June 1992

State v. Brown: How Limited a Right to Keep and Bear Arms?

June A. Jackson

University of Maine School of Law

Follow this and additional works at: https://digitalcommons.mainelaw.maine.edu/mlr

Part of the Constitutional Law Commons, and the Second Amendment Commons

Recommended Citation


This Case Note is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.
STATE v. BROWN: HOW LIMITED A RIGHT TO KEEP AND BEAR ARMS?

INTRODUCTION

Most state constitutions contain a clause guaranteeing a right to keep and bear arms. With gun control legislation on the rise, these state constitutional guarantees have come under increasing scrutiny. In State v. Brown, defendant Edward Brown, a convicted felon, challenged the Maine statute that forbade him to possess firearms on the ground that it violated his state constitutional right to bear arms. Similar statutes around the country limit the right to bear arms in various ways. Case law has tended to uphold these limitations and to establish that the right to bear arms is a limited right at best. The question is, how limited?

This Note will examine State v. Brown and its effect on the right to bear arms in Maine. It will analyze the recent amendment to the Maine Constitution concerning the right to bear arms and seek to determine whether, and to what extent, the amendment has achieved its intended result, and whether this result is consistent with existing law. This Note will discuss how other states have treated this issue and will show that the right to bear arms may be limited by the police powers of the state and federal government, as may other constitutional rights. It will conclude that the outer edge of permissible limitation has not yet been reached.

I. HISTORICAL BACKGROUND

The Second Amendment to the United States Constitution states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." State constitutional provisions guaranteeing a right to bear arms are patterned after this amendment. The Second Amendment has not been held to apply to the states, either directly or through the Due Process Clause of the Fourteenth Amendment.

1. 571 A.2d 816 (Me. 1990).
3. U.S. Const. amend. II.
4. See United States v. Cruikshank, 92 U.S. 542, 553 (1875) (holding that the Second Amendment restricts only Congress), aff'd, Presser v. Illinois, 116 U.S. 252, 265-66 (1886). See also Commonwealth v. Davis, 343 N.E.2d 847, 850 (Mass. 1976) (interpreting the Second Amendment not as a guarantee of individual rights, but as an assurance that the national government will give state militias some freedom from interference); Michael D. Ridberg, Comment, The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation, 38 U. Chi. L. Rev. 185, at 186 n.4 (1970) (noting that even if the Second Amendment is held to apply to the states, it might not protect private possession of firearms). Cf. United States v. Miller, 307 U.S. 174, 176-78 (1939) (holding that the National Firearms Act did not
Nonetheless, given its standing as the progenitor of many state constitutional guarantees of a right to keep and bear arms, the Second Amendment provides an important historical framework for interpretation. There has, of course, been much debate concerning whether the federal Constitution guarantees an individual or only a collective right to keep and bear arms. Because the right is explicitly stated to be for the purpose of maintaining a militia, most analysts interpret it as a collective right—the right of a state to maintain an armed state militia.\(^5\)

In the early years of the United States, guns were pervasive in society, in part because of the dependence on hunting for food in many areas. More importantly, virtually all male citizens were required to keep and bear arms and to serve in the militia when called. Militia members ordinarily used their own weapons when on duty.\(^6\) Today, relatively few citizens serve in the “militia” (i.e., the National Guard). Those who do are trained in the use of arms, which are issued to them by the government. Thus, it can be argued that if the federal right to bear arms is no more than a collective right, there is no longer a need for a well-armed general citizenry.\(^7\)

A related historical justification for the right to bear arms is deterrence of oppression. One practice that the framers of the Constitution sought to prevent in the new nation was oppression by military rule. The colonists saw (and experienced) standing armies as instruments of arbitrary and oppressive power by the colonial government, and as a serious threat to individual liberty. The colonial militias were believed to be the best defense against military rule.\(^8\) James Madison considered an armed citizenry necessary to prevent usurp state police power to regulate firearms, nor did it violate the Second Amendment).\(^5\)

5. See M. Truman Hunt, Note, The Individual Right to Bear Arms: An Illusory Pacifier?, 1986 UTAH L. REV. 751, 755-58. Most case law and the majority of legal scholarship support the idea that the right is collective. Some states, including Utah, are making an individual right more explicit in their constitutions. In 1984 article I, section 6 of the Utah Constitution was amended to read:

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.

\(^{\text{UTAH CONST. art. I, § 6 (amended 1984).}}\)

6. See United States v. Miller, 307 U.S. at 179. This case also provides an informative discussion of colonial militias. For a more in-depth discussion of the historical purposes of the right to bear arms, see Ridberg, supra note 4, at 190-93.

