

William & Mary Law Review

Volume 2 (1959-1960)
Issue 2

Article 6

March 1960

The Right to Bear Arms, A Study in Judicial Misinterpretation

Stuart R. Hays

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#), and the [Second Amendment Commons](#)

Repository Citation

Stuart R. Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 Wm. & Mary L. Rev. 381 (1960), <https://scholarship.law.wm.edu/wmlr/vol2/iss2/6>

Copyright c 1960 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

THE RIGHT TO BEAR ARMS, A STUDY IN JUDICIAL MISINTERPRETATION

STUART R. HAYS

INTRODUCTION

Since the very dawn of time, man had weapons to protect and defend himself. As primitive man learned the interplays of the tribal order which required set standards, he also learned the advantages of belonging to the tribe. The early tribes were based on the inter-action of the group against those outside the tribal group; not, against the members of the tribal group. From this interplay evolved a system of early social law.

The problem of the social control of weapons is not new. In 124 B.C. the Imperial Chancellor Kung-Sun Hung petitioned the Emperor Han to take the people's arms from them. The emperor replied:

Your subject has heard that when the ancients made the five kinds of weapons, it was not for the purpose of killing each other, but to prevent tyranny and to punish evil. When people lived in peace, these weapons were to be prepared against emergencies and to kill the fierce animals. If there were military affairs, then the weapons were used to set up defenses and form battle arrays . . .¹

The petition was turned down, stressing the *right* of the individual to bear arms for the common protection of society and the individual.

Weapons have been used in warfare for defense, offense, and revolution. It is with the defensive and revolutionary forces that the Second Amendment concerns itself. As part of the great power of the revolutionary force, weapons are an element of the control of men's destiny. In the operation of government they are a safeguard against tyranny. It has been said the

¹ Am. Rifleman, Jan. 1959, p. 14.

Tudors were rulers surrounded by an army: that of the English people.

Whenever men have banded together, in that fiction known as society, a series of laws have evolved. When these laws fail some form of social revolution results, whether it be widespread or guerilla in nature. England, with the tradition for law, has felt the force of arms in the reconstruction of the social order.

The Norman conquest of Anglo-Saxon England brought with it a legal upheaval that lasted for centuries, while the Angles and Saxons "reformed" the Norman administrator with Anglo-Saxon law and sword. Gradually the Norman Conquerors became conquered by the "legal system" and the rights of the common man began to evolve. Coke considers "due process of law" evolving during the reign of Edward III (1326-1377).² Throughout the *Commentaries* there pervades the theory of government by law, with remedies at law to prevent the usurpation of power; hence the special writs of Prohibition and Mandamus. The contrasting theory is government by revolution and insurrection to correct usurpation. Our South American neighbors with their foundations in the Roman-Civil law prefer this latter.

During the Reformation there was a tendency to revive the Roman law; this reception was powerful enough to shake the common law to its roots, but insufficient to overpower it. The Justinian theory of *legibus solutus*, the leader is absolved from the law, gained favor with the English Stuarts. In contemporary France the *lettre de cachet*, which permitted indefinite imprisonment by the ruler or high official were the popular modes of revenge and non-judicial ruling. The legal systems began to fail and revolution was the solution.

History has proved that no man without a standing army can subjugate a free and armed people. George III did not profit from this advice. Americans did understand the nature and effects of law by force and edict. Hence the preservation of the militia and the right to bear arms: remembered also was the right to revolt when the laws of the government began to oppress; witness the War Between the States in 1861.

² Coke, Comm. 381.

The Second Amendment was thought to be an expression of the common law rights of all Englishmen since the bill of rights of 1688. A grievance of Colonial America was the keeping of a standing army in the Colonies as a mode of enforcing the "king's justice". A cursory glance shows the amendment to be a limitation upon this practice and an expression of the common law as was inherited from England.³

ENGLAND: THE COMMON LAW AND THE RIGHT TO BEAR ARMS

From the very beginnings of early "England" the Saxons, Angles, Picts, Jutes, and other tribal factions possessed weapons for waging war and self-defense. The Roman conquest of lower "England" served to increase the fighting ability of these native people. The very early laws of Anglo-Saxon "England" were derived from the social pressures of the family group. This group of kin-folk was called the kindred and was connected in name and "blood" with the legendary characters of several ages before the beginnings of recorded time.⁴

The determining factor in the kindred was the blood line, which determined the proper faction to which one belonged. The kindred was a society for the protection of the various members of the family group and served from the beginnings as a deterrent in feuds and warfare. The right of self-defense was recognized only to the extent by which one kindred was stronger than another. Revenge for death involved the entire kindred of each party involved in the homicide. This bloody form of revenge lasted until it became the custom (law) to "purchase revenge" and thus limit the combatants to those originally wronged and not to cousins several times removed.⁵ Slowly the laws evolved so that the members of the kindred could disclaim the feud itself, and leave the wronged party to his own revenge.⁶ Thus the basis for the kindred was the force

³ See for a general discussion: Pound, *Constitutional Guarantees of Liberty*.

⁴ Anglo-Saxon Chronicle 449(A); Grimm, *Teutonic Mythology* 354.

⁵ 1 Aelfred 27; 1 Cnut § 5(2b).

⁶ 2 Eadmund 1.

and armed might of the kindred itself. As the individual might grew so did the structure of the laws of England, until legend tells us that a strong man called Arthur united much of England under the laws of the "Round Table". By circa 690 A.D. the *ceorl*, the lowest free social position in the kindred, owed the duty of protection to his lord or immediate master⁷. This "duty owed" in terms of military service and readiness was the militia of the day and involved all who could bear arms.

The kindreds expanded and became boroughs, which served as the principal defensive units, and were the equivalent of the medieval castles. They depended upon the services of the free-man for their defense and thus there was no need for a standing army.⁸ By the year 1066 A.D. and the Battle of Hastings the Anglo-Saxon kindred had become the bastion of society and law in the "early dark ages": the Norman invasion began the struggle for human rights. The kindred was more personal than the feudal system under the conquerors; and, while great steps were made in the advancing of administration, legend and fact tell also of great advances in oppression. The right to self-defense was not recognized if the dead was Norman.

