Volume 96 | Issue 1 Article 4

September 1993

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WEST VIRGINIA LAW REVIEW

Volume 96 Fall 1993 Number 1

# RATIONING FIREARMS PURCHASES AND THE RIGHT TO KEEP ARMS: REFLECTIONS ON THE BILLS OF RIGHTS OF VIRGINIA, WEST VIRGINIA, AND THE UNITED STATES

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## I. INTRODUCTION: CRIMINALIZING PURCHASES OF MORE THAN ONE HANDGUN EACH MONTH

May a constitutional right be limited by a legislature's determination of whether, to what extent, or how many times within a given time period a person has a "need" to exercise that right? Would it be consistent with the freedom of the press, for instance, to make it a crime to purchase more than one Bible, or more than one copy of Marx and Engles' *Communist Manifesto*, each month? Who, other than dealers in books, really "needs" more than one such book per month? Or what if, instead of listing specific titles, a legislature prohibited purchase of more than one book containing violent themes, or more than one book advocating civil disobedience, each month?

It has long been recognized that the pen is mightier than the sword, and that is why burning books was just as popular in Nazi Germany as was confiscating firearms. American jurisprudence has surely established that no legislature could, consistent with freedom of the press, determine that citizens have no "need" to purchase more than a specified number of books of a given type, no matter how "subversive," in a specified time period, and make it a crime to do so.

In 1993, the Virginia General Assembly enacted a statute criminalizing the purchase of more than one handgun each month.[1] Bills have been introduced in the United States Congress to do the same,[2] and are likely to be introduced in other states, including West Virginia. The City of Charleston, West Virginia, has passed such an ordinance.[3]

The bills of rights of forty-three states and the United States Constitution protect, albeit with different wording, the right of the people to keep and bear arms free from infringement.[4] The federal Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[5] The Virginia Declaration of Rights, originally adopted in 1776, was amended in 1971 to guarantee that "the right of the people to keep and bear arms shall not be infringed . . . ."[6] As amended in 1986, the West Virginia Bill of Rights includes the following: "A person has the right to keep and bear arms for the defense of self, family, home, and state, and for lawful hunting and recreational use."[7]

Would or does the criminalization of the purchase of more than one handgun each month infringe on the right to keep and bear arms? This is a relatively new query in regard to an issue that traditionally has asked questions such as whether a prohibition of mere possession of a firearm by a person infringes on the right to keep arms, or

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1. VA. CODE ANN. § 18.2-308.2:2O (Michie 1993). Virginia was not the first state to do so: South Carolina enacted such legislation in 1975. Code of Laws of South Carolina § 23-31-140 provides, *inter alia*, that "no person shall be allowed to purchase more than one pistol during each thirty-day period," except that "a person whose pistol is stolen or irretrievably lost and who feels that it is essential that he immediately possess a pistol" may obtain a police permit to do so.

2. S. 376, 103d Cong., 1st Sess. § 2 (1993) and H.R. 544, 103d Cong., 1st Sess. (1993).

3. CODE OF CITY OF CHARLESTON § 6-106.2.8 (1993).

4. Arms guarantees included in state bills of rights are reprinted in Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 84-89 (Fall 1989).

5. U.S. CONST. amend. II.

6. VA. CONST. art. 1, § 13.

7. W. VA. CONST. art. 3, § 22.

whether a prohibition on carrying a pistol concealed on the person without a permit infringes on the right to bear arms. All of these questions require a general exposition of the nature of the right without regard to the specific possible infringement at issue.

Beginning with a description of the Virginia "one-gun-a-month" statute, the Charleston ordinance, and proposed federal legislation, this Article then analyzes the nature of the right to keep and bear arms, with particular reference to Virginia and West Virginia. The perception of this right in Virginia is particularly significant in understanding the meaning of the federal Second Amendment, for Virginians provided the primary impetus for adoption of the Second Amendment in the eighteenth century, and exposited its nature in the nineteenth century in nationally acclaimed treatises. Analysis of the traditional perception in Virginia also contributes to the historical understanding of this right in the constitutional development of that state, which included West Virginia until the Civil War. This view is the backdrop for the explicit provisions adopted by Virginia in 1971 and West Virginia in 1986. The histories of those ratifications, which reveal the meaning of the respective guarantees, are analyzed separately.

While no court has ever considered the constitutionality of "one-gun-a-month" legislation, the former Virginia Attorney General rendered an official opinion in 1993 that such leglislation is valid under the Virginia arms guarantee and the federal Second Amendment. Detailed scrutiny of this opinion provides a springboard for further exposition of the nature of the right to keep and bear arms.

No published Virginia decision mentions the right to keep and bear arms. However, the West Virginia Supreme Court has discussed the nature of this right in detail. Pertinent cases from Virginia, West Virginia, and other jurisdictions will be scrutinized.

Advocates for the Virginia statute argued that limiting handgun purchases to one per month would prevent gun traffickers from New York from obtaining fictitious driver's licenses in Virginia, purchasing several handguns, and then reselling them in New York City. They claimed that in 1993, 41% of the firearms traced by the federal Bureau of Alcohol, Tobacco and Firearms (BATF), in New York City originated in Virginia. However, most "crime guns" are not traced, and most

firearms which are traced were never used in a violent crime. Firearms originating from Virginia may actually account for only 4% of the firearms seized by New York City police.[8] David B. Kopel writes:

> The BATF traces only involved about 6-8% of New York City crime guns. Only 32 guns traced to Virginia (17% of all Virginia traces) were thought to be involved in violent crimes; far more Virginia "crime" guns in New York City simply involve non-violent offenses, including technical violations of the City's draconian laws against simple possession of a handgun.[9]

In fact, New York City requires an extensive application process with the police and as much as a year's wait to approve the purchase of a handgun.[10] A law-abiding resident of Harlem threatened by gang members, with no hope of police protection, would not act irrationally if she purchased a handgun from another state without complying with legal technicalities. If she defends herself from a rapist, police arrest her for unlawful possession of the firearm, and a BATF trace indicates its origin to be Virginia, then her gun will be "seized by police from a crime scene."

Opponents of the handgun purchase limitation in Virginia argued that it was necessary only to stop giving out driver's licenses to anyone who walked into a Department of Motor Vehicles office. Requiring proof of Virginia residency would limit driver's licenses, the usual identification document for firearm sales, to true Virginia residents.[11] Moreover, the proposed law could be easily circumvented if the ultimate purchaser uses "straw sales" to make purchases through other persons.

Proponents justified Virginia's action by pointing out that South Carolina had already enacted a prohibition on purchase of more than

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8. David B. Kopel, *Do Federal Gun Traces Accurately Reflect Street Crime?*, 5-93 INDEPENDENCE ISSUE PAPER, 4-5 (1993).

9. *Id.* at 8.

10. ADMINISTRATIVE CODE OF THE CITY OF NEW YORK §§ 10-131, 10-301 to -309 (1993); *see also* LEE THOMAS AND JEFFREY CHAMBERLAIN, GUN CONTROL IN NEW YORK: A GUIDE TO NEW YORK'S FIREARMS ANDS WEAPONS LAWS (Gunlock Press 1990).

11. Just such a provision was enacted by the General Assembly. VA. CODE ANN. § 46.2-323.1 (Michie 1993).

one handgun per month. Opponents countered that South Carolina has a drastically higher rate of crime than Virginia, and that this rate increased after enactment of South Carolina's law. This Article is a constitutional, not a criminological, study. Arguments about causation and criminal behavior frequently encountered in the "gun control" controversy matter little from a constitutional perspective. For instance, it could hardly be argued that the Sixth Amendment right to the assistance of counsel in criminal cases would not be violated if crime decreased as a result of not allowing an accused person to consult with counsel more than once each month. A bill of rights guarantee cannot be disregarded under the guise that its existence contributes to increases in crime or that its absence would make it harder to extract confessions.

Restricting the exercise of a constitutional right to once per month raises interesting jurisprudential issues not encountered in more draconian prohibitions on the exercise of a constitutional right altogether. Other than persons who frequent gun shows to enhance collections of rare firearms, few persons have any wish to purchase more than one handgun per month,[12] just as few persons may have a desire to petition the government for a redress of grievances more than once per month. The legislation in question tests the outer edges of a constitutional right in a unique manner: to what extent may a legislature determine that the people do not "need" to exercise a given right more than a specific number of times in a given temporal period?

As amended by H.B. 1592, effective July 1, 1993, Code of Virginia section 18.2-308.2:2O provides in part: "Except as provided in subdivisions 1, 2 and 3 of this subsection, it shall be unlawful for any person who is not a licensed firearms dealer to purchase more than one handgun within any thirty-day period." Violation is punishable as a Class 1 misdemeanor, i.e., imprisonment of no more than one year and a fine of no more than $1,000.00.

12. This in itself may be an interesting fact from the viewpoint of penal reform. What interest does the state have in creating yet another victimless crime and branding yet more harmless persons as criminals? *See* Raymond G. Kessler, *Enforcement Problems of Gun Control: A Victimless Crimes Analysis*, 16 CRIM. L. BULL. 131 (1980).

The first paragraph of section 18.2-308.2:2O(1) describes a special approval process by the State Police for purchases in excess of one handgun per thirty-day period:

> Purchases in excess of one handgun within a thirty-day period may be made upon completion of an enhanced background check, as described herein, by special application to the department of state police listing the number and type of handguns to be purchased and transferred for lawful business or personal use, in a collector series, for collections, as a bulk purchase from estate sales and for similar purposes. Such applications shall be signed under oath by the applicant on forms provided by the department of state police, shall state the purpose for the purchase above the limit, and shall require satisfactory proof of residency and identity. Such application shall be in addition to the firearms sales report required by the bureau of alcohol, tobacco and firearms (ATF). The superintendent of state police shall promulgate regulations, pursuant to the administrative process act (§ 9-6.14:1 *et seq.*), for the implementation of an application process for purchases of handguns above the limit.[13]

Further, subdivision 2 of subsection O provides an additional exception to the prohibition as follows:

> The provisions of this subsection shall not apply to: . . .
>
> f. A person whose handgun is stolen or irretrievably lost who deems it essential that such handgun be replaced immediately. Such person may purchase another handgun, even if the person has previously purchased a handgun within a thirty-day period, provided (I) the person provides the firearms dealer with a copy of the official police report or a summary thereof, on forms provided by the department of state police, from the law-enforcement agency that took the report of the lost or stolen handgun . . . . The firearms dealer shall attach a copy of the official police report or summary thereof to the original copy of the Virginia firearms

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13. The second paragraph sets forth procedures for purchases from a dealer. It provides in pertinent part:

> Upon being satisfied that these requirements have been met, the department of state police shall forthwith issue to the applicant a nontransferable certificate which shall be valid for seven days from the date of issue. The certificate shall be surrendered to the dealer by the prospective purchaser prior to the consummation of such sale and shall be kept on file at the dealer's place of business for inspection as provided in subsection c of § 54.1-4201 for a period of not less than two years.