7. An additional purpose for the right to bear arms is self-defense. However, this was not used to justify the right until the states began to incorporate it explicitly into the arms provisions of their constitutions. See Ridberg, supra note 4 at 192-93.

the arbitrary use of power by those in authority. There is considerable doubt as to whether this purpose is still valid in America today, given the sophisticated weaponry possessed by today's standing army. In any event, because in early America the armed citizenry and the militia were inextricably intertwined, it is not clear that the Second Amendment conferred any individual right to bear arms for any purpose.

II. LEGAL BACKGROUND

Prior to its amendment in 1987, article I, section 16 of the Maine Constitution stated: "Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned." Maine courts and the Maine Legislature have not read this provision as bestowing an absolute right. The Legislature has consistently restricted the possession of firearms and regulated their use.

In 1986 the Supreme Judicial Court of Maine, sitting as the Law Court, held in State v. Friel that article I, section 16 did not create an individual right to keep and bear arms. In reaction to this decision the Legislature determined to amend the constitution to clarify that such a right was in fact conferred. At that time the constitutions of forty-one states included arms provisions. Some states had crafted arms guarantees that explicitly included individual rights. This effect was sometimes achieved by specifically providing for such rights as self-defense, defense of family and property, and hunting. Some of these same states also explicitly noted in the provision the power of the state legislature to limit the individual right

9. See Ridberg, supra note 4, at 191 n.32; Feller & Gotting, supra note 8, at 61-62 (discussing Madison's proposed version of the Second Amendment).
13. 508 A.2d 123 (Me. 1986).
to keep and bear arms. These various ways of wording the provision to confer an individual right were noted by the Maine Attorney General in an advisory opinion requested by the Legislature.

After receiving the Attorney General’s opinion and following voter approval in a statewide plebiscite, the Legislature proposed to delete the phrase “for the common defense” from the existing clause. This amendment was passed with little discussion, although members of the House did comment that the new provision was not meant to prevent or invalidate statutes pertaining to firearms. According to one House member, the amendment was intended to prevent any absolute prohibition on the possession of firearms by individual citizens. The Attorney General had advised that regardless of how an amended Article I, Section 16 should be categorized, it is likely that the elimination of the collective restriction to the right to bear arms in Maine would not be held to invalidate existing laws relating to the possession and use of weapons. Even in those states where an individual right to bear arms is declared, and is not limited to some notion of defense of person or property, the courts have been very reluctant to strike down reasonable statutes enacted pursuant to the police power concerning firearms.

Prior to the 1987 amendment the Law Court had several opportunities to rule on the constitutionality of Maine’s primary gun control statute, codified at title 15, section 393 of the Maine Revised Statutes Annotated [hereinafter “section 393”]. In State v. Myrick, the petitioner argued that his conviction under section 393, which regulates possession of firearms by felons, was unconstitutional in that the statute amounted to an ex post facto law. At the time of Myrick’s earlier conviction for cheating under false pretenses, for

20. Legis. Rec. H-906 (June 5, 1987) (statement of Rep. LaCroix). LaCroix stated: The intent of the legislature is to guarantee the right to keep and bear arms to every Maine citizen. It is also the intent of the legislature to preserve current statutes and ordinances pertaining to firearms. In passing this amendment, we reserve to the legislature the authority to regulate the possession of firearms by convicted felons, minors, and the mentally infirm.
21. I have been assured by the sponsors and other proponents of this bill that passage of this measure will not, in any way, alter the existing state of gun regulations in this state.
   The sole purpose of this bill, I have come to understand, is to establish a constitutional underpinning to protect against any absolute prohibition by this or any future legislature or any municipality for that matter, any absolute prohibition on the owning or bearing of guns, whether for hunting or out of interest as a collector or for purposes in defending one’s self and one’s home against an intruder.

24. Id. at 380.
which he was sentenced to one-and-one-half to three years’ imprisonment, section 393 was applicable only to concealable weapons. Subsequently, the statute was amended to include “any firearm.” Myrick had been convicted under section 393 for illegally possessing a shotgun.

In Myrick the Law Court cited a decision by the First Circuit Court of Appeals, *Cases v. United States*, in which a defendant appealed from a conviction under a similar possession statute. The First Circuit had held that

if the past conduct which is made the test of the right to engage in some activity in the future is not the kind of conduct which indicates unfitness to participate in the activity, it will be assumed, as it must be, that the purpose of the statute is to impose an additional penalty for the past conduct.

