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NOTE: This background paper presents only the views and interpretations of its author. It does not speak for the sponsors of HJR 1026 or anyone else.

Why Does the Oklahoma Constitutional Right to Keep and Bear Arms Need Amending?

The current constitutional guarantee has been grievously damaged through misinterpretations by the Oklahoma courts that stretch back more than a century. It does not provide the protection it was supposed to provide. And even if the current provision had been interpreted rightly, it would still provide less protection than Oklahomans today expect and deserve.

Current Provision

The text of section 26 of the Oklahoma Bill of Rights, OKLA. CONST. art. II, § 26, has been unchanged since statehood in 1907. It reads:

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.

The plain text of this provision tells much about how it should have been interpreted. Reading it, one would assume the right would have certain features:

(1) The most important purpose of the right should be **personal defense** – “defense of [the citizen’s] home, person, or property.” That is why the Oklahoma Constitution lists it first.

(2) Thus, the “arms” that a citizen has the right to keep and bear should include the weapons appropriate for personal defense, particularly **handguns**, which the U.S. Supreme Court calls “the quintessential self-defense weapon.”¹

¹ Dist. of Col. v. Heller, 554 U.S. 570, 629 (2008).

(3) The Legislature can “**regulate**” carrying weapons, but cannot “**prohibit**” the practice – the constitutional text itself makes this distinction.

(4) Since the text specifically affirms the citizen’s right “to ... bear arms in defense of his home ... *or property*” (emphasis added), a peaceable citizen should, at a bare minimum, have a constitutional right to carry a handgun for self-defense **on his or her own property**.

Shockingly, in the eyes of the courts, *not one* of these four claims is true today under the Oklahoma Constitution’s right to arms, despite the plain language of art. II, § 26. The right is not about personal defense. It does not protect defensive weapons. And the State can completely prohibit carrying a handgun in one’s own backyard. It can even ban handguns entirely.

This is a result of the grudging and erroneous interpretations that the Oklahoma courts have historically given to the provision. It is one important reason why the state constitution must be reformed.

The Leading Cases on Art. II, § 26

In *Ex parte Thomas*, 97 P. 260 (Okla. 1908), the Oklahoma Supreme Court upheld a conviction for concealed carry of a pistol. Whatever the merit of that result, the reasoning that the Oklahoma Supreme Court used to get there was blatantly contrary to the text of the state constitution. The court held that Art. II, § 26 does *not* generally protect arms useful for self-defense, such as pistols. Instead, it only protects militiaman’s weapons, those used in “civilized warfare”. It held that the purpose of the amendment is simply “the maintenance of an armed militia,” *id.* at p. 264, for the defense of the community as a whole, not the individual. *See id.* at 262-64.

This was obviously wrong, since the very first purpose listed by the Oklahoma Constitution is *individual* defense: the “defense” of “a citizen[s] ... home, person, or property.” To reach its implausible conclusion, *Thomas* relied only on cases from states whose constitutions are very different from Oklahoma’s. A few constitutions, such as Arkansas’s, say that the right to keep and bear arms is solely for the purpose of “the common defense.”² But most are not so narrow, including Oklahoma’s. Our constitutional convention

² See, e.g., ARK. CONST., art. II, § 5 (“The citizens of this State shall have the right to keep and bear arms for their common defense.”) (enacted 1868, art. I, § 5).

actually considered and *rejected* the “common defense” wording in favor of broad language recognizing personal defense.³ *Thomas* paid no heed to this.

In *Pierce v. State*, 275 P. 393 (Okla. Crim. App. 1929), the Oklahoma Court of Criminal Appeals held that it was perfectly constitutional to ban carrying a handgun on one’s own property. Deputies seeking a bootlegging still served a search warrant at Pierce’s home. Pierce came to the door, visibly wearing a Colt revolver in his belt. Pierce made no attempt to use the gun, and invited the deputies to execute their warrant. He stepped out of his front door onto his own land while the deputies searched inside. After finding nothing illegal in his house, deputies seized Pierce’s revolver and he was charged with the crime of carrying a handgun. A majority of the Court of Criminal Appeals affirmed the conviction, and held that the Oklahoma Constitution gave no protection in such a situation. Indeed, the court went out of its way to stress that, despite the guarantee of a right to bear arms in the state constitution, a complete ban of pistols and revolvers would be perfectly constitutional: the government “has power to not only prohibit the carrying of concealed or unconcealed [pistols or revolvers], but also has the power to even prohibit the ownership or possession of such arms.”⁴

Thomas and *Pierce* remain on the books today.

