

Introduction

Texas has a one of the most positive “pro-gun” reputations among the states. With this reputation, one would expect that Texas’s gun laws would be minimal and, as many believe, “pretty much anything goes.” This is not the case. Like most states, Texas has a long history of repressive firearm laws, particularly with regard to carrying firearms off a person’s own property. In 1989, Second Amendment attorney and scholar Stephen P. Halbrook wrote an excellent article regarding this history,¹ which is even more interesting because of the events that took place after Halbrook’s article was published.

As a result of Texas’s War of Independence from Mexico, largely instigated because of Mexico’s efforts to disarm those living in the Mexican States, Texas’s first constitution provided, “Every citizen shall have the right to keep and bear arms in the lawful defence of himself and the State.”² The legislature specifically rejected an amendment to limit this right to allow the legislature to “have power to prevent the carrying of concealed weapons, under such restrictions as may be prescribed.”³ During this period and up to the Civil War, “No one in Texas, regardless of race, was denied the right to possess or carry arms in any manner.”⁴ The inviolate nature of this right to keep and bear arms was explained by the Texas Supreme Court in 1859:

The object of the [Second Amendment to the U.S. Constitution] has reference to the perpetuation of free government, and is based on the idea, that the people cannot be effectually oppressed and enslaved, who are not first disarmed. The clause cited in our bill of rights, has the same broad object in relation to the government, and in addition thereto, secures a personal right to the citizen. The right of a citizen to bear arms, in the lawful defense of himself or the state, is absolute. He does not derive it from the state government, but directly from the sovereign convention of the people that framed the state government. It is one of the “high powers” delegated directly to the citizen, and “is excepted out of the general powers of government.” A law cannot be passed to infringe upon or impair it, because it is above the law, and independent of the law-making power.⁵

¹ Stephen P. Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bill of Rights*, 41 *Baylor L. Rev.* 629 (1989). This article is the basis for many of the historical facts summarized below.

² The Texas Constitution, Article 1, § 13 (1845).

³ Halbrook, *supra*, at p. 644 (quoting Debates of the Texas Convention 311 (Houston 1846), pp. 312-13).

⁴ Halbrook, *supra*, at p. 645.

⁵ *Cockrum v. State*, 24 *Tex.* 394 (1859), p. 401.

The first encroachments on the right to keep and bear arms began after the Civil War. While, “unlike other Southern states, Texas did not pass a black code provision disarming freedmen,” Texas did pass “its first gun control measure” in 1866 “which was also the closest Texas came to adopting a black code provision to disarm freedmen.”⁶ This law provided that “sharecroppers who still lived on plantations could keep firearms in their homes but could not carry them outside for any purpose other than civil or military duties.”⁷

Texas held its Reconstruction Convention, as required by Congress, in 1868. In accordance with that convention, the new Texas Constitution granted the legislature the ability to regulate the right to keep and bear arms: “Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; under such regulations as the legislature may prescribe.”⁸

The gates had been opened and the restrictions began. Texas passed its first major restrictions on weapons in 1870.⁹ This law prohibited the possession of Bowie knives, dirks, butcher knives, and firearms from being carried in churches or places of religious assembly; school rooms or places where persons are assembled for educational, literary, or scientific purposes; ballrooms, social parties, or other social gatherings “composed of ladies and gentlemen;” elections precincts on election day; places where “people may be assembled to muster or perform any . . . public duty;” or any other place of public assembly.¹⁰ This law was the foundation of Texas’s existing laws precluding where firearms may be carried.¹¹

The following year, Texas passed a more restrictive law which prohibited most open and concealed carry. This “Act to Regulate the Keeping and Bearing of Deadly Weapons” made it illegal for a person to carry “on or about his person, saddle, or in his saddle-bags, any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of knife manufactured or sold for the

⁶ Halbrook, *supra*, at p. 652; George Paschal, *A Digest of Laws of Texas, From 1754-1874, Vol. 2* (4th ed. 1874), p. 1321 (quoting *An Act to Prohibit the Carrying of Firearms on Premises or Plantations of Any Citizen Without the Consent of the Owner*, Vol. 20, p. 60, Article 6510 (1866).)

⁷ Halbrook, *supra*, at p. 652 (citing Law of Nov. 6, 1866, Ch. 92, § 1, 1866 Tex. Gen. Laws 90, 5 H. Gammel, *Laws of Texas* 1008 (1898)).