The Norman conquest brought with it the feudal system in a complete form, which reached its zenith in England during the 16th Century. During this period the kings began to formulate plans called *assizes* to determine the amount and tenure of their subjects in the military service of the king. Standing armies were unknown and little desired by the majority of free-men.

The Assize of Arms of Henry II (1181) required every free-man to keep arms suited to his station in life, and to be prepared to fight for the common defense and the king.⁹ It also developed the system of *scutage*, by which the subject could pay money to the king and avoid military service: it did not forfeit the right to bear or own personal arms. This right was protected by Henry II in an un-named charter of 1154, in which Henry declared that all men should retain the free rights and customs

⁷ 1 Ine 51.

⁸ See for general discussion: Burghal Hidage (circa 911-919); Chadwick, *Anglo-Saxon Institutions*, 207 *et seq.*

⁹ McKechnie, *Magna Charta*, p. 243 (2nd ed.).

that they had always possessed.¹⁰ Richard I also assized the rights and duties of the nobles and free-men to the king and increased the privileges of scutage in the Assize of Arms of 1198.¹¹

This position continued until the capture of Richard during the Crusades and the ascent of John to the throne. In 1210 a contemporary scholar said:

. . . all men bore witness that never since the time of Arthur was there a king who was so greatly feared . . .¹²

Thus the stage was set and the scene was Runnymede in 1215.

Section 61 of the Magna Carta provided that if the King (John) did not follow the provisions of the charter, the Barons should have a right to correct the King by force until the King should begin to follow the articles of the charter.¹³ Thus the right of lawful revolution was born into the constitutional law of England. This is of major import because without the right to revolt there is less reason to preserve the right to bear arms. This particular portion of the *carta* has been reaffirmed as were the regulations concerning the bearing of arms and *tenure by serjeanty*.¹⁴

It was also recognized at an early date that the society had certain rights against being terrorized by those going armed. The Statute of Northampton (1328) made it illegal to ride in the darkness armed with a dangerous weapon and terrorizing the people.¹⁵ Thus the right to bear arms for the purpose of self-defense and revolution were not impeded, but the "police power" to limit the use of weapons was recognized.

¹⁰ Stubbs, *Select, Charters*, 158.

¹¹ 1 Richard I, *Assize of Arms* of 1198.

¹² *Historie des ducs*, 109.

¹³ Magna Carta § 61; McKechnie, *Magna Carta*, 465 (2d ed.).

¹⁴ 1 Stat. of Westminster c. 36; Stat. de Mil. (1 Edward 2); 3 Edward 1.

¹⁵ 2 Edward III c. 3; Bishop, *Stat. Crimes*, §§ 783, 784 (3rd ed.); 4 Bl. Comm. 149; Knight's Case, 3 Mod. 117; 87 Eng. Rep. 75 (1686).

With the ascent of the Stuarts to the throne, England underwent sudden change. James I and Charles I made fine use of the scutage and raised small standing armies. After the Commonwealth, James II and Charles II raised even larger armies until the time of William and Mary (1688). Charles II forbade the owning of arms by anyone not owning land with rents of one hundred pounds or higher.¹⁶

The year 1688 brought the bill of rights which provided that standing armies were a menace, and that the people should all have the right to bear arms equally:

That the raising or keeping of a standing army within the kingdom in time of peace, unless it be with the consent of the parliament, be against the law . . .¹⁷

That the subjects known as protestants may have arms suitable to their conditions, and as allowed by law . . .¹⁸

These two provisions would seem to reaffirm the theory and right to revolution, for they were born in revolution. Blackstone, speaking of the evils of the standing army, said:

Our notions, indeed, of the dangers of standing armies, in time of peace are derived in a great measure from the principles and examples of our English ancestors. In England, the king possessed the power of raising standing armies in time of peace according to his own pleasure. And this prerogative was justly esteemed dangerous to the public liberties. Upon the revolution of 1688 Parliament wisely insisted upon a bill of rights, which should furnish an adequate security for the future.¹⁹

¹⁶ 22 Charles II, c. 25, § 3; 4 Bl. Comm. 150.

¹⁷ English bill of rights, § 6; 1 William and Mary, c. 6; 5 Corbett, Parl. Hist. 110; 1 Bl. Comm. 143, 144.

¹⁸ Id., § 7.

¹⁹ 1 Bl. Comm. 263.

In addition to the right of revolution is the right of personal self-defense. Without this basic right there would be no reason for man to bear arms. The right to bear arms must therefore draw its strength from the rights of man to resort to force when law fails or an adequate remedy is not immediately available to prevent the loss of human life. The thin line between self-defense with regard to actual bodily fear and that of stopping a progressing felony is in itself a delicate modern problem. A more ancient problem is that of self-defense when faced with an aggressive deadly force. Little is known about the early laws regarding self-defense; it is known that the Saxons and Angles relied on the kindred to avenge the death caused by an outsider of the kindred. What occurred when the killer was a member of the same kindred as that of the deceased is unknown.

The earliest cases of the 13th Century declare that the party was to be found guilty subject to the King's pleasure.²⁰ This usually meant a royal pardon for the offender. The Statute of Gloucester (1278) provided that the King be notified in all cases of defensive homicide.²¹ This position was later clarified by a statute of Henry VIII (1532) which declared that the defendant be found not guilty (of murdrum) of homicide.²² This was said to be declarative of the common law.²³ Thus man by the 16th Century had the right of self-defense of his property and kin. This is a portion of the American common law as inherited from England.

It is interesting to note that by 1920 the tide of public opinion in England had so changed as to practically eliminate the ownership of all weapons.²⁴ It is ironic to see that the very nation that was founded on the right to bear arms and limit the

²⁰ Stat. of Gloucester, 6 Edward I; 4 Bl. Comm. 182-188.

²¹ Bracton, 3 Notebook 229, mentioning a case dating to 1234; The Case of Robert of Herthale, 1 Seldon Society Select Pleas of the Crown 31 (1203); The Case of Leonin and Jacob, 1 Seldon Society Select Pleas of the Crown 85 (1212); The Case of the Carter, 1 Seldon Society Select Pleas of the Crown 94 (1222); Anon., Fitzherbert, Grand. Abridg., C & P Co. no. 284 (1328); 21, Edward III, c. 17.