Some might think these old cases are unlikely to guide courts today, but the truth is otherwise. The Oklahoma Supreme Court refused to overrule *Thomas* just sixteen years ago, in an important case that dealt with whether an individual could be precluded from a concealed carry license based on a prior felony arrest (after which he had been charged but acquitted).

In *State ex rel. OSBI v. Warren*, 975 P.2d 900 (Okla. 1998), the court quoted with approval the passage from *Thomas* that rejected protection for arms appropriate for personal defense, and noted that “*Thomas* has been consistently followed and never overruled.” *Id.* at 902.

The court also added that whatever the right to arms under the Oklahoma Constitution *did* protect, it would protect only to a weak degree, since the right was “subject to reasonable regulation under the police power.” *Id.* at 903. That statement was not even necessary to the decision in *Warren*,

³ Robert Dowlut, *One Take on the Right to Bear Arms*, TULSA WORLD, June 30, 2010 (describing how Oklahoma’s 1907 constitutional convention rejected the 1905 Sequoyah Constitution’s version of the right to arms, which would have only protected a right to keep and bear arms “in the common defense”).

⁴ *Id.* at 279. One judge dissented, citing art. II, § 26 and arguing that the statute banning gun carrying should not be applied to carrying handguns on private property near one’s own home. *Id.* at 280-83 (Davenport, J., dissenting).

since the case was ultimately decided in the permit applicant's *favor* on the basis of completely different constitutional provisions.⁵

In other words, the Oklahoma Supreme Court went out of its way in 1998 to approve the most objectionable aspects of *Thomas*, and to declare a weak “reasonable regulation” standard of review for claims under art. II, § 26 – even though it could have reached the identical outcome in the case without weakening the right to arms in this fashion.

The court has stated in another context that a statute does not violate the “reasonable regulation / police power” standard unless it “is palpably unreasonable and arbitrary in its requirements. ... It is not for [the courts] to say that a better method could be found, or that the method adopted is unwise.”⁶

Many other states’ courts today apply the weak “reasonable regulation” standard announced in *Warren* to the right to arms in their state constitutions. Under this standard, with some exceptions, almost any restriction on gun rights is upheld by the courts, as long as it does not completely prohibit the exercise of the right to keep and bear arms. See Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007). As Professor Winkler documents, the “reasonable regulation” standard involves a balancing of interests, but “this balancing is decidedly tipped in favor of the government, so much so that the individual almost never wins. The large-scale problem of violence in society ... virtually always overwhelms the individual ... interest in self-defense or recreation.” *Id.* at 717-718.

It is very likely that the Oklahoma Supreme Court will continue to apply *Warren*’s weak “reasonable regulation” standard to any newly amended version of the state constitutional right to arms, unless the amended text specifically mandates a *different*, more protective form of scrutiny. The court has given no reason to think it would do anything else.

In summary, our right to arms needs amending for three reasons:

First, to clarify that handguns and other common arms used for self-defense today are indeed protected. The historical tendency of Oklahoma courts to read the definition of “arms” in an unreasonably narrow way shows that the definition of protected “arms” needs to be very explicit.

Second, to clarify that individual self-defense, including carrying arms for self-defense, is a central purpose of the right to keep and bear arms in

⁵ Namely, the Equal Protection Clause of the federal Fourteenth Amendment and the equal protection principle of the Oklahoma Constitution, art. V, § 59.

⁶ *Jack Lincoln Shops v. State Dry Cleaners' Bd.*, 192 Okla. 251, 135 P.2d 332, 335 (Okla. 1943).

