP. DAHL: Thank you, Mr. Speaker. This is the right to bear arms amendment that we passed last session to go on the ballot. I think most of you received letters. There was the peace officers, and Public Safety had some problems with that. Our attorneys and the National Rifle Association and everybody felt comfortable with it, but we didn't want to get in a conflict with them. We've sit down and had several meetings to come up with some compromise. There's some other things we'd like to have on this, but at this late date, and we are under a compromise, so the material you have in front of you is a compromise position. They are supporting this. It sets out to do what we initially set out to do last year. The Senate attacked an amendment on there last year which caused the controversy. But what we have accomplished here is that the Legislature may not take our right away to bear arms for the protection of ourself, family and property. And so, I guess, I'll just be open for any questions. I would like, I guess, to encourage no amendments at this point so that we don't have to go back to the Senate for this and we can--I would like to let you know that those individuals that worked with us have give me their word that they'll help us, whoever next year, to sponsor some legislation that will, in fact, do the things that you see on the amendment that's on your

desk that we're not going to propose.

MR. SPEAKER: Representative Christensen.

REP. CHRISTENSEN: Thank you, Mr. Speaker. Ladies and Gentlemen of the House, gun possession in the southern part of the State is just a way of life. We do it all the time. It's just part of growing up. But the concept of gun control in Utah has been here before. Now you judge how effective it was. My information tells me that the Honorable H. Jay Richards presented a bill prohibiting the sale of this type of pistol. It was the first measure that year that was produced from the body that became law, being the very first one to go to the governor to receive his signature. The sale of this dangerous article, which was then prohibited, _____ said he expressed his pleasure at such a law being enacted. Now the bill passed both houses, almost without an attempt of dissent, the only objection coming from one member who expressed himself to the effect that he considered the subject to be too trifling for a regulative action. The local paper editorialized saying, "We are gratified that this bill for the prohibition of the sale of the little implement of evil has passed and become law." This happened 100 years ago in March of 1884 and dealt with the embargo of toy pistols. Mr. Speaker, I support this amendment, this bill.

MR. SPEAKER: It doesn't mean I have to get rid of my water pistol, does it? Representative Fullmer.

REP. FULLMER: Thank you, Mr. Speaker. As Representative Dahl says, this is a compromise and I appreciate all the parties who have agreed upon this amendment. There have been a lot of things said

good, bad or indifferent about things that have happened. I think that this is a good compromise and it embodies the two things that I was concerned about in that the Legislature can still speak on the matter and there are a number of issues that must be addressed. I pledged, and I follow that pledge, that the grievances by the Utah Sport Shooting Council as far as Divisional Wildlife Resources is concerned that I would sponsor a bill to insure due process, and I will do that. We even have the bill ready, but the Governor did not want any more things on the call. And I think that we could handle that problem. Wildlife Resources even signed off on it. So I ask your support in this bill and that we can pass it and get it on the ballot.

MR. SPEAKER: Representative Walker.

REP. WALKER: I move the previous question.

MR. SPEAKER: The previous question's been called for. All in favor say "aye."

BODY: Aye.

MR. SPEAKER: Opposed.

BODY:

MR. SPEAKER: The motion carries. Do you wish to sum up?

?: No, I waive summation, thank you.

MR. SPEAKER: The voting is open. It appears to the Chair that all present have voted. Voting is closed. I'll send it Joint Resolution 3, and having received 62 affirmative and 1 negative votes, passes this House, has been signed by the Speaker. We return for the signature of the President of the Senate. Turn to Joint

Resolution 5. Don't interrupt me while I'm announcing a vote.

Having received 66 affirmative and 2 negative votes, passes this House--Let's see, did we amend that here? It's moved back to the Senate for their consideration of our amendment.

Addendum IX

Mr. Tew indicated that the amendments would appear on the November 1984 ballot as follows:

- Proposition 1 - Tangible Personal Property Tax Exemption
- Proposition 2 - Legislative Sessions
- Proposition 3 - Judicial Article Revision
- Proposition 4 - State School Fund Amendments
- Proposition 5 - Right to Bear Arms

Mr. Tew reviewed the commission's involvement with 1984 education effort on the constitutional amendments. He noted that the commission's involvement would be similar to its role in 1982. Commission discussion ensued on the commission's position concerning each of the proposals. Particular concern centered on Propositions 4 and 5 which were not the subject of commission study.

MOTION: Sen. Black moved, seconded by Mr. LeFevre, that the commission endorse Propositions 1, 2, and 3 and take a neutral position concerning Propositions 4 and 5.

Further commission discussion ensued. Discussion centered on the role of the commission in providing information to the public.

SUB. MOTION: Dr. Hickman moved, seconded by Sen. Sowards, that the commission not endorse any proposals, and provide educational material on all of the amendments. The material could note which items were the subject of commission study.

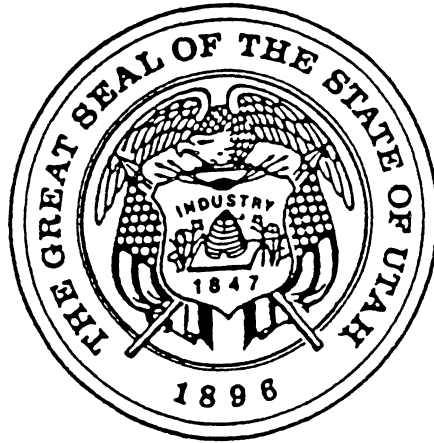
Dr. Hickman suggested that informing people only what items were studied by the commission would convey a tacit stamp of approval without getting into an actual endorsement. Sen. Sowards suggested that the same idea—that of commission approval of certain of the amendments—would be conveyed by the fact that commission members are writing on Propositions 1, 2, and 3 for the Voter Information Pamphlet. Justice Howe felt that this plan was too cautious. He noted that the commission had spend considerable study time on Propositions 1, 2, and 3, and should formally recommend their passage.

The substitute motion failed with Chairman Snow, Dr. Hickman, and Sen. Sowards voting in the affirmative, Mr. Fordham, Justice Howe, Mr. LeFevre, Mr. Mayne, Sen. Black, Rep. Richards, and Dr. Southwick voting in opposition, and Mr. Fowler, Speaker Bangarter, Mr. Hixson, Mr. Leavitt, and Mr. Memmott absent.

The main motion passed with Chairman Snow, Dr. Hickman, Justice Howe, Mr. LeFevre, Sen. Black, Rep. Richards, and Dr. Southwick voting in the affirmative, Mr. Fordham, Mr. Mayne, and Sen. Sowards voting in opposition, and Mr. Fowler, Speaker Bangarter, Mr. Hixson, Mr. Leavitt, and Mr. Memmott absent.

MOTION: Dr. Southwick moved, seconded by Rep. Richards, that the commission take no position on Propositions 4 and 5, and indicate this position was taken because the commission had not considered these proposals. The motion passed unanimously with all members marked present voting. Mr. Fowler, Speaker Bangarter, Mr. Hixson, Mr. Leavitt, and Mr. Memmott were absent.

Addendum X



Utah Voter Information Pamphlet

General Election
November 6, 1984

COMPILED BY DAVID S. MONSON, LT. GOVERNOR

IN COOPERATION WITH THE UTAH STATE LEGISLATURE
MILES 'CAP' FERRY, SENATE PRESIDENT
NORMAN H. BANGERTER, HOUSE SPEAKER

ANALYSIS BY JON M. MEMMOTT, DIRECTOR, OFFICE OF LEGISLATIVE RESEARCH AND GENERAL COUNSEL

For



Against



Proposition No. 5

RIGHT TO BEAR ARMS AMENDMENT

Vote cast by the members of the 1984 Legislature on final passage:
HOUSE (75 members). Yeas, 63, Nays, 1, Absent or not voting, 11
SENATE (29 members) Yeas, 26, Nays, 1, Absent or not voting, 2.

Official Ballot Title:

Shall Article I, Section 6, of the State Constitution be amended to state that the individual right to keep and bear arms for the security and defense of the individual, family, others, property, or for other lawful purposes shall not be infringed, but the Legislature may define the lawful use of arms.

IMPARTIAL ANALYSIS

Proposal

The Utah Constitution in Article 1, Section 6 guarantees the people the right to bear arms for their security and defense. This section also gives the legislature the authority to regulate the exercise of this right by law. The Utah Supreme Court has interpreted this section to indicate that it gives to the legislature the authority to forbid possession of dangerous weapons by those who are not citizens, who have been convicted of crimes, who are addicted to drugs, or who are mentally incompetent (*State v. Bearchia* 530 P. 2d 813 1974).

The proposed amendment defines the right to bear arms further by adding language which specifies the right as an individual right of the people to keep as well as bear arms. The revision lists the things for which keeping and bearing arms for security and defense may be used. These include: (1) self, (2) family, (3) others, (4) property, or (5) the state, and other lawful purposes.

The proposed amendment deletes the provision that allows the legislature to regulate the exercise of the right to bear arms and instead gives the legislature the right to define the lawful use of arms.

The changes in this proposed revision would not affect any of the current Utah laws which forbid the possession of dangerous weapons to criminals, drug addicts or mentally incompetent persons and other illegal use of arms now defined in statute. However, further legislation concerning the right to keep and bear arms would be limited to defining the lawful use of arms.

Effective Date

The amendment, if approved by the voters, would be effective beginning January 1, 1985.

Fiscal Effect

The proposed revision of Article 1, Section 6 will not have any significant fiscal impact.

Arguments for

Article I, Section 6 of the Utah Constitution is to be amended to read as follows:

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

The amendment specifically guarantees broad individual liberties and protects the enjoyment of those liberties from infringement. At the same time, the legislature may continue to enact laws against the misuse of arms and the police may continue to enforce such laws; enforcement would extend to seizing arms which are misused.

An individual right to keep and bear arms is guaranteed. However, convicted felons, mental incompetents, minors, and illegal aliens would not be guaranteed this right. The principle of law that such persons may be excluded from the enjoyment of the right to keep and bear arms is well-established.

Constitutionally protected arms include rifles, shotguns, pistols and revolvers, and hunting knives. The term "arms" does not extend to every conceivable weapon or instrument. Thus, weapons not commonly kept by people, such as switch-blade knives or instruments of mass destruction, for example, rockets or bombs, find no protection under this guarantee.

The right to keep constitutionally protected arms includes the right to purchase arms and ammunition and to keep arms in a state of repair.

The object or end to be attained by this right is to guarantee that arms may be kept or borne for defensive purposes. The right is not restricted just to the specified purposes. Other lawful purposes are also included. Thus, traditional purposes such as lawful hunting and lawful recreation use would also be protected.

While the bearing of arms for a constitutionally protected purpose extends to open carrying, the bearing of arms concealed may be regulated by, for example, requiring a license to carry arms concealed. However, licensing would have to be equitably administered. Furthermore, the open carrying of arms may be prohibited in places such as courtrooms, polling places, or at a public assembly.

The right to keep or bear arms for a constitutionally protected purpose may not be infringed. Thus, for example, laws banning the possession or sale of constitutionally protected arms, laws requiring a license to acquire or possess such arms, requiring the registration of such arms, or imposing special taxation on such arms would be impermissible.

The legislature retains the authority to define the lawful use of arms so as to protect the people for the misuse of arms. The types of misconduct that the legislature may forbid by defining the lawful use of arms are well-known and self-evident. Examples of such misconduct include using arms to commit robbery, carrying arms while intoxicated, using arms to harass, intimidate, or recklessly endanger someone, shooting in an unsafe place or manner, and poaching.

Vote "FOR" Proposition 5!