²² 24 Henry VIII, c. 5.

²³ 1 Hale P. C. 487; 1 East P. C. 272 (1803).

²⁴ Firearms Acts of 1940; 10 & 11 George V, c. 43.

standing army had to beg the American people to ship them small arms during the early 1940's.

It then stands to reason that the right to bear arms rests on three solid English rights: the right of revolution; the right of group self-preservation; and, the right of self-defense. Without these rights there would be no reason for the bearing of arms. If there were no reason for bearing arms, then there would be no valid legal basis for the right to bear arms. These basic rights are a portion of the English common law and had evolved prior to the landing at Jamestown in 1607. Further, these basic rights applied to all Englishmen and not merely to those living in England and personal to England. They are the basis for the interpretation of the Constitution of the United States.²⁵ The Code of the Commonwealth of Virginia, as do many other state codes, provides that the common law of England is in full force and effect as it existed at the time of the reign of (fourth year) of James I (1607) and is not repealed by statute.²⁶

REVOLUTION; CONFEDERATION; and CONSTITUTION

America in the 17th and 18th Centuries was a frontier country. The sense of group self-preservation and self-defense was strong; weapons were the natural backbone of the wilderness civilization. As the frontier was pushed back into the hills, urban areas developed and flourished. A new instinct of self-defense and self-administered local law developed. Thus at the time of the Revolution (1776) nearly every man was an army unto himself, equipped with rifle and powder. The retaining of arms was encouraged by the mother

²⁵ The various royal charters and grants all provided for the common law, "... not repugnant to the relme of Englande . . ."; Massachusetts (1626); Rhode Island (1663); Connecticut (1662); New York (1664); New Jersey (charter date is unknown); Pennsylvania (1681); Delaware (1701); Maryland (1701); Virginia (1606); North Carolina (1663); South Carolina (1712); and, Georgia (1732). N. B., The original boundaries of these colonies are not always the boundaries of the present state, and in some instances composed several present states. See also, *Zenger's Case*, 1 Chand. (N. Y.) Am. Crim. Trials, 151 (1734); *Paxton's Case*, Massachusetts (1761); *In Re Stamp Act*, Virginia (1776).

²⁶ Va. Code, § 1-11 (1950).

country.²⁷ With arms came the pushing back of the curtain of the frontier and expansion in quest of the gold and jewels that were not there.

When the shot "was heard round the world" and the Revolutionary War began, it was a war fought with musket and powder belonging to the revolutionaries.²⁸ With the surrender at Yorktown the victorious colonies bound themselves together with the Articles of Confederation. They were a series of weak and ineffective laws, based on the absolute consent of all the colonies involved.²⁹ The solution to these weak Articles was the proposed Constitution of 1787. It provided for a stronger central government, which could provide for the self-preservation of the nation in time of emergency and the *posse comitatus* to enforce the interior laws.

The Commonwealth of Virginia was the acknowledged leader in the fight for freedom; she did not want to be "oppressed" by another central government. For this reason were the "checks and balances" included in the central portion of Randolph's Virginia Plan. This plan did not include provisions relating to the militia and the rights to bear arms.³⁰

What fears promoted the constitutional conventions and the bill of rights? The Articles of Confederation did not provide for a mode of coercing a sister state to come to the aid of another; nor, was there any mode of raising a central army or armed force in time of emergency.³¹ With travel slow and time of the essence, this was a major consideration. The (major) objection was the fact that the English army had done nothing but oppress the colonies; and, indeed, all Englishmen since the time of its creation.

²⁷ 3 Henn. Stat. 131 (Virginia); 3 Henn. Stat. 338 (Virginia); 4 Anne § 23.

²⁸ Longfellow, inscription on the base of the statue of The Minuteman, Concord, Massachusetts.

²⁹ U. S. Const. art. 1, § 8, cls. 10, 11, 15, and 16; art. 2, § 2.

³⁰ Federalist Papers, no. 8 (Hamilton).

³¹ 2 Story, Comm. 265 (1833 ed.).

... all nations, under all governments, must have parties; the great secret is to control them; there are but two ways, either by monarchy and standing army, or by balance in the Constitution where the people have a voice, and there is no balance, there will be everlasting fluctuations, revolutions, and horrors, until a standing army, with a general at its head, commands the peace, or the necessity of an equilibrium is made appear to all, and is adopted by all.³²

The militia is the natural defense of a free country against sudden foreign invasions, domestic usurpation of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expense with which they afford ambitious and unprincipled rulers to subvert the government, or trammel upon the rights of the people. The rights of the citizens to keep and bear arms, has justly been considered as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary powers of rulers: and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.³³

The greatest worry was of usurpation of the military powers of government by either a strong civil or military leader. The Constitution must cure these evils or not exist. Virginia already was committed to the position of maintaining a strong militia for self-defense and to prevent the usurpation of internal powers in the Virginia Bill of Rights of 1776:

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state: that standing armies in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be

³² Adams, *A Defense of the Constitution* 392 (1787 ed.).

³³ 2 Story, *Comm.* 607 (1851 ed.). See also, 1 Tucker's *Bl. Comm. App.* 299, 300; Rawle, *On the Const.*, ch. 10, p. 125; 2 Lloyd's *Debates*, 219-220.

under strict subordination to, and governed by, the civil power.³⁴

Thus the struggle for a strong constitution was set, the scenes were Williamsburg, New York, Boston, and other capital cities, not Runnymede.