Oklahoma. (Unlike the courts, the Oklahoma Legislature has acknowledged this truth. Our state's 1995 handgun carry licensing law is called the "Oklahoma Self-Defense Act," 21 O.S. § 1290.1 *et seq.*, and the Legislature declares that it "shall be liberally construed to carry out the constitutional right to bear arms for self-defense and self-protection." 21 O.S. § 1290.25.)

Third, to supply a standard of scrutiny that is significantly more protective of the right than the weak "reasonable regulation / police power" standard. If the right to arms is amended but the amendment does not specify a higher standard of scrutiny, then it is very likely that the Oklahoma Supreme Court will continue to apply the "reasonable regulation" standard it announced in *Warren*, undoing much of the value of amending the constitutional guarantee. The Legislature and the People need to mandate more protection.

An Explanation of Standards of Constitutional Scrutiny

Beginning in the 1930s, the U.S. Supreme Court has developed a three-tier approach to constitutional rights claims. It is a matter of basic federal constitutional law that courts will usually apply one of three different levels of scrutiny to any law challenged as unconstitutional. Each of the three levels requires a court to ask how important are the government interests that motivate the law, and how carefully and closely tied the law is to serving that interest. The higher the level of scrutiny, the fewer government interests will be deemed important enough to justify the law, and the more *narrowly tailored* the law's restrictions must be, *i.e.*, the law must not go farther than what is necessary to accomplish the government's interest. From weakest to strongest, the three levels are:

Rational basis scrutiny. This is the minimum. It applies to all laws, even ones that do not infringe on a specific constitutional right. It is very easy to satisfy. The government wins unless the challenger can prove that the challenged statute lacks any *rational relationship* to any *legitimate* government interest.

Intermediate scrutiny. This requires that the government prove that the law is *substantially related* to an *important* government interest. For example, claims of sex discrimination under the Fourteenth Amendment Equal Protection Clause are subject to intermediate scrutiny. Under the First Amendment, regulations of the time, place, or manner of speech also receive intermediate scrutiny, as long as they do not discriminate against speech on the basis of its content or point of view. Most lower federal courts have decided to apply (what they call) intermediate scrutiny to Second

Amendment claims in recent years. In practice, however, most of these lower courts have upheld nearly any law challenged under the Second Amendment.

Strict Scrutiny. The most demanding form of scrutiny. The government has the burden to prove that a regulation is *narrowly tailored* to serve a truly *compelling* state interest, and the regulation must use the *least restrictive means* that will accomplish its goals. Content-based restrictions on First Amendment protected speech usually receive strict scrutiny. So do claims of racial discrimination under the Fourteenth Amendment.

The U.S. Supreme Court held in *D.C. v. Heller* that the Second Amendment must receive something more than rational basis scrutiny, but it did not specify which type of heightened scrutiny applies. Lower courts have tended to adopt intermediate scrutiny. A few have held that restrictions that affect conduct near the core of the right receive “nearly strict” scrutiny.

Some might ask, why not require intermediate scrutiny for the Oklahoma right to arms? The short answer is that the lower federal courts in the five years since *Heller* have applied the intermediate scrutiny standard to the Second Amendment dozens of times, and (with a few exceptions) it has resulted in something not very different in practice from mere rational basis scrutiny. Oklahoma courts will naturally draw upon these precedents if they are asked to apply intermediate scrutiny to an amended art. II, § 26, and the result will be weak judicial protection for the right to arms.

Put bluntly, the judicial application of intermediate scrutiny in the lower courts since 2008 has rendered intermediate scrutiny unreliable for protecting the right to keep and bear arms. Oklahoma must specify strict scrutiny if it wants significant judicial enforcement of the right.