⁸ The Texas Constitution, Article 1, § 13 (1869). Halbrook states, “The intent was to authorize the legislature to ban carrying concealed weapons, but not to ban the bearing of arms in any fashion.” (Halbrook, *supra*, p. 657.) Unfortunately, as subsequent legislation affirmed, the actual language of the Constitutional provision did not express this intent and was not so restrictive.

⁹ George Paschal, *A Digest of Laws of Texas, From 1754-1874, Vol. 2* (4th ed. 1874), p. 1322 (quoting *An Act Regulating the Right to Keep and Bear Arms*, Vol. 21, part 1, p. 63, Article 6511 (1870).)

¹⁰ *An Act Regulating the Right to Keep and Bear Arms*, Vol. 21, part 1, p. 63 (1870).

¹¹ See Chapter 3 regarding prohibited places to carry firearms.

purpose of offense or defense, unless he has reasonable grounds for fearing an unlawful attack on his person, and that such ground of attack shall be immediate and pressing.”¹² Additional exceptions were provided for “actual services” as militiamen, peace officers, and “persons traveling in the state” when “keeping or carrying arms in their baggage.”¹³ A person carrying a weapon because of a fear of an unlawful attack had the burden to prove that (1) “such danger was immediate and pressing,” (2) the danger “was of such a nature as to alarm a person of ordinary courage,” and (3) the weapon was “borne openly and not concealed beneath the clothing.”¹⁴ This law generally prohibiting the carrying of weapons remained until 1995.

Texas held another Constitutional Convention in 1875. The new constitutional guarantee to keep and bear arms, approved the following year, was modified to state, “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.”¹⁵ This constitutional provision remains in the Texas Constitution today. The change was more limited than the 1869 provision which allowed the legislature to regulate both the keeping and bearing of arms. The 1876 provision limited the legislature from making laws except those affecting the “wearing of arms.” Thus, by its language, the legislature was precluded from passing laws regarding the broader “keeping” of arms and could only regulate how those arms could be worn.¹⁶ However, this was not how the limitation was applied.

In 1989, Stephen P. Halbrook reported:

Despite its stereotype of being a state where cowboys promiscuously tote six-shooters, Texas is one of the few states that absolutely prohibits the bearing of pistols by private individuals. The only off-premises exception is for travelers, who may bear arms for self-defense, as the constitution allows, either openly or concealed. The only other exception is for hunters and other sportsmen, who bear arms for recreation and not for self-protection. . . . Unlike Texas, even the reputedly most restrictive jurisdictions such as Massachusetts, New York City, and Washington, D.C. provide for the issuance of permits to carry a firearm for self-protection.¹⁷

¹² George Paschal, *A Digest of Laws of Texas, From 1754-1874, Vol. 2* (4th ed. 1874), p. 1322 (*An Act to Regulate the Keeping and Bearing of Deadly Weapons*, Vol. 21, part 2, p. 25, Article 6512 (1871).)

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ The Texas Constitution, Article 1, § 23.

¹⁶ Halbrook, *supra*, at p. 667.

¹⁷ Halbrook, *supra*, pp. 632-33.

The first Texas concealed carry bill was passed in 1995. While significant inroads have been made in Texas's gun laws since that time, the struggle to overcome prohibitive laws passed almost 150 years ago has proved to be a slow process. While these rights are sometimes reluctantly restored,¹⁸ the legislative process involves the giving with one hand while taking away with the other. As prohibitions are removed, those new laws add multiple conditions and qualifications which are a long way from withstanding the standard that a "law cannot be passed to infringe upon or impair [the right to bear arms], because it is above the law, and independent of the law-making power."¹⁹ The most obvious example is the restoration of the right to carry a handgun and the limitations or infringements that came with that restoration, including the need for a license to carry, restrictions on who can carry, statutory²⁰ restrictions on the places where handguns can be carried, and provisions allowing entities to create their own "gun-free" zones.

Until the time when the phrase "shall not be infringed" is interpreted as it is stated in the United States Constitution, firearm owners, firearm businesses, and other businesses will continue to struggle with determining and complying with the continued onslaught of federal and state restrictions. To help in this endeavor, this volume serves as a valuable resource for determining what the firearm laws are in Texas.

¹⁸ The right to self-defense was not granted by the government, but is one of those inalienably rights granted to us by our Creator. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." (Declaration of Independence.)

¹⁹ *Cokerum v. State*, 24 Tex. 394 (1859), p. 401.

²⁰ Statutory refers to laws provided under one of the Texas codes, such as the Texas Government Code, the Texas Penal Code, etc.