On May 29, 1787, sufficient delegates had gathered in Philadelphia to revise the Articles of Confederation. Governor Randolph objected to the Confederation on the ground that it was ineffective defensively.³⁵ Mr. Williamson agreed, but was firmly against any decrease in the states' police power by the right of the proposed federal government in using the militia for a *posse comitatus* to enforce federal law.³⁶ Mr. Gerry attempted compromise by suggesting a dual form of militia with concurrent powers of activation in time of emergency.³⁷ Governor Randolph suggested that in lieu of the dual form, no state be allowed to have any form of army or navy without the consent of the Congress, but to retain the militia under the sole direction of the Congress.³⁸ Mr. Gerry suggested again the dual system, saying that all the power in the federal government was dangerous; but, that there was much to be said for a uniform system of martial action.³⁹ Mr. George Mason suggested that the power of the purse over the army was the best safeguard.⁴⁰ The final voting on the proposals showed two states against allowing the federal government some control over the militia. Eight (including Virginia) were against allowing the appointment of officers by the federal government. Four (including Virginia) were against

³⁴ Virginia Bill of Rights of 12 May 1776, §13; 2 Poore, Const. 1909 (1877 ed.); Note this provision is still carried in the Virginia Constitution to date: Va. Const., 29 June 1776, 2 Poore, Const. 1911; Va. Const., 1850, 2 Poore, Const. 1920, 1931; Va. Secession Const., 1861; 2 Poore, Const. 1947; Va. Const., 1864, 2 Poore 1947; Va. Const., 1870, 2 Poore 1954, 1968; Va. Const. 1902, Va. Code v. 9.

³⁵ 5 Elliot, Debates, 127 (1845 ed.).

³⁶ *Id.* 172.

³⁷ *Ibid.*

³⁸ *Id.*, 205; See also, U. S. Const., Art I, §10, cl. 3.

³⁹ *Id.*, 440.

⁴⁰ *Id.*, 443.

allowing the federal government the right of training the militia.⁴¹ By September 17, 1787, a draft of the proposed Constitution was completed and signed by a bare majority of the convention delegates. Thus the line was drawn tautly when the delegates returned home to consider the proposed Constitution during the ratification assemblies of the various states.

Two factions soon developed: the Federalists or pro-constitutionalists, and the anti-constitutionalists. The Federalists favored the strong central form of government that the Constitution proposed, while the anti-constitutionalists were split into many splinter groups. The Federalists, led by Hamilton, Madison, and Jay, were much in favor of the militia provision. They felt that there was little fear or danger from England and Europe in the way of aggression; and, hence little need of anything greater than the militia, and the provisions for a standing army limited by the two year appropriation rule.⁴² In addition the militia would never be required to travel long distances, but would be responsible only for the immediate defense.⁴³ The raising of a standing army would then be the solution to the relief of the militia in time of war.⁴⁴

The Federalist's position concerning the federal control of the militia with the attendant fear of possible federal disarmament caused many long hours and days of debate in this Commonwealth. Many Virginians felt the proposed Constitution was a government over the individual, and not a government of the several states with the supreme sovereignty vested in the citizens of the several states.⁴⁵ Without the militia there could be no strong provision for self-defense: with the militia there was the constant danger of federal disarmament—thus hung the sword of Damocles.

The Virginia debates of 1789 (in Williamsburg) touched on the militia as follows: Mr. Clay was concerned, why the

⁴¹ *Id.*, 446.

⁴² 3 Story, Comm. 297 (1833 ed.); See also, Federalist Papers, numbers 24, 35.

⁴³ 3 Story, Comm. 1196 (1833 ed.).

⁴⁴ 3 Story, Comm. 297 (1833 ed.).

⁴⁵ Adams, A Defense of the Constitution, 296 (1797 ed.); U. S. Const., Art. I, § 10, cl. 2.

Congress should have the power to call the states militia. Mr. Madison answered, showing that this was to provide for a uniform method of defense and law enforcement. Mr. George Mason expressed fear this would lead to a general harassment by the militia, with the people finally clamoring for a standing army in place of the militia. He feared having the sword and the purse in the same Congress without any separation thereof. Mr. Madison answered that we must first trust ourselves. The absence of the militia would be a better reason for the creation of the standing army so greatly feared. Mr. Clay interjected the idea of using the militia as a *posse comitatus* out of the militia's home state. Mr. Madison conceded that this is a necessary power of the sovereign, who must enforce the laws of the people as the final safeguard against chaos and anarchy. Mr. Henry was much more eloquent in his fears:

Pardon me if I am too jealous and suspicious to confide in this remote possibility (that the Congress would use the militia wisely). My friend (Madison) went on a supposition that the American Rulers, like all others, will not depart from their duties without bars and checks. No government can be safe without checks. Then he told us that they had no temptation to violate their duty, and that it would be to their interest to perform it. . . . His supposition that they will not depart from their duty as having no interest to do so, is no answer to my mind. This is no check . . . the militia sir, is our ultimate safety. We can have no security without it . . . ⁴⁶

Mr. Henry continued to say that the final power over the militia should rest with the states; and, the federal government be without the power to disarm the militia. Mr. Nicholas pointed out that the states have at common law the power to arm the militia and that the Constitution does not take this power away. There is no pre-emption here that would be vested in the Congress. Governor Randolph mentioned the evils attendant where there is common defense without coercion as was the

⁴⁶ 3 Elliot, Debates, 385 (1836 ed.).

case under the Articles. Mr. (Chief Justice) Marshall strongly supported this reasoning.⁴⁷

A committee was formed to consider the militia problem and to formulate a bill of rights.⁴⁸ This committee recommended the people should have the right to govern the militia through civil authority; and, the federal government would not be allowed to disarm the militia.⁴⁹ Because the assembly was under the impression that it was to be the ninth state to ratify, thus making the Constitution binding on all ratifiers, the matter of the bill of rights was agreed to be brought up later as amendments to the Constitution.⁵⁰ The final resolutions concerning the Virginia Plan bill of rights were:

That no standing army or regular troops, shall be raised, or kept up, in time of peace, without consent of two thirds of the members in both houses.⁵¹

That no soldier shall enlist for any longer term than four years, except in time of war, and then for no longer term than the continuance of the war.⁵²

That each state, respectively shall have the power to provide for the organizing, arming, and disciplining its own militia, whensoever Congress shall omit to neglect to provide for the same. The militia shall not be subject to martial law, except when in actual service, in time of war, invasion, or rebellion; and, when not in the actual service of the United States: shall be subject only to such fines, penalties, and punishments, as shall be directed or inflicted by the laws of its own state.⁵³

⁴⁷ See, 3 Elliot, Debates, 378-459 (1836 ed.). for a transcription of the debates.

