Limited Preemption of Firearms Laws: A Good Step for Civil Rights

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Synopsis:

Senate Bill 25 preempts some local firearms laws, based on the legislature's responsibility to protect the most important of all statewide concerns: the constitutional rights of Colorado's citizens. The bill enforces those rights with four specific measures:

- Protecting the rights of hunters to travel to transport firearms in their car while on the way to a hunting trip; and protecting the right of drivers to posses a firearm for lawful protection in their automobile
- Ending the collection of privacy-invading registration lists of legal gun owners.
- Prohibiting the banning of lawful firearms
- Requiring that restrictions or prohibitions on the unconcealed carrying of firearms be accompanied by posted signs, so that citizens can obey the law.

These four common-sense protections of civil rights do not interfere with any legitimate local interests in firearms regulation.

Discussion:

Forty-four states have some form of firearms preemption. From very liberal Rhode Island and Maryland on the Atlantic Ocean, to very liberal California and Oregon on the Pacific Coast--and almost everywhere in-between--state legislatures have decided to prohibit some or all local laws regarding firearms. These preemption laws have two foundations: First and foremost, protecting citizens from infringement of their federal Second Amendment rights, and from infringements of their state constitutional rights to arms and rights to self-defense. The second foundation is simply good government, giving citizens one clear statewide law to follow, rather than a confusing pastiche of local laws.

The only states totally without preemption are Colorado, Hawaii, Illinois, Kansas, New Hampshire, and Ohio. Like Colorado, New Hampshire is currently considering enactment of a preemption statute.

Various "fact sheets" from the Brady Campaign misstate the extent of preemption laws. For example, a "Facts and Information" brochure about preemption laws states that there is no preemption in Connecticut,

Massachusetts, Nebraska, and New York. In fact, Connecticut forbids local governments to make gun dealer licensing more stringent than state laws. (See *Dwyer v. Farrell*, 475 A.2d 257 [1984].) Massachusetts preempts all gun licensing (Mass. Gen. Laws ch. 140 sect. 129B), and the state constitution forbids local laws inconsistent with state law; for this reason, Boston's Dec. 1989 ban on "assault weapons" was not allowed to go into effect until the state legislature later passed a bill authorizing the ban. Nebraska's state constitutional right to arms declares that the right "shall not be denied or infringed by the state or any subdivision thereof" (Neb. Const., art. I, sect. 1); Nebraska's statewide handgun laws are preemptive except for measures enacted before 1991. (See Neb. Stat. 69-2425.) New York State preempts handgun licensing. (N.Y. Penal Law, sect. 400). Accordingly, there are only six states without some form of preemption.

In states which enact preemption laws, the leading model is to totally forbid local gun laws. Half of the preemption states--including Wyoming, New Mexico, and Utah--take this approach. About half a dozen others completely prohibit all new local laws, but allow some grandfathered local laws to remain on the books.

Senate Bill 25 is much narrower than the majority model of complete preemption. While the bill would eliminate some abusive local laws, a great many local laws would remain untouched.

Some of the Matters which SB 25 Does Not Affect:

Local governments would retain the power to control the *discharge* of firearms. Thus, Grand Junction's law which makes it a crime for a person to shoot a BB gun in his own basement would not be affected.

Local governments would retain the power to control or even prohibit the *illegal concealed carrying* of firearms. Senate Bill 25 does not address the issue of concealed carry in any way. Senate Bill 24, if enacted, would limit local controls over concealed carry by licensed persons who pass a background check and safety training. Neither Senate Bill 24 nor 25 would restrict local laws against persons who carry concealed firearms without a permit.

And as we shall see when we examine what SB 25 does, the local laws which are prohibited are not legitimate elements of home rule, but rather are vexatious oppressions of the exercise of civil rights. Even the specific limitations of Senate Bill 25 hardly foreclose legitimate local laws.

Firearms in Private Vehicles:

Under statewide law, it is lawful to carry a handgun in an automobile for lawful protection. A Denver ordinance more or less nullified this law, allowing such carrying in response only to "a direct and immediate threat." In other words, unless you knew in advance that you would be attacked during a particular automobile trip, it was illegal to carry a firearm for protection in a

car. The Denver City Council made the problem significantly worse by enacting a property confiscation ordinance which allowed for the seizure of an automobile, imposed a presumption of guilt, and allowed the City Attorney to wait 30 days before even beginning the legal proceedings at which an automobile owner might prove his innocence.

In 2000, the legislature partially addressed this problem. The legislature made defensive gun carrying in cars a matter of statewide concern (thus partially preempting Denver's ordinance)--but only for people traveling between jurisdictions. Senate Bill 25 would fix two loopholes in that 2000 statute.

First, the bill would apply preemption to automobile trips *within* a jurisdiction. This is appropriate because Article II, section 3 specifically guarantees that all Coloradoans have the "natural, essential, and inalienable rights" of "defending their lives" and "protecting property." This right should not be abolished simply because one is not driving across county lines.