The Law Court in Myrick held that there was a sufficiently rational connection between the conduct involved in the petitioner’s prior conviction and the statutory restriction so as not to implicate an ex post facto prohibition. The court also found that the purpose of section 393 was to protect the public—a legitimate state interest—and not to impose further punishment on convicts. Because the constitutional prohibition against ex post facto laws applies only to statutes designed to impose further punishment, the amended statute was not an ex post facto law.

The Law Court came to a similar conclusion two years later in *State v. Vainio*. Like the petitioner in Myrick, the defendant appealed his conviction under section 393 on the ground that the statute was an unconstitutional ex post facto law. He argued that the crime for which he had been convicted did not fall within the scope of section 393 as revised in 1977. The recent adoption of the Maine Criminal Code had eliminated the old felony/misdemeanor distinction under which he had previously been convicted of larceny.

---

25. ME. REV. STAT. ANN. tit. 15, § 393 (West 1965) read in pertinent part:
   It shall be unlawful for any person who has been convicted of a felony under the laws of the United States or of the State of Maine, or of any other state, to have in his possession any pistol, revolver or any other firearm capable of being concealed upon the person.


29. Id. at 921.


31. Id.

32. Id.

33. 466 A.2d 471, 474 (Me. 1983).

34. Id. at 475.

35. See supra note 25 for the partial text of the statute at time of Vainio’s conviction. Because the felony/misdemeanor distinction was eliminated by the new Maine Criminal Code, section 393 was amended to eliminate the reference to “felony” and
Vainio also argued that even if the pre-1977 statute applied, it violated his constitutional right to bear arms. The Law Court rejected these arguments and reaffirmed its decision in Myrick, holding that there existed "a sufficiently rational connection" between the defendant's conviction and the legislative purpose of the statute.

The petitioner in State v. Friel similarly challenged the constitutionality of section 393. Friel was decided before the 1987 amendment of article I, section 16 of the Maine Constitution. The petitioner, who had a prior conviction for larceny, argued that section 393 violated his individual right to bear arms. The Law Court held that the right was "limited by its purpose: the arms may be kept and borne 'for the common defense.'" Thus section 393 was held constitutional because the Legislature's decision to proscribe possession of arms by felons did not conflict with the "common defense" purpose.

The Law Court disagreed with the petitioner's argument that the Legislature had not determined that possession of firearms by felons would not serve the common defense, citing statutes in several states where similar constitutional provisions have been held not to proscribe limitations on the possession of firearms.

The Law Court's holding that the right to keep and bear arms guaranteed under article I, section 16 was limited to the common defense was based in part on a similar case in Massachusetts, Commonwealth v. Davis. The Massachusetts constitutional provision states: "The people have a right to keep and bear arms for the common defense." Relying on the inclusion of the phrase "for the common defense," the Supreme Judicial Court of Massachusetts interpreted the provision to confer only a collective right to bear arms.

The phrase "any crime ... which is punishable by one year or more imprisonment was substituted." Me. Rev. Stat Ann. tit. 15, § 393(1) (West 1980 & Supp. 1991-1992).

36. 466 A.2d at 475.
37. Id.
38. 508 A.2d 123 (Me. 1986).
39. Id. at 125. See, e.g., State v. McKinnon, 153 Me. 15, 21-22, 133 A.2d 885, 888-89 (1957) (holding that possession of a firearm for the purpose of hunting does not come within the constitutional right to possess arms for the common defense).
40. State v. Friel, 508 A.2d at 126.
42. 343 N.E.2d 847 (Mass. 1976).
43. Mass. Const. pt. 1, art. XVII.
44. Commonwealth v. Davis, 343 N.E.2d at 849.

The phrase "for the common defense" is not found in the Second Amendment to United States Constitution, but reflects the same concerns. This amendment has been held not to apply to the states, notwithstanding that other amendments in the Bill of Rights with similar wording have been so applied. See supra note 4 and accompanying text. For example, the Fourth Amendment begins, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. This
The Friel decision spurred the Maine Legislature to amend the arms provision in order to clarify that it granted an individual right to keep and bear arms. Rather than adopting or reworking language from the constitutions of other states, however, the Legislature merely deleted the phrase "for the common defense," on the supposition that this would suffice to guarantee an individual right.