⁴⁸ The committee included: Geo. Wythe, Geo. Washington, Geo. Madison, Gov. Randolph, and John Marshall; 3 Elliot, Debates 656.

⁴⁹ 3 Elliot, Debates 678 (1836 ed.).

⁵⁰ New Hampshire ratified on June 21, 1788, three days before Virginia on June 24, 1788; 3 Elliot, Debates 657.

⁵¹ 3 Elliot, Debates 660, § 9.

⁵² 3 Elliot, Debates 660, § 10.

⁵³ 3 Elliot, Debates 660, § 11.

After a strong fight the Constitution became law and the right to bear arms, the Second Amendment, included in the Bill of Rights.

THE CONSTITUTION AND JUDICIAL INTERPRETATION:

A JUDICIAL ERROR?

The Constitution of the United States provides for:

"... the Common Defense and General Welfare of the United States . . ." ⁵⁴

"... the Congress shall have the power . . . to provide for the calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion." ⁵⁵

"... to provide for the organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving of the states respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress." ⁵⁶

"... to declare war . . ." ⁵⁷

"... to raise and support armies . . ." ⁵⁸

"The President shall be the Commander-in-Chief of the . . . militia of the several states, when called into (the) actual service of the United States." ⁵⁹

"A well regulated militia, being necessary to the security of a free state, the right of the people to bear arms shall not be infringed." ⁶⁰

⁵⁴ U. S. Const., Art. I, § 8.

⁵⁵ U. S. Const., Art. I, § 8, cl. 15.

⁵⁶ U. S. Const., Art. I, § 8, cl. 16.

⁵⁷ U. S. Const., Art. I, § 8, cl. 10.

⁵⁸ U. S. Const., Art. I, § 8, cl. 11.

⁵⁹ U. S. Const., Art. 2, § 2.

⁶⁰ U. S. Const., Second Amendment.

The Constitutional provisions are the core of a great deal of discussion, but very little substantive case law. Dean Roscoe Pound feels the Second Amendment to be an error in American constitutional history, and the controversy surrounding it a form of the goblin of Don Quixote chasing rifles.

. . . but bearing arms today is a very different thing from what it was in the days of the embattled farmers, who withstood the British in 1775. In the urban industrial society of today a general right to bear arms so as to be able to resist oppression by the Government would mean that gangs could defeat the whole Bill of Rights.⁶¹

It is interesting to speculate the attitude of the British toward the American revolutionary of 1775. With a minority taking part in the war, it would be nearly impossible to think the Tories regarded the revolutionary American as much more than a "gang" defeating the English bill of rights. Certainly the average Russian who is without arms could not defeat the oppression of his government, but what of America with twenty million hunting licenses issued every year?

The largest area of controversy centers around the words, "right of the people" phrase of the Second Amendment. Is this part of the Amendment separable from the militia phrase? Does this particular phrase refer to individual rights, or the rights of the state as a sovereign power? Chief Justice Story thought that the clause was not separable; that the right was that belonging to the sovereign state, not to the individual citizen of the state from which the sovereignty is evolved.⁶²

The militia is the natural defense of a free country against sudden foreign invasion, and domestic insurrection, and domestic usurpation of power by rulers. It is against sound policy for a free people to keep up large standing armies . . . the right of the citizen to bear arms has been justly considered the palladium of the liberties . . .⁶³

⁶¹ Pound, Development of Constitutional Guarantees of Liberty 91.

⁶² 2 Story, Comm. 605 (1855 ed.); 1 Tucker's Bl. Comm. App. 299, 300; 2 Lloyd's Debates 219, 220.

⁶³ 2 Story, Comm. 607 (1855 ed.).

Justice Story does not consider that the militia is often controlled by the faction in power and that even with the militia usurpation may occur. The same usurpation cannot occur with the people individually holding their own personal arms.

The majority of the jurisdictions have concluded that both the United States Constitution and the various state constitutions, having a similar provision relating to the right to bear arms, refer to the militia as a whole composed and regulated by the state as it desires. The individual does not have the right to own or bear individual arms, such being a privilege not a right.⁶⁴ States holding the right to bear arms is an individual right belonging to the individuals of the state as the basis of the state's sovereign powers are in the minority.⁶⁵ In view of the *Dred Scott* case, this minority would appear to be the better view.⁶⁶ In *Dred Scott* Justice Tanney interpreted the Preamble of the Constitution to mean the powers of government flow from the individuals to form the sovereignty of the United States.⁶⁷ The government of the United States holds the power of sovereignty in a "giant trust" as granted by the individual persons that compose the citizenship of the United States.⁶⁸ There can be no reason for this principle not to apply to the several states. No state disputes the police power of the state to prevent or limit the carrying of concealed or unusual weapons; they do dispute the general theory of a right to bear arms by the individual.⁶⁹

Earlier decisions required that the weapons be of the type used in civilized warfare to be included under the right.⁷⁰

⁶⁴ *State v. Buzzard* 4 Ark. 18 (1843); *Aymette v. State*, 2 Humphr. (Tenn.) 154 (1891); *State v. Workman*, 35 W. Va. 367, 14 S. E. 9 (1891).

⁶⁵ *Nunn v. State*, 1 Ga. 243 (1846); *State v. Kerner*, 181 N. C. 574, 107 S. E. 222 (1921); *Andrews v. State*, 3 Heisk (1871).

⁶⁶ *The Dred Scott Case*, 19 How. (U. S.) 393 (1857).

⁶⁷ *Id.* at 397.

⁶⁸ *McCulloch v. Maryland*, 4 Wheat (U. S.) 316 (1819); *Chisholm v. Georgia*, 2 Dall (U. S.) 419 (1783).

⁶⁹ *State v. Reid*, 1 Ala. 612 (1840); *State v. Mitchell*, 3 Blackfrd. (Ind.) 229 (1833); *State v. Buzzard*, 4 Ark. 18 (1839); *Nunn v. State*, 1 Ga. 243 (1846).