Senator Jack M. Bangerter
1177 East 500 North
Bountiful, Utah 84010

Representative Donna M. Dahl
2440 East 6200 South
Salt Lake City, Utah 84121

Rebuttal to

Arguments in favor of Proposition No. 5

The argument is very ill-considered. It fails to take into account the basic fact that the subject is very thoughtfully dealt with in the constitution as it now reads.

The statement lists classes of persons who are said not to be assured rights under the provision. But that is not provided in the proposed amendment itself.

The statement undertakes to identify protected arms. It is so broad as to include Saturday-night specials. It speaks in unequivocal terms which amount to constitutional guarantees.

The fundamental infirmity of the statement is its declaration that the end to be attained by the "right" is to assure that arms may be kept for defensive purposes. Obviously it is not so confined.

The statement declares that if adopted the provision would preclude legislation requiring licenses to acquire or possess arms "for a constitutionally protected purpose" and would preclude laws requiring registration. Nothing could be more opposed to the public interest. Firearms are intrinsically dangerous and as such should be registered just as, of course, are motor vehicles. We know, in the case of the latter, that registration is vitally important to law enforcement and protection of public safety. With the aid of registration responsible persons will be encouraged to exercise the requisite care, criminal activity may be prevented and persons engaged in crime may be apprehended. This applies as well to firearms.

Mr. Jefferson B. Fordham
Distinguished Professor of Law
College of Law

Arguments Against

The proposed Utah constitutional amendment as to firearms should not be approved by the voters. The present constitutional provision is quite well-considered. It recognizes a right to bear arms and, at the same time, empowers the legislature to regulate the subject. Nothing could be more evident than that organized society should be competent to protect the public safety against the unregulated availability of deadly weapons.

As the Supreme Court of the United States has made quite clear, the provisions of the Second Amendment to the Constitution of the United States concerning a right to bear arms relate to the availability of arms for citizen militia.

It would be no less than foolhardy to deny the representatives of the people adequate authority to protect the citizenry generally against the misuse of deadly weapons.

Certainly it should be clear that all of us in organized society have vital dependence upon our elected representatives to adopt reasonable measures to assure the public safety.

Vote "AGAINST" Proposition 5 as an unnecessary and unwise change in the Utah constitution!

Mr. Jefferson B. Fordham
Distinguished Professor of Law
College of Law
University of Utah
Salt Lake City, Utah 84112

Rebuttal to

Arguments against Proposition No. 5

Currently, Article I, Section 6 of the Utah Constitution not only grants a right, but allows the legislature to restrict the right. This leaves the provision open to a great deal of interpretation. Subsequently, in one recent Utah Supreme Court case dealing with this issue, the five justices wrote three different opinions as to what rights the citizens of Utah have and the extent those rights can be regulated. One of those opinions state that regulation to the point of complete prohibition is a proper exercise of legislative authority under Utah's current constitutional provision!

Therefore, Proposition 5 seeks to change the last clause of the current language from a grant of legislative authority to regulate the right to a recognition of the legislative power to define the lawful use of arms. It's a change that will not compromise the ability of the legislature to draft laws necessary to protect the populace from firearms misuse.

The amendment also acknowledges the right belongs to the individuals in society rather than the people as a whole and adds the right of keeping arms to the already recognized right to bear arms. In addition, Proposition 5 clarifies the reasons for keeping and bearing arms to include not only security and defense, but other lawful purposes such as hunting and target shooting.

Proposition 5 is needed to provide this and future generations of Utah citizens with a strong, positive guarantee of their individual right to keep and bear arms.

VOTE "FOR" Proposition 5!

Senator Jack M. Bangerter
1177 East 500 North
Bountiful, Utah 84010

Representative Donna M. Dahl
2440 East 6200 South
Salt Lake City, Utah 84121

**COMPLETE TEXT OF PROPOSITION NO. 5
RIGHT TO BEAR ARMS AMENDMENT**

A JOINT RESOLUTION OF THE LEGISLATURE PROPOSING TO AMEND THE UTAH CONSTITUTION; RELATING TO THE RIGHT TO BEAR ARMS; SUBSTITUTING THIS RESOLUTION FOR A RESOLUTION PASSED AT THE GENERAL SESSION OF THE 45TH LEGISLATURE; AND PROVIDING AN EFFECTIVE DATE.

THIS RESOLUTION PROPOSES TO AMEND ARTICLE I, SEC 6, OF THE UTAH CONSTITUTION, AND REPEALS AND WITHDRAWS ENROLLED COPY S.J.R. NO. 2 PASSED BY THE GENERAL SESSION OF THE 45TH LEGISLATURE AND REPLACES IT WITH THIS RESOLUTION.

Be it resolved by the Legislature of the State of Utah, two thirds of all members elected to each of the two houses voting in favor thereof:

Section 1 It is proposed to amend Article I, Sec. 6, of the Utah Constitution, to read:

Sec. 6. The individual right of the people [~~have the right~~] to keep and bear arms for [~~their~~] security and defense [~~; but~~

~~the Legislature may regulate the exercise of this right by law] of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.~~

Section 2. Enrolled Copy S.J.R. No. 2 passed by the General Session of the 45th Legislature of the state of Utah is repealed and withdrawn in its entirety from the next general election.

Section 3. The lieutenant governor is directed to submit in lieu thereof this proposed amendment to the electors of the state of Utah at the next general election in the manner provided by law.

Section 4. If approved by the electors of the state the amendment proposed by this joint resolution shall take effect January 1, 1985.

Addendum XI

The Individual Right to Bear Arms: An Illusory Public Pacifier?

I. INTRODUCTION

In 1982 the Utah Supreme Court interpreted the second amendment to the United States Constitution¹ as providing a "collective"² rather than an "individual"³ right to bear arms.⁴ Relying on one of the few United States Supreme Court decisions interpreting the second amendment,⁵ the Utah court justified a state statute⁶ that prohibited aliens from possessing firearms as a valid exercise of state police power.⁷ By concluding that the second amendment provides a collective right to bear arms, the court opened the door for a similar interpretation of article I section 6 of

1. "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." U.S. CONST. amend. II.

2. The "collective" view essentially interprets the right to bear arms as the right of a state to maintain a militia, or as the right to prevent the impairment of a state's active militia. Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 67-68 (1983); see *infra* notes 21-22 and accompanying text.

3. The term "individual" is used in this Comment to mean that the right to bear arms guarantees the individual the right to keep and bear arms to perform militia duties, to deter governmental oppression, to maintain public order and for self-defense. Dowlut, *supra* note 2, at 67.

4. *State v. Vlacil*, 645 P.2d 677, 679 (Utah 1982).

5. *United States v. Miller*, 307 U.S. 174 (1939).

6. *UTAH CODE ANN.* § 76-10-503(1) (1978) provides in part:

Any person who is not a citizen of the United States . . . shall not own or have in his possession or under his custody or control any dangerous weapon as defined in this part. Any person who violates this section is guilty of a class A misdemeanor, and if the dangerous weapon is a firearm or sawed-off shotgun he shall be guilty of a felony of the third degree.

7. *Vlacil*, 645 P.2d at 679-80. The court reasoned that the "Second Amendment right is not absolute" and that "an individual's right to bear arms is subject to the police power" of the states. *Id.* (citing *Hardison v. State*, 84 Nev. 125, 129, 437 P.2d 868, 871 (1968)). Moreover, Utah precedent had established that prohibiting aliens from possessing firearms was a proper exercise of police power by the state. See *State v. Beorchia*, 530 P.2d 813, 814-15 (Utah 1974). The court affirmed the finding in *Beorchia* that "the Legislature had sufficient power" under the Utah Constitution "to enact the statute in question." *Vlacil*, 645 P.2d at 680 (citing *Beorchia*, 530 P.2d at 814). Despite the defendant's contention that the Utah Constitution gives the legislature the right to "regulate" but not "prohibit" the possession of firearms by any class, the court concluded that the statute safeguards the public peace and security because the legislature determined that the "possession of firearms by aliens was harmful." *Vlacil*, 645 P.2d at 680.

the Utah Constitution, which at that time read, "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."

On November 6, 1984, Utah voters attempted to close the door to a possible collective right interpretation of the Utah constitutional right to bear arms by voting to amend article I section 6. The amendment states, "The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the Legislature from defining the lawful use of arms."⁸

The National Rifle Association ("NRA"), the motivating force behind the amendment, argues that the amendment prohibits "laws banning the possession or sale of constitutionally protected arms, laws requiring a license to possess such arms, requiring the registration of such arms, or imposing special taxation on such arms."⁹ At a minimum, the NRA argues that the Utah amendment guarantees the right to every law abiding citizen to possess and to bear constitutionally protected weapons in nonthreatening situations.¹⁰

8. An examination of the language and circumstances surrounding passage of the right to bear arms amendment indicates that an individual right was intended. The right was formerly given to the "people" and now is given to the "individual." Proponents of the amendment claimed that the new amendment certifies that "[a]n individual right to keep and bear arms is guaranteed." Utah Voter Information Pamphlet 28 (1984). Proponents further argued that the amendment "specifically guarantees broad individual liberties and protects the enjoyment of those liberties from infringement." *Id.* The National Rifle Association ("NRA") was concerned primarily with the word "regulate" in the former amendment. Utah was the only state that granted the legislature the power to "regulate" arms. Proponents of the amendment argued that this word eventually could lead to a complete arms prohibition. Dowlut, *Utah's New Guarantee to Keep and Bear Arms: Development and Analysis 5* (unpublished manuscript, copy on file with author) (Mr. Dowlut is General Counsel for the NRA).

The NRA also believes that the amendment was necessary to make the Utah Constitution conform with what the NRA claims is an individual right to bear arms under the second amendment of the United States Constitution. Telephone interview with Dave Warner, NRA spokesperson, Washington, D.C. (Mar. 25, 1986); telephone interview with George Myfeler, NRA field representative, Colorado Springs, Colorado (Mar. 26, 1986) [hereinafter cited as Myfeler interview]. The NRA relies heavily on a Senate Subcommittee report to support its view that the second amendment guarantees an individual right to bear arms. See STAFF OF SENATE COMM. ON THE JUDICIARY, SUBCOMM. ON THE CONST., 97th CONG., 2d SESS., *THE RIGHT TO KEEP AND BEAR ARMS* (Comm. Print 1982).

9. Dowlut, *supra* note 8, at 18.

10. Although NRA representatives seem to disagree, it appears that the constitutional limit, in their opinion, hinges more on how a weapon is used than on where or when it is used. For example, George Myfeler, NRA field representative for several Western states, sees nothing wrong with a person carrying a rifle through a public shopping mall, as long as

On the other hand, some opponents of the amendment argued that the amendment was a waste of taxpayers' time and money because it did not change anything.¹¹ Others claimed that the amendment would give "every vigilante group free reign in justifying open use of modern weapons."¹²

The scope and implications of the new individual right to bear arms are unclear. What is the scope of an individual's expressly guaranteed right to bear arms for "security and defense"? What are the other "lawful purposes" for which an individual's right to bear arms are immune from state infringement? Finally, to what extent may the legislature regulate arms under the new amendment? The text and legislative history of the amendment provide little guidance on these questions.¹³ Consequently, the Utah courts

the carrier does not threaten anyone with it. Recently, however, a Colorado off-duty policeman shot his wife's attorney in a courtroom. The NRA did not oppose a subsequent ordinance banning all weapons from courtrooms. Myfeler interview, *supra* note 8.