Examples of Restrictive Gun Laws Recently Upheld by Lower Courts Using “Intermediate Scrutiny”

- *Heller v. D.C. (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011): Upheld **“assault weapons”** bans on AR-15s and many other types of bestselling firearms; bans on **magazines** holding more than 10 rounds; and mandatory handgun **registration**, all under intermediate scrutiny. (The majority even left open the possibility that a ban on *all* semi-automatic handguns might be constitutional.)
- *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012): Upheld, under intermediate scrutiny, New York’s extremely **restrictive permit laws on handgun carrying**, under which

most law-abiding citizens have no chance of ever legally carrying a handgun outside the home. (The federal court approvingly quoted a 1913 New York court's description of handguns as "the usual and the favorite weapon of the turbulent criminal class.").

The Third Circuit reached a similar decision in *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), holding that New Jersey's extremely restrictive handgun carry permit laws satisfy intermediate scrutiny, though they leave most citizens with no opportunity of lawfully carrying a handgun for self-defense.

- *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013): Upheld, under intermediate scrutiny, New York City's **\$340 registration fee** for a three-year permit to possess a handgun for self-protection in one's home. The majority went further, stating that it doubted that this costly restriction even placed any "substantial burden" on anyone's right to keep and bear arms.

HOUSE JOINT RESOLUTION 1026

Current HJR 1026, whose lead author is Rep. Fisher, was approved by the House States Rights Committee in February 2013. It is scheduled to be taken up on the House floor in February 2014. (A floor amendment version has been submitted.) If approved by a majority of the full House, HJR 1026 will also require approval by a Senate committee and the full Senate. Finally, if approved by both houses of the Legislature, HJR 1026 will be submitted to the People as a State Question for a majority vote in the November 2014 general election. (As a proposed constitutional amendment pursuant to OKLA. CONST. art. XXIV, § 1, HJR 1026 does not require signature by the Governor.)

Overall, HJR 1026 is a huge step forward. It accomplishes each of the three basic goals I listed above: foregrounding personal defense (including carry); making clear that handguns are "arms"; and mandating strict scrutiny.

Original HJR 1026 (as introduced to the House Floor, March 4, 2013):

The fundamental right of each individual citizen to keep and to bear arms including, but not limited to, handguns, rifles, shotguns, knives and other common arms, ammunition and the components thereof, for security, defense or in aid of the civil power when thereunto lawfully summoned, recreation, lawful hunting, or any other legitimate purpose shall not be infringed.

Regulations of this right shall be subject to strict scrutiny and shall not frustrate or impair the purposes of the right.

A **floor amendment version** was introduced by Rep. Fisher on February 13, 2014. It includes some additions to respond to specific issues, as I will now discuss. The floor amendment version is reproduced at the end of this paper. I hope that the proposal, as amended, will ultimately be approved by the Legislature and sent to the People for their approval.

POTENTIAL ISSUES RAISED BY STRICT SCRUTINY:

- **Are felon-in-possession laws constitutional under strict scrutiny? For all felonies? For some felonies? (Recent experience of Louisiana.)**

Courts have not traditionally applied “strict scrutiny” to claims implicating the constitutional right to arms. So this is somewhat new territory. To date, one other state has led the way. In November 2012, **Louisiana** voters overwhelmingly approved an amendment that strengthened the Louisiana Constitution’s right to arms guarantee (which had also been greatly watered down by the state’s courts). Louisiana’s new right to arms provision, LA. CONST. art. I, § 11 (2012), reads simply:

The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny.

When the new amendment took effect, some Louisiana trial courts began to strike down some convictions for being a felon in possession of a firearm, arguing that a lifetime ban on gun ownership for a nonviolent felon could violate strict scrutiny on an individual, case-by-case basis. But one trial court has gone further and declared that the entire Louisiana felon-in-possession law is now unconstitutional. *State v. Draughter*, No. 512-135 (La. Crim. Ct. Mar. 21, 2013). Because the statute did not distinguish between recent and old felonies, or violent and nonviolent felonies, the court declared it was not narrowly tailored and therefore was void on its face, in *all* applications. (This approach, which is called the “overbreadth” doctrine, is common in Free Speech Clause law when strict scrutiny is applied.)