Courts in other states with similar constitutional provisions have held that the right to bear arms is not absolute, and that felons may legally be deprived of this right. Although the wording of these constitutional provisions varies considerably from state to state, the case law is useful background for Maine's treatment of the two issues in State v. Brown: whether the right is absolute and, if not, the proper extent of police power regulation. For example, article I, section II of the Louisiana Constitution of 1974 provides that "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." The defendant in State v. Amos challenged a Louisiana statute prohibiting possession of a firearm by a felon as unconstitutional. The Supreme Court of Louisiana, relying on the legislative history of the constitutional provision, determined that it was not intended to exclude the statute in question. The court held that the statute did not impermissibly contravene the defendant's constitutional right. Although the state constitution was silent on the rights of felons, the court was "satisfied that it is reasonable for the legislature in the interest of public welfare and safety to regulate the possession of firearms for a limited period of time by citizens who have committed certain specified serious felonies."

A similar challenge was brought in Colorado by the defendant in People v. Blue. There the defendant argued that a statute prohib-
iting possession of weapons by certain felons violated his constitutional right to bear arms. The Colorado Constitution provides that "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." Like the Louisiana constitutional provision at issue in Amos, there is no express reservation of power to prohibit possession of arms. In Blue the Supreme Court of Colorado reversed a lower court ruling that the statute was overbroad and violated the constitution. The higher court held that the statute was a legitimate exercise of the state's police power. The statute, said the court, did not conflict with the constitution merely because it limited the possession of weapons by persons likely to abuse such possession. The court stated: "We do not read the Colorado Constitution as granting an absolute right to bear arms under all situations."

In State v. Ricehill, the Supreme Court of North Dakota reached a conclusion similar to the one in Blue. The Ricehill defendant, like those in Amos and Blue, argued that his constitutional right had been violated by a statute restricting possession of weapons by felons. This was the first time that the arms provision of the North Dakota Constitution had been interpreted by that state's highest court. Citing Amos and Blue, the Supreme Court of North

50. Id. at 387. See COLO. REV. STAT. § 18-12-108 (1986).
52. People v. Blue, 544 P.2d at 387.
53. Id. at 391.
54. Id.
55. Id. This decision is especially relevant to Brown because the language "the right of no person . . . shall be called in question" is very similar to Maine's constitutional language "shall never be questioned." Compare COLO. CONST. art. II, § 13 with ME. CONST. art. I, § 16. This kind of language was held not to create an absolute right in either state.

The superior court decision in Brown cited a Colorado case striking down a law restricting gun possession as support for finding section 393 unconstitutional. State v. Brown, No. CR-88-966 (Me. Super. Ct., Cum. Cty., July 20, 1989) at 9-10 (citing City of Lakewood v. Pillow, 501 P.2d 744 (Colo. 1972)). The Colorado Supreme Court, in City of Lakewood v. Pillow, held that a city ordinance outlawing possession of firearms within the city was invalid because it conflicted with the state constitution. 501 P.2d 744 (Colo. 1972). This case predated the Blue decision, and is distinguishable in that the ordinance clearly restricts the rights of city dwellers to keep and bear arms in the defense of their homes.

56. 415 N.W.2d 481 (N.D. 1987).
57. Id. at 482.
58. Id. N.D. CONST. art. I, § 1 (amended 1984). This section reads in pertinent part: "to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed."
Dakota rejected the defendant's argument and held that the prohibition under the statute was a patently reasonable exercise of police power.\textsuperscript{59}

Also notable in this context is \textit{Lewis v. United States},\textsuperscript{60} in which the United States Supreme Court upheld the constitutionality of a federal statute which prohibited possession of firearms by anyone who had committed a felony, whether violent or nonviolent.\textsuperscript{61} The Supreme Court noted that it "has recognized repeatedly that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm."\textsuperscript{62}

\section*{III. \textit{State v. Brown}}

In 1988 Edward Brown was indicted in Cumberland County, Maine, on two counts: criminal threatening with the use of a dangerous weapon and a violation of section 393—possession of a firearm by a person convicted of a crime punishable by one year or more in prison.\textsuperscript{63} Brown had previously been convicted, under Maine's habitual offender law, of operating a motor vehicle after his license had been revoked. Operating in these circumstances was a Class C crime, with an authorized term of imprisonment "not to exceed 5 years."\textsuperscript{64}