11. Salt Lake Tribune, Oct. 10, 1984, at A16, col. 1. The Tribune editorial claimed that "Proposition 5 [the right to bear arms amendment] is a total waste of public time and money. No showing has ever established the slightest need for this change. Utah has gotten along fine with its existing acknowledgment of a person's right to bear arms for reasonable purposes." *Id.* The editorial claimed that "[t]he hated word 'regulate' may be missing, but the legislature would lose none of its powers to prevent the perilous building of personal arsenals. The right to bear arms in Utah would be no more absolute than it is now." *Id.*

12. Salt Lake City television station KSL, editorial comment (Oct. 22, 1984). KSL claimed that

Proposition Five would considerably broaden the wording of the constitution and would cloud the issue of the right to bear arms It takes away the power to regulate and gives lawmakers only the power to define lawful use of arms.

The dangers of such freewheeling language are obvious. It would give every vigilante group free reign in justifying open use of modern weapons. And it would deny the elected representatives of the people the power to control such dangerous activities.

Id.

Despite media opposition, the amendment always had strong public support. See, e.g., Wehh, *We're About Evenly Split on Proposed Cable Law*, *Deseret News*, Aug. 12, 1984, at A1, col. 3 (indicating overwhelming public support of the amendment). Eventually, 370,668 voters favored the amendment, and 231,413 voted against it. Dowlut, *supra* note 8, at 1.

13. There is no official legislative history on the amendment as it passed the legislature in its final form. The 1984 amendment passed through the legislature with only two dissenting votes. There was no debate in either the House or Senate on the amendment.

The lack of official history could lead one to believe that the amendment passed without controversy. That was not the case. Behind the scenes work to amend the constitution began in 1982. Senator Jack Bangorter first proposed that the amendment 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." Dowlut, *supra* note 8, at 6; interview with Alan Carver, Legislative Chairman of the Utah State Rifle and Pistol Ass'n, Chairman of the Utah Shooting Sports, in Salt Lake City, Utah (Apr. 1, 1986) [hereinafter cited as Carver interview].

and the legislature are faced with the task of giving content to a constitutional right that is void of Utah precedent and legislative history. This Comment will address this dilemma by examining the history of the right to bear arms under federal law, and more importantly, by examining other state laws that provide an individual

In a memorandum circulated throughout the legislature, Professor Ronald N. Boyce claimed that the Bangerter amendment would "put the legislature in a straightjacket and make the legislature unable to respond to unforeseen needs to control the persons who can keep arms." Memorandum to William R. Hyde from Ronald N. Boyce I (Jan. 18, 1983) (copy on file with author). Professor Boyce believed the amendment was "dangerously unwise." He claimed it could "significantly undermine law enforcement and threaten society, not preserve it." *Id.*

Senator Fred Finlason successfully moved to amend the original proposal with the following clause:

[B]ut this provision shall not prevent the passage of laws to govern the carrying of concealed weapons, nor prevent passage of 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.

Dowlut, *supra* note 8, at 6, UTAH SENATE JOURNAL 460 (Feb. 11, 1983). In this form, the amendment passed the Senate by a 26-2 vote, then passed the House by a 61-9 vote. Dowlut, *supra* note 8, at 6 (citing House Clears Amendments on Right to Bear Arms, *Uniform Car Tax*, Salt Lake Tribune, Mar. 8, 1983, at A4, col. 1, *Legislative Calendar*, Deseret News, Mar. 8, 1983, at A1, A2, col. 1).

The NRA recognizes a tactical error in introducing the amendment in the 1983 legislative session because Utah voters could not vote on it until fall of 1984. Carver interview, *supra*. In the ensuing year, much debate surfaced over the language of the amendment. See, e.g., *Arms Bill Sponsors to Explain Proposal*, Deseret News, Apr. 3, 1983, at B11, col. 1; *Speak Out: The Right to Keep and Bear Arms*, Deseret News, June 5, 1983, at A21, col. 1; *Lauver: Ex Policeman Agrees, But Not on Gun Amendment*, Salt Lake Tribune, Dec. 2, 1983, at B8, col. 1; *Parker, Gun Amendment Needs Review, Adversers Report*, Salt Lake Tribune, Mar. 21, 1984, at B1, col. 5; *Pusey, Critics and Proponents Air Views on Amendment Hills*, Deseret News, Mar. 23, 1984, at B15, col. 1; *Bates, Debate Flares Over Arms Amendment*, Salt Lake Tribune, Mar. 24, 1984, at B1, col. 1.

Because of the possible problems with the amendment, Governor Scott M. Matheson recalled the amendment before the 1984 legislature. Of particular concern was the question whether police officers could "seize" weapons in dangerous circumstances. The Finlason amendment prohibiting "confiscation" was viewed as possibly prohibiting seizure. Carver interview, *supra*.

Therefore, to clarify this issue, the amendment was streamlined to its final version. The final language was settled on in a meeting between Senator Bangerter, Representative Donna Dahl, law enforcement representatives, and Alan Carver of the Utah Shooting Sports Council. *Id.*

Mr. Carver argues that the intent of the words, "but nothing herein shall prevent the legislature from defining the lawful use of arms," was not meant to limit the preceding clause. The right to bear arms, Carver claims, is absolute in defense of self, family, others, property, the state, and for "other lawful purposes." The last phrase was adopted only to allow the legislature to define "other lawful purposes," not to emasculate any right guaranteed by the preceding phrase. Mr. Carver claims that legislative history of the clause's purpose may have been purposely kept out of the official record to allow such an emasculation. *Id.*

right to bear arms.¹⁴

II THE RIGHT TO BEAR ARMS UNDER THE SECOND AMENDMENT

Utah's right to bear arms amendment was fueled by debate in recent years over an individual's right to possess firearms.¹⁵ The debate has centered largely on whether the second amendment to the United States Constitution guarantees a collective or an individual right to bear arms.¹⁶ An individual right generally refers to one's right to bear arms to perform militia duties, to deter governmental oppression, to maintain public order, and to protect one's self.¹⁷ This view is endorsed by a minority of legal scholars¹⁸ but is espoused by a majority of the populace that generally opposes the idea of controlling guns.¹⁹ The collective view essentially limits the right to bear arms to the right of a state to maintain a militia.²⁰ The collective position is supported by a majority of lawyers and

14 Examining state law is "more important" than relying on the history of the second amendment because the weight of authority interprets the second amendment as providing a collective right to bear arms, see *infra* notes 21-22, and because state constitutions play an increasingly important role in judicial review. For an excellent discussion of this evolution, see Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984).

15 See, e.g., Morganthau, *A Goetz Backlash*, NEWSWEEK, Mar. 11, 1985, at 50-53; Press, *A Very Rough Justice*, NEWSWEEK, Mar. 11, 1985, at 54. See generally Note, *Quilici v. Village of Morton Grove: Ammunition for a National Handgun Ban*, 32 DEPAUL L. REV. 371, 371-84 (1987) (recounting history of the most renowned firearm controversy). In *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983), the Seventh Circuit upheld a city ordinance that banned both the sale and possession of handguns. The *Morton Grove* decision launched a national debate on an individual's right to bear arms.

16 For a list of articles debating this issue, see *infra* notes 18, 21.

17 See *supra* note 3.

18 See, e.g., Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31, 50-53 (1976); Dowlut, *supra* note 2, at 100-01; Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63, 73-74 (1982); Hardy & Stimpoly, *Of Arms and the Law*, 51 CHI.-KENT L. REV. 62, 66-79 (1974); Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 405-06 (1960); Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 244-57 (1983); Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285, 305-14 (1983); Sprecher, *The Lost Amendment*, 51 ABA J. 554, 557 (1965).

19 In a 1975 national poll asking whether "the right to keep and bear arms applies to each individual citizen or only to the National Guard," 70% of the respondents favored the individual right alternative. Another 3% believed the second amendment applied to both the individual and the National Guard. 121 CONN. REC. 42, 112 (1975). In a 1978 poll that asked, "Do you believe the Constitution of the United States gives you the right to keep and bear arms?" 87% of the respondents responded affirmatively. DECISION MAKING INFORMATION ATTITUDES OF THE AMERICAN ELECTORATE TOWARD GUN CONTROL (1978) (both polls cited in Kates, *supra* note 18, at 206-07 n.11).

20 See *supra* note 2.

law professors²¹ and is endorsed by the American Bar Association.²²

A. Supreme Court Decisions

The second amendment reads, "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."²³ The United States Supreme Court has had but four occasions to interpret the second amendment.²⁴ In none of these cases did the Court expressly determine whether the second amendment provides an individual or

21 See, e.g., Feller & Gotting, *The Second Amendment: A Second Look*, 61 NW U L REV 46, 67-70 (1966); Jackson, *Handgun Control: Constitutional and Critically Needed*, NC CENTRAL LJ 189, 197 (1977); Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CIL-KENT L REV 148, 166-67 (1971); Rohrer, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH UL REV 53, 77-80 (1966); Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST LQ 961, 1000-01 (1975); Note, *The Right to Keep and Bear Arms*, 26 DRAKE L REV 423, 444 (1977).

22 AMERICAN BAR ASSOCIATION POLICY BOOK (Aug. 1975), Kates, *supra* note 18, at 207 n 14. Even the American Civil Liberties Union ("ACLU") denies that the second amendment creates an individual right to bear arms. The ACLU established the following policy:

The setting in which the Second Amendment was proposed and adopted demonstrates that the right to bear arms is a collective one existing only in the collective population of each state for the purpose of maintaining an effective state militia. The ACLU agrees with the Supreme Court's long standing interpretation of the Second Amendment that the individual's right to bear arms applies only to the preservation of efficiency of a well regulated militia. Except for lawful police and military purposes, the possession of weapons by individuals is not constitutionally protected. Therefore there is no constitutional impediment to the regulation of firearms.

ACLU SUMMARY (June 14-16, 1980) (as cited in Kates, *supra* note 18, at 207 n 15).

This Comment will not attempt to settle the collective versus individual right debate. Whether one believes that the second amendment provides an individual right or a collective right to bear arms, the Utah amendment providing an individual right is, nevertheless, a valid exercise of the state's authority to adopt a constitution more broad than the federal constitution. If an individual right is provided by the second amendment, the Utah provision merely confirms that right for Utah citizens. On the other hand, if the second amendment provides a collective right, the weight of authority indicates that states retain the right to regulate arms, which allows an individual state guarantee to keep and bear arms. See *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (second amendment only protects individuals from being disarmed by the federal government); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876) (second amendment shall not be infringed by Congress); *Commonwealth v. Davis*, 369 Mass. 886, 343 N.E.2d 847, 850 (1976) (second amendment inhibits only the national government, not the state government); *Harris v. State*, 83 Nev. 404, 432 P.2d 929, 930 (1967) (second amendment applies only to the federal government and does not restrict state action).

23 U.S. CONST. amend. II.

24 *United States v. Miller*, 307 U.S. 174 (1939); *Miller v. Texas*, 153 U.S. 536 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1876).

collective right to bear arms.²⁵ In 1939 the second amendment received its last and most thorough treatment.²⁶ In *United States v. Miller* the Supreme Court upheld indictments under the National Firearms Act for possession of an unregistered sawed-off shotgun.²⁷ The defendant argued that the Firearms Act violated his constitutional right to bear arms by prohibiting possession of a sawed-off shotgun. The Court rejected this argument, stating that second amendment protections only apply to those weapons that bear "some reasonable relationship to the preservation or efficiency of a well regulated militia."²⁸ The Court further implied that the second amendment guarantees only a collective right to bear arms by stating it exists for the "obvious purpose" of "organizing, arming, and disciplining, the Militia."²⁹

Even though the federal government has a comprehensive firearm regulatory scheme,³⁰ the Supreme Court has had few occasions to interpret the second amendment. Challenges to federal laws in lower courts often meet a quick death because there is no showing that the laws obstruct "the preservation or efficiency of a well regulated militia."³¹ Thus the generally recognized collective right stance taken by the Supreme Court³² has precluded federal case

25 *United States v. Miller*, 307 U.S. 174, 178 (1939) (upholding the constitutionality of an act prohibiting sawed off shotguns because the second amendment was made for the "obvious purpose" of "organizing, arming, and disciplining, the Militia"); *Miller v. Texas*, 153 U.S. 535, 538 (1894) (upholding a conviction under a Texas statute prohibiting the carrying of a pistol on a public street because the second amendment has "no reference whatever to proceedings in state courts"); *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (hinting that the second amendment provides a collective right by stating that "the States cannot prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security"); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876) (stating that the second amendment "is one of the amendments that has no other effect than to restrict the powers of the national government").

