
IN THE SUPREME COURT OF MISSOURI

No. SC85674

ALVIN BROOKS, *et al.*,
Respondents,

v.

STATE OF MISSOURI, *et al.*,
Appellants.

On Petition For Review
From The Circuit Court Of The City Of St. Louis
The Honorable Steven R. Ohmer

BRIEF OF AMICUS CURIAE NATIONAL RIFLE ASSOCIATION
OF AMERICA, INC.

Respectfully submitted

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Rifle Association of America, Inc. ("NRA") is a New York not-for-profit membership corporation founded in 1871. NRA has 4.2 million individual members and 10,700 affiliated members (clubs and associations) nationwide. Among its purposes, as set forth in its Bylaws, are:

1. To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens;
2. To promote public safety, law and order, and the national defense;
3. To train members of law enforcement agencies, the armed forces, the militia, and people of good repute in marksmanship and in the safe handling and efficient use of small arms;
4. To foster and promote the shooting sports, including the advancement of amateur competitions in marksmanship at the local, state, regional, national, and international levels;

5. To promote hunter safety, and to promote and defend hunting as a shooting sport and as a viable and necessary method of fostering the propagation, growth and conservation, and wise use of our renewable wildlife resources.

The NRA has a strong interest in upholding the rights of its members and all citizens to keep and bear arms as protected in the constitutions and laws of each State, including Missouri, and in ensuring that the right to due process of law is observed regarding licenses and permits to carry handguns and other firearms.

The NRA regularly litigates cases¹ and files *amicus curiae* briefs² in matters related to the right to keep and bear arms as guaranteed in the state and federal constitutions. This brief seeks to assist the Court by providing analysis and research, including historical matter and comparisons with other States, not fully set forth in the briefs of the parties³

¹ E.g., *NRA v. City of South Miami*, 812 So. 2d 504 (2002); *NRA v. Reno*, 216 F.3d 122 (D.C. Cir. 2000); *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992); *NRA v. Brady*, 914 F.2d 475 (4th Cir. 1990).

² E.g., *Nordyke v. King*, 319 F.3d 1185 (9th Cir. 2003); *Klein v. Leis*, 99 Ohio St.3d 537, 795 N.E.2d 633 (2003); *State v. Gonzales*, 645 N.W.2d 264 (Wis. 2002); *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

³ The chief author of this brief is also author of a book on the arms guarantees of the first 14 states, *see* Halbrook, Stephen P., *A Right to Bear Arms: State and Federal Bills of*

Jurisdictional Statement

Amicus curiae NRA hereby adopts the jurisdictional statement set forth in the brief of the Attorney General.

Statement of Facts

Amicus curiae NRA hereby adopts the statement of facts set forth in the brief of the Attorney General.

ARGUMENT

Introduction: The Act Continues the Tradition of Regulating the Circumstances in Which Persons May or May Not Carry Concealed Weapons

For well over a century, the legislature has regulated the carrying of concealed weapons. The legislature has never prohibited the carrying of concealed weapons by all persons in all places and in all circumstances. Instead, the legislature has repeatedly defined the classes of persons as well as the places and circumstances to which either the statutory *right* of concealed carry, or the statutory *prohibition* against concealed carry applies. In so doing, the legislature has repeatedly extended the limited right of concealed

Rights and Constitutional Guarantees (Westport, Conn.: Greenwood Press, 1989), and of another book and law review articles on the right to bear arms which are cited as authority in *Printz v. United States*, 521 U.S. 898, 939 n.2 (1997) (Thomas, J., concurring); *State v. Hirsch*, 177 Ore. App. 441, 446, 34 P.3d 1209, 1211 (2001); *In re Dailey*, 195 W. Va. 330, 342, 465 S.E.2d 601, 613 (1995); and *United States v. Emerson*, 270 F.3d 203, 220 n.12 & 227 (5th Cir. 2001).

carry to certain citizens under certain circumstances, and prohibited the carrying of concealed weapons by others who do not enjoy those limited rights. The Act at issue merely extends the right to yet another class of citizens⁴

R.S.Mo. § 571.030, subsection 1, provides in part: “A person commits the crime of unlawful use of weapons if he or she knowingly: (1) Carries concealed upon or about his or her person a knife, a firearm, a blackjack or any other weapon readily capable of lethal use”⁵ However, subsection 2 provides that this prohibition “shall not apply to” (and therefore creates a limited statutory right to concealed carry on behalf of) a number of categories of persons, including (1) all peace officers, regardless of whether “on or off duty,” or “within or outside” their lawful jurisdictions, and “any person summoned by such officers to assist in making arrests or preserving the peace”; (2) personnel of prisons and jails; (3) members of the armed forces or national guard while on duty; (4) state and federal judges; (5) persons who execute process; (6) federal probation officers; (7) state probation officers and parole board members; (8) certain corporate security advisors; and (9) coroners (including deputies) and medical examiners (including assistants).

According to plaintiffs' argument, all of these statutory rights to concealed carry (which exempt certain classes of citizens from the general statutory prohibition) must be

⁴ “The Act” refers to House Bills 349, 120, 136, and 368, which the general assembly enacted on September 11, 2003.

⁵ Subsection 7 provides that “Unlawful use of weapons is a class D felony”

unconstitutional. If the Constitution itself prohibits carrying a concealed weapon, certainly nothing in the Constitution authorizes the above exemptions.

Subsection 3 of R.S.Mo. § 571.030 includes further exemptions from the prohibition on carrying a concealed weapon, including transporting a nonfunctional, unloaded, or inaccessible weapon; transporting a firearm in a motor vehicle's passenger compartment by a person at least 21 years old; possession of an exposed firearm for pursuit of game; or the possession of a concealed firearm by a person who "is in his or her dwelling unit or upon premises over which the actor has possession, authority or control, or is traveling in a continuous journey peaceably through this state." Other than the provision for transport in a motor vehicle, these exemptions were already established law. Again, according to plaintiffs' theory, since carrying a concealed weapon is constitutionally prohibited, these traditional exemptions are all unconstitutional.

The vehicle for plaintiffs' constitutional challenge is just another limited right of concealed carry which exempts certain citizens from the general statutory prohibition. Subsection 4 of R.S.Mo. § 571.030 provides in pertinent part: "Subdivisions (1) . . . of subsection 1 of this section shall not apply to any person who has a valid concealed carry endorsement issued pursuant to section 571.094 or a valid permit or endorsement to carry concealed firearms issued by another state or political subdivision of another state." This is no different qualitatively than the exemptions in previous enactments for categories of persons, places, or circumstances.