⁷⁰ *Salina v. Blaksley*, 72 Kan. 230; 83 Pac. 619 (1905); *State v. Smith*, 11 La. Ann. 633 (1856); *Pierce v. State*, 42 Okla. Cr. 272, 275 p. 393 (1929); *English v. State*, 35 Tex. 473 (1872); *Ex parte Thomas*, 21 Okla. 770, 97 p. 260 (1910).

One state even upheld a law preventing the carrying of any handgun except of a military type held openly in the hand.⁷¹ Others have restricted the ownership of handguns to those of the current military type used by the armed forces.⁷² Arkansas limited the right to ownership of handguns to all except police or military persons.⁷³ Under a Michigan Constitution that gave the right to bear arms to all resident citizens for self-defense, it was held the state could not then take this right away under the guise of a game law.⁷⁴

The Georgia courts have been more outspoken in their defense of the right to bear arms. In discussing the Second Amendment to the Constitution of the United States the Georgia Supreme Court said:

... does it follow, that because the people refused to delegate the right to keep and bear arms, that they (are) designed to rest in the state governments? Is this a right reserved to the states or to themselves? Is it not an inalienable right, which lies at the bottom of every free government? We do not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they intended to confer it on the local legislatures. This right is too dear to be confided to a republican legislature.⁷⁵

This same court some years later drew a distinction between "bearing arms" and "carrying weapons". The former, "bearing arms" refers to the constitutional right to own and possess conferred upon the individual. The latter is the state granted privilege of concealing a weapon on the person.⁷⁶

⁷¹ *State v. Wilburn*, 7 Baxt. (Tenn.) 57 (1856).

⁷² *Page v. State*, 3 Heisic. (Tenn.) 198 (1871); *State v. Reid*, 1 Ala. 612 (1840); *Glenn v. State*, 10 Ga. App. 128, 72 S. E. 927 (1911); *State v. Jummel*, 13 La. Ann. 399 (1858); *Comm. v. Murphy*, 166 Mass. 171, 44 N. E. 138 (1896); *Contra: In re Brinkley*, 8 Idaho 597, 70 P. 609 (1902); *Bliss v. Comm.*, 2 Litt. (Ky.) 90 (1822). Note: The latter two cases allowed some regulation but not abolition.

⁷³ *Haide v. State*, 4 Turner (Ark.) 564 (1882).

⁷⁴ *People v. Zerillo*, 219 Mich. 635, 189 N. W. 927 (1922).

⁷⁵ *Nunn v. State*, 1 Ga. 243, 250 (1846).

⁷⁶ *Hill v. State*, 53 Ga. 472, 475 (1874).

Upon its very front, as we have said, the object of the clause is declared to be to secure to the state a well regulated militia . . . by well settled rules for the interpretation of laws, as well as by the dictates of common sense, the object and intent is the prime purpose to its meaning. A well regulated militia may fairly mean . . . The arms bearing population of this state, organized under law, in possession of weapons for defending the state, and accustomed to their use. The Constitution declares that as such a militia is necessary to the existence of a free state, the right of the people to keep and bear arms shall not be infringed . . . If the general right to carry and to use them exists; if they may be at pleasure borne and used in the fields, and woods, on the highways and byways, at home and abroad, the whole declared purpose of the provision is fulfilled. The right to keep and bear arms so that the state may be secured in the existence of a well regulated militia, is fully attained.⁷⁷

It does not follow, that in those jurisdictions that do not regard the clause as separable, and preserving the individual's right to bear arms, that the state should have the power to disarm the citizenry and render the entire militia useless to the federal government.⁷⁸ This power would be equal to that under the Articles, where each state could determine its position without regard to the nation as a whole. It would seem that the power to disarm is equal in danger to the power to remain armed. The latter power is that chosen by the Constitution. It would then appear that one is the correlative to the other: if the Federal power cannot disarm, neither can the state.

The Supreme Court of the United States passed on the right to bear arms in *Cruikshank v. U. S.*, which concerned the Reconstruction government after the War Between the States.⁷⁹ The defendants *et al.* had been convicted of conspiracy under the Enforcement Acts of 1870 in that they desired to feloniously

⁷⁷*Id.* at 475, 476.

⁷⁸ *Nunn v. State* 1 Ga. 243 (1846).

⁷⁹ *U. S. v. Cruikshank, et al.*, 92 U. S. (2 Otto) 425, 23 L. Ed. 588 (1876).

injure a Negro.⁸⁰ The Supreme Court held the Second Amendment was not a limitation on the states, but was only a control on Federal powers.⁸¹ This decision did not consider if the right to bear arms was a fundamental right possessed by all free men.

This position was affirmed several years later when the defendant was convicted of carrying a concealed weapon.⁸² The states have a right under the police power to control concealment or use of unusual weapons, but the Supreme Court did not consider this position as an exception to the general theory of a right to bear arms. The position taken was a flat affirming of the *Cruikshank* principle. Arguments in later cases have failed where the defendant has contended that the right is a "privilege and immunity" under the Fourteenth Amendment.⁸³

Where the violation consisted of armed marching in a parade as part of a quasi-military group without a state permit, the defendants were convicted.⁸⁴ Here was added to the *Cruikshank* theory the additional factor that the states control the membership in the militia. This control is without regard to any existing federal control. This viewpoint is interesting when considering that World War I and World War II brought the militia under the complete control of the federal government, and that control has remained vested therein.⁸⁵ By allowing the federal government to define the composition of the militia (National Guard) the state has lost this same power through the operation of the pre-emption theory of constitutional powers. Query, why couldn't the federal government then cause the

⁸⁰ 16 Stat. 140 (1870).

⁸¹ *U. S. v. Cruikshank*, *supra*; *Barron v. City of Baltimore*, 7 Pet. (U.S.) 250 (1835); *Fox v. Ohio*, 5 How. (U. S.) 434 (1840); *Lessee of Livingston v. Moore*, 7 Pet. (U. S.) 551 (1836); *Smith v. Maryland*, 18 How. (U. S.) 76 (1856); *Withers v. Buckley*, 20 How. (U. S.) 90 (1860); *Pervear v. Comm.*, 5 Wall. (U. S.) 479 (1862); *Twitchell v. Comm.* 7 Wall (U. S.) 321 (1864); *Edwards v. Elliot*, 21 Wall (U. S.) 557 (1867).