26 *United States v. Miller*, 307 U.S. 174 (1939).

27 *Id.* at 175.

28 *Id.* at 178.

29 *Id.*

30 See e.g., 26 USC §§ 5801-5862 (1982), 18 USC §§ 921-928 (1982).

31 *United States v. Warren*, 530 F.2d 103, 106 (6th Cir.), cert. denied, 426 U.S. 948 (1976); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974); *Cody v. United States*, 460 F.2d 14, 37 (8th Cir.), cert. denied, 409 U.S. 1010 (1972); *United States v. Synnes*, 438 F.2d 764, 772 (8th Cir. 1971), vacated on other grounds, 404 U.S. 1009 (1972); *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942).

32 Federal courts have relied on Supreme Court holdings to validate the Federal Firearms Act, 18 USC §§ 900-909 (1964) (repealed 1968), and the National Firearms Act, 26 USC §§ 5801-5862 (1982). See *United States v. Adams*, 11 F. Supp. 216, 219 (S.D. Fla. 1975) (upholding the National Firearms Act and claiming that the second amendment "re-

law prescribing the scope of an individual right to bear arms.

III THE INDIVIDUAL RIGHT TO BEAR ARMS UNDER STATE CONSTITUTIONS

One point made clear by the United States Supreme Court is that the second amendment is only a limitation on the power of the national government and does not restrict the states' ability to control arms.³³ Thus, in the absence of a state constitutional guarantee, a state's ability to regulate arms is limited only by the equal protection and due process requirements of the United States Constitution. State authority to regulate arms stems from the state's police power,³⁴ i.e., the power to enact laws protecting the public health, safety, morals, and general welfare.³⁵ The sole limitation on regulations enacted under a state's police power is the idea of reasonableness: "[B]oth the goals of legislation and the means chosen to achieve those goals must be reasonable in light of the public welfare."³⁶ Legislation is rarely invalidated as unreasonable, however, because courts generally defer to the legislative determination of the means needed to protect the public welfare.³⁷ Therefore, states without arms guarantees appear free to enact a broad range of firearms regulations.

Thirty-nine states have constitutional provisions that guarantee the right to bear arms.³⁸ Seventeen of those provisions contain

fers to the militia, a protective force of government, to the collective body and not individual rights"), *United States v. Tot*, 28 F. Supp. 900, 903 (D. N.J. 1939), *rev'd on other grounds*, 319 U.S. 463 (1943) (upholding the Federal Firearms Act and also claiming that the second amendment provides a collective right only applicable against the federal government).

33 See *supra* note 25.

34 Note, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U. Chi. L. Rev. 185, 187 (1970).

35 *Id.* "[A]lthough the federal government is one of enumerated powers, the state governments generally have plenary authority to act except where restricted by their constitutions." *Id.* at n.13 (citing *T.M. COOLEY CONSTITUTIONAL LIMITATIONS* 9 (1871)).

36 Note, *supra* note 34, at 188, *see, e.g., George v. Oren Ltd. & Assocs.*, 672 P.2d 732, 737 (Utah 1983) ("[I]n the exercise of its power, a state can enact regulations or laws reasonably necessary to secure the health, safety, morals, comfort or general welfare of the community").

37 Note, *supra* note 34, at 188 (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)), *see, e.g., Bastian v. King*, 661 P.2d 953 (Utah 1983) "It is the power and responsibility of the Legislature to enact laws to promote the public health, safety, morals and general welfare of society, and this Court will not substitute our judgment for that of the Legislature with respect to what best serves the public interest." *Id.* at 956 (citation omitted).

38 Dowlut, *supra* note 2, at 102-05 app. (citing the state provisions guaranteeing a right to bear arms).

language that suggests an individual rather than a collective right to bear arms.³⁹ Stated purposes for securing an individual right to bear arms, however, differ significantly among state constitutions. Illinois simply provides that "the right of the individual citizen to keep and bear arms shall not be infringed."⁴⁰ Utah, on the other hand, provides an individual right for "security and defense of self, family, others, property, or the state, as well as for other lawful purposes."⁴¹ A few state constitutions prescribe the regulating authority of the legislature. For example, Texas allows the legislature "to regulate the wearing of arms, with a view to prevent crime."⁴² Similarly, Utah provides that "nothing . . . shall prevent the legislature from defining the lawful use of arms."⁴³

Unlike the second amendment, state right to bear arms provisions are often interpreted and provide insight on the scope of Utah's new individual right to bear arms. The formulation of a uniform "test" by which to determine the validity of regulations in states with individual arms provisions would be convenient at this point. Unlike the "reasonableness" test employed in states without arms guarantees, however, a test to apply when an individual right exists is not readily available. This problem is a result of different stated purposes and regulatory abilities under each state provision. Essentially, however, three approaches are available to determine the validity of state statutes. First, many statutes can be upheld by referring directly to the language of the constitutional provision.⁴⁴ Second, the constitutionality of regulations can hinge on a "balancing of the public benefit to be derived from the regulation against the degree to which it frustrates the purposes of the provision."⁴⁵

39 See *infra* app. at pp. 778-79 (listing of state constitutional provisions guaranteeing an individual right to bear arms). The key phrases indicating that an individual right was intended include "every [each] [individual] citizen," "no person" and "individual right."

40 ILL. CONST. art. I, § 22.

41 UTAH CONST. art. I, § 6.

42 TEX. CONST. art. I, § 23 (emphasis added).

43 UTAH CONST. art. I, § 6.

44 For example, the constitutions of Colorado, Louisiana, Mississippi, Missouri, Montana and New Mexico specifically disavow a right to carry concealed weapons. See *infra* app. at pp. 778-79.

45 Note, *supra* note 34, at 202-03 (citing cases that uphold regulations that do not impair the purpose of the second amendment to maintain a state militia).

The balancing approach suggests a "reasonableness" type test by requiring a weighing of the public benefit versus the private harm resulting from the regulation. This test may be a recognition of the idea that a constitutional guarantee of rights does not place the exercise of these rights beyond the police power. See *State v. Rathbone*, 110 Mont. 225, 100 P.2d 86, 92 (1940) (questioning the constitutionality of a statute prohibiting the killing of game out of season and stating that "the operation of the police power is necessarily in most instances

Third, reference to the historical purposes for assuring a right to bear arms is helpful to assess the validity of state statutes in light of evolving historical reasons for bearing arms. Generally recognized historical purposes for assuring a right to bear arms include maintaining a militia,⁴⁶ deterring governmental oppression,⁴⁷ and

an infringement of private rights, but in the exercise of such power, property and individual rights may be injured or impaired only to the extent reasonably necessary to preserve the public welfare").

The balancing test also requires analysis of the stated purposes for providing an individual right to bear arms. This necessarily requires a determination of whether the stated purposes are as strong a reason today to grant an individual right to bear arms as they were when the provision was adopted. When no stated purposes are provided, reference to historical purposes is helpful. See *infra* notes 46-48.

46. The colonial distaste for standing armies led to widespread belief in individual possession of weapons. Further, the colonies could not afford to maintain a regular army. These factors resulted in a militia consisting of all "able bodied" men. Possession and familiarity with firearms was a necessity when the militia was called into action. See Kates, *supra* note 18, at 214-15; Malcolm, *supra* note 18, at 290-95; United States v. Miller, 307 U.S. 174, 179 (1939).

47. Colonists viewed a standing army as facilitating governmental oppression. Standing armies had been used by England to intimidate and control the colonies. Weatherup, *supra* note 21, at 982-84. In 1774 the Continental Colonies outlawed a "standing army in these colonies, in times of peace, without the consent of the legislature of that colony." R. PERRY & J. COOPER, *SOURCES OF OUR LIBERTIES* 288 (1959). This concern was reflected in all the state constitutions framed during the Revolutionary War. Many of the states' provisions were similar to Virginia's:

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; 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.

R. PERRY & J. COOPER, *supra*, at 312. Other states' statutes specifically referred to a "right to bear arms." Pennsylvania's declared, "That the people have a right to bear arms for the defense of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up . . ." *Id.* at 330. Thus, prohibiting standing armies and granting a "right to bear arms" was seen as a method of keeping the power of government in check.

After the Revolution, the need for a stable and organized government grew. One of the main issues debated at the Constitutional Convention was the creation of a national army. Weatherup, *supra* note 21, at 984-95. Many feared that a national army could gain enough strength to impose its will on the states and the people. *Id.* at 989, 991 (quoting James Madison, a strong opponent of a national army). A compromise was eventually struck that allowed the federal government to maintain and regulate a standing army while giving the states authority over the militia except when it was called into federal service. This result appears in article I section 8 of the United States Constitution:

To make Rules for the Government and Regulation of the land and naval Forces;

. . . .

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Not forgotten during the debate over the balance of power between the states and the

defending one's self.⁴⁸ The following sections examine regulations upheld under state individual right provisions, and apply the three approaches to determine the scope of the individual right to bear arms under Utah's new amendment.

A. Place and Manner Restrictions

A wide variety of laws restricting the place and manner in which firearms may be carried have been upheld in states guaranteeing an individual right. Among the most common regulations upheld are prohibitions against carrying concealed weapons. Several state constitutions guaranteeing an individual right expressly disavow a right to carry concealed weapons.⁴⁹ In other individual right states, statutes that prohibit carrying concealed weapons have been upheld as valid exercises of state power.⁵⁰

A few individual right states prohibit any carrying of certain weapons. A Texas statute prohibits a person from "intentionally, knowingly, or recklessly" carrying a "hand-gun, illegal knife, or a club."⁵¹ Such an act, ordinarily a class A misdemeanor, is a third degree felony if it takes place on any premises where alcoholic beverages are sold.⁵² This regulation has been upheld as a valid exercise of legislative authority, enacted "with a view to prevent crime."⁵³ Connecticut forbids a person from carrying a "pistol or

federal government was the issue of the balance of power between the people themselves and the new government. Even though the Constitution was ratified, the issue of a government militia was not resolved until passage of the second amendment.

48. The origin of the self-defense purpose for bearing arms is unclear. Blackstone recognized a relation between possession of arms and self-defense, although the laws of England greatly controlled the right to bear arms. Rohner, *supra* note 21, at 62 (citing Joseph Story, who claimed that the English right to bear arms was "more nominal than real, as a defensive privilege"). A sounder justification for the initial recognition of self-defense as a reason to bear arms is the American frontier experience, which led to a dependence on guns for survival. Note, *supra* note 34, at 192-93.

49. The Colorado, Louisiana, Mississippi, Missouri, Montana, and New Mexico constitutions specifically deny the right to carry concealed weapons. See *infra* app. at pp. 778-79.

