

DOES WISCONSIN HAVE A CONSTITUTION?

BECAUSE YOU WOULDN'T KNOW IT BY LOOKING

CHARLES J. SYKES

Earlier this year, a 64-year-old Arkansas man named V. O. Goins stopped at a gas station in Milwaukee's central city to ask for directions. He was set upon by a gang of five young men, who began to punch and kick him, at one point beating Goins with his cane. Fearing for his life, Goins reached under the front seat of his car, pulled out a handgun he had hidden there and shot and killed one of the robbers, 20-year-old Kendall Moss.

Although Goins was held in jail for several days, the Milwaukee County District Attorney's Office said that he would not be charged in the fatal shooting. Based on the evidence, Assistant District Attorney Karen Loebel told reporters, she wouldn't be able to disprove a claim that Goins had acted in self-defense.

The district attorney could also have charged Goins with violating Wisconsin's blanket prohibition against carrying a concealed weapon, but chose not to. And thereby hangs a tale.

In 1998, voters approved an amendment to the state constitution giving citizens the "right to keep and bear arms for security, defense,



hunting, recreation and any other lawful purpose."

In July 2003, the state's Supreme Court ruled 6 to 1 that: "If the constitutional right to keep and bear arms 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."

But would that right extend to carrying a weapon in one's car? The Milwaukee DA obviously didn't want to test the question with Goins's case.

The high Court had hoped the legislature would clarify the issue by now, inviting legislators to bring the concealed carry statute into line with the state constitution. "The approval of a state constitutional right to keep and bear arms for security, defense, hunting, recreation and other lawful purpose will present a continuing dilemma for law enforcement until the legislature acts to clarify the law," Justice David Prosser wrote for the majority.

Charles J. Sykes is the editor of WI:Wisconsin Interest and a senior fellow of the Wisconsin Policy Research Institute. He also hosts a talk-radio show on AM 620 WTMJ in Milwaukee.

But two years have passed, and Governor Jim Doyle and a veto-sustaining minority in the legislature have refused to change the law, which remains on the books, unchanged despite the definitive ruling of the state's highest Court that it conflicts with the state constitution.

Illegal Games

It has also been more than a year since the state Supreme Court ruled that Governor Doyle had exceeded his authority by entering into eternal gaming compacts with Indian tribes. Specifically, the Court ruled that the 1993 state constitutional amendment banned new forms of gambling—roulette, craps, and poker—that had been expanded in the 2003 compacts.

There have been no appeals.

There has been no stay.

But despite the high Court's ruling, the roulette wheels are still spinning, dice are still bouncing, and men in polyester jackets are still trying to draw to an inside straight—even though all of those activities are illegal under the state constitution.

No games have been removed. In casinos throughout the state, it is as if the Supreme Court had never spoken.

The Court also ruled that Doyle had exceeded his authority by waiving the state's sovereign immunity and by cutting the legislature completely out of the process. It did, however, leave the door open for Doyle to renegotiate compacts that returned the casinos to the pre-2003 games.

But there has been no legislative action. And while negotiations continue, no new compacts have been signed.

Under our system of laws, it is the executive branch's responsibility to enforce the laws, but even though they all took oaths pledging to uphold the constitution, no one, from the governor, to the attorney general, to local district attorneys has lifted a finger. Perhaps the oddest player of all has been Milwaukee District Attorney E. Michael McCann, who

actually sided with legislators in the legal challenge against the compacts, but who has said he was barred from taking any action by a federal injunction. But neither McCann, nor the tribes, have sought any clarification from the federal courts.

So what does it mean when the Supreme Court issues a ruling and nobody listens? While the state constitution is not exactly a dead letter on both issues—concealed carry and tribal gaming—it is, at best, being treated as a vague annoyance, but not enough to compel changes in state law, or enforcement actions by law enforcement.

It's almost as if the state didn't have a constitution.

Munir Hamdan

The beginning of the end of Wisconsin's concealed carry law began late in the day on November 26, 1999.