VA. CODE ANN. § 18.2-308.2:2O(1) (Michie 1993).

> transaction report completed for the transaction and retain it for the period prescribed by the department of state police.

The Handgun Control Act enacted in 1993 by Charleston, West Virginia, is a direct registration system. Under that ordinance, "no person or dealer shall sell any handgun to any other person without first obtaining . . . a registration form" containing information about the purchaser.[14] The purchaser must certify that the handgun is "not for resale within a thirty-day period" and that "the purchaser has not purchased any other handgun within the thirty-day period" before the date on the registration form.[15] A copy of the form is filed with the police.[16]

"No person or dealer shall knowingly sell any handgun to any other person (i) who has acquired a handgun within the previous 30 days," and "no person shall purchase a handgun (i) if such person has acquired a handgun within the previous thirty (30) days . . . ."[17] Violation is a misdemeanor.[18]

The constitutional right to keep arms is not the only obstacle to the validity of this ordinance. An exception provides: "The Chief of Police may authorize the purchase of three (3) additional handguns in a 30-day period by written authorization . . . ."[19] This is a textbook case of standandless police discretion which the Council should have recognized as a due process violation.[20] Moreover, statutory preemption exists in West Virginia: "neither a municipality nor the governing body of any municipality shall have the power to limit the right of any person to own any revolver, pistol, rifle or shotgun . . . ."[21]

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14. Bill No. 4982, passed by Council on July 19, 1993, and codified as CODE OF CITY OF CHARLESTON § 6-106.2.5(a) (1993).
15. *Id.*
16. *Id.* at § 6-106.2.7.
17. *Id.* at § 6-106.2.8.
18. *Id.* at § 6-106.2.11.
19. CODE OF CITY OF CHARLESTON § 6-106.2.10(b) (1993).
20. *See* Yick Wo v. Hopkins, 118 U.S. 356, 366-70 (1886); Brevard County v. Bagwell, 388 So. 2d 645, 646 (Fla. Dist. Ct. App. 1980).
21. W. VA. CODE § 8-12-5a (1993).

The Multiple Handgun Transfer Prohibition Act of 1993 introduced in the United States Congress, Senate Bill No. 376 (Lautenberg) and House Bill No. 544 (Torricelli), would create a new subsection in the Gun Control Act, 18 U.S.C. § 922(s), making it unlawful for a federally-licensed importer, manufacturer, or dealer[22] to transfer two or more handguns to a nonlicensed individual in any 30-day period, or to transfer a handgun to an individual who has already received a handgun within 30 days.[23] Similarly, it would be unlawful for a person who is not a licensee to receive two or more handguns during any 30 day period.

Transactions between nonlicensees, or between a licensed collector[24] and a nonlicensee, would not be regulated by the above proposed statute. The Gun Control Act does not generally regulate intrastate transactions between nonlicensees.[25]

The bills would require the licensee, before transferring a handgun to an individual, to obtain a statement from the individual containing his or her name, address, and birthdate from a valid identification document containing the person's photograph, and a statement that the person is not a convicted felon or otherwise prohibited from receipt of a firearm by federal law.[26] The licensee must verify the identity of the person by examining the identification document. Within one day after the individual furnishes the statement, the licensee must provide a copy of the statement to the chief law enforcement officer of the buyer's place of residence.

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22. A federal license is required to engage in the business of importing, manufacturing, or dealing in firearms. 18 U.S.C. §§ 922(a)(1)(A), 923(a) (1993).

23. A "handgun" is defined as a firearm with a short stock designed to be held and fired by a single hand, or any combination of parts from which a handgun can be assembled.

24. A collector's license allows one to engage in interstate transactions in curio and relic firearms. 18 U.S.C. §§ 922(a)(2), 923(b) (1993).

25. Transactions between nonlicensees who reside in different states are prohibited. 18 U.S.C. § 922(a)(3) (1993).

26. 18 U.S.C. § 922(g) and (n) prohibit receipt of firearms by persons indicted for or convicted of felonies, and persons who are mental defectives, fugitives, unlawful drug users or addicts, illegal aliens, and certain others.

None of the above requirements will apply if the individual presents to the transferor a statement issued by the chief law enforcement officer within the previous ten days stating that the person requires a handgun because of a threat to the life of a person or one's household. However, that provision "shall not be interpreted to require any action by a chief law enforcement officer which is not otherwise required."[27] Thus, the officer has no duty to investigate or even consider making such a statement.

If the officer notifies the licensee that a purchase was not legally made by an eligible purchaser, the licensee must immediately inform the chief law enforcement officer of the licensee's place of business and of the transferee's residence. The licensee must also communicate to the chief law enforcement officer all information the transferor has about the transfer and the transferee.

Both the transferor and the chief law enforcement officer "shall retain" the statement of the transferee, which includes personal information. The officer "shall retain the copy for at least 30 days . . . ." Since no duty exists ever to destroy the record, this allows a system of registration of firearms owners. Moreover, no constitutional authority exists for a federal statute to impose this duty on law enforcement officers, who are employed by States and subdivisions thereof.[28]

A knowing violation of section 922(s) would subject one to a $5,000 fine, one year imprisonment, or both. Does a dealer who "knowingly" sells a handgun to a person violate this law even if he

27. H.R. 544, 103d Cong., 1st Sess. § 2 (1993).

28. As long ago as *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66, 107-08 (1861), the Court stated that "the federal government, under the constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." And as recently as *New York* v. *United States*, 112 S. Ct. 2408 (1992), the Court repeated:

> No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to preempt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript State governments as its agents.

*Id.* at 2429.

lacks knowledge that the person purchased a handgun elsewhere within thirty days? The bill, as written, is unclear.

To what extent are the above pieces of legislation consistent with the right to keep arms? The first step is to consider the origins of this right in American constitutionalism.

## II. THE RIGHT TO KEEP AND BEAR ARMS AS A PREEXISTING RIGHT: THE SECOND AND FOURTEENTH AMENDMENTS

### A. *The Virginia Declaration of Rights*

Virginia was the first of all the colonies to adopt a bill of rights, and it became the prototype for those of other colonies. The Virginia Declaration of Rights, adopted in convention on June 12, 1776, included the following interconnected propositions:

> I. That all Men are by Nature equally free and independent, and have certain inherent Rights . . . ; namely, the Enjoyment of Life and Liberty, with the Means of . . . pursuing and obtaining . . . Safety.
>
> II. That all Power is vested in, and consequently derived from, the People . . . .
>
> XIII. 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.

The author of the Declaration was George Mason, who had employed similar phraseology during the previous two years in his writings on the Fairfax Independent Militia Company. As Mason insisted in 1775, "a well regulated Militia, composed of the Gentlemen, Freeholders, and other Freemen," would preserve liberty, and thus "we do each of us, for ourselves respectively, promise and engage to keep a good Fire-lock . . . ."[29] In the same year, comparable language was proposed by Patrick Henry and adopted by the Virginia convention: "That a well regulated Militia, composed of Gentlemen and Yeomen,

29. 1 GEORGE MASON, THE PAPERS OF 215-16 (Rutland ed. 1970) [hereinafter MASON].

is the natural Strength, and only Security, of a free Government . . . ."[30]

Pursuant to its resolution, the 1775 convention appointed Patrick Henry, Thomas Jefferson, Richard Henry Lee, and others to a committee to plan the "embodying, arming, and disciplining such a Number of Men as may be sufficient for that purpose."[31] The convention also recommended "that every Man be provided with a good Rifle" and "that every Horseman be provided . . . with Pistols and Holsters, a Carbine, or other Firelock . . . ."[32] This background clarifies the meaning of the Declaration of Rights adopted a year later. Every freeman would have "the means" of obtaining "safety," "all power" would remain in "the people," and "a free state" would be defended where the citizens kept and trained with "arms" (rifles, firelocks, carbines, and pistols) and associated themselves into "militia."[33]

Having adopted the Declaration of Rights, the 1776 convention considered various proposals for a constitution. Thomas Jefferson—himself a gun collector who would, on at least one occasion, purchase two pistols at a time[34]—prepared a draft which included a bill of rights which stated: "All persons shall have full & free liberty of religious opinion . . . . *No freeman shall ever be debarred the use of arms* . . . . There shall be no standing army but in time of . . . actual war. Printing presses shall be free . . . ."[35]

On June 29, 1776, the Virginia convention adopted a constitution. The preface incorporated Jefferson's strictures against George III, which found their way into the Declaration of Independence. The text was based on proposals submitted by George Mason and others.[36] It contained no additional bill of rights since the Declaration of Rights

30. JOURNAL OF PROCEEDINGS OF CONVENTION HELD AT RICHMOND 10 (1775).

31. *Id.* at 11.

32. *Id.* at 17.

33. PROCEEDINGS OF THE CONVENTION OF DELEGATES 100-02 (1776).

34. Ashley Halsey and John Snyder, *Jefferson's Beloved Guns*, AMERICAN RIFLEMAN 17, 20 (Nov. 1969) (quoting Jefferson's account book entry of March 30, 1786: "P[ai]d . . . for p[ai]r pocket pistols, one pound 18 shillings").

35. 1 THOMAS JEFFERSON, THE PAPERS OF 344 (Boyd ed. 1950) (emphasis added) [hereinafter JEFFERSON].

36. *Id.* at 377.

had been adopted just over two weeks before. Jefferson's postulate that "no freeman shall ever be debarred the use of arms" had been expressed in other words in that declaration—"the Body of the People, trained to Arms"—and indeed was fundamental to the American world view at that time.

Encouraged by Virginia's declaration, other states adopted bills of rights, embellishing or expanding on the freedoms listed by George Mason. The Pennsylvania Declaration of Rights of 1776 stated "that the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up . . . ."[37] North Carolina's Declaration of Rights, drafted during the same year, asserted "that the people have a right to bear arms, for the defence of the State"[38]—a subtle way of claiming not only the individual right to personal defense but also the right to overthrow the established (British) government by protecting the state against it. The Vermont Declaration of Rights of 1777 maintained "that the people have a right to bear arms for the defence of themselves and the State."[39]

The Massachusetts Declaration of Rights of 1780 provided that "the people have a right to keep and bear arms for the common defence."[40] The phrase "common defence" precluded any construction that arms could be used only for individual self-defense but not for common defense against governmental despotism.

### *B. The Adoption of the Second Amendment*

The Revolution was won, and in 1787 came the constitutional convention which met at Philadelphia. What became the federal Constitution was proposed without a bill of rights, leading to great controversy in the state ratification conventions, particularly that of Virginia.