Brown moved to dismiss both counts of the indictment. This Note is concerned only with the second count, which he contested on the ground that the statute under which he was charged violated his right to bear arms as guaranteed by the Maine Constitution.\textsuperscript{65} Brown's challenge to section 393 was the first to arise following the 1987 amendment to article I, section 16—an amendment that, read

\begin{itemize}
  \item \textsuperscript{59} State v. Ricehill, 415 N.W.2d at 483.
  \item \textsuperscript{61} State v. Brown, 571 A.2d at 820-21.
  \item \textsuperscript{62} Lewis v. United States, 445 U.S. at 66. \textit{See}, e.g., Doe v. Webster, 606 F.2d 1226, 1233-34 nn.24-32 (D.C. Cir. 1979) and supporting cases for examples of conduct from which convicts may be prohibited. \textit{See also infra} note 96 and accompanying text.
  \item \textsuperscript{63} ME REV. STAT ANN. tit. 15, § 393(1) (West 1980) stated in part:
    \begin{quote}
      No person who has been convicted of any crime, under the laws of the United States, the State of Maine or any other state, which is punishable by one year or more imprisonment . . . shall own, have in his possession or under his control any firearm, unless such a person has obtained a permit under this section.
    \end{quote}
    \begin{quote}
    \end{quote}
  \item \textsuperscript{64} State v. Brown, No. CR-88-966, at 1 (citing ME REV. STAT ANN. tit. 29, § 2298 (West 1989)) (violation of section 2298 was a Class C crime; sentence length was determined by reference to ME REV. STAT ANN. tit. 17-A, § 1252(2)(c) (West 1980)). \textit{See} P.L. 1979, ch. 10, § 2 (in effect at the time).
  \item \textsuperscript{65} State v. Brown, No. CR-88-966, at 1.
\end{itemize}
literally, appeared to create an absolute individual right to bear arms.

The superior court granted Brown's motion to dismiss, holding that section 393 was unconstitutional. The court held that restricting firearms possession by a person convicted of a crime "which is punishable by one year or more imprisonment or any other crime" was "overbroad" in that "the law reache[d] conduct that may not be prohibited by infringing upon the constitutional right to keep and bear arms guaranteed to defendant by Article I, Section 16." The court found that "there is simply no rational connection between the conduct made criminal by 15 M.R.S.A. § 393(1) . . . and the class of individuals penalized by the statute . . . ."

The State argued that the court should look to the legislative history of the amendment of article I, section 16 to determine its proper scope. The superior court rejected this view. Stating that the wording of the amendment lacked ambiguity, the court found it unnecessary to look to its legislative history. The opinion pointed out that "Maine's right to keep and bear arms amendment is the most broad and least restrictive of any of the forty-three similar state amendments." Even so, the superior court justice did not hold that the amendment conferred an absolute right to bear arms. In refusing to dismiss Count I of the indictment, he acknowledged that the state has the power to preserve and promote the general welfare within constitutional limits. Included in this power is the right to require that the use of firearms be lawful.

Regarding Count II, he found the relevant portion of section 393 unconstitutional because its restriction on gun ownership was too broad, not because it imposed restrictions at all. In his criticism of the State's position, the justice pointed out that many of the criminal convictions that would bar a citizen from possessing firearms involve no force, violence, or use of firearms. This, according to his interpretation of the constitution, defined the boundary of the state's police power to restrict possession of firearms by felons.

67. Id.
68. Id.
69. Id. at 3.
70. Id. at 6. It is worth noting that the phrase "shall never be questioned," Me Const. art. I, § 16, was apparently never construed to mean that the right was absolute. See supra note 20 (legislative intent), and text accompanying note 22. See also State v. Brown, 571 A.2d at 819 (reasonable police power). This phrase is the same in both the original and amended constitutions. See Me. Const. art. I, § 16 (amended 1987). The right that "shall never be questioned" can be inferred as the right to bear arms as limited by the police power.
In fact, the legislative history on which the State relied is quite explicit. The Legislature stated that, in amending article I, section 16, it did not intend to confer an absolute individual right to bear arms, nor did it intend to prevent the state from restricting the right of certain categories of citizens, such as convicted felons. The superior court noted, however, that none of the Legislature's statements to this effect was incorporated into the text of the amendment itself.

On appeal by the State, the Law Court considered two questions: First, did the amendment create an absolute right for Maine citizens to keep and bear arms? Second, if it did not, does a statute prohibiting possession of firearms by felons exceed the permissible constitutional limits of the state's police power?

The Brown court held that prior to 1987 the Maine Constitution did not confer an absolute right to keep and bear arms, and none was created by the 1987 amendment. Before and after the amendment, section 16 asserted that the right "shall never be questioned." The amendment merely converted the right from a common to an individual right. The State historically has regulated gun ownership in spite of that phrase. Friel, Vainio, and Myrick supported the view that the right was not absolute.