⁸² *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1065, 30 L.Ed. 320 (1886); *Patson v. Penn.*, 232 U. S. 138, 34 S. Ct. 281, 58 L. Ed. 539 (1913); *Miller v. Texas*, 153 U. S. 535, 38 L.Ed. 812 (1893); *Brown v. Walker*, 161 U. S. 591, 16 S. Ct. 644, 40 L.Ed. 819 (1896).

⁸³ *U. S. v. Cruikshank*, *supra*.

⁸⁴ *Presser v. Ill.*, 116 U. S. 252, 6 S. Ct. 580, 29 L. Ed. 615 (1885).

⁸⁵ 39 Stat. 166 (1916); 61 Stat. 191 (1947).

standards of the National Guard's membership to be so defined as to eliminate the national militia? This would circumvent the construction of the Second Amendment, unless the provisions were in fact separable. Then without regard to definition there still would remain the unorganized "militia" of the individual.

The dissent in *Presser v. Illinois*, forseees the continued fight between the "arms bearing" portion of the population and the local governmental units. It also foresees the present federal control of the militia:

It is undoubtedly true that all citizens capable of bearing arms constitutes the reserved military force of the United States as well as of the states; and, in view of this prerogative of the General Government, as well as of its general powers, the states cannot, even laying the Constitutional provision out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resources for maintaining the public security, and disable the people from performing their duty to the General Government.⁸⁶

Another dissent, this time concerning the State of New York's Sullivan Act, which virtually disarmed the populous of the City of New York, denied the right of the state under the police power to take or render useless prior legally owned property.⁸⁷ The effect of this was to render it impossible for the honest citizen to own a handgun or purchase ammunition therefor without a police issued permit, which was not issued as a matter of course. This in effect then disarms those who should be armed, the citizen, and allows those who will break the law to remain armed. This should be a denial of the right to self-defense.

Considering that the strongest pro-right to bear arms arguments are found in the dissenting opinions, or those of certain state courts, it seems strange to hear the Supreme Court then say (concerning the right):

⁸⁶ *Presser v. Ill.*, 116 U. S. 252, 256, 6 S. Ct. 580, 585, 29 L. Ed. 615, 619.

⁸⁷ *People ex rel Darling v. Board of Wardens, City Prison*, 154 N. Y. App. Div. 413 (1913). See also, *Fredrich, Pistol Regulations*, 23 J.C.L.; C. & P.S. 531.

Simply to embody certain guarantees and immunities, which we had inherited from our English ancestors, and which had from time immemorial been subjected to certain well-recognized exceptions, arising from the necessity of the case: incorporated these into the fundamental law there was no intention of disregarding the exceptions, which continue to be recognized as if they had been formally expressed.⁸⁸

To admit the exceptions, is to admit there must be a fundamental right from which the exception came. How can the court then deny the fundamental right and recognize the mental right and recognize the exceptions? It is apparent that this right has not been recognized, because to recognize the right would be to reverse the *Cruickshank* and *Presser* cases. It would appear that the Court should determine first that there is a right, not that there are exceptions to a non-existent right.

Congress has the right to delegate the authority of calling out the militia to the President in times of civil strife or insurrection.⁸⁹ This power over the militia is concurrent with that of the states.⁹⁰

. . . the power over the militia by Congress being unlimited except, in the particulars of officering and training them . . . it may be exercised to any extent that may be deemed necessary by Congress . . . the power of the state government to legislate on the same subjects, having existed prior to the formation of the Constitution, and not having been prohibited by that instrument, it remains with the states, subordinated nevertheless to the paramount law of the General Government.⁹¹

⁸⁸ *Robertson v. Baldwin*, 165 U. S. 275, 281, 17 S.Ct. 326, 329, 41 L.Ed. 715, 717 (1899).

⁸⁹ 1 Stat. 424 (1785); *Martin v. Mott*, 12 Wheat. (U. S.) 19, 32 (1827).

⁹⁰ *Moore v. Houston*, 3 S. & R. (Penn.) 169 (1817); *Houston v. Moore*, 5 Wheat (U. S.) 1 (1820).

⁹¹ *Houston v. Moore*, *supra* 16.

Both Congress and the President have exercised this power quite sparingly, allowing the states the first privilege of declaring a "state of emergency" and/or martial law.⁹² One of these instances was the call for troops in 1861 by President Lincoln. In this instance the troops were designated as a *posse comitatus* and sent into northern Virginia against Lee's Army of Northern Virginia. The Southern States did not answer this call on the ground that the states had called the militia prior to the federal call. Secondly, they were engaged in a lawful revolution, which is a basic right of all men.

During the era of Prohibition a new form of legislation appeared on the federal scene, patterned after the Harrison Anti-Narcotics Act.⁹³ These were the Federal Firearms Acts of 1934 and 1938, based on the power of the Congress to levy tax and regulate inter-state commerce by means of the police power.⁹⁴ These particular acts defined a "firearm" and placed certain taxes on the transfer of any weapon designated by the Act to be a "firearm".⁹⁵ These taxes (\$200) are sufficient to make transfer both expensive and traceable by police authorities. Thus the traffic in machine guns and sawed-off shotguns, the principal weapons included in the Act as "firearms" was reduced under stiff penalty of law.

This Act was sustained in *U. S. v. Adams*, as a revenue measure.⁹⁶ The District Court said that the Second Amendment did not apply to gangsters as a social group, but only

⁹² Whiskey Rebellion of 1792, under 1 Stat. 264 (1792); Embargo Acts of 1808 under 1 Stat. 264 (1792), 1 Stat. 424 (1795), 2 Stat. 443 (1807); Lincoln's Call of Apr. 15, 1861, 12 Stat. 281 (1861), 12 Stat. (App.) 1258 (1861).

⁹³ Harrison Anti-Narcotics Act, held to be a constitutional grant of the taxing power as a police power over interstate commerce in, *U. S. v. Doremus*, 249 U.S. 86, 39 S.Ct. 214, 62 L.Ed. 493 (1919).