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37. PA. DEC. OF RIGHTS, art. XIII (1776).
38. N.C. DEC. OF RIGHTS art. XVII (1776).
39. VT. DEC. OF RIGHTS, art. XV (1777).
40. MASS. DEC. OF RIGHTS, art. XVII (1780).

Before the Virginia ratification convention met, at least three versions of arms guarantees were proposed in connection with other state conventions. The majority of the Pennsylvania convention refused to propose amendments to the Constitution, which it ratified on December 12, 1787. However, the "Dissent of the Minority of the Convention" demanded a declaration of rights, including the following:

> That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers.[41].

Samuel Adams, the most prolific proponent of the individual right to keep and bear arms in the pre-Revolutionary era,[42] introduced the following amendment in the Massachusetts convention:

> And that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for a redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.[43]

When it ratified the Constitution on June 21, 1788, the New Hampshire convention became the first in which a majority voted to recommend a bill of rights, albeit a brief one. The recommended amendments concerning individual rights, which would be reflected in the First, Second, and Third Amendments, were as follows:

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41. 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 623-24 (Merrill Jensen ed. 1976).

42. STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS 1-7 (1989).

43. DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS HELD IN THE YEAR 1788 at 86-87, 266 (Boston, Bradford K. Peirce & Charles Hale eds. 1856).

> X. That no standing army shall be kept up in time of peace, unless with the consent of three fourths of the members of each branch of Congress; nor shall soldiers, in a time of peace, be quartered upon private houses, without the consent of the owners.
>
> XI. Congress shall make no laws touching religion, or to infringe the rights of conscience.
>
> XII. Congress shall never disarm any citizen, unless such as are or have been in actual rebellion.[44]

Virginia's federalists fervently denied any danger from the proposed general government, in part because the people were armed. In *The Federalist* No. 46, James Madison contended that "the ultimate authority . . . resides in the people alone." To a regular army of the United States government "would be opposed a militia amounting to near half a million citizens with arms in their hands." Alluding to "the advantage of being armed, which the Americans possess over the people of almost every other nation,"[45] Madison continued: "Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms."[46]

Alexander White, another Virginian who would be elected to that state's convention, published a strong reply to the Pennsylvania "Dissent" as follows:

> There are other things so clearly out of the power of Congress, that the bare recital of them is sufficient, I mean the "rights of conscience, or religious liberty—the rights of bearing arms for defence, or for killing game—the liberty of fowling, hunting and fishing . . . ." These things seem to have been inserted among their objections, merely to induce the ignorant to believe that Congress would have a power over such objects and to infer from their being refused a place in the Constitution, their intention to exercise that power to the oppression of the people.[47]

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44. 1 JONATHON ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS: ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (J. B. LippinCott Company 1836) [hereinafter ELLIOT].

45. 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 492 (John P. Kaminski & Gaspare J. Saladino 1984).

46. *Id.* at 493.

47. 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 404 (John P. Kaminski & Gaspare J. Saladino eds. 1988).

Antifederalist Richard Henry Lee, a Virginia political leader since colonial times, wanted no constitution without a bill of rights. In a series of *Letters from the Federal Farmer*,[48] Lee expressed fear that Congress would establish a "select militia" apart from the people that would be used as an instrument of domination by the federal government:

> But, say gentlemen, the general militia are for the most part employed at home in their private concerns, cannot well be called out, or be depended upon; that we must have a select militia; that is, as I understand it, particular corps or bodies of young men, and of men who have but little to do at home, particularly armed and disciplined in some measure, at the public expense, and always ready to take the field. These corps, not much unlike regular troops, will ever produce an inattention to the general militia; and the consequence has ever been, and always must be, that the substantial men, having families and property, will generally be without arms, without knowing the use of them, and defenseless; whereas, *to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them*; nor does it follow from this, that all promiscuously must go into actual service on every occasion. The mind that aims at a select militia, must be influenced by a truly anti-republican principle; and when we see many men disposed to practice upon it, whenever they can prevail, no wonder true republicans are for carefully guarding against it.[49]

Virginians at the ratification convention of 1788 demanded that the rights to speak, assemble, and keep arms be expressly recognized in the proposed federal compact. "The great object is, that every man be armed," contended Patrick Henry.[50] George Mason warned against "disarm[ing] the people; that it was the best and most effectual way to enslave them . . . ."[51] Zachriah Johnson defended the proposed federal constitution: "The people are not to be disarmed of their weapons."[52]

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48. RICHARD HENRY LEE, AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 170 (Quadrangle Books 1962) (1788).

49. *Id.* at 170 (emphasis added).

50. 3 ELLIOT, *supra* note 44, at 386.

51. *Id.* at 380.

52. *Id.* at 646.

Concerning the militia, George Mason asked "who are the militia, if they be not the *people* of this country . . . ? I ask, Who are the militia? They consist now of the whole people, except a few public officers."[53]

Federalists and antifederalists reached a compromise to ratify the Constitution and at the same time to propose a bill of rights. The recommended bill of rights asserting "the essential and unalienable rights of the people"[54] included the following:

> That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.[55]

George Mason, the draftsman, simply added the first clause—the right to keep and bear arms—to the rest of the provision he had drafted for the Virginia Declaration of Rights of 1776.[56]

The Virginia convention recommended an entirely different set of amendments to the text of the Constitution, including the provision: "That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same."[57] This language did not appear in the draft declaration Mason had authored before the convention. This and other amendments clarifying the federal-state relationship would later fail in Congress altogether. Even so, the essence of some of these proposals would be ratified in the more general Tenth Amendment. However, the significance of its proposal is clear: when the framers wished to protect individual rights, such as keeping and bearing arms, they referred to "the right of the people." When

53. *Id.* at 425-26.
54. *Id.* at 657.
55. *Id.* at 659.
56. 3 MASON, *supra* note 29, at 1068-71.
57. 3 ELLIOT, *supra* note 44, at 660.

referring to state powers, such as the power to maintain a militia, they stated just that—"each state respectively shall have the power . . . ."

On June 8, 1789, in the United States House of Representatives, James Madison proposed his long-awaited bill of rights. In his notes for a speech introducing what became the Bill of Rights, Madison wrote: "They [the proposed amendments] relate first to private rights—fallacy on both sides-espec[iall]y as to English Decl[aratio]n. of Rights—1. mere act of parl[iamen]t. 2. no freedom of press—Conscience . . . attainders—arms to protest[an]ts."[58]

Thus, Madison stated that the rights he would propose, such as freedom of the press and keeping and bearing arms, were "private rights." The "fallacy" as to the English Declaration of Rights was that it was a "mere act of Parliament" which Parliament itself could repeal; by contrast, the American bill of rights would not, as part of the Constitution, be subject to repeal by Congress. Moreover, the English Declaration either omitted or unreasonably limited fundamental rights. Freedom of the press was not recognized at all, and the right to keep and bear arms was limited to Protestants and further limited by class: "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Condition, and as are allowed by Law."[59]

Madison's proposed bill of rights as introduced in the Congress contained both philosophical declarations and substantive restrictions. "The people shall not be deprived or abridged of their right to speak," and a free press, "as one of the great bulwarks of liberty," would be inviolable.[60] "The people shall not be restrained from peaceably assembling and consulting for their common good," and petitioning the legislature for redress of grievances.[61] The next guarantee referred to the same entity with rights—"the people"—and interposed a philosoph-

58. JOHN MADISON, THE PAPERS OF, *Notes for Speech in Congress*, 193-94 (Rutland ed. 1979) [hereinafter MADISON].

59. An Act Declaring the Rights and Liberties of the Subject, 1 W. & M., Sess. 2, c.2 (1689). *See* JOYCE LEE MALCOLM, ARMS FOR THEIR DEFENCE: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (Harvard Univ. Press 1990).

60. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 10 (Charlene Bangs Bickford & Helen E. Veit eds. 1986).

61. *Id.*

ical declaration between two restrictions: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[62]

This provision, which became the Second Amendment, began with a substantive guarantee in the nature of a command that the individual right to keep and bear arms shall not be infringed. Just as "keeping" arms referred to possession of arms by an individual, such as in the home, the terms "bear arms" meant simply to carry arms. Previously, Madison had sponsored a bill in the Virginia legislature under which a person who hunted deer illegally would be on probation for a year and could not "bear a gun out of his inclosed ground, unless whilst performing military duty . . . ."[63] The violator could bear a pistol, but not a shoulder arm, except for militia duty.

After the above command that the right shall not be infringed, Madison's proposal made the philosophical declaration that a well armed and regulated militia is the best security of a free country. This declaration did not limit the right, but gave the chief political reason for guaranteeing the right against governmental infringement. Keeping and bearing arms would be protected for all lawful purposes.

Ten days after the Bill of Rights was proposed in the House, Tench Coxe published his "Remarks on the First Part of the Amendments to the Federal Constitution," under the pen name "A Pennsylvanian," in the Philadelphia Federal Gazette.[64] Probably the most complete exposition of the Bill of Rights to be published during its ratification period, the "Remarks" included the following: "[A]s civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next

62. *Id.*

63. Bill for Preservation of Deer (1785), *in* 2 JEFFERSON, *supra* note 35, at 443-44.

64. FEDERAL GAZETTE, June 18, 1789, at 2, col. 1. Madison's proposals had been published two days before in the same paper. FEDERAL GAZETTE, June 16, 1789, at 2, col. 2-3.

article in their right to keep and bear their private arms." In short, what is now the Second Amendment was designed to guarantee the right of the people to have "their private arms" to prevent tyranny and to overpower an abusive standing army or select militia.

Coxe sent a copy of his article to Madison along with a letter of the same date. Madison endorsed Coxe's analysis—including that the amendment protected the possession and use of "private arms"—with the comment that ratification of the amendments "will however be greatly favored by explanatory strictures of a healing tendency, and is therefore already indebted to the co-operation of your pen."[65] It was only a matter of time before the Bill of Rights would become part of the Constitution.

Forty years later, Madison's career came full circle as he served as a delegate to the Virginia constitutional convention of 1829. Reflecting on the danger to a republic of limited suffrage as had been advocated at the convention, Madison expressed the world view of the generation that produced the Revolution and the Bill of Rights as follows: "A Government resting on a minority, is an aristocracy not a Republic, and could not be safe with a numerical physical force against it, without a standing Army, an enslaved press, and a disarmed populace."[66]

### *C. St. George Tucker, The American Blackstone*

Decades after its publication in 1803, St. George Tucker's edition of Sir William Blackstone's *Commentaries* was described as "a work of great ability, and necessary to every student and practitioner of law in Virginia."[67] Having taught the common law for some time at the College of William and Mary, that same year Tucker was appointed judge of the Court of Appeals of Virginia, and later served on the United States District Court for the Eastern District of Virginia.[68]

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65. Madison to Coxe (June 24, 1789), *in* 12 MADISON *supra* note 58, at 257.