50. See *State v. Reid*, 1 Ala. 612 (1840); *People v. Graves*, 23 Ill. App. 3d 782, 320 N.E.2d 95 (1974), *aff'd*, 62 Ill. 2d 393, 342 N.E.2d 371 (1976); *Ex parte Thomas*, 21 Okla. 770, 97 P. 260 (1908); *State v. Kelley*, 36 Wash. 2d 772, 220 P.2d 342 (1950); see also ARIZ. REV. STAT. ANN. § 13-3102 (Supp. 1985) ("person commits misconduct involving weapons by . . . [c]arrying a deadly weapon except a pocket knife concealed on his person").

51. TEX. PENAL CODE ANN. § 46.02 (Vernon 1974).

52. *Id.*

53. *Roy v. State*, 552 S.W.2d 827, 830 (Tex. Crim. App. 1977); *Collins v. State*, 501 S.W.2d 876, 878 (Tex. Crim. App. 1973); *Masters v. State*, 653 S.W.2d 944, 946-47 (Tex. Ct. App. 1983); see also *Clark v. State*, 527 S.W.2d 292, 294 (Tex. Crim. App. 1975) (upholding constitutionality of provision increasing the degree of the crime for carrying a weapon on premises whereon alcohol is sold).

revolver upon his person" without a permit, unless done within one's "dwelling house or place of business."⁵⁴ Arrests and seizures of weapons under this statute have also been upheld in the face of the Connecticut Constitution, which provides that "[e]very citizen has a right to bear arms in defense of himself and the state."⁵⁵

Regulations prohibiting weapons on certain premises also are upheld frequently. Such prohibitions preclude carrying weapons in "any casino, bar, bank, cabaret, theater, park, school or playground;"⁵⁶ during any "demonstration being held at a public place;"⁵⁷ in "any public establishment or [while] attending any public event;"⁵⁸ at an "election polling place on the day of any election;"⁵⁹ "within any building in which . . . the general assembly, . . . a legislative hearing . . . or official offices of any member, officer, or employee of the general assembly are located;"⁶⁰ "in any place which is licensed to sell intoxicating beverages;"⁶¹ and "on the campus, college or school grounds, or within two miles thereof."⁶²

The above list is not exhaustive⁶³ and indicates that an indi-

The application of this section is somewhat uncertain, however, because of confusion over what constitutes "carrying." Compare *Summerville v. State*, 301 S.W.2d 913, 913 (Tex. Crim. App. 1957) (pistol in glove compartment of car not in "possession" of defendant), with *Courtney v. State*, 424 S.W.2d 440, 441 (Tex. Crim. App. 1968) (weapon in the glove compartment is "on or about" the person).

The terms handgun, illegal knife, and club are statutorily defined. TEX. PENAL CODE ANN. § 46.01 (Vernon 1974 & Supp. 1986).

54. CONN. GEN. STAT. § 29-35 (1985). Exceptions are allowed for peace officers, sheriffs, parole officers, federal marshals, or law enforcement agents, and members of the armed forces when such people are in pursuit of their official duties. Other exemptions apply for the carrying of a pistol or revolver incidental to required travel. *Id.*

55. CONN. CONST. art. I, § 15. See *State v. Williams*, 157 Conn. 114, 249 A.2d 245 (1968) (upholding conviction for carrying a pistol without a permit), *cert. denied*, 395 U.S. 927 (1969), see also ILL. ANN. STAT. ch. 38, § 24-1(1) (Smith-Hurd Supp. 1986) (prohibiting the carrying of any "bludgeon, black jack, slung shot, sand club, sand bag, metal knuckles, throwing star, or any knife, commonly referred to as a switchblade knife"), *State v. Brown*, 173 Conn. 254, 377 A.2d 268, 271-72 (1977) (requiring the state to show that pistol meets a statutory definition of being less than twelve inches in length).

56. *In re Dubois*, 84 Nev. 562, 445 P.2d 354, 356 (1968) (upholding a conviction for violation of a Reno city ordinance).

57. ALA. CODE § 13A-11-59(b) (1982). "Public place" is defined as "[a]ny place to which the general public has access and a right to resort for business, entertainment or other lawful purpose." *Id.* § 13A-11-59(a)(4).

58. ARIZ. REV. STAT. ANN. § 13-3102(A)(8) (Supp. 1985).

59. *Id.* § 13-3102(A)(9).

60. COLO. REV. STAT. § 18-12-105(1)(c) (1973).

61. ILL. ANN. STAT. ch. 38, § 24-1(8) (Smith-Hurd Supp. 1986).

62. MISS. CODE ANN. § 97-37-17 (1972).

63. See, e.g., OKLA. STAT. ANN. tit. 21, §§ 1272.1, 1277 (West 1983) (prohibiting possession of weapons "in any establishment where beer or alcoholic beverages are consumed" and

vidual right state can prohibit carrying or possessing weapons in virtually any public area. The justification typically advanced for upholding such regulations is that states and communities have a strong interest in deterring crime.⁶⁴ This justification, however, is advanced principally by Texas courts, where the right to bear arms guarantee specifically empowers the legislature to enact provisions "with a view to prevent crime."⁶⁵ States where case law is currently lacking, however, may appropriately rely on the balancing test to uphold place and manner restrictions. A court could determine that the public benefit derived from prohibiting weapons in courtrooms, shopping centers, and many other public places outweighs the right of an individual to protect himself, his property, or the state in those public places. Further, the historical purposes for assuring a right to bear arms—maintenance of a militia, governmental deterrence, and self-defense—are arguably less important today than in colonial or frontier times. The need to maintain a militia is largely undermined by the sophistication of modern warfare. Today's armies are highly trained and are skilled in the use of weapons unsuitable for private use. Private possession of arms may serve as a deterrent to invasion, but the historical significance of the need for a militia is largely inapplicable today.⁶⁶

Place and manner restrictions currently in effect in Utah in-

in "any church . . . schoolroom . . . circus . . . public exhibition . . . ballroom . . . social gathering . . . election . . . or . . . political convention") (see *Spears v. State*, 44 Okla. Crim. 406, 281 P. 167 (1929) (upholding conviction for carrying pistol into public gathering place)), TEX. PENAL CODE ANN. § 46.02(c) (Vernon 1974) (increasing degree of crime to third degree felony if weapon carried onto premises licensed to sell alcoholic beverages).

64. See *supra* cases cited in note 50.

65. TEX. CONST. art. I, § 23, see *infra* app. at pp. 779.

66. See *City of Salina v. Blakely*, 72 Kan. 230, 83 P. 619, 620 (1905) (stating that an individual right to bear arms based on the need for citizens to be accustomed to their weapons overlooks the fact that every state has organized and drilled military resources). Note, *supra* note 14, at 190-91. But see B. DAVIDSON, *TO KEEP AND BEAR ARMS* 27-28 (1969) (author claims that the frustration of American troops in Vietnam was due, in large part, to the poor marksmanship of troops caused by the lack of experience with weapons in the general citizenry).

The deterring of governmental oppression facet has also lost some validity in light of advances in modern weaponry. Chances are remote that citizens could repel an attack by, or lead a charge against, organized military forces equipped with highly potent weaponry. But see Note, *supra* note 34, at 191-92 (arguing that private weapon possession still has a deterrent effect on governmental action).

Time has also changed the self-defense justification for the right to bear arms. Weapons are certainly not needed for day-to-day survival, although recent national debate surrounding vigilante type "subway shootings" has brought this issue to the nation's attention. See *Machine Gun U.S.A.*, *NEWSWEEK*, Oct. 14, 1985, at 46.

clude prohibitions against carrying concealed dangerous weapons⁶⁷ and against threatening the use of a dangerous weapon in a fight.⁶⁸ Therefore, Utah law is consistent with the place and manner restrictions imposed in other states guaranteeing an individual right to bear arms.⁶⁹ In fact, under the tests available to determine the validity of individual right regulations, Utah could enact further regulations to promote societal benefits. The Utah arms provision provides broader stated purposes for guaranteeing an individual right than any other individual right state: "for security and defense of self, family, others, property, or the state, as well as for other lawful purposes."⁷⁰ The provision, however, further allows for greater legislative authority to regulate arms than is available in other states by stating that "nothing . . . shall prevent the legislature from defining the lawful use of arms."⁷¹ Utah's broad legislative power to regulate arms, the public benefit derived from preventing arms possession in many public places, and the declining importance of carrying weapons suggest that Utah could follow other individual right states by enacting laws preventing the carrying of weapons in public places.⁷²

B. Prohibiting Ownership by Certain Classes of People

Virtually all individual right states prohibit the possession of firearms by certain classes of people such as felons and incompe-

67 UTAH CODE ANN § 76-10-504 (Supp. 1986) A dangerous weapon is defined as "any item that . . . is capable of causing death or serious bodily injury" *Id.* § 76-10-501(2)(a) See *State v. Williams*, 836 P.2d 1092, 1094-95 (Utah 1981) (weapon need not be on defendant's person to violate statute, can be in satchel within reach of driver of car) UTAH CODE ANN §§ 76-10-509, 513, 518 (1978 & Supp. 1986) outline the requirements for obtaining a license to carry a concealed weapon

68 UTAH CODE ANN § 76-10-506 (1978)

69 See *supra* notes 49-63 and accompanying text

70 UTAH CONST. art. I, § 6

71 *Id.* Many state constitutions expressly prescribe the scope of the legislature's regulatory power. For example, Oklahoma allows the legislature to regulate "the carrying of weapons." OKLA. CONST. art. 2, § 26. Mississippi provides the legislature the power to "regulate or forbid carrying concealed weapons." MISS. CONST. art. 3, § 12. The Utah Constitution, however, appears to give the legislature unlimited authority to regulate all uses of weapons. The phrase "lawful use of arms" is the focal point of the legislature's power to regulate and is not defined in the Utah Code. The phrase arguably limits the legislature's power to regulate only the actual discharge of a firearm. This interpretation is unlikely and unsound because it would essentially invalidate all current Utah arms regulations except the prohibition on discharging a firearm from a vehicle. See UTAH CODE ANN § 76-10-508 (1978). Such an interpretation would exceed any other individual right to bear arms interpretation.

72 For a list of public places where weapons are barred by other individual right states, see *supra* notes 56-63 and accompanying text.

tents.⁷³ Such statutes illustrate that an individual right to bear arms is far from absolute. Felons and incompetents have a need to bear arms for defense of self, property, and the state equal to that of normal citizens, yet the great weight of authority reflects the belief that the danger created by weapons in the hands of these persons outweighs the benefit of allowing them to defend themselves or others.⁷⁴

Utah follows other individual right states by prohibiting the possession of weapons by noncitizens of the United States, felons, drug addicts, and those declared mentally incompetent.⁷⁵ The Utah Supreme Court upheld the constitutionality of this provision in *State v. Vlacil* by claiming that it is "quite evident from the language . . . set forth [in the former right to bear arms provision] that the legislature had sufficient power to enact the statute in question."⁷⁶ This prohibition on possession undoubtedly remains

73 See *Mason v. State*, 29 Ala. App. 1, 103 So. 2d 337 (1956) (holding constitutional an Alabama statute prohibiting possession of pistols by those committing or attempting to commit a violent crime and drug addicts or "[h]abitual drunkards"), *aff'd*, 267 Ala. 507, 103 So. 2d 341 (1958), *cert. denied*, 358 U.S. 934 (1959), *State v. Rascon*, 110 Ariz. 338, 519 P.2d 37 (1974) (upholding repealed Arizona law similar to current Arizona statute that prohibits felons from possessing weapons), *People v. Tenorio*, 197 Colo. 137, 590 P.2d 952 (1979) (holding constitutional a Colorado statute prohibiting possession of essentially all weapons by certain felons), *In re Ephraim*, 60 Ill. App. 2d 848, 377 N.E.2d 49 (1978) (holding constitutional an Illinois statute prohibiting possession of concealable weapon by person under 18 years of age, and further prohibiting possession of weapons by felons, those under 21 years of age convicted of a misdemeanor, narcotic addicts, those who have been in a mental hospital within the past five years, and those persons mentally retarded), *ILL. ANN. STAT.* ch. 38, § 24-3.1 (Smith-Hurd 1961)), *State v. Vainio*, 466 A.2d 471 (Me. 1983) (upholding Maine statute prohibiting weapon possession by one convicted of crime committed with use of weapon and punishable by one year or more imprisonment), *cert. denied*, 467 U.S. 1204 (1984), *Haker v. State*, 394 So. 2d 1376 (Miss. 1981) (upholding sentence of life imprisonment of felon in possession of weapon in violation of Mississippi statute), *In re Dubois*, 84 Nev. 562, 445 P.2d 354 (1968) (upholding conviction under statute prohibiting ex-felons from possessing weapons), *McGuire v. State*, 537 S.W.2d 26 (Tex. Crim. App. 1976) (holding constitutional Texas statute prohibiting weapon possession by those convicted of an act of violence or threatening violence), *State v. Luther*, 31 Wash. App. 589, 643 P.2d 914 (1982) (upholding conviction under Washington statute prohibiting possession of a "short firearm or pistol" by one convicted of a crime of violence or a felony in which a firearm was used).