Around closing time that day, two plainclothes officers entered the store owned by Munir Hamdan in Milwaukee's central city. Hamdan was in the backroom, but his son pushed a buzzer, calling his father. Hamdan kept a handgun under the counter near the cash register, but since he was closing the shop, he had taken it into a back room for storage, placing it in a plastic bag. When his son buzzed him, Hamdan put the wrapped gun into his pants pocket and came out to meet the visitors.

The officers were conducting a routine license check, but during their conversation, they asked Hamdan whether he had a gun on the premises. Hamdan said he did and pulled the wrapped handgun from the front pocket of his pants. The officers did not arrest Hamdan or charge him with any offense, but they did seize the gun. Six days later, Milwaukee's District Attorney's Office charged Hamdan with carrying a concealed weapon.

Under Wisconsin's statute there are no exceptions. Except for peace officers, no one is allowed to carry a concealed weapon for any reason or under any circumstances.

At his trial, Hamdan was not allowed to raise a defense based on his constitutional right to keep and bear arms, nor—because the law allowed no exceptions—was he allowed to tell the jury about his reasons for carrying a gun: the crime rate in his neighborhood and previous robberies at his store. The jury was not told, for example, that in the past year there had been at least three murders, 24 robberies, and 28 batteries committed in the small census tract where Hamdan's store was located.

Even more compelling, Hamdan's store had been the site of four armed-robberies and two fatal shootings. In one instance, Hamdan said that an assailant held a gun to his head and actually pulled the trigger, only to have it misfire. Hamdan was robbed again in February 1997 when he struggled with the armed assailant and eventually killed the attacker in self-defense. Violent crime continued to swirl around the store, including incidents where bullets actually struck the store itself.

"As a result of these general and specific concerns for the safety of himself, his family, and his customers, and for the security of his property," the State Supreme Court would later note, "Hamdan kept a handgun under the store's front counter next to the cash register during store hours." But the jury was told none of this, including the fact that the gun confiscated by police was the same one that Hamdan had used to defend himself in February 1997.

At the trial, one of the police officers who seized the gun—the state's only witness—testified that "the majority of the store owners [in the area] have some type of weapon on the premises based on my experience."

After a trial in Milwaukee County Circuit Court he was convicted; the judge, noting the

"consternation" of the jury, gave him a token fine of \$1.

The case was the high court's first chance to interpret the meaning and scope of the constitution's new right to keep and bear arms.

Section 941.23 provides, "any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor."

But Article I, Section 25, of the Wisconsin Constitution, adopted in 1998, provides, "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."

*The question before the
Court was whether
Wisconsin's
constitution mattered,
or whether the
amendment was simply
boilerplate that had no
effect on statutes. . .*

The question before the Court was whether Wisconsin's constitution mattered, or whether the amendment was simply boilerplate that had no effect on statutes like the ban on concealed carry, as then-Attorney General Jim Doyle argued.

Doyle argued that Hamdan only had the right to keep and bear arms for his security if it was displayed openly. Only one justice, Shirley Abrahamson, adopted

Doyle's logic.

The rest of the Court decisively—and at times derisively—dismissed Doyle's arguments.

Justice Prosser wrote for the majority,

Requiring a storeowner to carry a gun openly or in a holster is simply not reasonable. Such practices would alert criminals to the presence of the weapon and frighten friends and customers. Likewise, requiring the gun owner to leave a handgun in plain view in his or her store so that he or she avoids a CCW charge fails the litmus test of common sense. . . .

Requiring a store owner to openly display weapons as the only available means of

exercising the right to keep and bear arms for security is impractical, unsettling, and possibly dangerous. If the State prosecutes a storeowner for having a concealed weapon within easy reach, it is strongly discouraging the use of firearms for security and is practically nullifying the right to do so.

Although he was regarded as a member of the Court's moderate/liberal block, Justice William Bablitch wrote a blistering concurrent opinion that mocked the Abrahamson/Doyle position.