66. *James Madison's Autobiography*, 2 WM. & MARY Q. 191, 208 (1945).

67. Daniel Call, Biography of the Judges, 8 Va. (4 Call) xxvi, xxviii (1827).

68. *Id. See also* Stephen P. Halbrook, *St. George Tucker: The American Blackstone*, 32 VA. BAR NEWS 45 (Feb. 1984).

United States Supreme Court Justice Hugo Black, joined by Justice William O. Douglas, would praise Tucker as expressing "the general view held when the First Amendment was adopted and ever since."[69] "St. George Tucker, a distinguished Virginia jurist, took part in the Annapolis Convention of 1786, sat on both state and federal courts, and was widely known for his writings on judicial and constitutional subjects."[70]

The lengthy appendix by Tucker in his edition of Blackstone has been characterized as "the first disquisition upon the character and interpretation of the Federal Constitution, as well as upon its origin and true nature."[71] It includes a clause-by-clause legal commentary on the United States Constitution, and was for years a textbook in Virginia and other states in the early republic.[72] Tucker considered the bill of rights to be a message for every citizen:

> A bill of rights may be considered, not only as intended to give law, and assign limits to a government about to be established, but as giving information to the people. By reducing speculative truths to fundamental laws, every man of the meanest capacity and understanding may learn his own rights, and know when they are violated . . . .[73]

Judge Tucker adhered to the then-incipient view that the courts are duty bound to declare statutes contrary to the constitution as void. Tucker opined that the Virginia Constitution of 1776, being the sovereign act of the people and hence the supreme law, "is a rule to all departments of the government, to the judiciary as well as to the legis-

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69. New York Times Co. v. Sullivan, 376 U.S. 254, 286 (1964) (Black, J., concurring).

70. *Id.* at 296 n.2. A colonel during the Revolution, St. George Tucker's "most brilliant exploit was his undertaking, at the instance of Governor Patrick Henry, an expedition to the West Indies, taking down indigo and bringing back much needed arms and ammunition." Hon. A.M. Dobie, Federal District Judges in Virginia Before the Civil War, 12 F.R.D. 451, 459 (4th Cir. 1951). Tucker's edition of Blackstone was "unquestionably one of the most important law-books of its day . . . ." *Id.* at 460.

71. St. George Tucker, *The Judges Tucker of the Court of Appeals of Virginia*, 1 VA. L. REG. 789, 794 (1896).

72. *Id.* at 793.

73. 1 BLACKSTONE, COMMENTARIES, App., 308 (St. George Tucker ed. 1803) [hereinafter BLACKSTONE].

lature . . . ."[74] And in his appendix to Blackstone's Commentaries, Tucker elaborated as follows:

> If, for example, a law be passed by congress, prohibiting the free exercise of religion, according to the dictates, or persuasions of a man's own conscience; or abridging the freedom of speech, of the press; or the right of the people to assemble peaceably, or to keep and bear arms; it would, in any of these cases, be the province of the judiciary to pronounce whether any such act were constitutional, or not; and if not, to acquit the accused from any penalty which might be annexed to the breach of such unconstitutional act . . . . The judiciary, therefore, is that department of the government to whom the protection of the rights of the individual is by the constitution especially confided, interposing its shield between him and the sword of usurped authority, the darts of oppression, and the shafts of faction and violence.[75]

The above doctrine would be adopted by the United States Supreme Court in *Marbury v. Madison* in 1803.[76]

Blackstone himself examined the right to have arms as one of "the rights of persons." In referring to "the principal absolute rights which appertain to every Englishman," Blackstone cautioned:

> But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has, therefore, established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.[77]

Blackstone then discussed these "auxiliary subordinate rights," including the right to petition the government, as being among the methods of securing, protecting, and maintaining inviolate the "primary rights of personal security, personal liberty, and private property." Blackstone explained about one such right:

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74. Kamper v. Hawkins, 1 Va. (1 Wash.) 20, 79 (1793).
75. 1 BLACKSTONE, *supra* note 73, at 357.
76. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
77. 1 BLACKSTONE, *supra* note 73, at 140-41.

> The fifth and last auxiliary right of the subjects, that I shall at present mention, is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law . . . . It is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.
>
> In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen . . . . To vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defense.[78]

However, comparing the English Declaration of Rights to the federal Second Amendment, St. George Tucker wrote: "The right of the people to keep and bear arms shall not be infringed . . . and this without any qualification as to their condition or degree, as is the case in the British government . . . ."[79] Tucker further distinguished the English Declaration from the Second Amendment:

> This may be considered as the true palladium of liberty . . . . The right of self-defense is the first law of nature; in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Whenever standing armies are kept up, and the right of the people to keep and bears arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally under the specious pretext of preserving the game; a never-failing lure to bring over the landed aristocracy to support any measure under that mask, though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy; but their right of bearing arms is confined to protestants, and the words "suitable to their condition or degree" have been interpreted to authorize the prohibition of keeping a gun or other engine for the destruction of game, by any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty.[80]

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78. *Id.* at 143-44.

79. *Id.* at 143 n.40.

80. *Id.*, App., at 300. While Tucker's criticism reflects American rejection of British practices, the courts interpreted the game laws as *not* prohibiting a gun in the house as long as not used by an unqualified person for hunting. *See, e.g.*, Rex v. Gardner, 87 Eng.

Blackstone himself wrote of the tradition of European kingdoms "to keep the *rustici* or natives of the county . . . in as low a condition as possible, and especially to prohibit them the use of arms."[81] As noted, this was done in part under the pretence of preserving game. Tucker commented further:

> The bill of rights, 1 W. and M., says Mr. Blackstone, (Vol. 1. p. 143,) secures to the subjects of England the right of having arms for their defense, *suitable to their condition and degree.* In the construction of these game laws it seems to be held, that no person who is not qualified according to law to kill game, hath any right to keep a gun in his house. Now, as no person, (except the game-keeper of a lord or lady of a manor) is admitted to be qualified to kill game, unless he has 100*l.* per annum, &c. it follows that no others can keep a gun for their defence; so that the whole nation are completely disarmed, and left at the mercy of the government, under the pretext of preserving the breed of hares and partridges, for the exclusive use of the independent country gentlemen. In America we may reasonably hope that the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty.[82]

A great deal of antislavery sentiment existed at the time of the ratification of the Constitution, and soon thereafter, St. George Tucker published *A Dissertation on Slavery: With a Proposal for the Gradual Abolition of it, in the State of Virginia* (1796), which Tucker reprinted in his edition of Blackstone. Early in his work, Tucker noted that "free Negroes and mulattoes, whose civil incapacities are almost as numerous as the civil rights of our free citizens," were thereby relegated to a state of "civil slavery."[83] Despite their military assistance in the Revolution, and their present enrollment "in the lists of those that bear arms," under existing Virginia law "all but housekeepers, and persons residing upon the frontiers are prohibited from keeping, or carrying any gun, powder, shot, club, or other weapon offensive or defensive.

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Rep. 1240 (K.B. 1739). Of course, local sherrifs and prosecutors may have bullied commoners who could not afford counsel to invoke such precedents.

81. 3 BLACKSTONE, *supra* note 73, at 413.

82. *Id.* at 414 n.3.

83. ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY 19 (Philadelphia 1796) [hereinafter TUCKER, DISSERTATION ON SLAVERY].

Resistance to a white person . . . is punishable by whipping."[84] Of course, the same disabilities applied to those subjected to "domestic slavery,"[85] that is, to chattel slaves.

Civil slavery and domestic slavery, Tucker noted, were in blatant contradiction to section 1 of the Virginia Bill of Rights, which held "that all men are by nature equally free and independent . . . ."[86] The "civil rights" of free persons included "the right of personal security,"[87] which Tucker elsewhere pointed out included keeping and bearing arms.[88] These civil rights had been denied to slaves by the Virginia act of 1680, which

> prohibited slaves from carrying any club, staff, gun, sword, or other weapon, offensive or defensive. This was afterwards extended to all Negroes, mulattoes and Indians whatsoever, with a few exceptions in favor of housekeepers, residents on a frontier plantation, and such as were enlisted in the militia.[89]
>
> . . . .
>
> From this melancholy review it will appear that . . . even the right of personal security, has been, at times, either wholly annihilated or reduced to a shadow . . . .[90]

Of course, the deprivation of arms was one of a bundle of disabilities bolstering the peculiar institution of slavery. "To go abroad without a written permission; to keep or carry a gun, or other weapon; to utter any seditious speech; to be present at any unlawful assembly of slaves; to lift the hand in opposition to a white person, unless wantonly assaulted, are all offences punishable by whipping."[91]

The most perplexing problem for the moderate abolitionist Tucker concerned the mode and consequences of manumission. Under the ancient law of William the Conqueror, English villeins were eman-

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84. *Id.* at 20.
85. *Id.* at 22.
86. *Id.* at 30, 50.
87. *Id.* at 49.
88. 1 BLACKSTONE, *supra* note 73, at 144.
89. TUCKER, DISSERTATION ON SLAVERY *supra* note 83, at 55. This act was reenacted in 1705 and 1792.
90. *Id.* at 57.
91. *Id.* at 65.

cipated as follows: "If any person is willing to enfranchise his slave, let him . . . deliver him *free arms*, to wit, a lance and a sword; thereupon he is a free man."[92] This was not in accord with American practice: "In England, the presenting the villein with *free arms*, seems to have been the symbol of his restoration to all the rights which a feudatory was entitled to. With us, we have seen that emancipation does not confer the rights of citizenship on the person emancipated . . . ."[93]

Specifically, Tucker prescribed that domestic slaves be promoted to a status of what he had earlier defined as "civil slavery." In a detailed plan, he wrote:

> Let no Negroe or mulattoe be capable of taking, holding, or exercising, any public office, freehold, franchise or privilege . . . . Nor of keeping, or bearing arms, unless authorized so to do by some act of the general assembly, whose duration shall be limited to three years.[94]
>
> By denying them the most valuable privileges which civil government affords, I wished to render it their inclination and their interest to seek those privileges in some other climate . . . . [B]y disarming them, we may calm our apprehensions of their resentments arising from past sufferings . . . .[95]

Henry St. George Tucker, son of St. George Tucker and president of the Virginia Supreme Court, wrote his own expanded commentaries on Blackstone, whose principles were applied to the American experience. This work was described as "the *vade mecum* of the bar of Virginia" and as follows: "It was recognized by the bar of Virginia, and in many of the Southern States, as the most valuable text-book for

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92. *Id.* at 70-71.