Second, the bill protects the carrying of weapons in automobiles for lawful hunting. Thus, if a person is driving from Douglas County to Routt County for a hunting trip, he travel on I-25 and I-70 through Denver, without worrying that his automobile and hunting rifle will be confiscated.

It is very important to note that current state hunting law forbids the carrying of loaded rifles or shotguns in automobiles. C.R.S. 33-6-125. Accordingly, gangsters cruising a neighborhood at night with loaded rifles in their car would not be able to plausibly claim that they were on a hunting trip. And of course the police would evaluate any driver's claim about being on a hunting trip by making common-sense inquiries such as whether the driver has an in-season hunting permit, whether the car is carrying other hunting gear, and the route that police officer observed the driver following (would likely be traveling directly on a main thoroughfare, not meandering on back streets).

Existing state law, which SB 25 would amend, refers to "weapons," a broader category than "firearms." This makes sense, because a hunter might carry items such as hatchets or knives. Existing state law also makes it illegal to posses a "dangerous weapon" (firearm silencer, machine gun, short shotgun, short rifle, ballistic knife) or an "illegal weapon" (blackjack, gas gun, metallic knuckles, gravity knife, switchblade knife) unless a person has a special permit. C.R.S. 18-12-102. A separate statute prohibits the possession of an "explosive or incendiary device" without a special permit. C.R.S. 18-12-109. Senate Bill 25 does not change these current statewide prohibitions in any way.

Government Lists of People Exercising Constitutional Rights:

Senate Bill 25 makes it illegal for local governments to compile lists of lawful gun owners or of lawfully-owned guns. Especially in light of the Denver police "spy files" scandal, it ought to be obvious that local governments ought not to collect lists of people who exercise their civil rights. Local government should not be in the business of compiling lists of people who belong to political organizations, lists of people who buy books, lists of books owned by a particular individual, or lists of people who have undergone particular medical procedures. Of course if a government is conducting a legitimate criminal investigation about a particular individual, some of these inquiries might be proper; the point is that the government should not collect lists of individuals about whom there is no suspicion at all.

Significantly, federal laws already ensure the maintenance of records which will facilitate legitimate criminal investigations involving firearms, without infringing the privacy rights of law-abiding gun owners. Ever since the federal Gun Control Act of 1968, all firearms manufactured or imported in the United States must contain a serial number. The manufacturer or importer must keep records showing to whom the firearm was transferred, and when the transfer took place. A firearms wholesaler must do the same, and so must a firearms retailer. The retailer's records will contain the name, address, birth date, and other information about the consumer purchaser of the firearm. The retailer must keep permanent files of the "Form 4473" registration records.

If local police find a gun at a crime scene, or if they find a gun which might have been stolen, and which they wish to return to the owner, the police contact the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE). Using the gun's serial number, BATFE can quickly "trace" the gun from its manufacturer to its wholesale to its retailer to its retail purchaser. Federal law requires all licensed gun sellers to cooperate with BATFE traces. BATFE currently traces hundreds of thousands of guns every year.

This system means that, ordinarily, a law-abiding person's purchase of a firearm remains private, since the firearms retailer keeps the registration form, rather than sending the form to the government. When there is a law enforcement need to investigate a gun's ownership records, the relevant records are readily available.

Accordingly, the practice of the Denver and Colorado Springs Police Departments of keeping government registration records of law-abiding gun owners is a waste of money, because it duplicates records which can be made available to the police departments through a BATFE firearms trace. The local police record-keeping needlessly invades the privacy of law-abiding citizens.

No Prohibition of Lawful Firearms:

The third specific item of Senate Bill 25 forbids local governments from banning the possession of firearms which are lawful under state and federal law. This section of the bill is necessarily unacceptable to gun prohibition advocates, but the section does not interfere with non-prohibitory gun controls.

Only a very few local ordinance are affected by this prohibition. Denver Revised Municipal Code 38-122(c) makes it illegal for a retailer or wholesaler to sell a firearm:

(1) Of any material having a melting point (liquidus) of less than one thousand (1,000) degrees Fahrenheit; or

(2) Of any material having an ultimate tensile strength of less than fifty-five thousand (55,000) pounds per square inch; or

(3) Of any powdered metal having a density of less than seven and five-tenths (7.5) grams per cubic centimeter.

This 1986 ordinance is barely rational. If consumers often stored their handguns in extremely high temperature ovens, and then accidentally melted their handguns while baking a cake at 1,100 degrees, the ordinance might make some sense as a consumer protection measure. What the ordinance really is, however, is deliberate economic discrimination against poor people's right to self-defense.

The ordinance outlaws guns made with less-expensive alloys, as opposed to pure metals. The ordinance does not affect expensive guns made by companies like Ruger or Smith & Wesson, but does ban less-expensive guns. Stated another way, the ordinance aims to make guns unaffordable for poor people.