Bablitch wrote,

Justice Abrahamson's opinion (that the constitution only protects weapons in the open) eviscerated the constitutional amendment. It renders the constitutional amendment a sham by reading into it the words "unless concealed." The inevitable and logical result of that interpretation is to create absurdities neither the legislature nor the voters could have intended.

Those included, Bablitch said, making it legal to have a gun "on top of your night table or bureau, but not in a drawer." A gun in plain view in a person's home would be legal, but not if it was hidden behind a solid door.

"With all due respect," wrote Justice Bablitch, "that just doesn't make sense."

The balancing act

The Court made it clear that it was not questioning the state's authority to regulate firearms. But it noted that the state's current ban was "very broad."

As presently construed, the statute prohibits any person, except a peace officer, from carrying a concealed weapon, regardless of the circumstances, including pursuit of one of the lawful purposes enumerated in Article I, Section 25.

The Court also compared Wisconsin's law to that of other states. When Wisconsin adopted the constitutional amendment in 1998 establishing a right to bear arms, it joined 43 other states with similar constitutional provisions. At the same time, the justices wrote, Wisconsin

was one of only six states to have a blanket ban on concealed weapons.

The Court found that there were "few similarities" between Wisconsin's CCW law and the law of the other five states, some of which have written in affirmative defenses that do not exist under Wisconsin law.

As a result of our legislature's decision to prohibit the carrying of concealed weapons under any circumstances, the interaction between Wisconsin's CCW statute and the state constitution's right to bear arms is anomalous, if not unique.

The Court did not mean that as a compliment.

In deciding the Hamdan case, the Court adopted the reasoning of the Wyoming Supreme Court, which held,

[A] balance must be struck between the individual's right to exercise each constitutional guarantee and society's right to enact laws which will ensure some semblance of order. As these interests will necessarily conflict, the question then becomes which party should accept the encroachment of its right. . .

The Court then addressed the question of "reasonableness."

Bans on the carrying of concealed weapons were based on the rationale that such laws would provide public notice of the danger posed by armed individuals and to prevent the use of such weapons in anger or passion.

"None of these rationale is particularly compelling when applied to a person owning and operating a small store," the Court concluded.

Although a shopkeeper is not immune from acting on impulse, he or she is less likely to do so in a familiar setting in which the safety and the satisfaction of customers is paramount and the liability for mistakes is nearly certain. . . .

Rejecting Doyle's other arguments, the Supreme Court overturned Hamdan's convictions declaring:

Strict application of the CCW statute effectively disallowed the reasonable exercise of Hamdan's constitutional right to keep and bear arms for the lawful purpose of security.

Unresolved questions

Even so, the Court left several unresolved questions. Would, for example, the right to carry a concealed weapon for security extend to a shop owner's employees as well as himself? And while the Court made it clear that individuals had a right to carry a concealed weapon in one's own home or business, what about on the street?

"Another obvious candidate is people in automobiles," wrote David Ziemer in the *Wisconsin Law Review*.

A person such as Hamdan faces as much danger transporting the day's receipts from the store to his vehicle to take to the bank as he does in the store itself. From a "security" standpoint, carrying the weapon to and from the car, and in the car with him, may be just as necessary as keeping it in the store.

Furthermore, after one's home and business, a vehicle qualifies as the next most valuable place in which most people have a "possessory interest." The Court explicitly stated in Hamdan, "We believe the domain most closely associated with a persistent state of peace is one's home or residence, followed by other places in which a person has a possessory interest."

But as Ziemer noted, "The biggest question of all, however, is whether a law-abiding citizen carrying a concealed weapon as he walks down the sidewalk will be able to successfully avoid prosecution for CCW.

Such a scenario really presents the ultimate collision of the competing interests involved—for most people, it is then that they are most vulnerable, and their need

for security greatest, yet it is also when the State's interests in preserving order are the highest.

The Court recognized the dilemma it had created and explicitly called on the legislature to remedy the situation:

We urge the legislature to thoughtfully examine (the concealed carry law) in the wake of the amendment and to consider the possibility of a licensing or permit system for persons who have a good reason to carry a concealed weapon.