Federal law also prohibits importers, manufacturers, dealers or collectors from selling or delivering a firearm or ammunition to anyone under 18 years of age (or 21 years of age if the firearm is a rifle or a shotgun or the ammunition is for a rifle or a shotgun), nonresidents of the seller's licensing state, those under indictment or convicted of a crime punishable by more than 1 year in prison, fugitives, drug addicts, and mental incompetents. 18 U.S.C. § 922 (b)(1) (3), (d)(1)-(4) (1982).

74 See, e.g., *People v. Trujillo*, 178 Colo. 147, 497 P.2d 1, 2 (1972).

75 UTAH CODE ANN § 76-10-503 (1978).

76 *State v. Vlacil*, 645 P.2d 677, 680 (Utah 1982), *State v. Beorchia*, 530 P.2d 813, 814 (Utah 1974).

valid under the new arms right because of the legislature's broad regulating authority⁷⁷ and the fact that all other individual right states have determined that an individual's right to bear arms is outweighed by the public benefit derived from prohibiting possession by felons and incompetents.⁷⁸

C. Prohibiting Certain Types of Weapons

Historically, the types of arms prohibited, despite state constitutional guarantees, have been those unrelated to maintaining a militia.⁷⁹ Thus, arms guarantees applied to those weapons used in "civilized warfare and not those used by the ruffian, brawler, or the assassin."⁸⁰ While the historical standard may retain some validity, the idea of allowing an individual to possess grenades, bazookas, tanks, intercontinental missiles, or other forms of weaponry employed in modern "civilized warfare" reveals the inadequacy of the historical standard for justifying arms regulation.

In response to this problem, states, municipalities, and courts have resorted to defining and enumerating the types of arms prohibited. These weapons include short-barreled rifles and short-barreled shotguns,⁸¹ poison gas,⁸² bombs,⁸³ grenades,⁸⁴ rockets,⁸⁵ mines,⁸⁶ silencers,⁸⁷ machine guns,⁸⁸ nunchakus,⁸⁹ blackjacks,⁹⁰ me-

77 See *supra* note 71

78 See *supra* cases cited in note 73

79 *Pierce v. State*, 42 Okla. Crim. 272, 275 P. 393, 395 (1929)

80 275 P. at 395

81 *Vaequez v. State*, 649 S.W.2d 647 (Tex. Ct. App. 1982), ALA. CODE § 13A-11-63 (1975) (Alabama also prohibits the concealed possession of bowie knives, air guns, brass knuckles, and slingshots. *Id.* §§ 13A-11-50, 51), ARIZ. REV. STAT. ANN. §§ 13-3101(6)(d), -3102(A)(3) (1956), ILL. ANN. STAT. ch. 38, § 24-1(a)(7) (Smith-Hurd 1961), MISS. CODE ANN. § 97-37-1 (1972) (if concealed or partly concealed)

82 ARIZ. REV. STAT. ANN. §§ 13-3101(6)(a), -3102(A)(3) (1956), ILL. ANN. STAT. ch. 38, § 24-1(a)(3) (Smith-Hurd 1961)

83 *Miller v. District Court*, 193 Colo. 404, 588 P.2d 1063 (1977), *People v. Green*, 96 Ill. 2d 334, 450 N.E.2d 329 (1983), *McClane v. State*, 170 Tex. Crim. 603, 343 S.W.2d 447, *cert. denied* 365 U.S. 816 (1961), ARIZ. REV. STAT. ANN. §§ 13-3101(6)(a)(i), -3102(A)(3) (1956), MO. ANN. STAT. § 571.100 (Vernon 1979)

84 *People v. Greene*, 96 Ill. 2d 334, 450 N.E.2d 329 (1983), ARIZ. REV. STAT. ANN. §§ 13-3101(6)(a)(iii), -3102(A)(3) (1956)

85 ARIZ. REV. STAT. ANN. §§ 13-3101(6)(a)(iii), -3102(A)(3) (1956)

86 *Id.* §§ 13-3101(6)(a)(iv), -3102(A)(3)

87 *Huffines v. State*, 646 S.W.2d 612 (Tex. Ct. App. 1983), ARIZ. REV. STAT. ANN. §§ 13-3101(6)(b), -3102(A)(3) (1956), ILL. ANN. STAT. ch. 38, § 24-1(a)(6) (Smith-Hurd 1977), MISS. CODE ANN. § 97-37-1 (1972)

88 *Morrison v. State*, 170 Tex. Crim. 218, 339 S.W.2d 529 (1960), ARIZ. REV. STAT. ANN. §§ 13-3101(6)(c), -3102(A)(3) (1956), CONN. GEN. STAT. § 53-202 (1985), ILL. ANN. STAT. ch. 38, § 24-1(a)(7) (Smith-Hurd 1977), LA. REV. STAT. ANN. § 40-1752 (West 1977), ME. REV.

tallic knuckles,⁹¹ switchblade knives,⁹² BB guns⁹³ and, spring guns.⁹⁴ Statutes that enumerate prohibited weapons, however, are by no means exhaustive and fail to expressly prohibit possession of many types of modern weaponry. To cure this problem, "catch-all" phrases are often added to statutes to make ordinary objects "such as a razor, a baseball bat, or a mechanical tool"⁹⁵ prohibited weapons if they are used in a dangerous way.⁹⁶

One court has held that prohibited weapon statutes do not infringe on an individual's right of personal or public defense because of the public benefit in preventing crime.⁹⁷ Most state statutes prohibiting certain weapons, however, have been challenged only for vagueness and not as violations of a right to bear arms.⁹⁸

In *Quilici v. Morton Grove*,⁹⁹ however, the Seventh Circuit found that a town ordinance that completely banned the possession of handguns did not violate a provision of the Illinois Constitution guaranteeing an individual the right to bear arms. In up-

STAT. ANN. tit. 17-A, § 1051 (1964), MISS. CODE ANN. § 97-37-1 (1972), MO. ANN. STAT. § 571.105 (Vernon 1979)

89 *State v. Swanton*, 129 Ariz. 131, 629 P.2d 98 (1981). *But see City v. Shindldecker*, 99 Ill. App. 3d 571, 426 N.E.2d 413, 415 (1981) (holding that "karate sticks" are not prohibited dangerous weapons)

90 *People v. Brown*, 253 Mich. 537, 235 N.W. 245 (1931), *People v. Norris*, 40 Mich. App. 45, 198 N.W.2d 430 (1972), *Pierce v. State*, 42 Okla. Crim. 272, 275 P. 393 (1929), COLO. REV. STAT. § 18-12-102(2), (4) (Supp. 1984), CONN. GEN. STAT. § 53-206 (1985), ILL. ANN. STAT. ch. 38, § 24-1(a)(1) (Smith-Hurd 1977), MISS. CODE ANN. § 97-37-1 (1972)

91 *People v. Brown*, 253 Mich. 537, 235 N.W. 245 (1931), *Pierce v. State*, 42 Okla. Crim. App. 272, 275 P. 393 (1929), COLO. REV. STAT. § 18-12-102(2), (4) (Supp. 1984), CONN. GEN. STAT. § 53-206 (1985), ILL. ANN. STAT. ch. 38, § 24-1(a)(1) (Smith-Hurd 1977), TEX. PENAL CODE ANN. § 46.06 (Vernon 1974), WASH. REV. CODE ANN. § 9A-12-050 (1977)

92 CONN. GEN. STAT. § 53-206 (1985)

93 *Id.*

94 ILL. ANN. STAT. ch. 38, § 24-1(a)(5) (Smith-Hurd 1977), WASH. REV. CODE ANN. § 9A-12-050 (1977)

95 *State ex rel. Williams v. City Court*, 21 Ariz. App. 318, 519 P.2d 71, 72-73 (1974)

96 See *State v. Sims*, 80 Miss. 381, 31 So. 907 (1902) (concluding that a brick is a prohibited deadly weapon even though not expressly mentioned by the statute), *People v. Fort*, 119 Ill. App. 2d 350, 256 N.E.2d 63, 66 (1970) (concluding that a stone and a bottle were prohibited deadly weapons). *But see City v. Shindldecker*, 99 Ill. App. 3d 571, 426 N.E.2d 411, 415 (1981) (warning that the unlawful weapons statute "is not intended to make the possession of every tool, implement, or sporting device . . . an unlawful weapon"), *Brown v. State*, 105 Miss. 367, 62 So. 353, 353-54 (1913) (a razor is not a prohibited weapon when simply concealed in a pocket)

97 *People v. Brown*, 253 Mich. 537, 235 N.W. 245, 247 (1931)

98 See e.g., *State v. Swanton*, 129 Ariz. 131, 629 P.2d 98, 98-99 (1981) (finding statute prohibiting possession of nunchakus not void for vagueness), *People v. Greene*, 96 Ill. 2d 334, 450 N.E.2d 329, 331 (1983) (prohibited possession statute not unconstitutionally vague)

99 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983)

holding the ordinance, the court focused on two significant factors. First, the court found that the Illinois Constitution "grants only the right to keep and bear arms, not handguns."¹⁰⁰ Second, the court relied on statements made in legislative proceedings when the Illinois right to bear arms provision was adopted. The legislative history indicated that the individual right provision was designed to prevent "an absolute ban on all firearms" but would not prevent "a ban on certain categories."¹⁰¹ Because the ordinance did not prohibit all firearms, the court found that it did not interfere on a constitutionally protected right.¹⁰²

The *Quilici* decision provides a tool to justify broad arms prohibitions by strictly interpreting state constitutional provisions. None of the states with a guaranteed individual right to bear arms expressly provides for the types of weapons protected, and thus their constitutional provisions are susceptible to the same narrow interpretation given the Illinois provision in *Quilici*. This approach is supported by the fact that the public need to prevent crime has been determined to outweigh the private right to bear arms for protection¹⁰³ and by the decreasing historical importance of possessing weapons.¹⁰⁴

Utah regulations currently impose no restrictions on the types of weapons an individual can possess. The wide range of weapons currently outlawed in other individual right states indicates that Utah could constitutionally prohibit many types of dangerous weapons.¹⁰⁵ However, limitations on extremely dangerous weapons raise the question of when traditional weapons such as handguns, rifles, and shotguns are dangerous enough to allow regulation. For example, despite the *Quilici* precedent, a handgun prohibition may not withstand a constitutional attack in Utah. The Illinois Constitution is devoid of stated purposes for securing a right to bear arms, and legislative history indicated the possibility of some weapon prohibitions. The Utah provision, on the other hand, is devoid of legislative history and contains broad stated purposes for securing a right to bear arms. A handgun prohibition in Utah could

100. 695 F.2d at 267.