⁹⁴ National Firearms Act of 1934, 48 Stat. 1236 (1934); National Firearms Act of 1938, 48 Stat. 1237 (1938); See also, 1939 Internal Rev. Code, 15 U. S. C. § 902 *et seq.*; See also, 1954 Internal Rev. Code, 26 U.S.C. § 5848.

⁹⁵ The tax levied is at the rate of \$200, to be paid by the transferor, both parties are liable for the payment. Under certain exceptions where the weapon is included within the meaning of the Act, but is deemed to be for collectors, the tax is \$1.

⁹⁶ Generally included in the term "firearm" are all weapons capable of firing more than one shot with each pull of the trigger (machine and sub-machine guns), any rifle or shotgun with a barrel length of under 18 inches in length. Thus mainly concealed rifles and shotguns are included in the term.

to the lawful militia, of which criminals were excluded.⁹⁷ This is not stretching a point, because it is a well known theory of law that the law breaker cannot subjugate the Constitution to overcome the Constitution. You must follow the legal rules of the game of life. Gangsters are not engaged in lawful revolution from the oppression of the police state.

When the defendant contended that the tax was confiscatory and penal in nature, the Supreme Court said the Congress has the power to levy confiscatory taxes under the Constitution, provided these taxes do not interfere with the local police powers.⁹⁸ *U. S. v. Miller*, found a District Court upholding the claim that the acts deprived the defendant of his property without due process of law.⁹⁹ Here the petitioners contended, because they could lawfully possess the weapon (sawed-off shotgun) in a state, but could not transport it into another state under the act, without payment of the tax, that this was the denial of due process. The Supreme Court reversed this case and sanctioned the acts as valid exercises of the police power by taxation under the interstate commerce and directed tax provisions of the United States Constitution.¹⁰⁰ In reality this series of limiting laws is based on public opinion and the necessity of the times. Yet why should the honest citizen forfeit the right to own a certain type of weapon because criminals also use that type of weapon. Criminals and gangsters use motor vehicles, yet we do not limit the ownership of them. The real issue in the anti-narcotics case revolved about the fact that narcotics addiction is *contra mores bonum* or *malum in se*, with firearms there is not the same connotation, except in so far as the press is able to arouse the public. The Federal Firearms Acts are a direct result of the aroused public during the "war" between gangsters and the F. B. I. They also are the result of misguided persons who shout "there ought to be a law"

⁹⁷ *U. S. v. Adams*, 11 F. Supp. 216 (D.Ct., Fla. 1935).

⁹⁸ *U. S. v. Adams*, *supra*; *U. S. v. Tot.*, 28 F. Supp., 900 (D.Ct., N. J. 1935); *State v. Workman*, 35 W. Va. 365, 14 S. E. 9 (1891); *Hill v. State*, 53 Ga. 472 (1874); Civil Rights cases, 109 U. S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1869); *Robertson v. Baldwin*, 165 U. S. 275, 17 S. Ct. 356, 41 L.Ed. 715 (1899).

⁹⁹ *U. S. v. Miller*, 26 F. Supp. 1002 (D. Ct. Ark. 1935).

¹⁰⁰ *U.S. v. Miller*, 307 U. S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939). See also, *Sonzinsky v. U. S.*, 300 U. S. 506, 57 S.Ct. 554, 87 L.Ed. 772 (1937).

every time someone is killed with a firearm. This same type of person does not pay any attention to the rising death rate on the highways. Yet would anyone deny there is a *right* to own a motor vehicle?

CONCLUSION

Historically, society has recognized that man has the right to preserve his own species. This is the right to repeal invasion and to resist enemy activity. Secondly, society has recognized the right of man to protect himself against his internal enemies and to preserve his own life through the right of *personal* self-defense. This basic ground has been enlarged to include that which society has deemed *super malum in se*; that is to include the prevention of certain felonies and the protection of certain property rights. Thirdly, society has recognized the right of man to revolt against the oppression of his political leaders. This right, the sword of the Magna Carta, has been preserved throughout the Anglo-American history of the last five hundred years. When society is able to guarantee to each member that he will have no fear of oppression, aggression, or bodily harm, then no longer will these rights be of any real legal meaning. When the reason ceases the rule should cease. Has the modern society met this responsibility? It would seem that as long as there is danger to the life of man that the society has not eliminated the right of self-defense. As long as this right lives, then also should coexist the right to bear arms, this is exoteric. Can we deny the right of self-defense and remove the ability therefor? The United States Supreme Court has admitted there are exceptions to the right to bear arms; and, then refused to recognize the right itself. Isn't this a recognition of the right, and also perhaps an understanding that the *Presser* and *Cruikshank* decisions were the children of the War Between the States and "Black Republican Reconstructionism"?

The term militia means an army of citizens; it is a collective term referring to a group of persons acting under authority as the army of the people. Why then does the Second Amendment refer to both the "militia" and the "people" if not for the very purpose of protecting the rights of *both* groups?

Militia connotes a group, while people refers to all the group. It is very possible for a person in the militia to be of the people, in fact all persons in the militia are of the people group, but not all of the people are in the militia.

Does it not follow that the state courts would not have expended as much effort in defining the differences between a weapon and a concealed weapon if they thought that the Amendment referred only to the militia? Why did the legislatures before the *Cruikshank* decision expend so many terms in defining their various statutes in terms of types of weapons if they did not think that the Amendment might include the people? Why did certain states outlaw all except military handguns if they were not fearful of a declaration of unconstitutionality? The logical result is that the terms militia and people were thought to be separate in nature and preserving two distinct rights.

Why does the state have the power to disarm the Federal Government (militia) while the Federal Government does not have the same right? Is it because the states could eliminate the militia but not the right of the people to bear arms? Is it to be considered that the reason this issue did not evolve any sooner was because the "framers" of the Constitution had no idea that the state and local governments would attempt to disarm the people? That the bearing of arms for self-defense was so common that it does need a constitutional guarantee? The answer of yes to any of the above questions is a recognition of the right of all people to bear arms for their self-defense and to preserve their forms of government.