93. *Id.* at 75.

94. *Id.* at 93. 1 MONTESQUIEU, SPIRIT OF THE LAWS 243-44 (1899) warned of the "danger from the multitude of slaves" and "the danger of arming slaves . . . in republics." 1 BLACKSTONE, *supra* note 73, at 417 states that slaves, excluded from liberty, envy and hate the rest of the community, and thus warned "not to intrust those slaves with arms; who will then find themselves an overmatch for the freemen."

95. TUCKER, DISSERTATION ON SLAVERY, *supra* note 83, at 94-95.

students and lawyers then in existence."[96] Henry Tucker wrote concerning "the principal absolute rights of individuals":

> To secure their enjoyment, however, certain protections or barriers have been erected which serve to maintain inviolate the three primary rights of personal security, personal liberty, and private property. These may in America be said to be:
>
> 1. The bill of rights and written constitutions . . . .
>
> 2. The right of bearing arms—which with us is not limited and restrained by an arbitrary system of game laws as in England; but is practically enjoyed by every citizen, and is among his most valuable privileges, since it furnishes the means of resisting as a freeman ought, the inroads of usurpation.
>
> 3. The right of applying to the courts of justice for the redress of injuries.[97]

When Tucker wrote the above, the only "gun-control" law on the books required slaves, free negroes and mulattoes, to have a permit to carry a weapon, without which punishment and forfeiture of the weapon were mandated.[98] In 1838, the first such law applicable to whites

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96. St. George Tucker, *The Judges Tucker of the Court of Appeals of Virginia*, 1 VA. L. REG. 789, 807 (1896).

97. 1 HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 43 (1831). *And see* H. TUCKER, LECTURES ON GOVERNMENT 37 (1844) (as sovereigns, the people have the right "to reform, to alter or abolish [the government], at their discretion."). In A FEW LECTURES ON NATURAL LAW 95 (1844), Henry Tucker wrote:

> Now the natural right of self defence is nothing more than the liberty which the law of nature allows us of defending ourselves from an attack which is made upon our persons or of taking such measures as may guard against any injuries we are likely to suffer from another . . . .
>
> . . . [A]s the law of nature allows us to defend ourselves, and imposes no limit upon the right, the only limit we can impose is the necessity of the case. Whatever means are necessary must be lawful; for the rule is general, that where a right is absolutely given, the means of exercising it must also follow.

*And see id.* at 10-11, 96-99.

98. The Code of Virginia, 1819, provided in pertinent part in Chapter III:

> § 7. No Negro or mulatto slave whatsoever shall keep or carry any gun, powder, shot, club or other weapon whatsoever, offensive or defensive . . . [under penalty of up to thirty-nine lashes]: *Provided*, that slaves living at any frontier plantation, may be permitted to keep and use guns, powder, shot, and weapons, offensive or defensive, by license from a justice of the peace of the county wherein such plantation lies . . . .

was passed. "If a free person, habitually, carry about his person hid from common observation, any pistol, dirk, bowie knife, or weapon of the like kind, he shall be fined fifty dollars. The informer shall have one half of such fine."[99] Law enforcement officers at that time had no special privileges, and the Virginia high court affirmed the conviction under the statute of a constable who "drew out a pistol and dirk" against one merely to levy an execution.[100]

### *D. Protecting the Right of Freedmen to Have Arms: Virginia and the Fourteenth Amendment*

The Fourteenth Amendment to the United States Constitution was the product of the Joint Committee on Reconstruction, which held extensive hearings in the First Session of the Thirty-Ninth Congress. These 1866 hearings would document the violation of the freedmen's rights, including the right to keep and bear arms, thereby showing the need for constitutional protection.

Senator Jacob Howard conducted a great deal, perhaps most, of the examination of witnesses at the hearings. Some of these witnesses testified concerning the mistreatment of blacks in Virginia. John Hawkshurst, a federal tax commissioner from Fairfax County, Virginia, responded to a question by Senator Howard concerning the disposition of whites toward freedmen as follows:

> The corporate authorities of Alexandria refused to grant them licenses to do business, the law of the State not allowing it; and attempts were made

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§ 8. No free negro or mulatto, shall be suffered to keep or carry any firelock of any kind, any military weapon, or any powder or lead, without first obtaining a license from the court of the county or corporation in which he resides, which license may, at any time, be withdrawn by an order of such court.

99. VA. CODE, as amended, tit. 54, ch. 196, § 7 (1849). By that time permits were no longer available for blacks. Tit. 54, ch. 200, § 8 simply provided: "A negro shall be punished with stripes . . . [i]f he keep or carry firearms, sword or other weapon, or balls or ammunition; besides forfeiting to the state, any such articles in his possession . . . ." While the same reappears in VA. CODE, tit. 54, ch. 200, § 11 (1860), the prohibition against blacks bearing arms was partially repealed to allow for black Confederate soldiers. Act of March 6, 1865, 46 WAR OF REBELLION, Ser. I., pt. 3, p. 1315 (1894).

100. Hicks v. Commonwealth, 48 Va. (7 Gratt.) 597, 598 (1850).

> in that city to enforce the old law against them in respect to whipping and carrying fire-arms, nearly or quite up to the time of the establishment of the Freedmen's Bureau in that city.[101]

Testimony centered on the need for freedmen and others to be armed for self defense against violent attack. William J. Dews, a music professor, noted an incident at Mount Sydney, Virginia, where "two Union men were attacked . . . . But they drew their revolvers and held their assailants at bay."[102] The professor himself was armed for protection.[103]

Senator Howard questioned Colonel Orlando Brown, an assistant commissioner of the Freedmen's Bureau at Richmond, Virginia. If the Bureau were to be removed, asked Howard, what would be the result of the increased violence toward blacks? The following exchange took place:

> Answer: I think it would eventually result in an insurrection on the part of the blacks; the black troops that are about being mustered out, and those that have been mustered out, will all provide themselves with arms; probably most of them will purchase their arms; and they will not endure those outrages, without any protection except that which they obtain from Virginia; they have not confidence in their old masters, notwithstanding their great love for them, in which they have tried to make us believe.
> Question. Are there many arms among the blacks?
> Answer: Yes, sir; attempts have been made, in many instances, to disarm them.
> Question. Who have made the attempts?
> Answer: The citizens, by organizing what they call "patrols"—combinations of citizens.
> Question: Has that arrangement pervaded the State generally?
> Answer: No sir; it has not been allowed; they would disarm the negroes at once if they could.
> Question. Is that feeling extensive?
> Answer. I may say it is universal.[104]

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101. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. NO. 30, 39th Cong., 1st Sess., pt. 2, at 21 (1866).

102. *Id.* at 110.

103. *Id.* at 112.

104. *Id.* at 127-28.

In other words, the need existed to prevent Virginia and other states from disarming blacks, who were still not recognized as citizens. The Freedmen's Bureau would soon receive an explicit statutory mandate to continue its policy of protecting the right to keep and bear arms.

Senator Howard also interrogated Major General Alfred H. Terry, who was in command at Richmond, Virginia, and who assisted the Freedmen's Bureau, as follows:

> Question. Have you reason to believe that the blacks possess arms to any extent at the present time?
> Answer. I have been told that they do. I have received that information from citizens of Virginia, including State officials, who have entreated me to take the arms of the blacks away from them.
> Question. Who were those officials?
> Answer. Some were members of the present legislature. I have also been asked to do so by a public meeting held in one of the counties.
> Question. Have you, in any case, issued orders for disarming blacks?
> Answer. I have not.[105]

The Civil Rights Act of 1866 and the Freedmen's Bureau bill were direct predecessors of the Fourteenth Amendment. Representative James Wilson, Chairman of the Judiciary Committee, explained the meaning of "civil rights and immunities" as used in the civil rights bill, which also protected in part the related right "to full and equal benefit of all laws and proceedings for the security of person and property . . . ."[106] Referring further to "the great fundamental civil rights," Representative Wilson pointed out:

> Blackstone classifies them under three articles, as follows:
> 1. The right of personal security; which, he says, "Consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."
> 2. The right of personal liberty; and this, he says, "Consists in the power of locomotion, of changing situation, or moving one's person to whatever

105. *Id.* at 143.

106. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (Mar. 1, 1866).

> place one's own inclination may direct, without imprisonment or restraint, unless by due course of law."
> 3. The right of personal property; which he defines to be, "The free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the law of the land."[107]

As will be seen, the Freedmen's Bureau bill explicitly declared that the rights of personal security and personal liberty included what Blackstone referred to as "the right of having and using arms for self-preservation and defence."[108]

On May 23, 1866, the Senate began consideration of what became the Fourteenth Amendment. Senator Jacob M. Howard introduced the subject on behalf of the Joint Committee on Reconstruction, promising to present "the views and the motives which influenced that committee . . . ."[109] After acknowledging the important role of the testimony before the Joint Committee, Howard examined section 1 of the proposed constitutional amendment.

Senator Howard referred to "the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; . . . *the right to keep and to bear arms* . . . ."[110] Because state legislation infringed these rights, adoption of the Fourteenth Amendment was imperative. "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[111]

Howard explained that Congress could enforce the above rights through section 5 of the proposed amendment, which provided that "'the Congress shall have power to enforce by appropriate legislation the provisions of this article.' Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution."[112] Of the Amendment,

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107. *Id.* at 1118.
108. 1 BLACKSTONE, *supra* note 73, at 143-44.
109. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (May 23, 1866).
110. *Id.* (emphasis added).
111. *Id.* at 2766.
112. *Id.*

Howard added: "It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction."[113]

Congress passed both the Fourteenth Amendment and the Freedmen's Bureau Act by over two-thirds majority, the former because the Constitution so required, the latter to override the President's veto. Expanding on the language of the Civil Rights Act, the Freedmen's Bureau Act provided protection in the Southern states as follows:

> [T]he right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have *full and equal benefit of all laws and proceedings concerning personal liberty, personal security*, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens* of such State or district without respect to race or color, or previous condition of slavery . . . . [T]he President shall, through the commissioner and the officers of the bureau, and under such rules and regulations as the President, through the Secretary of War, shall prescribe, extend military protection and have military jurisdiction over all cases and questions concerning *the free enjoyment of such immunities and rights* . . . .[114]

The Second Session of the Thirty-Ninth Congress passed legislation requiring the ex-Confederate states, as conditions of reentry into the Union, to ratify the Fourteenth Amendment and to adopt state constitutions in conformity with that of the United States.[115] Virginia did so in 1868.