Unlike the lower court, the Law Court decided that it was appropriate to examine the legislative history of the amendment in the course of formulating its decision. The court cited Justice Holmes's familiar observation in Gompers v. United States: "[T]he provisions of the Constitution are not mathematical formulas having their essence in their form... Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." The court found through examining the legislative history

72. Regarding Committee Amendment A, the Statement of Fact stated: "It is the intent of this amendment to allow the State to continue to restrict the right of convicted felons and mentally incompetent persons to bear arms, to continue to restrict the type of weapons that a person may keep and bear and to maintain existing law relating to concealed weapons and other similar issues." Comm. Amend. A to L.D. 651, No. H-230, Statement of Fact (113th Legis. 1987).


77. 233 U.S. 604 (1914).

78. Id. at 610. The Law Court also noted that the Supreme Court relied in part on the nonabsolute nature of the Second Amendment to the United States Constitution in Konigsberg v. State Bar of California, 366 U.S. 36, 49 n.10 (1961). State v. Brown,
that the amendment to article I, section 16 had been undertaken to create an individual right to bear arms. The Law Court noted that members of the Legislature had specifically stated that the individual right, like the former collective right to bear arms, would be subject to reasonable regulation under the state's police power. On this point, the lower court and Law Court are in agreement.

The Law Court disagreed with the lower court, however, on the extent of the state's police power. It concluded that the right conferred under the amended version of article I, section 16 was subject to the same state regulation as the old version. The Law Court held that the statute prohibiting possession of a firearm by a "non-violent" felon was not unconstitutional as an unreasonable or excessive use of the state's police power. The restriction was reasonable in that it bore a rational relation to its intended goal of protecting the public welfare. The Law Court observed that "[s]tatutes such as section 393(1), prohibiting possession of firearms by a felon regardless of the nature of the underlying felony, have never been found constitutionally deficient."

IV. DISCUSSION

A. Police Powers

Because the United States Constitution does not reserve all regulation of firearms possession to the federal government, the right to so regulate remains for the most part with the states as part of their
police powers. Federal regulations have been enacted under the Commerce Clause, covering such actions as interstate trafficking in firearms. At one time possession of firearms by felons was prohibited by federal law, but this provision has been repealed. At no time has the right of individual states to regulate the possession and sale of arms been questioned by the federal government.

Like the rest of its police powers, a state's power to restrict the right to keep and bear arms is limited. Due process requires that all regulations must be for the purpose of protecting the health and welfare of the people of the state. In determining whether the statute challenged in Brown was reasonable, the Law Court used the test of reasonableness described in National Hearing Aid Centers v. Smith. Reasonableness requires that the methods used by the Legislature must bear a rational relation to a statute's intended goals, which in turn must promote or protect the public welfare. The Law Court determined that section 393's prohibition on possession of firearms by felons met this test.

The court cited cases from other state and federal courts finding a rational relationship between similar statutes and the legitimate state purpose of protecting the public from the misuse of firearms. Examples of such holdings can be found in Blue and Ricehill. These cases support the argument that a state can use its police power to reasonably prohibit the possession of firearms, even if the state constitution contains no express reservation of the power to do so. What they do not show is where the outer limit of reasonableness lies. Lewis v. United States, although concerned with an exercise of federal rather than state power, is helpful on this point because it clearly states that a nonviolent felony is a sufficient basis for prohibiting possession of a firearm. Using the Lewis standard, the Maine

88. Id. at 460-61. Statutes are presumed reasonable. See U.S. v. Caroline Products, 304 U.S. 144, 152 (1938).
89. The court spelled out the due process analysis of the exercise of police power in State v. Rush, 324 A.2d 748, 752-53 (Me. 1974). First, the object of the exercise must be the public welfare. Second, the means used must be appropriate to the ends sought. Third, the manner of exercising this power must not be "unduly arbitrary or capricious." Id. The National Hearing Aid decision cited Rush with approval. 376 A.2d at 460.
90. State v. Brown, 571 A.2d at 820-21. If the right to keep and bear arms were a fundamental right guaranteed under the United States Constitution, the Law Court would have subjected the statute to strict scrutiny analysis. National Hearing Aid Ctrs. v. Smith, 376 A.2d at 460 n.2.
statute at issue in *Brown* is "reasonable."