Indeed, the concealed carry right created by §§ 571.030.4 and 571.094 is far more restrictive than the preexisting absolute rights granted to other classes of officials and

citizens (about which plaintiffs do not complain and the trial court did not mention). For instance, judges, coroners, peace officers (including those who are off-duty and outside their lawful jurisdictions), and others listed in § 571.030.2 are completely exempt from the prohibition on carrying concealed weapons, regardless of the place where the weapon is carried (including schools and churches) or the complete absence of any firearms training by the holder of the right. By contrast, subsection 20 of § 571.094 provides that a concealed carry endorsement shall not authorize a person to carry a concealed firearm into some seventeen broad categories of places,⁶ and subsections 9, 22, and 23 spell out specific firearms training requirements that must be met in order to qualify for the

⁶ These places include a police station, within 25 feet of a polling place on election day, a jail or prison, a courthouse or court office, any meeting of local government or the general assembly, any building designated by certain legislative or judicial bodies, a bar, the restricted area of an airport, any place where federal law restricts firearms, a school or institution of higher education, a child care facility, a riverboat gambling operation, an amusement park, a church, any private property with posted signs, a sports arena or stadium, and a hospital. Pursuant to subsection 21 of § 571.094, a person who carries a concealed firearm in any such restricted place may be removed from the premises, and if removal requires that a peace officer be summoned, the person is subjected to various monetary fines ranging from \$100 to \$500, and suspension or revocation of the endorsement. In addition to these penalties, such person who refuses to leave may be subject to arrest for criminal trespass.

concealed carry endorsement. Finally, in addition to each of the concealed carry rights described above, the legislature has also granted the right of concealed carry to all persons when carrying a concealed weapon in their dwellings or certain other premises, or while traveling in a continuous peaceable journey through the state. Subsection 3, *id.* These citizens need not have any training and are not subject to a criminal background check in order to claim the exemption.

Only those seeking the endorsement must satisfy the requirements of § 571.094. Such persons may not have been convicted of a felony or certain misdemeanors (subsection 2(2) & (3)), and may not have been the subject of a “valid full order of protection which is still in effect” (*id.* (10)). They must be fingerprinted and have a criminal background check (subsection 5), and must take and pass a firearms safety training course (subsections 22, 23, & 24).

Accordingly, the new exemption for persons with the concealed carry endorsement has reasonable restrictions, and these restrictions are more stringent than those applicable to the preexisting categories of exemptions.

I. THE TEXTUAL STATEMENT THAT “THIS” DECLARED RIGHT TO BEAR ARMS “SHALL NOT JUSTIFY THE WEARING OF CONCEALED WEAPONS”

DOES NOT AFFECT THE LEGISLATURE’S POWER TO REGULATE CONCEALED WEAPONS AS IT SEES FIT

A. The Limiting Clause Refers Solely to the Declared Right

Missouri Const., Art. I, § 23, as adopted in 1945, provides: “That the right of every citizen to keep and bear arms in defense of his home, person and property, or when

lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons.” The 1945 language derived from Mo. Const., Art. II, § 17 (1875), which stated: “That the right of no citizen 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 into question; but nothing herein contained is intended to justify the practice of wearing concealed weapons.”

It is axiomatic that legislation is entitled to a strong presumption of constitutionality. *See Missouri Libertarian Party v. Conger*, 88 S.W.3d 446, 447 (Mo. banc 2002). As demonstrated below, everything the Court needs to determine the constitutionality of the Act is contained in the clear language of Article I, § 23. As this Court has repeatedly held, the language of the Missouri Constitution must be interpreted according to its plain meaning. *See, e.g., State ex rel. Heimberger v. Bd. of Curators of University of Missouri*, 188 S.W. 128, 130-131 (Mo. banc 1916). Where the language of the Constitution is clear, Courts must give the words “their plain and ordinary meaning.” *Lagares v. Camdenton R-III School Dist.*, 68 S.W.3d 518, 525 (Mo. banc 2002). Moreover, if the “plain and ordinary meaning” of the Constitution admits of *any* reasonable construction that supports the constitutionality of a challenged statute, the statute must be found to be constitutional and the Court’s inquiry must end. *See Heimberger, supra*. Despite acknowledging this obligation and the strong presumption of constitutionality the Act enjoys, the Trial Court nevertheless improperly inquired beyond the language of Article I, § 23 in assessing the validity of the Act. (L 408).

The term “this” means “the person, thing, or *idea* that is present or near in place, time, or thought or *that has just been mentioned . . .*” *Webster’s Ninth New Collegiate Dictionary* 1127 (1991) (emphasis added). Thus the phrase “*this* shall not justify the wearing of concealed weapons” refers solely to the immediately preceding constitutional right of the citizen to bear arms.⁷

The term “justify” means “(a) to prove or show to be just, right or reasonable, (b) to show to have had a sufficient legal reason . . .” *Id.* at 656. Accordingly, the just-declared right to bear arms, standing alone, is not a sufficient legal reason for the wearing of a concealed weapon.

The plain meaning of the “this shall not justify” clause is that the constitutional right to bear arms does not include a concomitant constitutional right to bear them in a concealed manner. The clause thus assures legislators that they are not violating the Constitution when they enact regulations specifying the circumstances under which concealed weapons may or may not be carried. The provision also gives information to the citizens at large that they have a right to bear arms, but that right is subject to applicable legislative restrictions on concealed weapons. The provision also precludes a defendant charged with the statutory crime of carrying a concealed weapon from asserting that the constitutional right to bear arms “justifies” his conduct.

⁷ Similarly, the language from the 1875 constitution “nothing *herein contained* is intended to justify the practice of wearing concealed weapons” referred to the same right as just expressed “*herein,*” i.e., in this section.

B. The Limiting Clause Does Not Prohibit Citizen Conduct or Define a Crime

Plaintiffs assert three untenable claims about the wording of Art. I, § 23. First, “the exception to this constitutional provision is clearly a *prohibition* on the wearing of any concealed firearm.”⁸ Amended Verified Petition ¶ 21(a)(1)(i) (emphasis added). Second, the Act at issue “conveys rights to bear firearms at times and under circumstances which go beyond the express limitations of Article I, Section 23, restricting the right to bear arms for the defense of a citizen’s home, person or property.” *Id.* (ii). Third, the Act “allows permit holders to carry exposed firearms at any time, place or in any manner, and allows concealed lethal weapons, excluding firearms, at any time, place or manner.”⁹ This allegedly “extends beyond rights expressly limited by the Missouri Constitution.” *Id.* (iii).

Not all activity fits into either of two dichotomous parts: (1) constitutionally protected or (2) constitutionally prohibited. The fact that an activity is not a constitutional right does not prohibit or make the activity unlawful, nor does it diminish the power of the legislature either to regulate or not to regulate the activity (much less

⁸ In their Memorandum in Support of Permanent Injunction, at 1, plaintiffs further assert that “there is a right under the Missouri Constitution to be free of concealed weapons.”

⁹ This last assertion is particularly puzzling, in that it involves “exposed firearms,” not concealed ones, and “concealed lethal weapons, excluding firearms.” The relevance of such items to the concealed firearms addressed by the Act is unclear.

mandate that the legislature must criminalize the conduct). Human activity would indeed be limited if confined only to activity guaranteed by the Constitution, such that all other activity must be deemed constitutionally prohibited. In fact, because the power of the legislature is plenary and residual, it may protect all variety of activities through the grant of statutory rights, except where the Constitution expressly denies it the power to act. *Three Rivers Junior College District v. Statler*, 421 S.W.2d, 235, 237-38 (Mo. banc 1967).

