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Bearing Arms in Washington State

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BEARING ARMS IN WASHINGTON STATE

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Article I, Section 24 of the Washington State Constitution directly affects two "hot topics" today: first, the increase in the carrying of weapons by the citizenry (particularly concealed weapons, with or without permits) and, second, the increase in "citizen militias" in various parts of the state.

Article I, Section 24 also presents interesting issues from a pure state-constitutional-law standpoint, because it represents one of the striking characteristics of state constitutions: these basic documents of civil society for each state represent centuries of buildup and accretion. State constitutional provisions can often be analyzed in terms of layering. In preparing a state constitutional argument before a Washington court,[2]

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[2] The Washington Supreme Court's guide to preparing a state constitutional argument, particularly in the context of a provision for which there is a U.S. constitutional analogue, is contained at State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). Gunwall presented the following six "non-exclusive neutral criteria" for analyzing the language of Washington's constitution and comparing it with similar federal provisions: (1) the textual language of the state constitution, (2) significant differences in the texts of parallel provisions of the federal and state constitutions, (3) state constitutional and common-law history, (4) preexisting state law, (5) differences in structure between the federal

(this construction requires that the actor appear here) we must peel away the layers of history behind a provision one by one to better understand its origins, purpose, and meaning. The history of Article I, Section 24, which was enacted as part of Washington's original Constitution in 1889, is a perfect example.

Same Topic: Different Provisions

When compared with the Second Amendment to the United States Constitution, Washington's right-to-bear-arms provision is immediately seen as similar in some respects and strikingly different in others. The Federal Constitution's provision, adopted as the Second Amendment and part of the Bill of Rights, states:

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

Article I, Section 24 of Washington's constitution reads as follows:

> RIGHT TO BEAR ARMS. 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.

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and state constitutions, and (6) matters of particular state interest or local concern. Lawyers who fail to perform a thorough "Gunwall analysis" of a state constitutional issue do so at their peril. See State v. Wethered, 110 Wn.2d 466, 472, 755 P.2d 797 (1988).

Upon reading the two provisions, one is instantly aware of important differences: the federal provision emphasizes the militia,[3] while the state provision speaks in terms of the right of the individual to bear arms in defense of himself, as well as the state, and also includes an interesting provision on "armed bodies of men."

Article I, Section 24 is a perfect example of layering, going back at least 800 years, with a populist twist added in Washington on top of the more traditional versions in east coast constitutions and in the Federal Second Amendment.

Henry II and All That

Scholars trace the origins of the right-to-bear-arms provisions at least as far back as 1181, when Henry II promulgated the Assize of Arms, setting forth the type of armament required of each level of society, from fully armored knights down to the poorest freeman required to have a helmet and a lance.[4] That law stated:

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[3] See also the following provisions of Washington's constitution that relate to the militia: Article I, Section 18 ("The military shall be in strict subordination to the civil power."); Article I, Section 18 (prohibiting a state standing army in times of peace); and Article X (governing the state militia generally).

[4] Roy Weatherup, Standing Armies and Armed Citizens: A Historical Analysis of the Second Amendment, 2 Hastings Const. L.Q. 961 (1975). See also Ralph J. Roner, The Right To Bear Arms: A Phenomenon of Constitutional History, 16 Catholic U.L. Rev. 53 (1966). For a list of various other law review articles and books on this topic, see William Dennis, A Right To Keep and Bear Arms? The State of the Rebate, Washington State Bar News 47 (July 1995), and B. Renee Alsept, "I Sing of a Man and His Gun" (1989 Seminar Paper, Seattle Univ. L. Sch. Lib.), which was of great assistance in preparing this presentation.

> Moreover, let each and every one of them swear that before the feast of St. Hilary he will possess these arms and will bear allegiance to the lord king, Henry, namely the son of the Empress Maud, and that he will bear these arms in his service according to his order and in allegiance to the lord king and his realm. And let none of those who hold these arms sell them or pledge them or offer them, or in any other way alienate them; neither let a lord in any way deprive his men of them either by forfeiture or gift, or in any other manner.

Henry II's edict was important. After all, it was the English citizen army of pikes and long bows that later defeated French mounted knights at Crecy in 1346 and at Agincourt in 1415. It was a jumble of merchant ships filled with militiamen that helped the small Royal Navy mop up the Spanish Armada in 1588. Without an active, trained militia of nonprofessional soldiers, England would never have been able to enjoy its spectacular victories over much larger powers.