The Virginia convention of 1867-68 readopted the provision of the Declaration of Rights of 1776 recognizing "a well regulated Militia, composed of the Body of the People, trained to Arms" under the descriptive label "RIGHT TO BEAR ARMS."[116] The formal militia, composed of all able-bodied males without regard to race, was provid-

113. *Id.*
114. Freedmen's Bureau Act, ch. 200, 14 Stat. 176-77 (1866) (emphasis added).
115. Act of 1867, ch. 153, 14 Stat. 429.
116. 1 VIRGINIA CONVENTION OF 1867-1868, DEBATES AND PROCEEDINGS 350 (1868).

ed for in a separate article.[117] Delegate John Hawnhurst stated: "The Bill of Rights is a declaration of individual rights, as against the Government. It is an assertion of certain rights that the Government shall not take away from the individual."[118] Radical Republican Edward K. Snead added that "the rights declared in the Bill of Rights are natural and inherent rights, rights which previously existed."[119]

Discussion centered on the fact that the proposed federal Fourteenth Amendment would confer citizenship on freedmen. The delegates were well aware from the authorities upon which they relied that "citizenship" carried with it broad rights, including keeping and bearing arms.[120]

The convention also added a new provision to the Virginia Declaration of Rights as follows: "The rights enumerated in this Bill of Rights shall not be construed to limit other rights of the people not therein expressed."[121] Bearing arms for self defense had yet another foundation.

### *E. John Randolph Tucker and the Incorporation Dispute*

John Randolph Tucker, son of Henry St. George Tucker, served as Attorney General of Virginia, Representative to Congress, and president of the American Bar Association.[122] In his treatise on the United States Constitution, Tucker wrote of the Second Amendment: "This prohibition indicates that the security of liberty against the tyrannical

117. *Id.* at 519. The Conservative members complained: "This Constitution further provides for a militia to be composed of *all male citizens* . . . without distinction of race or color." DOCUMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF VIRGINIA 5-6 (Richmond 1867).

118. 1 VA. CONVENTION 421.

119. *Id.* at 634.

120. *Id.* at 535-40 (St. Geo. Tucker), 622 (Dred Scott decision), 356 and 403 (right of revolution).

121. DOCUMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF VIRGINIA 109 (Richmond, 1867). This provision is current. VA. CONST. art. 1, § 17.

122. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1958 (1989).

tendency of government is only to be found in the right of the people to keep and bear arms in resisting the wrongs of government."[123]

In 1887, Tucker argued for the defendants, who were condemned to death for murder, in *Spies v. Illinois*,[124] which stemmed from reaction to police violence against workers in an event known as the Haymarket Riot. Tucker argued before the Supreme Court that the Fourteenth Amendment imposed the Bill of Rights on the states, thereby requiring protection for the Fifth Amendment privilege against self incrimination and an impartial jury trial as guaranteed by the Sixth Amendment. When asked how he could represent the radicals, Tucker replied: "I do not defend anarchy. I defend the Constitution."[125]

Tucker's argument that the Fourteenth Amendment incorporated the Bill of Rights was consistent with what Senator Howard and other framers of the Fourteenth Amendment actually said. Tucker told the Court:

> I hold the privilege and immunity of a citizen of the United States to be such as have their recognition in or guaranty from the Constitution of the United States . . . . See . . . the Declaration of Rights—the privilege of freedom of speech and press—of peaceable assemblages of the people—of keeping and bearing arms—of *immunity* from search and seizure—*immunity from self-accusation*, from second trial—and privilege of trial by due process of law . . . .
>
> The position I take is this: Though originally the first ten Amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental rights—common law rights—of the man, they make them privileges and immunities of the man as citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment. In other words, while the ten Amendments as limitations on power only apply to the Federal government, and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs, as citizens of the United States, and the Fourteenth Amendment as to such rights limits state power, as the ten Amendments had limited Federal power.[126]

123. 2 JOHN RANDOLPH TUCKER, CONSTITUTION OF THE UNITED STATES 671 (1899).

124. Spies v. Illinois, 123 U.S. 131, 143 (1887).

125. MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 186 (1986).

126. 123 U.S. at 150-51.

The Court quoted the last paragraph above in its opinion.[127] The Court had just finished pointing out that *before* the adoption of the Fourteenth Amendment, and since *Barron v. Baltimore*,[128] the Bill of Rights had been interpreted as being inapplicable to state action.[129] Included in the listed precedents was *United States v. Cruikshank*,[130] which held that private citizens cannot infringe the First and Second Amendment rights to assemble and bear arms, and in dictum adding that those rights only prohibit infringement by Congress.[131] Also cited was *Presser v. Illinois*,[132] another case generated by labor-capital strife, which held that a prohibition on armed marches (in that case by workers to protest police violence) does not violate the rights to assemble or to bear arms.[133]

Tucker sought to use these cases in a favorable manner. *Cruikshank* and similar precedents "show that the rights declared in the first ten Amendments are to be regarded as privileges and immunities of citizens of the United States, which, as I insist, are protected as such by the Fourteenth Amendment."[134] *Presser* "did not decide that the right to keep and bear arms was not a privilege of a citizen of the United States which a State might therefore abridge, but that a State could under its police power forbid organizations of armed men, dangerous to the public peace."[135]

The Supreme Court completely sidestepped the issue of whether the Fourteenth Amendment makes the Bill of Rights applicable to the states. In response to Tucker's argument, the Court stated: "Before considering whether the Constitution of the United States has the effect

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127. *Id.* at 166.
128. 32 U.S. 243 (1833).
129. 123 U.S. at 166.
130. 92 U.S. 542 (1876).
131. *Id.* at 551, 553.
132. 116 U.S. 252 (1886).
133. *Id.* at 265, 267. On the sociohistorical background of *Spies* and *Presser*, *see* L. H. LaRue, *Constitutional Law and Constitutional History*, 36 BUFFALO L. REV. 373, 386-91 (1987).
134. 123 U.S. at 152.
135. *Id.*

which is claimed, it is proper to inquire whether the Federal questions relied on in fact do arise on the face of this record."[136] That was the kiss of death for the petitioners, for the Court concluded that the alleged violations were not adequately asserted in the trial court, and thus could not be considered in the Supreme Court.[137] The defendants were executed, and whether the Bill of Rights applied to the states through the Fourteenth Amendment was left undecided.[138]

## III. VIRGINIA'S 1971 CONSTITUTIONAL AMENDMENT: GEORGE MASON'S LEGACY COMPLETED

In addition to an explicit guarantee of the right to keep and bear arms, that right may be found to be a penumbra of and implicit in the broader rights to life, liberty, and property.[139] Article I, section 1 of the Virginia Constitution refers to "inherent rights . . . the enjoyment of life and liberty, with the means of . . . pursuing and obtaining . . . safety."[140] This provides additional protection for the right to have arms and to use them for self-defense.[141] "The right of self-defense . . . is founded in the law of nature, and is not, nor can be superseded by the law of society."[142] It is well established that "a person who has been threatened with death or serious bodily harm and

136. *Id.* at 167.

137. *Id.* at 181.

138. On the influence of Tucker's argument, *see* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1259-60, 1270-72 (1992).

139. The right to have arms may also be one of those "other rights of the people" not expressed in a Bill of Rights. *See, e.g.*, VA. CONST. art. I, § 17 (1971). *See* Nicholas Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, 6, 37, 64 (1992).

140. VA. CONST. art. I, § 1.

141. Relying on a provision of Ohio's Constitution similar to § 1 of the Virginia Declaration of Rights, State v. Hardy, 397 N.E.2d 773 (Ohio App. 1978) upheld the right to use a firearm in self-defense.

Similarly, Commonwealth v. Ray, 272 A.2d 275, 279 (Pa. Super. Ct. 1970), *vacated on other grounds*, 292 A.2d 410 (Pa. 1972), invalidated restrictions on the right to possess firearms based on guarantees similar to both § 1 and § 13 of the Virginia Declaration of Rights. "The right of a citizen to bear arms in defense of himself or his property . . . is a constitutional one and cannot be diminished by any act of the Legislature." *Id.*

142. Parrish v. Commonwealth, 81 Va. 1, 12 (1884).

has reasonable grounds to believe that such threats will be carried into execution, has the right to arm himself in order to combat such an emergency."[143]

The right is also historically related to the guarantee of a well regulated militia.[144] The Virginia high court has never discussed that state's Declaration of Rights provision on the right to keep and bear arms which became effective in 1971, but has reaffirmed the meaning of a well regulated militia composed of the body of the people, trained to arms, adopted in 1776.[145]

Other than the slave codes, Virginia's only gun control law on the books until recent times, a prohibition on the carrying of concealed weapons, has been the subject of few reported decisions. [146] The statute was amended over the years to include any person and not merely free persons, as blacks were no longer prohibited from carrying weapons;[147] to impose imprisonment of up to twelve months;[148] to delete the word "habitually" and extend the act to cover "any person [who] carr[ies] about his person, hid from common observation," a prohibited weapon;[149] and to except from the prohibition police officers, town or city sergeants, constables, sheriffs, conservators of the peace, and collecting officers in the discharge of their duties.[150] The 1896 amendment added the provision that a court "upon a written ap-

143. Bevley v. Commonwealth, 38 S.E.2d 331, 333 (Va. 1946).

144. "The militia embraces the whole arms bearing population . . . ." Burroughs v. Peyton, 57 Va. (16 Gratt.) 470, 482 (1864). Code of Virginia, § 44.1 provides that "the militia of the Commonwealth of Virginia shall consist of all able bodied citizens . . . and persons resident" between ages 18 and 55 years old. Previous statutes limited militia membership to males, but females are included in this language.

In World War II, when the National Guard was drafted and sent overseas, self-armed reserve militias were called out in the state to guard against sabotage and repel invasion. "Virginia Reserve Militiamen, whose forefathers, the Minute-men, gained fame in Revolutionary Days, purchased their own forest green uniforms as well as arms and ammunition." REPORT OF THE ADJUTANT GENERAL FOR 1945 at 24 (Richmond 1946).

145. *See* United States v. Blakeney, 44 Va. (3 Gratt.) 387, 390, 421 (1847) ("every man capable of carrying arms").

146. *See* Hicks v. Commonwealth, 48 Va. (7 Gratt.) 597 (1850).

147. VA. CODE tit. 54, ch. 191, § 7 (1873).

148. *Id.*

149. VA. CODE § 3780 (1887).

150. *Id.*

plication and satisfactory proof of the good character and necessity of the applicant to carry concealed weapon may grant such permission for one year . . . ."[151] Instead of making slaves completely into citizens, parts of the slave codes were made applicable to citizens.