Thus the fact that an act is not a constitutional right does not mean that it is constitutionally prohibited or that the legislature must criminalize it. The phrase “this [declared right to bear arms] shall not justify the wearing of concealed weapons” neither expresses a constitutional prohibition nor creates a crime. The provision does not purport to prohibit the conduct or otherwise state that carrying a concealed weapon is an offense. It does not set forth the elements of an offense, does not classify it as felony or misdemeanor, and does not specify any punishment.¹⁰ Instead of providing that “the wearing of concealed weapons is unlawful and shall be punished” by whatever sentence (or mandating that the legislature define the punishment), the clause merely states that the

¹⁰ The Constitution is clear when it creates and defines crimes. *E.g.*, Art. I, § 30 (“That treason against the state can consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort . . .”). The “this shall not justify” clause is not one of them.

right to bear arms “shall not justify” wearing concealed weapons. In this respect, the clause is similar to the qualifying clauses of other Bill of Rights guarantees.¹¹

Moreover, plaintiffs’ proposed construction that the Constitution prohibits concealed carry in all circumstances would cause any number of absurd results. For starters, all exceptions to the statutory prohibition on carrying a concealed weapon would be void (as constituting rights granted by the legislature in defiance of a constitutional prohibition), including the exemptions for peace officers and judges. Public officials and employees are in no way exempt from the constraints of the Bill of Rights. Indeed, Art. II, § 3, expressly provides: “That the people of this state have the inherent, sole and

¹¹ For instance, Art. II, § 8, states in part that “every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty” That does not purport to define what those “abuses” are or to provide for civil or criminal liabilities and penalties. Other than the section’s further mention of procedures regarding libel and slander, defining what are and what are not “abuses” is left to legislative discretion.

Again, Art. II, § 5, provides in part that “no human authority can control or interfere with the rights of conscience, . . . but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others.” The legislature is empowered to define what it does or does not consider “good order” and the other categories listed.

exclusive right to regulate the internal government *and police thereof . . .*” (emphasis added.)

Similarly, under plaintiffs’ theory, the historic exemption allowing persons to carry concealed arms in their own homes would be void.¹² *State v. Hamdan*, 2003 Wis. 113, 665 N.W.2d 785, 808 (2003), correctly notes:

If the constitutional right to keep and bear arms for security is to mean anything, it must, as a general matter, permit a person to possess, carry, and sometimes conceal arms to maintain the security of his private residence or privately operated business, and to safely move and store weapons within these premises.¹³

In sum, the fact that the bearing of concealed arms is not constitutionally guaranteed does not render it constitutionally prohibited. Plaintiffs’ necessary argument

¹² Indicative of the absurdity of their position, even plaintiffs concede: “Certainly, a gun should be concealed at home when not in use to prevent accidents involving children and otherwise.” Plaintiffs’ Memorandum in support of permanent injunction, at 9-10.

¹³ *State v. Stevens*, 113 Ore. App. 429, 432, 833 P.2d 318, 319 (1992), held that a prohibition on carrying concealed weapons “was applied unconstitutionally” to a person in his own home. “[T]he state’s interpretation would restrict the manner in which one could carry a legal weapon from room to room within one’s home and would inhibit an act that is so intrinsic to ownership and self-defense that it would unreasonably interfere with the exercise of one’s constitutional right . . .” *Id.*

that the legislature has no power but to prohibit concealed carry by all persons, and at all times and places, would lead to patently absurd results. As shown next, the “this shall not justify” clause does not prohibit the Missouri legislature from legislating or not legislating on the subject, as they may see fit, pursuant to their plenary power.

C. The Limiting Clause Does Not Affect the Legislative Power

The fact that the guarantee of the right to bear arms does “not justify the wearing of concealed weapons” leaves discretion to the legislature to determine whether, and the extent to which, concealed weapons shall be regulated. The effect of the limiting clause is simply to remove any doubt that the legislature has power to regulate the concealed wearing of arms. Both in the past and currently, the legislature has decided the places and circumstances under which wearing concealed weapons are and are not regulated.¹⁴

It is noteworthy that no pertinent restriction on the legislative power is set forth in Missouri Const., Art. III, Legislative Department. Indeed, Art. III, §§ 36-39, entitled

¹⁴ The wisdom of the legislature’s judgment is irrelevant here. It certainly had facts before it which justify the Act. The FBI lists 13 categories of “factors which are known to affect the volume and type of crime occurring from place to place,” none of which includes carrying concealed weapons, particularly by licensees. Department of Justice, Federal Bureau of Investigation, *Crime in the United States 2000, Uniform Crime Reports* (2001), iv-v. The definitive scholarly study demonstrates that States which issue concealed carry permits have lower crime rates. John R. Lott, *More Guns, Less Crime* (University of Chicago Press, 1998).

“Limitation of Legislative Power,” would have been the appropriate place to deny legislative discretion over whether and how to regulate concealed weapons, but no such limitation exists. The General Assembly has the power to enact any law not prohibited by the United States Constitution or the Missouri Constitution. *Three Rivers Junior College District v. Statler*, 421 S.W. 235, 237-38 (Mo. banc 1967).

Reflecting that the legislature historically has regulated the circumstances under which the carrying of firearms are or are not restricted, *City of Cape Girardeau v. Joyce*, 884 S.W.2d 33, 34 (Mo. App. 1994), explained:

Every constitution adopted by the citizens of the State of Missouri since its inception in 1820 has contained language virtually identical to that of Article I, Section 23. However, *such constitutional provisions have never been held to deprive the General Assembly of authority to enact laws which regulate the time, place and manner of bearing firearms*. In 1881, one Wilforth was convicted of violating a statute which prohibited the carrying of a firearm into a church or place of religious worship. In upholding the statute against a constitutional challenge, the Missouri Supreme Court adopted the language of the Supreme Court of Alabama in *State v. Reid*, 1 Ala. 612, and stated "the constitution, in declaring that every citizen has the right to bear arms in defense of himself and the state, has neither expressly or by implication denied to the legislature the right to enact laws in regard to the manner in which arms shall be borne." *State v. Wilforth*, 74 Mo. 528, 530, 41Am.Rep. 330 (1881).

As if written for this very case, *Joyce* concluded: “Nothing in the Missouri constitution limits the power of the legislature to enact laws pertaining to the time, place and manner of carrying weapons.” *Id.* at 35. That statement obviously applies to the Act at issue here.

II. THE CONSTITUTIONAL, LEGISLATIVE, AND JUDICIAL HISTORY

CLARIFY THAT THE ACT IS A MERE VARIATION OF THE LEGISLATURE’S HISTORICAL TRADITION OF REGULATING CONCEALED WEAPONS

Mo. Const., Art. I, § 23, as noted previously, is derived from the 1875 Constitution. As the following demonstrates, the qualifying clause to the arms guarantee was explained at the 1875 constitutional convention as motivated by a desire to avoid any judicial declaration that the right to bear arms includes the right to wear them concealed. The 1875 Constitution itself included provisions limiting the authority of the legislature to authorize certain conduct, and also provided penalties for other conduct, but wearing arms was not included in either. Just four years after its adoption, the general assembly enacted legislation prohibiting concealed weapons in some circumstances and authorizing them on other circumstances. The courts have consistently adjudicated cases under this statutory scheme without any hint that it was and is unconstitutional.