The role of the militia was also important in the 17th century, which saw civil and religious wars in England and a decades-long struggle between King and Parliament.

During that century, the King's large, standing professional army was viewed by Parliament as extremely dangerous, both to Parliamentary powers and to personal liberties. Oliver Cromwell's initial victories in the 1640s followed on the heels of a forced demobilization of the King's standing army by Parliament. Ironically, when Cromwell came to power, he immediately developed the "New Model Army," an ultraprofessional fighting force that replaced the militia, maintained Cromwell in power,

and soon came to be more disliked among the citizenry than the Crown's earlier troops.[5]

After restoration of the monarchy after Cromwell, the militia was reinstated by statutes in 1661 and 1662. But Charles II soon rebuilt a professional army. Then his brother James II, a Catholic who ascended the throne in 1685, doubled the size of the professional fighting force, promoted mainly Catholic officers, and recommended the abolition of the militia.[6]

Not everyone in England backed the militia. The poet John Dryden, a Tory who backed royal power, expressed his position in a poem that reflected the views of many of his countrymen:[7]

> The country rings around with loud alarms,
> And raw in fields the rude militia swarms;
> Mouths without hands; maintained at vast expense,
> In peace a charge, in war a weak defence;
> Stout once a month they march, a blustering band,
> And ever, but in times of need, at hand.
>
> This was the morn when, issuing on the guard,
> Drawn up in rank and file they stood prepared
> Of seeming arms to make a short essay,
> Then hasten to be drunk; the business of the day.

As it turns out, Parliament backed neither Dryden nor James II, but switched to Prince William of Orange when he invaded with a Dutch army in 1689. From James II's point of view, the professional army and

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[5] Weatherup at 969.

[6] Id. at 971.

[7] Quoted in Weatherup at 971-72.

the militia were equally unreliable - both either signed on with William and Mary or just melted away.[8]

Parliament thereafter named William and his wife Mary as corulers, and the quid pro quo for their ascendence to the throne was their acceptance of a Declaration of Rights. Two of those rights read as follows:

> 5. That the raising or keeping a Standing Army within the Kingdom in Time of Peace unless it be with Consent of Parliament is against Law.
>
> 6. That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by law.

Those paragraphs of the Declaration of Rights, demanded by the Whig faction dominant in Parliament, reinforced the importance of a locally based citizen militia, as opposed to a standing army controlled by the King.[9]

One of the "Rights of Englishmen"

When the original Thirteen Colonies declared their independence from England because of the King's alleged failure to respect their rights as Englishmen, most of those colonies (now states) included declarations

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[8] Stephen B. Baxter, William III and the Defense of European Liberty 1650-1702 at 237-41 (1966).

[9] Paragraph 6 of the Declaration of Rights also reflects an anti-Catholic bias that carried over to many of the colonies. That bias is reflected in various state constitutions, including Washington's in a curious way. See Robert Utter & Edward Carson, Church and State on the Frontier: The History of the Establishment Clauses in the Washington Constitution, 15 Hastings Const. L.Q. 451, 464-65 (1988).

of rights in their newly minted constitutions. Those declarations were direct descendants of the 1689 document, and the provisions on the right to bear arms reflect the language crafted in England 100 years earlier. Article XIII of Pennsylvania's 1776 Declaration of Rights, the earliest American organic document protecting the right to bear arms, stated:

> PENNSYLVANIA DECLARATION OF RIGHTS - 1776
> XIII. That the people have a right to bear arms for the defence 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; And that the military should be kept under strict subordination to, and governed by, the civil power.

The Virginia Bill of Rights (1776) and the Massachusetts 1780 constitution are two similar examples:

> VIRGINIA BILL OF RIGHTS - 1776
> § 13. That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence 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.

> MASSACHUSETTS DECLARATION OF RIGHTS - 1780
> 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, and they ought not to be maintained without 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.

The right to serve in a civilian-controlled militia was one of those important "Rights of Englishmen" that the American Revolution was all about. Americans had relied mainly on their own militias during the French and Indian War, and by 1776 they had certainly had enough of the King's standing army.