The *Brown* court's holding that section 393 is a reasonable exercise of police power is well founded. It is well settled that legislatures have the power to restrict the rights of felons.\(^9\) Courts have traditionally found statutes that restrict convicts from enjoying apparently fundamental rights to be reasonable.\(^6\) The rights which have been so restricted include the right to vote, to hold public office, to execute and enforce contracts, to testify in court, and to serve as a juror.\(^6\)

The law clearly does not guarantee full citizenship rights to the felon. Indeed, the legislative history of the amendment to article I, section 16 states in plain language that this amendment was not intended to annul existing laws restricting the possession of firearms by convicted felons, minors, and the mentally incompetent, or to restrict the state's right to regulate the lawful possession of arms.\(^7\) The argument between the parties in *Brown* focused on whether the legislative history of the amendment should be examined as an aid in construing the amendment's proper scope.

### B. Constitutional Construction

Brown's argument rested on two contentions: that the meaning of the amendment was so clear and unambiguous that to look for its meaning in the legislative history was unnecessary,\(^8\) and that the legislative history could not be relevant to the citizenry's intent to create a constitutional right.\(^9\) Brown's second contention was not addressed by the Law Court. The actual question put to the citizens of Maine in referendum was "Shall the Constitution of Maine be amended to clarify the rights of citizens to keep and bear arms?"\(^10\) The citizens voted yes, and the details were left to the Legislature. The evidence shows that the citizenry wanted the right clarified; it does not show an intent to confer an absolute constitutional right, nor does it indicate how extensive the right should be.\(^10\)

The question whether the legislative history may be referred to only when the language of the amendment is ambiguous is more

---

\(^9\) *Id.*

\(^{95}\) *See also* Brief of Amici Curiae, National Rifle Ass'n and Sportsman's Alliance of Me. at 8, State v. Brown, 571 A.2d 816 (Me. 1990) (reviewing cases from several jurisdictions).

\(^{96}\) Doe v. Webster, 606 F.2d 1226, 1233-34. *See also* Brief of Amici Curiae, *supra* note 95, at 8.

\(^{97}\) *See supra* notes 21, 39-41 and accompanying text.

\(^{98}\) Brief for Appellee at 12, State v. Brown, 571 A.2d 816 (Me. 1990).

\(^{99}\) *Id.* at 9.

\(^{100}\) L.D. 651 at 2 (113th Legis. 1987).

\(^{101}\) *See, e.g.*, Brief of Amicus Curiae, Center to Prevent Handgun Violence—Legal Action Project at 6-10, State v. Brown, 571 A.2d 816 (Me. 1990) (no citizen vote on text of the amendment).
complex. The superior court found the amendment's language clear and unambiguous, and did not examine the legislative history. The court quoted Vainio in support: "It is a fundamental principle of statutory interpretation that '[t]he starting point in any given case . . . must be the language of the statute itself. . . . Unless the statute itself discloses a contrary intent, words . . . must be given their plain, common and ordinary meaning . . . ." 103

This statement from Vainio, however, referred to the appellant's argument that the revised section 393 did not apply to his past conviction, and did not refer to an interpretation of the Maine Constitution. Regarding constitutional interpretation, the Maine Supreme Judicial Court has stated that "the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter." 104 While interpretation of a constitutional provision should be based on the language itself, "[t]he fundamental rule of construction of statutory and constitutional provisions is that language shall be interpreted in accordance with the intention with which it was used, if that result may be accomplished by giving words their ordinary and usual significance." 105 Thus it is permissible to consider the intentions of lawmakers in amending a constitutional provision if the actual language of the provision is not unreasonably twisted in the process.

The lower court's decision in Brown does suggest the fundamental dilemma posed by article I, section 16 in its current version. How can the amendment mean exactly what it says, and yet, as the superior court asked, not confer an absolute right? None of the words of the amendment are ambiguous in their meaning. If the amendment is read without considering its context, it does appear to state a right without any restrictions at all. Nevertheless, there is an ambiguity problem. Even fundamental constitutional rights must be interpreted within the context of the state's police powers. Because an absolute right to keep and bear arms conflicts with the established power of the state to protect the public welfare, the scope of the amendment is unclear. An amicus brief argued that "the ambiguity might be posited as whether the amendment established an absolute, individual right to bear arms or an individual right that is subject to police power regulation for the common good." 106 This ambi-

103. Id. (quoting State v. Vainio, 466 A.2d at 474).
106. Opinion of the Justices, 142 Me. 409, 415, 60 A.2d 903, 906 (1947).
guity should be sufficient to warrant examination of the legislative history.108