**A. At the 1875 Constitutional Convention, the Qualifying Clause Was
Explained Simply As Precluding a Judicial Decision that the Right to
Bear Arms Justifies the Wearing of Concealed Weapons**

Missouri's original arms guarantee included no qualifying clause.¹⁵ Missouri enacted no laws concerning concealed weapons until the Act of 1874, which prohibited having a concealed weapon only in certain places – church, school, certain assemblies, and courts.¹⁶ Carrying a concealed weapon at all other places was lawful. The

¹⁵ The first version, Mo. Const., Art. XIII, § 3 (1820), read: “That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances by petition or remonstrance; and that their right to bear arms in defense of themselves and of the State cannot be questioned.” Mo. Const., Art. I, § 8 (1865) substituted “the lawful authority of the State” for “the State.”

¹⁶ Laws of Missouri 1874, at 43, provided:

Whoever shall, in this state, go into any church or place where people have assembled for religious worship, or into any school-room, or into any place where people may be assembled for educational, literary or social purposes, or to any election precinct on any election day, or into any court-room during the sitting of court, or into any other public assemblage of persons met for other than militia drill or meetings, called under the militia law of this state, having concealed about his person any kind of fire-arms, bowie-knife, dirk, dagger, slung-shot, or other

following year, this was amended only to state that any acts inconsistent with this one were repealed.¹⁷ That was the same year, of course, that the 1875 Constitution inserted the qualification to the right to bear arms that “nothing herein contained is intended to justify the practice of wearing concealed weapons.” Mo. Const., Art. II, § 17 (1875).

At its beginning, the constitutional convention of 1875 resolved to appoint a Committee on Preamble and Bill of Rights composed of seven members. *Debates of the Missouri Constitution Convention of 1875*, eds. Isidor Loeb & Floyd Shoemaker (Columbia: State Historical Society of Missouri, 1930-1944), vol. 1, at 43. The draft bill of rights first reported by that committee included the following as § 18:

That the dwelling house of each citizen shall be sacred from invasion or entry by all persons except officers of justice in the execution of a warrant as described in section 11 of this article, or in fresh pursuit or view of a fugitive from arrest; and that the right of no citizen to keep and bear arms in defense of his home, person and property when unlawfully

deadly weapon, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not less than ten nor more than one hundred dollars or by imprisonment in the county jail not to exceed six months, or by both such fine and imprisonment: *Provided*, that this act shall not apply to any person whose duty it is to bear arms in the discharge of duties imposed by law.

¹⁷ *Session Laws of Missouri 1875*, at 51, provided: “All acts and parts of acts inconsistent with this act are hereby repealed.”

threatened, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons.

Id. at 427.

In reporting the above, delegate T.T. Gantt explained the provision about privacy in one's dwelling¹⁸ and then continued as follows:

Then this provision goes on and declares, that the right of every citizen to bear arms in support of his house, his person, and his property, when these are unlawfully threatened, shall never be questioned, and that he shall also have the right to bear arms when he is summoned legally or under authority of law to aid the civil processes or to defend the State. There will be no

¹⁸ Gantt noted that the St. Louis charter had a provision that "allows a policeman to go in at any hour in the day into my house. He may go in when he pleases." *Id.* at 439. Another delegate denied that, but Gantt continued (*id.*):

It is in the charter of the city of St. Louis, and I say that thing ought to be impossible; it is against the law and if some policeman is shot on the threshold by some indignant citizen, then perhaps the law will be vindicated by the court declaring that under the legislative enactment or provision or charter which authorizes this violation of the sanctity of the home of a citizen, was a usurpation and conferred no immunity to the misguided man who assumed to be governed by it.

difference of opinion I think about that subject; but then the declaration is distinctly made, Mr. President, that *nothing contained in this provision shall be construed to sanction or justify* the wearing of concealed weapons.

Id. at 439 (emphasis added).

Thus, the qualification that “nothing herein contained is intended to justify the practice of wearing concealed weapons” was explained as meaning “that nothing contained *in this provision* shall be construed to sanction or justify the wearing of concealed weapons.” The clause related only to that which was “herein contained” or “contained in this provision,” and had no applicability to other provisions, such as those defining the legislative power. Moreover, the phrase was plainly understood as nothing more than a rule of construction of the declared right to bear arms. The 1945 version would say the same more concisely by stating simply that “but *this* shall not justify the wearing of concealed weapons.” Mo. Const., Art. I, § 23.

Delegate Gantt proceeded to explain: “I need not call the attention of my brethren of the bar to the fact that in one, at least, of the states of the Union, the decision was made that a provision in the Constitution declaring that the right of any citizen to bear arms shall not be questioned, *prohibited the Legislature from preventing* the wearing of concealed weapons.” *Debates of the Missouri Constitution Convention of 1875*, at 439 (emphasis added). That case was *Bliss v. Commonwealth*, 2 Litt. (Ky.) 90, 13 Am. Dec. 251 (1822), in which the high court of Kentucky declared that a law prohibiting the

wearing of concealed weapons violated that State's guarantee of the right to bear arms.¹⁹ After that decision, Kentucky and some other states added qualifying clauses to their respective guarantees to clarify that the legislature had power to regulate concealed weapons.²⁰ It is noteworthy that Gantt explained the Missouri proposal as precluding a judicial decision declaring that the right to bear arms '*prohibited the Legislature* from

¹⁹ “[I]n principle, there is no difference between a law prohibiting the wearing concealed arms, and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise.” *Bliss*, 2 Litt. (Ky.) at 92. There was certainly logic to this argument, particularly “it was not a violation of the common law to carry a pistol about one’s person; it is only made so by statute.” *Town of Lester v. Trail*, 85 W.Va. 386, 101 S.E. 732, 733 (1920). To be an offense, carrying arms had to be “*malo animo*” (with an evil intent). *Rex v. Knight*, Comb. 38, 90 Eng. Rep. 330 (K. B. 1686). See William Hawkins, *Pleas of the Crown*, I, 488 (8th ed., London 1824) (affray committed “where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law”).

²⁰ Other states did not add such clauses, but their courts still upheld concealed weapon prohibitions. *E.g.*, *State v. Reid*, 1 Ala. (New Series) 612, 616 (1840). That court added, however, that “a statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional.” *Id.* at 616-17.

preventing the wearing of concealed weapons.” He did not state that the objective was to prohibit the Legislature from *allowing*, or to require it to ban all forms of, the wearing of concealed weapons.

Gantt next opined that wearing concealed weapons “meets with the general reprobation of all thinking men,” “cannot be too severely condemned,” and “is fraught with the most incalculable evil.” *Id.* at 339-440. But that opinion does not suggest that the qualification to the arms guarantee somehow outlawed concealed weapons. To the contrary, as Gantt explained: “The Committee desired me to say in reference to this provision that they gave no sanction to the idea which is sometimes entertained, not however, by our Supreme Court, that the right to bear arms shall not [*sic*] include the right to carry a pistol in the pocket or a bowie knife under the belt.”²¹ *Id.* at 440. In short, “the right to bear arms” did not include “the right” to carry them concealed, just as the proposed provision stated, but no more. The only effect of the provision on the legislative power was to remove from doubt its authority to regulate concealed weapons.