In *Sutherland v. Commonwealth*, a hunter who placed his revolver in latched saddlebags was held not to have been carrying it "about his person" since it was not readily accessible for immediate use.[152] The editors at the *Virginia Law Register* were unhappy with the decision, and appealed to racism in support of restrictive measures:

> It is a matter of common knowledge that in this state and in several others, the more especially in the Southern states where the negro population is so large, that this cowardly practice of "toting" guns has always been one of the most fruitful sources of crime, and we believe the criminal statistics will bear us out in this statement. There would be a very decided falling off of killings "in the heat of passion" if a prohibitive tax were laid on the privilege of handling and disposing of revolvers and other small arms, or else that every person purchasing such deadly weapons should be required to register . . . . Let a negro board a railroad train with a quart of mean whiskey and a pistol in his grip and the chances are that there will be a murder, or at least a row, before he alights. In that "lawless" state of Texas, "toting" guns is altogether forbidden, and we all know that the section of the Byrd law forbidding drinking on railroad trains is so far a dead letter, that it would hardly prevent this aforesaid son of Ham from consuming most of the quart even on the cars in this state.[153]

Registration and an annual tax of one dollar per pistol or revolver was later enacted in Virginia.[154] But the statute was declared unconstitutional—"the pistol of little value and the revolver of the rich studded with diamonds are liable to the same direct tax of one dollar"[155]—and repealed.[156]

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151. VA. CODE § 3780 (1904).

152. 65 S.E. 15 (Va. 1909). The Record filed with the Petition at p. 8 notes that the defendant had been chasing a squirrel through some brush with his pistol.

153. Comment, *Carrying Concealed Weapons*, 15 VA L. REG. 391-92 (1909).

154. 1926 Va. Acts 285-87.

155. Commonwealth v. O'Neal, 13 VA. L. REG., N.S. 746 (Hustings Ct.-Roanoke 1928) (found unconstitutional because it imposed the same tax on all pistols regardless of value).

156. 1936 Va. Acts 486.

The political assassinations and urban unrest of the nineteen-sixties led to the proposal or enactment at the federal and state levels of numerous prohibitions on the right to keep and bear arms. In 1964, the Virginia General Assembly reacted to proposals for such enactments by passing a resolution "[c]oncerning the inherent right of citizens of this Commonwealth to own and bear arms" which stated:

> WHEREAS, from the landing at Jamestown on to the expansion of this nation to the Pacific coast, a peaceful society developed in the area that was wrested from the wilderness by sturdy riflemen armed with their personal weapons and skilled in their use; and
>
> WHEREAS, the history of this great nation bears witness to the many benefits derived by a citizenry, free to own—bear—and become skilled in the use of rifles and other firearms and among these historic occasions, to mention but a few, were the following: Valley Forge, Yorktown, New Orleans, the Alamo, Manassas, Chateau Thierry, Tarawa and Iwo Jima; and
>
> WHEREAS, the right of the citizen is entwined in the very roots of the founding of this Commonwealth when it was not only the individual's right to bear arms but his duty to bear arms in the defense of his community—only slaves were forbidden by law to carry weapons—Thomas Jefferson deemed the right to bear arms worthy of inclusion in his drafts of the Virginia Constitution—and the rise or fall of the political rights of the citizen has been allied with right to bear arms or the deprivation of such rights; and
>
> WHEREAS, our armed forces have always been dependent upon citizen soldiers who were familiar with the use of firearms and a capable and well armed citizenry is an efficient deterrent to any aggressor who would seek to overthrow this government by conquest or subversion; and
>
> WHEREAS, laws limiting the right to own and bear arms have never succeeded in deterring crime but have rather served to disarm the public; and
>
> WHEREAS, the horrible tragedy which befell the Jackson family of Louisa County at the hands of a fiend could well have been prevented had Mr. Jackson had available to him a firearm for self defense; and
>
> WHEREAS, many citizens of this Commonwealth who own and enjoy the use of firearms are greatly disturbed by the proposals of certain groups to regulate and restrict gun ownership and such citizens are of the firm and undying conviction that the safety of our nation from enemies within and without makes even more necessary proper training in the safe and effective use of firearms which can only be guaranteed by continuation of the existing right to own and employ such weapons; now, therefore, be it

> RESOLVED by the House of Delegates, the Senate concurring, That the right to keep and bear arms guaranteed by the second amendment to the Constitution of the United States and which right is an inalienable part of our citizens' heritage in this State shall not be infringed; that any action taken by the General Assembly of Virginia to interfere with this right would strike at the basic liberty of our citizens; that no agency of this State or of any political subdivision should be given any power or seek any power which would prohibit the purchase or possession of firearms by any citizen of good standing for the purpose of personal defense, sport, recreation or other noncriminal activities; and that registration of arms, for which registration is not presently required, not be required, by legislative action of this body . . . .[157]

The idea that the right to keep and bear arms was a preexisting right continued to be expressed in Virginia in opposition to federal proposals in 1968 to register and license firearms owners.[158] The following year, the Virginia Commission on Constitutional Revision solicited and received public views, including a proposal from George S. Knight of Alexandria, Virginia, "for a constitutional guarantee of the right to bear arms."[159] However, the Commission failed to recom-

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157. JOURNAL OF THE SENATE (Va.) 250-251, 472 (1964). It was further resolved that the resolution be sent to members of the Virginia delegation in Congress "as a reminder of the fact that laws cannot prevent tragedies but bad laws can bring on in their train even greater tragedies." *Id.*

158. The Virginia Commission of Game and Inland Fisheries issued a statement noting that "such legislation would be obeyed by the law-abiding citizens, no matter how much they disliked it, and therefore the effect would be to discourage gun ownership and use by precisely the element in our society whose right to possess and bear arms should not be infringed." *Federal Firearms Legislation: Hearings Before the Subcommittee to Investigate Juvenile Delinquency*, 90th Cong., 2d Sess. 773 (1968).

159. THE CONSTITUTION OF VIRGINIA: REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 507 (Charlottesville 1969). George S. Knight explained in an affidavit dated Oct. 2, 1986 in the author's possession as follows:

> As commonly understood in the 1969-1970 period by members of the general public in Virginia, "the right of the people to keep and bear arms" expresses a personal right of private individuals to keep firearms (including rifles, shotguns, pistols, and revolvers) and other commonly possessed arms in their homes, businesses, and other premises, and to bear or carry arms for lawful purposes, including defense of self, family, and the Commonwealth.
>
> The right-to-bear-arms guarantee was supported by and adopted to protect the interests of sportsmen, hunters, and lawabiding persons in general from infringement of said right, "infringement" meaning registration of firearms, waiting periods to purchase firearms, any general prohibition on possession of firearms by

mend any change to the Declaration of Rights such as would have made this right more explicit.[160]

The purpose of the Knight proposal may be gleaned from a contemporaneous newspaper account concerning an organization known as Fairfax County Citizens Opposing Gun Registration and Licensing, which consisted of as many as 10,000 members.[161] The group opposed an extension of the County's 72-hour waiting period on handgun purchases to long guns as based on "hysteria" and "beneficial only to those who seek repression of the individual and supremacy of the state."[162] George S. Knight, chairman of the group's communications committee, was identified as a State Department attorney.[163] The article reported: "The group also claims credit for the clause insuring 'the right of the people to keep and bear arms' in Virginia's revised constitution. 'We flooded them with telegrams' one spokesman explained."[164]

Indeed, in 1969-1970, the Virginia General Assembly proposed and the public ratified an amendment to section 13 of the Virginia Declaration of Rights so that the section would read: "That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of free state, *therefore, the right of the people to keep and bear arms shall not be infringed* . . . ."[165] George Mason, author of section 13 as originally adopted in 1776, had himself drafted the proposal in 1788 that a federal bill of rights precede the language of section 13 of the Virginia

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lawabiding persons, and failure to issue permits to lawabiding persons to carry firearms not open to common observation for personal protection.

*Id.*

160. *Id.* at 98.

161. Jerry Ceppos, *Gun Lobbyists Stalk Fairfax*, ALEXANDRIA SENTINEL, May 8, 1969, at 1, 5.

162. *Id.* at 1.

163. *Id.* at 1, 5.

164. *Id.* at 5.

165. PROCEEDING AND DEBATES OF THE HOUSE OF DELEGATES PERTAINING TO AMENDMENT OF THE CONSTITUTION, Extra Session 1969/1970 at 473 (1970) (April 2, 1969) (emphasis added) [hereinafter PROCEEDING AND DEBATES].

Declaration with the words: "That the people have a right to keep and bear arms . . . ."[166]

The 1969-1970 debate in the House of Delegates, where the amendment originated in committee, emphasized that the amendment had the same objectives as the federal Second Amendment. Chief spokesman was Delegate Lyman C. Harrell, Jr., who assured critics that the new language would not prevent "reasonable" firearms legislation such as existed in the federal statutes.[167] Delegate William R. Durland suggested that the addition would be "redundant since that also would be in the first phrase already in the Constitution as written by George Mason." Harrell replied that "this merely states something that has been a right and merely puts into the Virginia Constitution what is in the federal Constitution."[168] Durland made clear that an individual right was intended because he contemplated moving to amend the guarantee also to state "and to be protected from the danger of the abuse of that right as the public safety may require."[169]

When it was moved that the new language be stricken, and that the original militia language of section 13 should be left as it was, Harrell reacted that "all people in the Commonwealth over the age of eighteen years are really a part of the militia of the State of Virginia."[170] Because section 13 already declared that the "militia" was protected by its definition as "the body of the people, trained to arms," this statement suggests that the private keeping and bearing of arms promoted a well regulated and trained militia composed of the general

166. 3 ELLIOT, *supra* note 44, at 659; 3 MASON, *supra* note 29, at 1070-71.

167. PROCEEDINGS AND DEBATES, *supra* note 165, at 473. Reference was made by Mr. Duland to "licensing," which on the federal level applied to dealers in firearms (18 U.S.C. § 923 (1988)) and to "registration," which in federal law applied to machineguns, short-barrelled shotguns, and destructive devices (26 U.S.C. § 5841 (1988)). Since reasonable regulations passed by "the Commonwealth or its local subdivisions" were referred to by Mrs. Marion G. Galland, Durland's reply would also make the new provision consistent with the state prohibition on carrying concealed weapons in public places without a permit and parallel municipal ordinances.

168. *Id.* at 474.