In a *Northwestern Law Review*comment, author Markus Funk examines discriminatory gun laws such as Denver's. He shows that the laws have no plausible basis in public safety: the banned guns (while not the right choice for a competitive target shooter) are not unsafe or unreliable. They tend to be less powerful (and hence less lethal) than more expensive handguns. The effect of such laws is to transform self-defense from a right guaranteed to everyone to a privilege dependent not available to the poor. If a person can only afford $150 for a handgun, that person probably needs the handgun much more than someone who can afford a $1,200 target pistol; the first person is much more likely to live in a high-crime neighborhood with poor police protection.

Because the Denver ordinance targets the poor for special burdens, it an especially appropriate subject for statewide preemption, not only to protect the Colorado Constitution's Article II, section 3 right to self-defense and the Article II, section 13 right to bear arms, but also to protect the U.S. Constitution's Fourteenth Amendment, which requires each state to

guarantee to every person the equal protection of the law. It is certainly not "equal protection" when self-protection is made unaffordable for poor people.

The second type of law which would be preempted by SB 25 is the ban in Denver and Vail of so-called "assault weapons." These laws a direct copy of a (since-modified) California statute which was created by some people looking through a picture book of guns, and picking out which guns should be banned. As I detail in the *Journal of Contemporary Law*, bans on so-called "assault weapons" are based on cosmetics. The banned guns are not more powerful or faster-firing than other guns; they simply look different.

The banned guns do, however, tend to be quite sturdy and reliable. For persons with relatively low upper body strength, they are easier to fire accurately, because the self-loading mechanism of the gun absorbs much of the gun's recoil.

In 1989-94, I participated in litigation in which individual plaintiffs and the Attorney General of Colorado (first, Duane Woodard, then Gale Norton) argued that the Denver "assault weapon" ordinance violated the state Constitution's right to keep and bear arms. A Denver District Court declared the ordinance unconstitutional. A divided opinion of the Colorado Supreme Court upheld the ordinance--ignoring the quite explicit original intent of the 1876 Colorado Constitution, misstating the court's own precedents, and finding no problem with the Denver ordinance's explicitly-stated intent to ban guns useful for personal protection (dubbed "anti-personnel") while not banning guns made mainly for sports.

Rather significantly, the dissent in the Denver gun ban case (*Robertson v. Denver*)argued that the Denver ordinance was preempted by existing state law. The majority opinion simply refused to address this issue.

The *Robertson* case illustrates how courts can sometimes disparage constitutional rights. Because legislators have their own oath and duty to defend the constitution, legislators are not required to treat anti-liberty decisions by judges as the outer boundaries of constitutional rights. In 1919, the U.S. Supreme Court ruled that it was no violation of the First Amendment to send Eugene Debs to federal prison for speaking out against U.S. participation in World War One. That horrible Court opinion did not preclude a constitutionally-conscientious state legislator from voting for a Free Speech Preemption Bill which would abolish local anti-speech laws similar to the law which was used to imprison Debs.

Especially in a period when ordinary citizens everywhere in America face the possibility of being attacked by foreign terrorists, it is appropriate for the state legislature to eliminate laws which substantially interfere with the ability of Coloradoans to protect their families and communities. With our nation at war, now is certainly not the time for ordinances which attempt to prevent people from protecting themselves.

In 1994, Congress enacted a ban on "assault weapons" manufactured after September 1994. 18 U.S. Code 922(v). Denver would, under SB 25, be allowed to ban post-1994 "assault weapons" conforming to the federal definition.

Open Carrying

The fourth section of Senate Bill 25 specifically protects the power of local governments to prohibit or regulate the open carrying of firearms, provided that the locality posts appropriate notices. Since there is no statewide law against unconcealed carrying of firearms, this posting requirement provides appropriate notice to people so that they can obey local laws.

Conclusion

Senate Bill 25 makes four specific reforms to prevent abuses of local gun laws. These reforms involve:

1. Transportation of firearms in cars for hunting and for lawful protection.

2. Prohibiting governments spy files compiled on citizens just because the citizens purchase a firearm.

3. Ending local prohibition of firearms which are legal under federal and state law.

4. Requiring posting so that citizens are informed about areas where open carrying of firearms is illegal.

Lobbyists who oppose even these simple reforms are spreading claims that SB 25 will wipe out local gun laws. All one needs to do to see the falsity of this claim is to read the bill itself. Indeed, the most serious flaw of SB 25 is that it does not go nearly far enough.

Senate Bill 25 is an extremely limited preemption law. Each of the four subjects which it addresses are in need of reform. However, SB 25 does nothing regarding ammunition and firearms accessories. It does not address grossly overbroad laws on firearms discharge, as the Grand Junction ordinance. Even if SB 25 becomes law, Colorado will still have a very long way to go to achieve a strong firearms preemption like the laws in the majority of states.