²¹ The last phrase above evokes the colorful language of the time. *See, e.g.*, “The Knife and the Pistol – Bad Black Boys Bring Both Into Play in Their Bestial Bouts,” *St. Louis Democrat*, May 25, 1875, at 4 (typical crime report with racial slant); “Mrs. Samuels . . . Denied That Her Boys Killed Askew,” *St. Louis Democrat*, May 31, 1875 (ongoing coverage of the James gang, featuring “the mother of the notorious James boys,” whose arm was blown off and son was killed by a bomb set off by detectives).

Delegate Gantt also opined about the other provisions of the draft bill of rights, but no general debate took place. The report was referred to the committee of the whole.

The circuit court in this case found a “lack of a clear and definitive interpretation or meaning of the words of the Constitution” (slip op. at 16) and then proceeded to rely solely on Gantt’s above speech to find that the Act at issue is void:

It seems clear from this history that the intent of the framers and the people who adopted the Constitution were to not justify the wearing of concealed weapons. This language was put into the Constitution due to a court striking down a law banning concealed weapons. *This is a direct limitation on the inherent power of the legislature to regulate the manner, time and place of the citizens’ right to bear arms.*

Id. at 18 (emphasis added).

However, Gantt never suggested that the qualifying clause *limited* the legislature’s power. Moreover, the court cited no source for what “the people who adopted the Constitution” were thinking. Indeed, while Missouri newspapers published the proposed bill of rights and mentioned that Mr. Gantt made a report, they did not publish his remarks. *E.g.*, “Proceedings of the State Convention . . . Preamble and Bill of Rights Reported,” *St. Louis Democrat*, May 14, 1875, at 1; “Regular Proceedings of the Constitutional Convention,” *St. Louis Republican*, May 14, 1875, at 1.²² While the arms

²² Ironically, the *St. Louis Democrat* supported the Republican party, and the *St. Louis Republican* supported the Democratic party.

guarantee was not criticized, fault was found with deletions from the previous bill of rights²³ and with a few of the proposals²⁴

When debate on the proposed bill of rights began and the subject of § 18 arose, the initial portion concerning searches of dwelling houses was stricken with the explanation that the subject of search and seizure was covered in a previous provision. *Debates of the*

²³ For instance, “The Bill of Rights,” *St. Louis Democrat*, May 15, 1875, at 2, criticized the draft for deleting from the 1865 Constitution a clause declaring the supremacy of the United States and prohibiting slavery, and a provision against disqualifying a person as a witness on account of color. It added, “There are people who hold the civil rights amendment [Fourteenth Amendment to the U.S. Constitution] is not binding. One of them, if we are not mistaken, is president of this convention.” *Id.*

²⁴ In “Constitution Makers,” *St. Louis Republican*, May 17, 1875, at 1, a proposed section concerning religious institutions was criticized. In a more general discussion, the article referred to “certain natural rights which are common to all mankind.” *Id.* Citing Blackstone, it identified these rights as:

First. The right of personal security.
Second. The right of personal liberty; and
Third. The right of private property.

Id. Using these same terms, the federal Freedmen’s Bureau Act sought to protect “personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms” 14 U.S. Statutes at Large 173, 176-77 (1866).

Missouri Constitution Convention of 1875, vol. 2, at 503-04. Next, as moved by delegate Spaunhorst, the convention voted to strike out “when unlawfully threatened” from the clause “that the right of no citizen to keep and bear arms in defense of his home, person and property *when unlawfully threatened* . . . shall be called in question” *Id.* at 504 (emphasis added). This strengthened the guarantee by clarifying that one need not be unlawfully threatened in order to exercise the right to bear arms.

After the convention approved the new constitution, a committee thereof recommending it to the people described the Bill of Rights as including “the usual guarantees of natural and civil rights.” “Address to the People of Missouri,” *St. Louis Republican*, Aug. 3, 1875, at 3 . As before, the arms guarantee was not controversial.²⁵ Clearly, Missouri had not embarked on an unprecedented attempt to impose a constitutional ban on concealed weapons and remove all legislative power on the subject, but instead was simply following in the footsteps of some of the other states by removing from any debate that the right to bear arms in and of itself does not guarantee a right to carry concealed weapons in all circumstances.

²⁵ *E.g.*, “The Old and the New: A Comparison of the Present Constitution of Missouri with that Just Finished,” *St. Louis Journal*, Aug. 3, 1875, at 2 (no criticism of arms guarantee in analysis of bill of rights).

**B. The Text of the Constitution of 1875 Made Clear that Legislative Discretion
to Regulate or Not Regulate Concealed Weapons was not Disturbed**

As finally adopted, Mo. Const., Art. II, § 17 (1875), stated: “That the right of no citizen 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 into question; but nothing herein contained is intended to justify the practice of wearing concealed weapons.” As discussed above, the clause “nothing herein contained” simply referred to this section alone, and signified no more than that the declared right to bear arms was not to be interpreted to include carrying concealed weapons.

Other provisions of the 1875 Constitution demonstrate the kinds of provisions which did tie the legislature’s hands when that was intended. Mo. Const., Art. IV, § 1 (1875), provided: “The legislative power, *subject to the limitations herein contained*, shall be vested in a senate and house of representatives, to be styled ‘the general assembly of the State of Missouri.’” (emphasis added.) Sections 43-56 were entitled “Limitations on Legislative Power.” (This is the origin of today’s Mo. Const., Art. III, §§ 36-39, entitled “Limitation of Legislative Power.”) Of those, §§ 44-52 and 55-56 all began with the clause, “The general assembly shall have no power to . . .” Section 53 provided in part: “The general assembly shall not pass any local or special law – . . . Legalizing the unauthorized or invalid acts of any officer or agent of the State . . .” Similarly, Art. XIV (Miscellaneous Provisions), § 10, provided: “The general assembly shall have no power to authorize lotteries . . .”

One will search in vain for any provision mandating that “the general assembly shall have no power to legalize or authorize the wearing of concealed weapons.” Just as Art. II, § 17, did not prohibit concealed weapons, nothing in Art. IV or elsewhere prohibited the legislature from regulating them in its sole discretion.

Similarly, the 1875 Constitution did not direct the legislature to provide for the prohibition, and penalize the wearing, of concealed weapons. It did provide directives requiring the legislature to act when it intended to do so. For instance, Art. XIV (Miscellaneous Provisions), § 7, provided: “The general assembly shall, in addition to other penalties, provide for the removal from office of county, city, town, and township officers, on conviction of willful, corrupt, or fraudulent violation or neglect of official duty.” Nor did the Constitution impose any penalties on persons who wore concealed weapons, as it did with persons who engaged in duels with weapons. As provided in Art. XIV (Miscellaneous Provisions), § 3: “No person who shall hereafter fight a duel, or assist in the same as a second, or send, accept, or knowingly carry a challenge therefor, or agree to go out of this State to fight a duel, shall hold any office in this State.”