Scholars debate whether these provisions, and the Second Amendment to the United States Constitution, were meant to provide an individual right to own weapons for personal reasons. The weight of academic authority (and more important, the weight of U.S. Supreme Court opinions) is that the origins of the Second Amendment related primarily to the militia and to the protection of collective liberties. Accordingly, the Second Amendment has been held to have little or nothing to do with the personal use of arms by individuals, and governments are allowed full police power to regulate weapons ownership.[10]

The Second Amendment's focus on the militia is reflected in James Madison's original draft, which included a conscientious-objector provision, the presence of which underscores the military nature of that section:

> The right of the people to keep and bear arms shall not be infringed; a well armed but well regulated militia being the best

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[10] See United States v. Cruikshank, 92 U.S. 542 (1876); Presser v. Illinois, 116 U.S. 252 (1886); United States v. Miller, 307 U.S. 174 (1939); see also the cases and articles cited in Dennis' article at note 4, above. The U.S. Supreme Court's restrictive reading of the Second Amendment is criticized in Nelson Lund, The Second Amendment, Political Liberty, and the Right to Self-Preservation, 39 Ala. L. Rev. 103 (1987).

> security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.

While not included in the final version of the Second Amendment, conscientious-objector language was included in several state constitutions, including Oregon's 1859 constitution.[11] While not included in Washington's document, the issue of whether all able-bodied men should be required to serve in the militia was a hot topic at Washington's 1889 convention.[12]

And Now for Something Completely Different

Nevertheless, it is clear that the Washington State Constitution's right to bear arms is quite different from the Second Amendment. It looks something like its federal counterpart, but it says little about the militia - that topic was split off into a place of its own - Article X.[13] The right to bear arms that remained in Article I, Section 24 was predominantly a personal right. That section does mention the right to bear arms in defense of the state, but there is quite explicit language about the "right of the individual citizen to bear arms in defense of himself." This means what it says. From time to time, people in the West had to use their weapons to defend themselves and were not interested in being

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[11] Oregon Const. art. X, § 2 (1859).

[12] Seattle Post-Intelligencer, July 31, 1889.

[13] Article X, on the militia, was the subject of a lively debate on the universality of militia membership, compensation of the militia, construction of an Old Soldiers' Home, and a number of other points. See Beverly P. Rosenow, The Journal of the Washington State Constitutional Convention, 1889 at 694-95 (1962).

disarmed. Constitutions of new states organized in the west since the Jacksonian period typically included language expressing citizens' rights to bear arms "in defense of themselves" or, in the case of Washington, "in defense of himself," as well as the state.[14]

The 1878 draft "Walla Walla Constitution" for a proposed Washington State had included an Article V, Section 19, which read:

> The right of the people to keep and bear arms shall not be infringed; but this shall not be so construed as to justify the carrying of concealed weapons.

That 1878 proposal clearly implied that the right to bear arms extended to individuals, and the language that allowed restrictions on concealed weapons reflected a common belief that only a gambler, sneak, or some other bad actor would carry a firearm anywhere other than on his belt or slung over his shoulder. Many southern and western states had (or would later have) provisions making it clear that what they meant by "arms" was rifles, shotguns, and Colt 45s worn outside, on the belt, and in full view - not concealed pistols, knives, or other easily hidden weapons.[15]

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[14] See constitutional provisions cited in note 15, infra.

[15] The following state right-to-bear-arms provisions originally included language expressly permitting legislatures to regulate concealed weapons or the carrying of weapons generally: Colorado art. II, § 13; Florida art. I, § 8; Georgia art. I, § 1, para. XXII; Kentucky § 1, para. 7; Louisiana art. I, § 8; Mississippi art. 3, § 12; Missouri art. I, § 23; Montana art. III, § 13; New Mexico art. II, § 6; North Carolina art. I, § 30; Oklahoma art. II, § 26; Tennessee art. I, § 26; Texas art. I, § 23; Utah art. I, § 6. See also the cases listed by Justice Talmadge in the case cited at note 38, infra.