In conceding that the right to bear arms could not be absolute, the superior court justice attempted to resolve this ambiguity without reference to the legislative history. In his holding he attempted to define the limits of the state's police power while ignoring the limits already defined and held to be constitutional in Myrick.109 Myrick had a previous conviction for cheating under false pretenses,110 which, like operating a motor vehicle without a license, is a nonviolent crime. However, because the Law Court decided Myrick under the old constitutional provision, its precedential value as a gauge of permissible police power was dismissed. Instead, the superior court justice created what he considered to be a reasonable boundary line, excluding nonviolent criminal convictions from the legitimate scope of the statute. He did not decide whether the remainder of the statute would survive a constitutional challenge.111

While the superior court and the Law Court applied the same legal standard to determine whether the statute was a legitimate exercise of police power,112 the courts reached opposite results. The superior court's broad interpretation of the right to bear arms, and consequent narrowing of the police power to regulate firearms possession, is contradicted by the legislative history. Although the Law Court found support in the legislative history for its holding that an absolute right to bear arms was not conferred by the amendment, the court primarily relied on case law to determine that the statute was a legitimate exercise of the state's police power.

C. The Extent of Permissible Restriction

In holding that the commission of any felony, even if nonviolent, shows a "degree of lawlessness"113 that reasonably justifies the restriction of a constitutional right, the Law Court affirmed current Maine law but did not affirmatively state whether the right to bear arms could be further limited. There remains a gray area where the extent of the right is still undefined. How lawless is lawless enough? It is possible that lesser offenses, punishable by less than a year in

108. Id. at 4-5.
110. Id. at 380.
112. The superior court justice held part of the statute unconstitutional because it had "no reasonable connection to the achievement of any legitimate governmental purpose." State v. Brown, No. CR-88-966, at 11-12. The Law Court used the test from National Hearing Aid Ctrs. v. Smith, 376 A.2d 456 (Me. 1977), which in part required that "the methods utilized [by the state] bear a rational relationship to the intended goals." State v. Brown, 571 A.2d at 820.
prison, could be sufficiently lawless behavior to justify a restriction on the right. Brown does not hold otherwise.

Under the present state of the law, deprivation of the right requires a conviction of some sort. It is also possible, although less likely, that the right to bear arms could be abrogated temporarily without any crime being committed at all, such as during a time of riot and insurrection. Under such extreme circumstances a temporary rescission of the right to bear arms could meet the test of reasonableness under National Hearing Aid Centers. Such speculation remains possible because the Brown decision was silent on whether the restriction in section 393 represents the maximum reasonable restriction on the right to bear arms, or is anywhere near it. One can understand the desire of the superior court to draw a bright line between violent and nonviolent felonies. The Brown decision, however, merely narrowed the right to bear arms without defining its limits.

V. Conclusion

The Law Court's decision to reverse the lower court ruling in Brown was sound. The court applied the correct legal standard to determine that section 393 was constitutional. It also correctly determined that the legislative history of the 1987 amendment to article I, section 16 of the Maine Constitution could and should be examined, and the result in Brown conforms to the apparent intent expressed in the historical record. The amendment, intended to counteract the decision in Friel, sought to create an individual right, not to make the right absolute. The Law Court's holding that a law prohibiting possession of firearms by a felon is a reasonable exercise of the police power is consistent with the latitude given to firearms regulation before the 1987 amendment. In addition, it appears that a reservation of the state's right to regulate the possession of firearms need not be explicitly stated in the constitutional provision.

The legitimacy of statutes limiting the right of felons to keep and bear arms is well established in case law. The policy considerations behind such use of the police power are readily understandable at the level of violent felonies and felonies committed with the use of weapons. The disagreement between the lower court and the Law Court centered on what degree of lawlessness is sufficient to warrant a reasonable restriction on a constitutional right. The holding in Brown clarifies that the degree of lawlessness is not limited to violent felonious conduct.

The Law Court did not state whether section 393 defines the outer boundary of permissible state regulation. It is possible that the right to bear arms may be subjected to broader restrictions in

the future. The *Brown* decision does not state a bright line test. While the lack of clearly defined limits may leave Maine citizens with some uncertainty about their right to bear arms, it would have been unreasonable to expect a clear boundary line from this case, since the Law Court's holding was limited by the facts presented. It would have been inappropriate for the court to speculate as to where the limit of permissible regulation might actually be, and such dicta would have been of questionable value. This question will have to be resolved by future decisions.

*June A. Jackson*