In sum, the 1875 Constitution merely provided about the declared right to bear arms that “nothing herein contained is intended to justify the practice of wearing concealed weapons.” It did not provide that “the general assembly shall have no power to authorize the wearing of concealed weapons.” Nor did the Constitution impose any penalties, or direct the legislature to impose penalties, on any person who wore a concealed weapon.

C. Just Four Years After the Constitution's Adoption, the Legislature

Prohibited Concealed Weapons in Some Circumstances and Not Others

In 1879, just four years after the Constitution's adoption, the general assembly enacted a provision punishing, *inter alia*, "any person [who] shall carry concealed, upon or about his person, any deadly or dangerous weapon . . ." R.S.Mo. § 1274 (1879). That statute also included a "shall not apply" provision, exempting various law enforcement officers and "persons moving or traveling peaceably through this state, and it shall [be] a good defense to the charge of carrying such weapon, if the defendant shall show that he has been threatened with great bodily harm, or had good reason to carry the same in the necessary defense of his person, home or property." *Id.* § 1275²⁶

²⁶ The full text of the 1879 enactment provided:

Sec. 1274. *Carrying deadly weapons, etc.*--If any person shall carry concealed, upon or about his person, any deadly or dangerous weapon, or shall go into any church or place where people have assembled for religious worship, or into any school room or place where people are assembled for educational, literary or social purposes, or to any election precinct, on any election day, or into any court room during the sitting of court, or into any other public assemblage of persons met for any lawful purpose, other than for militia drill or meetings called under the militia law of this state, having upon or about his person any kind of firearms, bowie-knife dirk, dagger, slung-shot, or other deadly weapon, or shall, in the presence of one or more

According to plaintiff's hypothesis, these "shall not apply" provisions enacted by the clueless statesmen of 1879 were void under the Constitution just enacted four years before. Plaintiffs' "discovery" that any exemption from a statutory prohibition on concealed weapons is unconstitutional would have surprised the authors of the Constitution of 1875 (as well as that of 1945). If plaintiffs' theory is correct, no one in

persons, exhibit any such weapon in a rude, angry or threatening manner or shall have or carry any such weapon upon or about his person when intoxicated or under the influence of intoxicating drinks, or shall, directly or indirectly, sell or deliver, loan or barter to any minor, any such weapon, without the consent of the parent or guardian of such minor, he shall, upon conviction, be punished by a fine of not less than five nor more than one hundred dollars, or by imprisonment in the county jail not exceeding three months or by both such fine and imprisonment.

Sec. 1275. *Above section not to apply to certain officers.*--The next preceding section shall not apply to police officers, nor to any officer or person whose duty it is to execute process or warrants, or to suppress breaches of the peace, or make arrests, nor to persons moving or traveling peaceably through this state, and it shall [be] a good defense to the charge of carrying such weapon, if the defendant shall show that he has been threatened with great bodily harm, or had good reason to carry the same in the necessary defense of his person, home or property.

Missouri knew at the time – whether members of the legislature, the judiciary, or the public – that the law was unconstitutional because the general assembly did not ban concealed weapons at all times and places by all persons. In reality, the enactment at issue is just a descendent of this prior law which defined the circumstances under which concealed weapons may be or not be worn.²⁷

D. The Courts Have Consistently Applied the Laws on Concealed Weapons and the Exemptions Thereto With No Hint of Unconstitutionality

The Missouri courts have consistently applied the statutes regulating concealed weapons, including the various exemptions in which the prohibition does not apply. No court has ever suggested that the exemptions are unconstitutional, as do plaintiffs here.

As noted, R.S.Mo. § 1275 (1879) provided that the prohibition did not apply to a person who shows that he was threatened with great bodily harm or carried a weapon in the necessary defense of his person, home or property. The equitable character of that exemption was illustrated in *State v. Cook*, 112 S.W. 710 (Mo. App. 1908), in which the defendant was carrying a large sum of money and feared attack. The court explained the following further compelling facts:

²⁷ Oblivious to the statutory history, plaintiffs asserted that “this state has *never*, to this day, permitted its citizens to conceal weapons on their person.” Memorandum in Support of Permanent Injunction, at 3. In fact, every statute on the subject has prohibited concealed weapons in some circumstances and permitted them in others.

Defendant is a negro, and his evidence shows that in April, 1906, three negroes were taken from the jail at Springfield by a mob of whites and hung and burned on the public square of that city, and also introduced evidence tending to show that the negro population of Springfield was still in danger from mob violence, that they had been notified in the spring of 1906 to leave the county, and at about the same time he received two letters threatening to make way with him if he did not leave the county.

Id. at 710-711.

Despite the clause providing that “nothing herein contained is intended to justify the practice of wearing concealed weapons,” Mo. Const., Art. I, § 17 (1875), *Cook* held that the defendant “had the right to carry arms concealed on his person to defend his possession thereof [i.e., the cash], if in good faith he believed there was danger of thieves and robbers trying to take it from him on his way home.” *Id.* at 711. *Cook* reversed the conviction, holding that “there is very substantial evidence tending to show defendant was justified under the statute in carrying the revolver”²⁸ *Id.*

²⁸ A related ground of reversal in *Cook*, 112 S.W. at 711, concerned the prosecution’s incitement to racist arguments as follows:

[T]he prosecuting attorney . . . was permitted to show that defendant kept or owned a club composed of negroes in the city of Springfield, and that defendant and other negroes had pleaded guilty to the illegal sale of liquor at this club, and in his address to the jury the prosecuting attorney used the

According to plaintiffs' supposition here, *Cook* erred in reversing the conviction because the defendant was constitutionally forbidden from protecting himself with a concealed firearm, and the legislature was constitutionally inhibited from exempting from the concealed-weapon prohibition the carrying of a firearm in necessary self defense. Yet this novel theory occurred to no one.²⁹

following objectionable and prejudicial remarks: "What causes white people to rise in a mob in a community? It's a white jury backing up a burly negro in such offenses as packing a pistol. The experience you all have had is that such dives as this defendant was running causes the mobs."

²⁹ See also *State v. Venable*, 93 S.W. 356 (Mo. App. 1906) ("We think that, in order to justify the defendant in carrying a concealed weapon, he must have believed that there was danger of the threat being executed."). This theme was expanded in *Town of Canton v. Madden*, 96 S.W. 699, 700 (Mo. App. 1906), which explained:

Now it must be conceded if the citizen has reserved to himself the right to bear arms in defense of his home, person or property, he also has reserved the right to effectuate that privilege by employing such arms under the established limitations of the law, when a proper occasion presents itself and renders such employment imperative in order to give life and vigor to this natural right, for the right to bear arms in defense of one's property, his home or his person, would amount to naught if the right to use such arms, under proper circumstances, were denied.

Comparable exemptions were on the books after the adoption of the Constitution of 1945, which shortened the exception to the right to bear arms to state more concisely that "this shall not justify the wearing of concealed weapons." Mo. Const., Art. I, § 23 (1945). As before, the judiciary did not question the exemptions provided by the legislature. For instance, the general assembly has seen fit to provide an exemption for persons who wear concealed weapons in their own homes. *Taylor v. McNeal*, 523 S.W.2d 148, 150 (Mo. App. 1975), notes:

Under Art. I, § 23, Mo. Const. 1945, V.A.M.S., every citizen has the right to keep and bear arms in defense of his home, person and property, with the limitation that this section shall not justify the wearing of concealed arms. However, possession of concealable firearms in one's home is not unlawful in our state.