101. *Id.* The court further relied on the "home rule doctrine," which permits local governments to "exercise their police power to restrict, or prohibit, the right to keep and bear handguns." *Id.* For a discussion of the *Quilici* case, see Note, *supra* note 15.

102. *Quilici*, 695 F.2d at 268.

103. See *supra* note 97 and accompanying text.

104. See *supra* note 66 and accompanying text.

105. See *supra* notes 81-96 and accompanying text.

only be valid if a court gave the legislature virtually absolute discretion in defining the "lawful use of arms."¹⁰⁶

Even though a rifle or shotgun may be more effective than a handgun in self-defense or defense of property, the possible danger to society, especially in urban areas, may outweigh the public need to possess these weapons. Rifle and shotgun projectiles generally penetrate much farther than even the most powerful handguns.¹⁰⁷ This results in a greater danger of rifle and shotgun fire piercing through walls into adjoining homes or apartments.¹⁰⁸ A long gun prohibition would be a step never before taken in collective or individual right states, but a balancing argument suggests that a state could determine that in urban areas, the public benefit derived from banning rifles or shotguns outweighs the stated purposes for bearing arms.

D. Prohibited Uses

Constitutionally protected ownership of a weapon does not validate all uses of that weapon. Prohibited use statutes vary widely among individual right states. Among the prohibited uses previously mentioned are carrying concealed weapons,¹⁰⁹ carrying certain weapons prohibited by statute,¹¹⁰ and carrying weapons on certain premises.¹¹¹ Other more particular prohibited use statutes include banning the use of firearms while fighting in public places,¹¹² prohibiting the alteration of manufacturers' identification numbers,¹¹³ forbidding aiming at another or negligently discharging a firearm,¹¹⁴ and prohibiting the exhibition of a weapon in a

106. See *supra* note 71.

107. Kates, *supra* note 18, at 261 (citing several weapons digests).

108. *Id.* at 261-64. Kates, who argues that the second amendment provides an individual right to bear arms, further notes that accidental discharge of long guns is much more dangerous and more likely. Therefore, the high risks associated with discharging a weapon in an urban area support possible prohibition of long guns and highly penetrative ammunition. *Id.*

109. See *supra* notes 49-50 and accompanying text.

110. See *supra* notes 51-55 and accompanying text.

111. See *supra* notes 56-65 and accompanying text.

112. ALA. CODE § 13A-11-56 (1975).

113. *People v. Baer*, 20 Ill. App. 3d 896, 314 N.E.2d 258 (1974); ALA. CODE § 13A-11-64 (1975); ARIZ. REV. STAT. ANN. § 13-3102(A)(6) (1956); CONN. GEN. STAT. § 29-36 (1985); WASH. REV. CODE ANN. § 9A.140 (1977).

114. *Ward v. State*, 628 P.2d 376, 378 (Okla. Crim. App. 1981) (upholding conviction for feloniously pointing a firearm that the defendant fired, hitting a gubernatorial candidate with a wax bullet filled with red paint); *Cane v. State*, 65 Okla. Crim. 192, 84 P.2d 807 (1938) (upholding conviction under statute prohibiting pointing weapon at another); COLO. REV. STAT. § 18-12-106(1)(a), (b) (1973); MICH. STAT. ANN. §§ 28.430, .431 (Callaghan 1981);

"rude, angry, or threatening manner."¹¹⁵ Notably, no state statutes in individual right states would prohibit the use of arms for hunting or other recreational purposes.

Many prohibited use statutes may withstand constitutional challenges because the state constitutions only grant an individual right for limited purposes such as protection of self,¹¹⁶ state,¹¹⁷ property,¹¹⁸ and for lawful hunting and recreational uses.¹¹⁹ A court also might rely on the balancing test¹²⁰ to conclude that the individual right to use a weapon in all circumstances gives way to the public benefit derived from proscribing certain dangerous uses.

The validity of prohibited use statutes is more troublesome in states that do not list specific purposes for securing an individual right to bear arms¹²¹ and in states where the right is given for "all lawful purposes."¹²² The problem is mitigated in states without articulated purposes by decisions restricting the scope of the right granted and by the power given the legislatures to regulate the use of weapons.¹²³ Not as easily resolved, however, is the proper interpretation of the "other lawful purpose" provisions contained in three state provisions, including Utah's. The lack of precedents interpreting this phrase requires a return to the three approaches suggested to determine the validity of prohibited use statutes.¹²⁴

MISS CODE ANN § 97-37-29 (1972), WASH REV CODE ANN § 9A.12.030 (1977).

115 *Svkes v. City of Crystal Springs*, 216 Miss 18, 61 So 2d 387, 388 (1952) (upholding conviction under Mississippi statute forbidding exhibition of a dangerous weapon in a "rude, angry, or threatening manner"); *State v. McMillan*, 649 S.W.2d 467, 473 (Mo. Ct. App. 1983) (upholding constitutionality of statute prohibiting exhibition of a weapon in a "rude, angry or threatening manner").

116 Those states apparently granting an individual right to bear arms for self-defense are Alabama, Arizona, Colorado, Connecticut, Michigan, Mississippi, Missouri, Montana, Nevada, New Mexico, Oklahoma, Texas, Utah, and Washington. See *infra* app. at pp. 778-79.

117 Those states apparently granting an individual right to bear arms for protection of the state are Alabama, Arizona, Colorado, Connecticut, Maine, Michigan, Mississippi, Missouri, Montana, Oklahoma, and Utah. See *id.*

118 See *id.* (state constitutional provisions for Colorado, Mississippi, Missouri, Montana, Oklahoma, and Utah).

119 See *id.* (state constitutional provisions for Nevada and New Mexico).

120 See *id.* (state constitutional provisions for Illinois and Louisiana).

121 See *id.* (state constitutions for Nevada, New Mexico, and Utah).

122 Both Illinois and Louisiana have enacted prohibited use statutes. See *People v. Greene*, 96 Ill. 2d 334, 450 N.E.2d 329 (1983), LA REV STAT ANN § 40:1752 (West 1977). An Illinois decision indicates that the lack of stated purposes in the Illinois arms guarantee does not guarantee absolute discretion in the use of a weapon. See *supra* notes 99-102 and accompanying text. The Louisiana Constitution at the legislature to prohibit the carrying of concealed weapons, which also indicates that a lack of stated purposes does not secure an absolute right.

123 See *supra* text accompanying notes 44-48.

Especially relevant are the balancing test, which allows for prohibitions in light of a strong public benefit, and the declining importance of the historical purposes for bearing arms. For example, the public benefit derived from prohibiting the discharge of a weapon in a dwelling or building is undoubtedly more compelling than the need to allow such an act under the proposition that an individual has a right to use a weapon for "all lawful purposes." Further, the prohibited uses cited above have little to do with maintaining a militia, deterring governmental oppression, or self-defense.

Utah law currently prohibits carrying a concealed dangerous weapon,¹²⁴ carrying a loaded firearm in a vehicle or on a street,¹²⁵ threatening use of a dangerous weapon in a fight or quarrel,¹²⁶ and discharging a firearm from a vehicle or near a highway.¹²⁷ These prohibited uses obviously are unrelated to defense of self, others, property, or the state. The issue, however, is whether the new individual right, assuring the use of a weapon for "all other lawful purposes," invalidates existing use restrictions. Again applying the tests previously suggested,¹²⁸ Utah courts could justify existing and possibly future prohibited uses. First, the Utah arms guarantee expressly allows the legislature to "define the lawful use of arms."¹²⁹ This legislative power appears unlimited because of the constitutional statement that "nothing" in the constitution limits the power of the legislature to "define the lawful use of arms."¹³⁰ Second, a court could determine that preventing the discharge of weapons from vehicles, or prohibiting the carrying of concealed weapons, for example, provides a public benefit that outweighs the scope of any "lawful use." Finally, in the absence of prior interpretation of "other lawful uses" protected by an individual right, reliance may be placed on the historical uses that have been constitutionally protected. As noted, these uses are limited to self-defense, deterring governmental oppression, and maintaining a militia, all of which appear to be of decreasing importance.¹³¹

124 UTAH CODE ANN § 76-10-504 (Supp. 1986). A dangerous weapon is defined as "any item . . . capable of causing death or serious bodily injury." *Id.* § 76-10-501(1) (1978).

125 *Id.* § 76-10-505 (1978).

126 *Id.* § 76-10-506.

127 *Id.* § 76-10-508.

128 See *supra* text accompanying notes 44-48.

129 UTAH CONST. art. I, § 6.

130 *Id.*

131 See *supra* note 66.

E. Transfer Restrictions, Licensing, and Registration

Restrictions on transferring firearms exist in many states with individual right guarantees. Among the common regulations are those prohibiting weapon transfers to unauthorized persons¹³² and transfers of prohibited weapons.¹³³ Courts have relied on the strong public interest in keeping dangerous weapons from certain people to hold these restrictions valid in the face of individual right guarantees.¹³⁴

One of the most controversial issues surrounding firearm legislation is whether licensing and registration are valid exercises of state authority.¹³⁵ The controversy is largely a result of the confusion that exists in defining licensing and registration. There are es-

132. *Bernethy v. Walt Failor's, Inc.*, 97 Wash. 2d 929, 653 P.2d 280, 283 (1982) (upholding Washington law prohibiting transfers to certain persons and stating that "one should not furnish a dangerous instrumentality such as a gun to an incompetent"); ALA. CODE §§ 13A-11-57, -76 (1976) (prohibiting transfer of a pistol or bowie knife to minors, one convicted of a crime of violence, drug addicts, habitual drunkards, or those of unsound mind); ARIZ. REV. STAT. ANN. § 13-3102 (1956) (prohibiting transfer of deadly weapon to specified persons); CONN. GEN. STAT. §§ 29-33 to -34 (1985) (prohibiting sales to aliens and minors); ILL. ANN. STAT. ch. 38, § 24-3 (Smith-Hurd 1961) (prohibiting sale to minors, persons under 21 convicted of a misdemeanor, narcotic addicts, felons, mentally retarded persons, or unstable persons); LA. REV. STAT. ANN. § 40:1784 (West 1977) (comprehensive filing requirements on all transfers); MICH. STAT. ANN. § 28.420 (Callaghan 1981) (prohibiting sale to minors); MISS. CODE ANN. § 97-37-13 (1972) (prohibiting transfer to minor or intoxicated person); OKLA. STAT. ANN. tit. 21, §§ 1273, 1289.12 (West 1983) (prohibits transfer to minors, felons, intoxicated persons, and "disturbed persons"); TEX. PENAL CODE ANN. § 46.07 (Vernon 1974) (prohibiting sale to one intending to commit unlawful act, minor, or intoxicated person).