Last year, the legislature did just that, only to have the bill vetoed by Governor Jim Doyle, who continues to take the same position that

he took in the Hamdan case when he was Attorney General, despite its decisive rejection by the state's highest court. The legislature is expected to send another bill to the governor this year, where it will again face a gubernatorial veto.

The governor seems no more anxious to give effect to the Supreme Court's ruling on gambling.

Ignoring the decision on gambling

Shortly after assuming office in 2003, Governor Doyle announced that he had signed compacts with a number of state tribes that dramatically expanded the scope of the gaming allowed in tribal casinos. In return for providing more than \$200 million to help Doyle balance the state budget, Doyle waived the state's sovereign immunity, granted compacts in perpetuity, and allowed the tribes to expand existing games to include keno, roulette, poker, craps, and a variation on blackjack. So sweeping were the compacts, they earned Doyle the sobriquet, "Diamond Jim."

Legislative Republicans reacted by passing legislation requiring legislative approval of the

*The Court recognized
the dilemma it had
created and explicitly
called on the legislature
to remedy the situation*

compacts, but failed to override a Doyle veto. Frustrated, the leaders, Assembly Speaker John Gard and Senate Majority Leader Mary Panzer, turned to the courts. Their lawsuit raised fundamental issues of separation of powers and whether the state constitution banned the new games.

On May 13, 2004, the State Supreme Court ruled 4 to 3 that the governor had exceeded his authority in signing compacts that extended into eternity and in waiving the state's sovereign immunity. But, perhaps, most dramatically, the Court ruled that Doyle had unconstitutionally expanded the sorts of gambling allowed in the state.

Dole had once again insisted that a 1993 amendment to the constitution did not preclude the new games and was, in any case, irrelevant to the new compacts. And once again, the Court ruled that, to the contrary, the constitution was, in fact, quite relevant that its language was straightforward and clear.

"The text of the constitution is absolutely clear," the Court ruled:

Except as provided in this section, the legislature may not authorize gambling in any form. Nothing in Section 24 authorizes electronic keno, roulette, craps, and poker. These games are specifically denied to the Wisconsin Lottery.

Unlike the expansive interpretation of the term "lottery" that was at least plausible before 1993, our constitution is now quite clear that the legislature may not authorize any gambling except that permitted by article IV, section 24, and is very clear that certain games do not fall under the term "lottery". . . . The constitution is now specific about what the state-operated lottery may do and what it may not do. Blackjack and other varieties of banking card games, poker, roulette, craps, keno and slot machines are all games specifically outside the scope of Section 24(6)'s authorized exception, and they do not come within any other exception.

Despite the Court's ruling, however, the games continued to be played.

In December 2004, two Wisconsin tribes cut a deal with the state of New York to open casinos that will eventually pay the state 25% of the take from their slot machines—far higher than the 4.5% to 8% that Wisconsin tribes pay under the deal with Doyle. In California, Governor Arnold Schwarzenegger hammered out a deal with five tribes that will give the state of California an additional \$1 billion a year in revenue.

In response, Governor Doyle said that he would not try to get a bigger slice of the casino pie, nor did he have any intention of enforcing the Court's ruling that said that some of the new games violate the constitution.

Instead, the administration continues to renegotiate the compacts and several tribes have threatened to withhold promised payments to the state. The tribes also continue to wait for the results of a pending suit by the owners of the Dairyland Greyhound track, which asks the high court to invalidate all of the gambling in the tribal casinos.

A cynic might suggest that (a) the lure of casino cash has simply trumped the law, or (b) that Governor Doyle is simply waiting for his new appointee to the Court to tip the 4-3 balance in his direction.

But in the meantime, he continues the status quo, and the constitution goes unenforced.

"If a tavern owner decided to ignore the law," notes Speaker John Gard, "they'd get put in jail or pay a stiff fine. The governor of the state gets to ignore the ruling of the highest court in the land, and apparently there's going to be no accountability."

Or at least not yet.