On appeal, the Louisiana Supreme Court reversed, *State v. Draughter*, No. 2013-KA-0914, 2013 WL 6474419 (Dec. 10, 2013). It held that the Louisiana felon-in-possession statute was not facially unconstitutional, and it upheld that statute as applied to Draughter. But it also made clear that its holding was narrow. The Louisiana Supreme Court pointed out that at the

time he was caught with a weapon, Draughter was still subject to state supervision because of his earlier felony conviction. It declined to say whether the statute would still have been constitutional as applied to Draughter if he had finished his period of post-release supervision.

Oklahoma should address the constitutionality of state felon-in-possession laws⁷ in the text of HJR 1026, and the current floor substitute version (see the end of this white paper) explicitly does so in subsection B.

- **Is the Oklahoma Self-Defense Act’s requirement of a “shall issue” license to carry a handgun in public places constitutional under strict scrutiny?**

Another question is whether a law requiring a “shall issue” permit to carry a handgun in public places, such as the Oklahoma Self-Defense Act, 21 O.S. 1290.1 *et seq.*, and the similar laws of about 36 other states, is constitutional (at least in its basic outlines) under strict scrutiny. No court has yet considered such a question, because the application of strict scrutiny to gun rights claims has been rare.

It is clear that anything *more* restrictive than our current “shall issue” permit-based carry law would become unconstitutional if strict scrutiny applies. Indeed, one federal court of appeals and some state courts have held that restrictive “may issue” carry laws violate the federal or state right to bear arms. *Peruta v. County of San Diego*, No. 10-56971 (9th Cir. Feb. 13, 2014); *City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988); *Schubert v. DeBard* 398 N.E.2d 1339 (Ind. App. 1980). But several lower federal courts have held the opposite, that restrictive “may issue” laws survive under intermediate scrutiny, *e.g.*, *Kachalsky v. Westchester County*, 701 F.3d 81 (2d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013).

Given this history, I believe it is likely that Oklahoma courts would uphold the basic structure of the SDA (i.e., its license requirement) under strict scrutiny, because it is a “shall issue” statute. “Shall issue” laws reflect a good deal of narrow tailoring, especially when the preclusions from eligibility for the license are limited to things such as convictions for serious crimes, insanity, and the like. Experience shows that “shall issue” licensees rarely commit crimes, thus suggesting that the law furthers compelling interests while still allowing the right to be readily exercised.

⁷ Of course, the federal felon-in-possession law, 18 U.S.C. § 922(g)(1), is not subject to state constitutional challenges, and remains in effect in Louisiana and elsewhere.

What follows is the text of the **floor amendment version** of HJR 1026. Subsection B addresses felons in possession. Subsection C explicitly outlaws gun registration and the special taxation of arms and ammunition. This subsection essentially says that *keeping* arms – acquiring and possessing them – cannot be subject to registration. It does not decide the question of whether *bearing* arms in public places can be subjected to a “shall issue” licensure requirement. As discussed above, a court would decide that issue by applying strict scrutiny. Subsection C is adapted from the right to arms in the Idaho Constitution, adopted in 1978.⁸ Idaho currently has a “shall issue,” permit-based concealed carry statute.

Floor Amendment Version of HJR 1026 (March 11, 2014)

Section 26. Keeping and bearing arms – Fundamental status – Specific regulations.

- A. The fundamental right of each individual citizen to keep and to bear (that is, to carry) arms, including handguns, rifles, shotguns, knives, nonlethal defensive weapons and other arms in common use, as well as ammunition and the components of arms and ammunition, for security, self-defense, lawful hunting and recreation, in aid of the civil power, when thereunto lawfully summoned, or for any other legitimate purpose shall not be infringed. Any regulation of this right shall be subject to strict scrutiny.**
- B. This section shall not prevent the Legislature from prohibiting the possession of arms by convicted felons, those adjudicated as mentally incompetent, or those who have been involuntarily committed in any mental institution.**
- C. No law shall impose registration or special taxation upon the keeping of arms, including the acquisition, ownership, possession, or transfer of arms, ammunition, or the components of arms or ammunition.**

⁸ IDAHO CONST., art. I, § 11 (1978) (“The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not 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.”).