133. *Biffer v. City of Chicago*, 278 Ill. 562, 116 N.E. 182, 185 (1917) ("sale of deadly weapons may be absolutely prohibited under the police power of the state"); *People v. Brown*, 253 Mich. 537, 235 N.W. 245 (1931) (upholding statute prohibiting sale of machine guns, silencers, blackjacks, bombs, etc.); ALA. CODE § 13A-11-77 (1976) (requiring seller of pistol to forward application of purchase to chief of police before the pistol can be delivered to the purchaser); CONN. GEN. STAT. § 53-206(b) (1985) (requiring notice to chief of police within 24 hours of the sale of a "slung shot, air rifle, BB gun, blackjack, sand bag, metal or brass knuckles, or any knife or a switch knife"); ILL. ANN. STAT. ch. 38, § 24-3(g) (Smith-Hurd 1977) (delivery prohibited until 72 hours after purchase application made for concealable weapon and 24 hours before delivery of a long gun); MICH. STAT. ANN. § 28.421(1) (Callaghan 1981) (prohibiting sale of electronic weapons).

134. *Biffer v. City of Chicago*, 278 Ill. 562, 116 N.E. 182, 185 (1917); *Bernethy v. Walt Failor's, Inc.*, 97 Wash. 2d 929, 653 P.2d 280, 282 (1982). This principle is closely related to the tort idea that one should not transfer to another, knowing that the other is incompetent, a potentially dangerous instrumentality. 653 P.2d at 283 (citing *Mitchell v. Churches*, 119 Wash. 547, 206 P. 6 (1922)).

135. Proponents of the Utah amendment argued that the revision prohibited "laws requiring a license to acquire or possess [constitutionally protected] arms, requiring the registration of such arms, or imposing special taxation on such arms." Utah Voter Information Pamphlet 28 (1984) (arguments by Senator Jack M. Bangerter and Representative Donna M. Dahl).

entially two types of licensing: restrictive and permissive. Under restrictive licensing, the grant of a license is discretionary; the applicant has no right to have a firearm or to receive a permit even if all statutory requirements are met.¹³⁶ Permissive licensing, on the other hand, entitles the applicant to a license unless he falls into expressly prohibited categories such as felons or minors.¹³⁷

Individual right states employ both permissive and restrictive licensing systems. Permissive licensing for handguns exists in Connecticut and Washington,¹³⁸ whereas restrictive licensing is used in Alabama, Maine, and Nevada.¹³⁹ The restrictive licensing used in these states, however, is not entirely restrictive because it only applies to carrying concealed¹⁴⁰ or certain dangerous weapons.¹⁴¹ The restrictive system, which calls for a subjective analysis of the applicant by the licensing authority, is not required in any individual right state to purchase a standard firearm, i.e., a rifle, shotgun, or pistol of ordinary make and usage. The purchase of a standard firearm is interrupted in Connecticut and Washington, however, to make sure the purchaser does not fall into one of the statutorily prohibited possessor categories.¹⁴²

Registration is often mistaken for licensing but only requires that owners identify themselves and their weapons to the designated authority.¹⁴³ Many individual right states employ a registration system that generally requires a seller to keep a record of the purchaser's name, address, occupation, place of birth, time of purchase, and the caliber, make, model, and manufacturer's num-

136. *Kates*, *supra* note 18, at 264.

137. *Id.* at 264-65.

138. CONN. GEN. STAT. § 29-33 (1985) (to purchase a handgun, a purchaser must apply for a license, which is granted unless the purchaser has a prior felony conviction); WASH. REV. CODE ANN. §§ 9A.1070, .090 (1977) (handgun purchaser must present a license on purchase, which is granted unless purchaser has been convicted of short firearm or illegal pistol possession, is under 21 years of age, is subject to court order regarding firearms, is free on bond or personal recognizance pending trial, or has an outstanding warrant for his arrest).

139. ALA. CODE § 13A-11-73, -75 (1976) (license to carry pistol concealed or in vehicle at discretion of county sheriff); ME. REV. STAT. ANN. tit. 25, §§ 2031, 2032 (Supp. 1984-85) (license requires a finding of "good moral character"); NEV. REV. STAT. §§ 202.350, .400 (1983) (permit issued by county sheriff on showing of good cause) (constitutionality of statute upheld in *Harris v. State*, 83 Nev. 404, 432 P.2d 929 (1967)).

140. Licensing in Alabama and Maine is only required for concealed weapons. See *supra* note 139.

141. Licensing in Nevada only applies to sawed-off shotguns, machine guns, tear gas, and other like weapons. See *supra* note 139.

142. See *supra* note 138.

143. *Kates*, *supra* note 18, at 265.

r of the firearm purchased.¹⁴⁴

Judicial interpretation of registration and licensing requirements is limited in individual right states.¹⁴⁵ One court, however, sustained the validity of a Chicago registration requirement despite arguments that registration had no deterrent effect on crime and reduced one's right to self-protection.¹⁴⁶ Nevertheless, the limits of these requirements remain unknown due to a lack of constitutional challenges. Therefore, returning to the criteria previously suggested for measuring the validity of regulations under an individual right¹⁴⁷ provides some insight on the arguments presented. First, the power retained by some legislatures to regulate arms despite the individual right guaranteed may sustain the validity of registration and licensing.¹⁴⁸ Second, the public benefit gained from registration and licensing requirements may outweigh any infringement on a stated purpose for securing an individual right.¹⁴⁹ Third, the declining importance of the historical right to bear arms may weaken the arguments against registration and licensing requirements.¹⁵⁰

While this area awaits further judicial interpretation, it is clear that several individual right states impose registration requirements on all weapons.¹⁵¹ Licensing, however, is only imposed on limited types of weapons¹⁵² and in limited circumstances.¹⁵³ A restrictive licensing system to purchase certain weapons, i.e., a system that would require the subjective judgment of an authority re-

144. See, e.g., ALA. CODE § 13A-11-77 (1975); CONN. GEN. STAT. § 29-33 (1985); ILL. STAT. ch. 38, § 24-4 (Smith-Hurd 1977); LA. REV. STAT. ANN. § 40:1783 (1977); MICH. ANN. § 28.429 (Callaghan 1981); MISS. CODE ANN. §§ 45-9-1, -17 (1972).

145. Laws requiring licenses to purchase and carry weapons have often been upheld in active right states. See *Strickland v. State*, 137 Ga. 1, 72 S.E. 260, 261 (1911); *Matthews v. State*, 237 Ind. 677, 148 N.E.2d 334, 338 (1958); *State v. Kerner*, 181 N.C. 574, 107 S.E. 223 (1921); *People ex rel. Darling v. Warden*, 154 A.D. 413, 139 N.Y.S. 277, 286 (1913); *People v. City of Toledo*, 19 Ohio Misc. 147, 250 N.E.2d 916, 928 (1969).

146. *Brown v. City of Chicago*, 42 Ill. 2d 501, 250 N.E.2d 129, 132-33 (1969).

147. See *supra* text accompanying notes 44-48.

148. For example, several state constitutions expressly disavow the right to carry concealed weapons. See *infra* app. at pp. 778-79 (constitutional provisions of Colorado, Louisiana, Mississippi, Missouri, and New Mexico).

149. The argument is made, however, that when the stated purposes are defense of property, and the state, registration and licensing greatly infringe on an individual right to bear arms. Lists of weapons and owners could be obtained by force that could confiscate weapons and leave the populace defenseless. See *Kates*, *supra* note 18, at 285.

150. See *supra* note 68 and accompanying text.

151. See *supra* notes 143-44 and accompanying text.

152. See *supra* notes 138-42 and accompanying text.

153. *Id.*

garding the purchaser of a rifle or shotgun, would apparently infringe on an individual right to bear arms.¹⁵⁴

Utah law currently applies a restrictive licensing system only to those wishing to carry concealed weapons.¹⁵⁵ The regulating authority makes a subjective determination of "good cause" and "good character" before a license to carry a concealed weapon is granted.¹⁵⁶ In this regard, Utah is in line with other individual right states imposing similar requirements.¹⁵⁷ There are no other licensing or registration requirements under Utah law.

Because Utah law prohibits carrying a concealed weapon,¹⁵⁸ and in light of the power given the legislature to regulate arms,¹⁵⁹ the license required to carry concealed weapons is expected to withstand a constitutional attack. The real issue in this area is whether gun registration would infringe on the individual right to bear arms provided under the Utah Constitution. Reflecting the analysis applied to other state provisions, Utah courts should first consider the regulating authority expressly granted the legislature. In this regard, Utah courts could interpret the Utah provision to provide a broader legislative power than that of any other state.¹⁶⁰ Public benefits obtained through the exercise of the legislature's power should then be weighed against the infringement on the stated purposes for securing a right to bear arms.¹⁶¹ It is difficult to conclude that registration would infringe on the Utah constitutional right to bear arms because registration would only keep firearms from those who are not eligible to possess them—noncitizens of the United States, convicted criminals, drug addicts, the mentally incompetent, and minors.¹⁶² A jurisdiction not requiring registration is without means of controlling weapon possession by those specifically denied such right. Without registration requirements, there is no way to prevent the purchase of weapons by felons, drug addicts, or the mentally incompetent.

154. The weapons that are immune from restrictive licensing are arguably those weapons not subject to prohibition in any individual right states. See *supra* text accompanying notes 79-96.

155. UTAH CODE ANN. § 76-10-513 (Supp. 1986).

156. *Id.* The regulatory authorities are county sheriffs, boards of police commissioners, chiefs of police, city marshals, town marshals, or other heads of police departments. *Id.*

157. See *supra* note 139.

158. See *supra* note 67.

159. See *supra* note 71 and accompanying text.

160. *Id.*

161. See *supra* note 45 and accompanying text.

162. See UTAH CODE ANN. § 76-10-503 (1978); *supra* notes 75-78 and accompanying text.

The argument that registration would infringe on the right to maintain a militia and to deter governmental oppression also seems inconsistent with certain historical facts. Colonial law required households to possess arms and to submit them periodically for inspection.¹⁶³ In essence, the government knew who possessed weapons and knew whom to call into action in case of a national emergency.¹⁶⁴ Registration today could arguably serve the same purpose. At any rate, history refutes the argument that privacy or anonymity is required to guarantee an individual right to bear arms.

IV. CONCLUSION

Historical and legal analyses disclose that changing the language of the Utah constitutional guarantee to provide an individual right to bear arms means much less than some proponents of the amendment might believe. On its face, the Utah provision guarantees an individual right to bear arms for all "lawful purposes."¹⁶⁵ Nevertheless, this broad guarantee is subject to significant limitation by the broad power retained by the legislature to define the "lawful use of arms."¹⁶⁶

Because the power to regulate arms is left solely to the legislature, the legislature should act to bring Utah law in line with other individual right states. Utah law is notably void of regulation controlling many types of weapons and uses of weapons that are prohibited in other states. Utah law also falls far short of preventing the use of weapons in many public establishments. Further, the legislature should weigh the benefits and detriments of weapon registration, which is within the scope of its power under the new amendment.

In essence, state constitutions guaranteeing an individual right to bear arms may be more of a public pacifier than a grant of significant substantive rights. States have broad discretion to regulate arms by simply relying on the language of their constitutional provisions. Further, courts are free to uphold regulations when the public benefit outweighs the stated purposes for securing an individual right to bear arms. The diminishing importance of possessing weapons, combined with judicial and legislative authority to

regulate, make an individual right to bear arms more illusory than real.

M. TRUMAN HUNT

163. Kates, *supra* note 18, at 265.

164. *Id.* at 266.

165. UTAH CONST. art. I, § 6.

166. *Id.*

APPENDIX

STATE CONSTITUTIONAL PROVISIONS GUARANTEEING
AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS

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

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

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

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

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

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

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

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

MISSISSIPPI: The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons. Article 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 shall not justify the wearing of concealed weapons. Article I, § 2.

MONTANA: The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the

civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons. Article II, § 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. Article I, § 11, ¶ 1.

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. Article II, § 6.

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

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

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

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