In Washington's 1889 Convention, delegate E.H. Sullivan made a proposal that would have tracked provisions in many other states and expressly permitted the banning of concealed weapons. But the delegates decided that the matter would best be left to the elected lawmakers.[16] Concealed pistols, knives, and other weapons had been banned by the Territorial Legislature in 1886,[17] brandishing dangerous weapons was outlawed in 1888,[18] and both prohibitions continued on the books into statehood until today, where they remain in modified form.[19] The Legislature's right to regulate in this field is further emphasized by the peculiar language[20] in our state's constitution making it clear that the right to bear arms was not to be absolute. That right did not extend to a right to individuals or corporations to organize "armed bodies of men." What was this all about?

Washington had an active territorial militia, which served as necessary to protect settlers from Native Americans, the British, and as it turns out, from each other.[21]

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[16] Rosenow, note 13, supra, at 513. Tacoma Daily Ledger, July 30, 1989; Tacoma Morning Globe, July 30, 1889.

[17] Laws of 1886, § 1, at 81.

[18] Laws of 1888, §§ 2, 3, at 100.

[19] See RCW 9.41.050, .270.

[20] Only Arizona's constitution, at art. 2, § 26 (1912), contains similar language.

[21] J.L. Fitts, The Washington Constitutional Convention of 1889 at 118-25 (1951 U.W. M.A. Thesis).

At the time Washington's constitution was drafted, the state (and Idaho) had suffered some recent and very bad experiences with unofficial "armed bodies of men." In 1886, anti-Chinese rioting had broken out in Tacoma, Seattle, and several other western Washington communities. Chinese immigrants were viewed as low-wage competitors of European-American workers. Organized vigilantes backed by some of the establishment and by the Knights of Labor attempted to round up Chinese nationals in Puget Sound ports and put them on ships bound for San Francisco. The Governor enlisted the help of the "Home Guard" militia, including cadets at the University of Washington, the equivalent of ROTC. In an incident that was something of a reverse Kent State Massacre, the nervous youngsters opened fire on the vigilantes, killing four of them. The Governor then called out additional militia and imposed martial law on Seattle for several months.[22]

In 1889 there was labor unrest and rioting in Coeur d'Alene, and many people there were victims of armed Pinkerton detectives, who, as the historian Labbeus Knapp noted, "worked for the highest bidder."[23] Closer to home, in 1888-89, Knights of Labor strikes at Newcastle (near Renton) and Roslyn were busted up by armed private thugs.[24] The Washington Constitution's framers wanted to put a stop to this, and while they amply provided for a public militia in Article X, they left the

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[22] Archie Binns, Northwest Gateway: The Story of the Port of Seattle at 230-53 (1941).

[23] Labbeus Knapp, Origins of the Constitution of the State of Washington, 4 Wash. Hist. Q. 227, 267 (1913).

[24] Wilfred Airey, A History of the Constitution and Government of Washington Territory at 456 (1945 U.W. Ph.D. Thesis).

Legislature in Article I, Section 24 with full authority to regulate private militias, private rent-a-cops, and any other armed nongovernmental groups.

Courts Sustain the Restrictions

While recognizing the underlying personal right to bear arms, Washington's courts subsequently enforced laws banning private groups of armed men and consistently supported reasonable government regulations on personal weapons.[25] In State v. Gohl,[26] just 18 years after Washington's constitution was adopted, the State Supreme Court sustained the Legislature's authority to regulate private militias and vigilantes. In that case, the court upheld the conviction of William Gohl, who apparently had hired a squad of goons to intimidate the captain of a schooner. Justice Rudkin stated that "a constitutional guaranty of certain rights to the individual citizen does not place such rights entirely beyond the police power of the state."[27] He further wrote:[28]

> Armed bodies of men are a menace to the public, their mere presence is fraught with danger, and the state has wisely reserved to itself the right to organize, maintain and employ them.

Gohl makes it clear (if it had ever been unclear) that the Legislature had full authority to regulate or ban private citizen "militia" groups. In

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[25] See notes 17-18, supra, regarding weapons regulations in effect at the time the constitution was drafted.

[26] 46 Wash. 408, 90 P. 259 (1907).

[27] Id. at 410.