The legislative decision to exempt persons from the concealed-weapon prohibition when at home reflects historic privacy concerns. *State v. Taylor*, 143 Mo. 150, 44 S.W. 785, 788 (1898), explained:

That "one's dwelling house is his castle" is a maxim of the common law. This was ruled in *Semayne's Case*, 5 Coke, 91 A: "The house of every one is his castle, and if thieves come to a man's house to rob or murder, and the owner or his servants kill any of the thieves in defense of

himself and his house, it is no felony, and he shall lose nothing." 3 Coke,

188.³⁰

Similarly, *State v. Murray*, 925 S.W.2d 492 (Mo. App. 1996), applied the still-valid exemption for travelers. "The exception enables travelers to protect themselves 'against perils which typically do not face them back home among their neighbors.'" *Id.* at 493.

In sum, the constitutional, statutory, and jurisprudential history establishes that plaintiffs' argument has never been even imagined by anyone until now, much less has such a view been applied by any court. Since it first regulated concealed weapons, the legislature has never criminalized the carrying of concealed weapons in all places and circumstances. It has regulated them in some places and not others and has made exceptions for some people involved in certain activities and not others. The enactment at issue is no different. The necessary premise of plaintiffs' argument -- that the general assembly, the courts, and everyone else have been plainly and utterly mistaken for 128

³⁰ Under that doctrine, a person may protect "against the armed invader who would plunder and destroy." *Rhodes v. A. Moll Grocer Co.*, 231 Mo. App. 751, 95 S.W.2d 837, 842 (1936). "Humans from the era of the cave man to our present-day civilization have ever been ready to fight in defense of the home." *Id.* at 843. That decision also recalled Coke: "The house of every one is to him as his castle, and fortress, as well for his defense against injury and violence, as for his repose." *Id.*, quoting Coke, Reports, Semaynes' Case, vol. 3, pt. 5, p. 185.

years, and that the legislature is powerless except to mandate an absolute prohibition on concealed weapons -- is simply absurd.

III. STATES WITH COMPARABLE CONSTITUTIONAL PROVISIONS ALSO HAVE ENACTMENTS PROVIDING FOR CONCEALED-CARRY PERMITS

A number of states have limiting clauses in their arms guarantees much like that of Missouri. Also like Missouri, these same states traditionally have regulated concealed weapons in some places and circumstances and not in others. These regulatory schemes typically include provision for licenses or permits to carry concealed firearms, and the courts have upheld these provisions. These experiences all refute plaintiffs' novel theory.

The following analysis concerns the states other than Missouri which have either (1) declared that the constitutional right to bear arms does not create the concomitant constitutional right to carry them in a concealed fashion, or (2) achieved the same result by explicitly recognizing the legislative power to regulate concealed weapons. All of these states have uniformly recognized, and indeed have never questioned, the power of the legislature both to define the wearing of concealed arms as a crime and simultaneously to provide exceptions, including the right to concealed carry pursuant to the issuance of licenses or permits.³¹

³¹ The arms guarantees and firearm laws of each state, including procedures for licenses and permits to carry concealed firearms, are summarized in the Appendix to Halbrook, Stephen P., *Firearms Law Deskbook: Federal and State Criminal Practice* (St. Paul, MN: Thomson/West Group, 2002).

Colorado Const., Art. II, § 13, provides: “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.*” (emphasis added.) This language is almost identical to Mo. Const., Art. II, § 17 (1875). Permits for concealed weapons are provided by Colo. Rev. Stat. § 18-12-201 *et seq.* In *Douglass v. Kelton*, 199 Colo. 446, 449, 610 P.2d 1067, 1069 (1980), the Colorado Supreme Court held:

The appellants' right to bear arms is not absolute. In fact, Article II, Section 13 of the Colorado Constitution specifically excludes the carrying of concealed firearms from this right:

The right of no person to keep and bear arms in defense of his home, person and property, or in the aid of the civil power when thereto legally summoned, shall be called in question;*but nothing herein shall be construed to justify the practice of carrying concealed weapons.* (emphasis added.)

Whether the legislature or the municipality shall choose to delegate or create the power to issue permits [to carry concealed arms] is a matter of legislative policy.

Id. In short, since carrying a concealed firearm is excluded from the constitutional right to bear arms, the legislature is free to set its own policy about permits.

Florida Const., Art. I, § 8(a), states: “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.*” (emphasis added.) Permits for concealed weapons are provided by Fla. Stat. Ann. § 790.06. *See Iley v. Harris*, 345 So. 2d 336 (Fla. 1977) (county had no discretion under State law to deny license to carry firearm).

Georgia Const., Art. I, § 1, ¶ VIII, provides: “The right of the people to keep and bear arms shall not be infringed, *but the General Assembly shall have power to prescribe the manner in which arms may be borne.*” (emphasis added.) Permits for concealed weapons are provided by Ga. Code Ann. § 16-11-126 *et seq.*

Idaho Const., Art. I, § 11, states in part: “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 . . .*” (emphasis added.) Permits for concealed weapons are provided by Idaho Code § 18-3302.

Kentucky Const., Art. I, § 7, provides: “All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . Seventh: The right to bear arms in defense of themselves and of the State, *subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.*” (emphasis added.) Permits for concealed weapons are provided by Ky. Rev. Stat. Ann. § 237.110. *See Holland v. Commonwealth*, 294 S.W.2d 83, 85 (Ky. 1956) (defining offense of carrying concealed weapon and noting exceptions).

Louisiana Const., Art. I, § 11, states : “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.*” (emphasis added.) Permits for concealed weapons are provided by La. Rev. Stat. Ann. § 1379.3 .

Mississippi Const., Art. III, § 12, provides: “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.*” (emphasis added.) Permits for concealed weapons are provided by Miss. Code Ann. § 45-9-101.

Montana Const., Art. II, § 12, states: “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.*” (emphasis added.) Permits for concealed weapons are provided by Mont. Code Ann. § 45-8-321. No permit is required to carrying concealed arms on one’s own premises. *State v. Nickerson*, 126 Mont. 157, 166, 247 P.2d 188, 192 (1952), noted that “the law of this jurisdiction accords to the defendant the right to keep and bear arms,” quoted the constitutional guarantee and its qualifying clause that “nothing herein contained shall be held to permit” concealed weapons, and then stated that Montana law “authorizes: ‘The carrying of arms on one’s own premises or at his home or place of business.’” *Id.* Once again, a clause like that of Missouri’s was held to be consistent with the legislative power to decide that concealed weapons will or will not be allowed in various circumstances.

New Mexico Const., Art. II, § 6, provides: “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*. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.” (emphasis added.) New Mexico’s permit system for concealed weapons enacted in 2002³² was invalidated because it included a local option to opt out, in violation of the above preemption provision. *Baca v. New Mexico Dep’t. of Public Safety*, 47 P.3d 441, 443 (N.M. 2002). The court did “not reach the argument that Article II, Section 6 prohibits the carrying of concealed weapons.” *Id.* That was the first time in American legal history that such an argument had been made – the case at bar is the second.