[28] Id. at 412.

subsequent cases, our courts have also upheld handgun permit requirements,[29] restrictions on weapon ownership by those convicted of violent crimes,[30] proscriptions on firearms where liquor is served,[31] prohibitions on possession of weapons by prisoners,[32] and bans on brandishing weapons with intent to intimidate.[33] At the same time, the State Supreme Court has underscored that lawful ownership of weapons is protected under Article I, Section 24, in one case barring evidence of a legal gun collection in a sentencing hearing.[34]

In Seattle v. Montana,[35] Washington's high court recently spoke again on the right to bear arms. Two defendants were found in Seattle Municipal Court to have violated a city ordinance barring the carrying of dangerous knives. The King County Superior Court reversed on the grounds that the City's ban violated the defendants' Article I, Section 24 right to bear arms - in this instance a three-inch paring knife and a six-to-nine-inch filleting knife, respectively. Writing the lead opinion, Justice Talmadge chided the parties for failing to perform an adequate "Gunwall"

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[29] State v. Tully, 198 Wash. 605, 89 P.2d 517 (1939).

[30] State v. Krantz, 24 Wn.2d 350, 164 P.2d 453 (1945).

[31] Second Amendment Foundation v. Renton, 35 Wn. App. 583, 668 P.2d 596 (1983).

[32] State v. Barnes, 42 Wn. App. 56, 708 P.2d 414 (1985).

[33] State v. Spencer, 75 Wn. App. 118, 876 P.2d 939 (1994), review denied, 125 Wn.2d 1015 (1995).

[34] State v. Rupe, 101 Wn.2d 664, 706-08, 683 P.2d 571 (1984).

[35] 129 Wn.2d 583, 919 P.2d 1218 (1996).

analysis[36] of the Washington Constitution to help the court understand the background of Article I, Section 24 so that it could properly interpret that provision. Although he stated that without Gunwall briefing, the court could not address whether knives constituted "arms,"[37] Talmadge nevertheless plunged ahead on that very point. In a carefully researched footnote that theoretically should be treated as dicta,[38] Talmadge conclusively demonstrated that during the second half of the nineteenth century, there was broad consensus in the American south and west that protected "arms" encompassed military-type weapons such as rifles - not knives, pocket pistols, and other concealable weapons. Talmadge then concluded that despite the lack of a formal Gunwall analysis, the court could uphold Seattle's ordinance: If the knives were arms, under Gohl they were regulable;[39] if the knives were not arms, they could be banned under the general police power.[40] Summarizing his analysis, Talmadge wrote that Article I, Section 24 "is not absolute and permits reasonable regulation of arms."[41]

In a short but lively concurrence, Justice Alexander wrote that the case should have been decided solely on the basis that the knives in question were not the sort of "arms" protected by Washington's

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[36] See note 2, supra.

[37] 129 Wn.2d at 591.

[38] Id. at 590 n.1.

[39] Id. at 593.

[40] Id. at 591-92.

[41] Id. at 587.

constitution.[42] Alexander offered no analysis, but it would be fair to assume that he based his analysis on Justice Talmadge's footnote on 19th century court holdings that small concealable weapons were constitutionally unprotected. Justice Alexander also offered a spirited argument that Article I, Section 24 was meant "absolutely to protect a person's right to carry arms for personal defense" and hinted that if the knives had been "arms," they might not have been subject to the City's police power regulation.[43] Alexander had history on his side in asserting that Article I, Section 24 provides a strong protection of the lawful possession of certain firearms, and his words likely gave comfort to those concerned about the overregulation of guns. But his concurring opinion overlooked the unwavering line of Washington cases upholding gun registration and limits on the carrying of weapons in places, by persons, or in a manner that might endanger the public.[44]

Montana is an important case in the development of Article I, Section 24, a section of Washington's constitution that can trace its roots to the year 1181, if not earlier. But because the Montana attorneys did not engage in a full Gunwall analysis, and because Justice Talmadge was able to carry only three of his colleagues in his lead opinion, there will likely be future cases that flesh out the scope and meaning of Washington's personal right to bear arms. There should be no doubt,

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[42] Id. at 601.

[43] Id. at 600. Chief Justice Durham concurred with Justice Alexander, stating that knives were not "arms," but that it was "unwise to speculate about the boundaries of the 'reasonable regulation' limit on the constitutional right to bear arms in self-defense." Id. at 599.

[44] See text accompanying notes 29-33, supra.

however, that the Legislature will continue to have full powers to control private "militias," "posses," and vigilante groups. Furthermore, although Justice Alexander has reminded us that lawful possession of "arms" is strongly protected in Washington, the court's earlier rulings should continue to sustain reasonable regulation of a broad array of weapons in the interest of public safety.