As here, that argument disregarded that historically the state never prohibited the carrying of concealed weapons at all times and places, and instead made the prohibition

³² Permits previously were also available as a matter of longstanding practice. Thomas Donnelly, *The Government of New Mexico* (University of New Mexico Press, 1947), at 57, states:

While a citizen may keep a gun or other arms in his home for protection, he cannot legally carry a concealed weapon around with him without being licensed to do so. If one’s life is threatened by another, he may apply to the district court for a permit to carry a gun, and if the court thinks the situation warrants it, it will issue the permit.

applicable in some circumstances and not others. *Lopez v. Chewiwie*, 51 N.M. 421, 422-23, 186 P.2d 512, 513 (1947), quoted the arms guarantee with its limiting clause and noted that the statute “makes it an offense to carry deadly weapons, but permits them to be carried in the residence of the carrier or on his landed estate” and “allows travelers to carry arms for their protection.” Another statute “allows the carrying of an unloaded concealed weapon.” *State v. Ramirez*, 79 N.M. 475, 478, 444 P.2d 986, 989 (1968).

At any rate, the New Mexico legislature promptly enacted new legislation providing for concealed weapon permits which does not include the invalid local option. N.M. S.B. 23, Chapter 255, Laws of New Mexico 2003.

North Carolina Const., Art. 1, § 30, states in part: “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. . . . *Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.*” (emphasis added.) Permits for concealed weapons are provided by N.C. Gen. Stat. § 14.415.10. “This exception indicates the extent to which the right of the people to bear arms can be restricted; that is, the Legislature can prohibit the carrying of concealed weapons, but no further.” *State v. Kerner*, 181 N.C. 574, 575, 107 S.E. 222, 223 (1921). Authorization that “the legislature may enact penal statutes against carrying concealed weapons was undoubtedly ‘a matter of superabundant caution, inserted to prevent a doubt,’” but even without the clause the legislature could still regulate concealed weapons under its “police powers.” *State v. Dawson*, 272 N.C. 535, 548, 159 S.E.2d 1, 11 (1968).

Oklahoma Const., Art. II, § 26, provides: “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.*” (emphasis added.) Permits for concealed weapons are provided by Okla. Stat. Ann. § 1290.1. *Gilio v. State*, 33 P.3d 937, 941 (Okla. Civ. App. 2001), explained:

It is clear that while there is no absolute right to carry a loaded, concealed firearm at all times in all places, our courts and legislature have chosen to allow an otherwise qualified citizen of this state to carry a loaded firearm in their home, and, if they are a permit holder, to carry a concealed, loaded firearm outside their home, pursuant to the terms of the Act.

Tennessee Const., Art. I, § 26, states: “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.*” (emphasis added.) Permits for concealed weapons are provided by Tenn. Code Ann. § 39-17-1351.

Texas Const., Art. I, § 23, states: “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.*” (emphasis added.) Permits for concealed weapons are provided by Tex. Code Ann. § 411.171.

Utah Const., Art. I, § 6, 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.” (emphasis added.) Permits for concealed weapons are provided by Utah Code Ann. § 53-5-701.

Considering all fifty states and the District of Columbia, almost all jurisdictions provide for the issuance of permits or licenses to carry concealed weapons. Hon. J. Harvie Wilkinson III, “Federalism for the Future,” 74 *S. Cal. L. Rev.* 523, 525 (2001), summarizes them as follows:

Currently there are four broad categories of state laws that concern carrying concealed weapons. At one end of the spectrum are eight jurisdictions that generally prohibit the carrying of concealed weapons.³³ Less restrictive are thirteen states that have “may-issue” laws, meaning the state has some discretion in deciding to whom to issue a concealed weapons permit.³⁴ Even less restrictive are twenty-nine states that have “shall-issue” laws, meaning the state must issue a concealed weapons permit to anyone not subject to a statutory exclusion (e.g., convicted felons).³⁵

³³ Illinois, Kansas, Missouri, Nebraska, New Mexico, Ohio, Wisconsin, and the District of Columbia prohibit the carrying of concealed weapons. . . .

³⁴ Alabama, California, Colorado, Delaware, Hawaii, Iowa, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, and Rhode Island have “may-issue” laws. . . .

³⁵ Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Mississippi, Montana, Nevada, New Hampshire, North Carolina, North Dakota,

Vermont apparently does not require any type of permit to carry a concealed weapon.

Since the above was written, the number of jurisdictions which do not issue concealed carry permits or licenses has shrunk by at least two (New Mexico and Missouri), leaving only five states and the District of Columbia. Yet even those states all allow concealed weapons under various circumstances.³⁶ The “shall-issue” states have increased to at least thirty one. Added to the “may-issue” states and Vermont,³⁷ a total of forty-five states provide for concealed weapon permits or licenses, and *all* states

Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming have “shall-issue” laws.

³⁶ This typically includes carrying in one’s dwelling, defensive purposes, or in other circumstances. *See* 720 Ill. Comp. Stat. 5/24-1(a)(4); Kan. Stat. § 21-4201(a)(4); Ohio R.C. 2923.12; Neb. R.S. § 28-1202. Wisconsin’s prohibition on concealed weapons even in the home and business premises was invalidated in *State v. Hamdan*, 2003 Wis. 113, 665 N.W.2d 785, 808 (2003). Even the District of Columbia provides for a permit to carry a firearm, although it is “virtually unobtainable.” *Bsharah v. United States*, 646 A.2d 993, 996 n.12 (D.C. 1994).

³⁷ In Vermont, a prohibition on carrying a concealed weapon without a permit was declared violative of the right to bear arms. *State v. Rosenthal*, 75 Vt. 295, 55 A. 610 (1903). The court suggested that carrying a concealed weapon could be made an offense only if done so “with the intent or avowed purpose of injuring another.” *Id.* at 610-11.

otherwise exempt carrying concealed weapons by certain persons or in certain circumstances.

In sum, legislation providing for permits or licenses to carry concealed weapons exists in all states with arms guarantees which qualify the right by authorizing restrictive legislation regarding concealed weapons or by “shall not justify” type clauses like that of Missouri. No state of all the fifty states has apparently ever prohibited the carrying of concealed weapons by all persons in all places and circumstances. Plaintiffs’ unprecedented claim here – that the qualification to the right to bear arms that “this shall not justify the wearing of concealed weapons” somehow prohibits concealed weapons in all circumstances and removes the subject from legislative discretion – is contrary to the constitutional text and its historical interpretation by the legislatures and judiciaries of Missouri and every other state with similar provisions.

CONCLUSION

This Court should find that the Act at issue is consistent with the Missouri Constitution, reverse the judgment of the circuit court, and vacate the preliminary and permanent injunctions entered by the circuit court.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 19th day of November, 2003, one true and correct copy of the foregoing brief (two copies to Plaintiffs' counsel), and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Supreme Court Rule No. 84.06(b), and that the brief contains 12,903 words.

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