169. *Id.*

170. *Id.* at 484.

populace. The motion to delete the guarantee was defeated 86 to 11.[171]

The last reference in the House to the amendment was by Delegate D. French Slaughter, who noted that it "confirms the historical parallel between this Article of the Virginia Constitution and the Second Amendment to the Constitution of the United States."[172]

The substance of the amendment was made clearer in the Senate. Senator George F. Barnes began by noting that "I dare say that not a person on this floor at the time we opened this session realized that these words were not in our state Constitution."[173] Barnes recalled the 1964 General Assembly resolution as follows:

> This apparently was of such concern to the General Assembly of Virginia that in 1964 they passed a resolution, of which I will read part only, to be brief . . . . "[T]he right to keep and bear arms guaranteed by the second amendment to the Constitution of the United States, and which right is an inalienable part of our citizens' heritage in this state, shall not be infringed, that any action taken by the General Assembly of Virginia to interfere with this right would strike at the basic liberty of our citizens."[174]

Barnes further quoted writings of Chief Justice of the United States Earl Warren that the federal Constitution would not have been adopted without assurances provided by the Second Amendment "authorizing a decentralized militia, guaranteeing the rights of the people to keep and bear arms . . . ."[175] Barnes continued:

> More recently the Honorable Hubert H. Humphrey, writing in connection with the second amendment, said "Certainly one of the chief guarantees of freedom under any government, no matter how popular and respected, is the right of the citizen to keep and bear arms. This is not to say that firearms should not be carefully used and that definite safety rules and pre-

171. *Id.*

172. *Id.* at 775.

173. PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION, Extra Session 1969/1970 at 391 (1970) [hereinafter PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA].

174. *Id.*

175. *Id.* at 392.

> cautions should not be called into force. But the right of the citizens to bear arms is just one more guarantee against arbitrary government," one more safeguard against the tyranny which historically had been the greatest danger to freedom.[176]

When Barnes explained that the proposal would mean the same as the federal Second Amendment, Senator Herbert H. Bateman asked if "it is really necessary since it is already guaranteed to *all the citizens* of the United States."[177] Barnes then yielded to Senator M.M. Long, who revealed the real interest behind the new provision—sportsmen who wished to carry arms and all citizens who wished to keep arms in their homes—as follows:

> This is the same wording as is in the Constitutions of thirty-five different States. And as stated by the Senator from Tazewell, we practically adopted the same thing in a resolution in 1964.
>
> The object and purpose of it is not to cripple law enforcement or anything of that sort. It is simply that the sportsmen of this State are very much interested in it. They think that they should have it since it is in the Constitution of thirty-five States and is guaranteed to the citizens by the second amendment to the Constitution of the United States which has been in force for many, many years. It is certainly not for the purpose of starting up the Hatfields and McCoys again or anything of that sort. But some citizens feel that they should be permitted to have arms in their homes, and they think that this will give them some protection.[178]

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176. *Id.*

177. *Id.* (emphasis added).

178. *Id.* at 393. This discussion, which clearly indicates that an individual right was contemplated, is not mentioned in Professor A.E. Dick Howard's argument that the only right guaranteed was to serve in the militia. Howard is correct in that the same rights thought to be guaranteed in the federal Second Amendment were intended to be protected in the revised Virginia Declaration of Rights. COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 265-77 (1974).

Contrary to the controversial law review article which Howard relies on for the exclusive militia interpretation, Virginians have always interpreted the Second Amendment as guaranteeing a private right to keep and bear arms. This is clear in the 1964 resolution and the 1969-1970 debates, not to mention the thought of James Madison, St. George Tucker, and similar early figures. As the former Attorney General of Virgina stated: "I do not believe that restrictions placed on the ownership or lawful use of guns by honest citizens will reduce crime to the point where it warrants infringing on the constitutional right to bear arms in self-defense, a guarantee inherent in the Constitutions of Virginia and the United States." Marshall Coleman, *Gun Control Can't Curb Violent Crime*, THE VIRGINIA SHERIFF 5 (1981).

The only dissenter was Senator Harry E. Howell, Jr., who thought that the militia should be confined to the National Guard and that constitutional protection of the right of the people to keep and bear arms should not be recognized.[179] Senator Long agreed with Senator Bateman that the amendment was intended "to realign the language of our Bill of Rights on this subject with the language and the purpose and the same protections as are in the second amendment to the Constitution of the United Sates." The arms guarantee then passed thirty-one to one.[180]

The arms guarantee was part of a general revision of the Virginia Constitution which was laid before the voters as Proposal No. 1. At the November 1970 elections, it passed by a vote of 576,776 to 226,219, and became effective in 1971.[181]

The public doubtlessly read the proposal as recognizing a private right to keep arms in the home and to carry them, at least openly.[182] Restrictive measures proposed or enacted in Congress and the various states had threatened the right, and a written guarantee would give it more security. While a right to keep and bears arms had always been assumed in Virginia, the public adopted explicit language in the Declaration of Rights as amended in 1971 to insure that it would be unquestioned.

Bearing arms in a militia (as well as not in a militia) is protected by the language of the guarantee, but was not the impetus for its adoption. Even less was the amendment intended to guarantee the exis-

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179. PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA, *supra* note 173, at 393-94.

180. *Id.* at 394.

181. VA. CONST. art. I and IV.

182. Alexandria Delegate Marion G. Galland criticized the proposal as follows:

> There were minor lapses of the modern spirit, as in the case of adding a guarantee in the Bill of Rights of the right to bear arms. It was a meaningless bow to the "gun nuts" since it appears as part of the section providing for a militia. The idea seemed to be that every citizen will have his gun at the ready against the day some new Paul Revere thunders through every hamlet in Virginia shouting "To arms, Brothers. The enemy is at our gates!"

M. Galland, *Assembly Has Progressive Image*, ALEXANDRIA GAZETTE, May 12, 1969, at 5.

tence of the National Guard, the only controversy concerning which existed in the 1969-1970 period was its deployment at college campuses (such as Kent State University) and inner city ghettos. No one complained that the right of National Guard members to keep and bear arms was being infringed.[183] Instead, the perceived threats giving rise to the arms guarantee were the federal Gun Control Act of 1968 and more restrictive proposals at the state and federal levels.

The Virginia Supreme Court has never mentioned the arms guarantee. However, chivalry took a blow in 1979 when *Schaaf v. Commonwealth*[184] ruled that a woman with a pistol for self-protection in an unzippered purse carried it concealed "about her person" since it was readily accessible.[185] The Court distinguished the traditional "saddlebags" defense, and suggested that Mrs. Schaff should and could have obtained a permit before carrying a pistol in her purse.[186]

*Sandiford v. Commonwealth*[187] ruled unconstitutional a statutory presumption that possession of a short barrelled shotgun by an unnaturalized foreigner is for an offensive or aggressive purpose. "We

183. Indeed, such an argument would have been absurd since the National Guard is a creation of the state. Soldiers do not need a guarantee to bear arms on duty. Their rights are completely dependent on what the state allows, and the state cannot infringe its own "rights."

184. 258 S.E.2d 574, 575 (Va. 1990).

185. This holding was reached despite the fact that the Virginia Attorney General and even the Commonwealth Attorney who prosecuted Mrs. Schaaf had advised that a pistol in a ladies purse was not sufficiently accessible to be considered about her person. Report of the Attorney General 80 (Va. 1965-66); Commonwealth's Attorney's Memorandum (May 28, 1969), reproduced in brief of Appellant at 5-6. As Justice Compton pointed out in his dissent, the Virginia legislature had tactily assented to this interpretation because it had not amended the statute after the 1909 *Sutherland* ruling. Moreover, since the statute uses the language "any person carry about his person," the concealed weapon "must be in touch with a member of the body or in touch with clothing, coverings, or other items worn about the body." *Schaaf*, 258 S.E.2d at 576.

As a practical matter, the Virginia gentlemen on the high court probably decided *Schaaf* as they did not because they liked male hunters with saddlebags but not women with purses, but because of where the pistols were carried. Mr. Sutherland was walking down a country road, while Mrs. Schaaf was having her purse x-ray screened while entering a courtroom. Since no law prohibited taking a firearm to court, concealed carry was the only offense with which to charge Mrs. Schaaf.

186. *Id.* at 575.

187. 225 S.E.2d 409 (Va. 1976).

see no rational connection between a person's place of birth and his disposition to commit offensive or aggressive acts."[188] The Court concluded: "Mere possession of a sawed-off shotgun by a citizen (natural or not naturalized) raises no presumption of an unlawful purpose, . . . and we hold that [the code] created such a presumption based upon mere possession by an unnaturalized foreign-born person, it denied Sandiford equal protection and due process of law."[189]

Whether Virginia's prohibition on purchase of more than one handgun each month violates the arms guarantee depends on the nature of the right. The preamble to the Virginia Declaration of Rights, which is Article 1 of the Constitution, states: "A Declaration of Rights made by the good people of Virginia in the exercise of their sovereign powers, which rights do pertain to them and their posterity, as the basis and foundation of government." There follows an enumeration of specific rights, including the following: "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, therefore, the right of the people to keep and bear arms shall not be infringed . . . ."[190] Accordingly, keeping and bearing arms is a fundamental right of all law-abiding individuals which may not be infringed.

The need to rely on the text of the guarantee and the meaning attributed to it by the framers is particularly relevant in the interpretation of individual rights, since government has only such power as the people authorize. The Virginia Supreme Court has artfully stated:

> The office and purpose of the constitution is to shape and fix the limits of governmental activity. It thus proclaims, safeguards, and preserves in basic form the pre-existing laws, rights, *mores*, habits and modes of thought and life of the people as developed under the common law and as existed at the time of its adoption to the extent and as therein stated . . . .
>
> The purpose and object sought to be attained by the framers of the constitution is to be looked for, and the will and intent of the people who ratified it is to be made effective.[191]

188. *Id.* at 410.
189. *Id.* at 411.
190. VA. CONST. art. I, § 13.
191. Dean v. Paolicelli, 72 S.E.2d 506, 510 (Va. 1952).

Moreover, the "plain mandates [of constitutions] should not be disregarded because conditions change . . . . Nor do exigent circumstances justify judicial sophistry as a means to circumvent them."[192]

Fundamental rights under the Virginia Constitution may not be unreasonably regulated, by a procedure "which imposes arbitrary, oppressive and unwarranted requirements . . . ."[193] Setting an arbitrary number of firearms a citizen may purchase in a given time period would seem to be of this nature.

Since keeping and bearing arms for personal protection is a constitutional right, the proposal would violate both the right to keep and bear arms and the right to due process. As was held in a Connecticut case concerning a pistol permit: "It appears that a Connecticut citizen, under the language of the Connecticut constitution, has a fundamental right to bear arms in self-defense, a liberty interest which must be protected by procedural due process."[194] Keeping and bearing arms is also considered a "fundamental right" in Virginia, since it is "explicitly or implicitly guaranteed by the Constitution."[195]

The existence of a constitutional right to have an object, whether a newspaper or a firearm, implies a right to purchase that object. Virginia's high court has noted: "Liberty of the press embraces the circulation and distribution of magazines and periodicals as well as religious literature . . . . The ordinance . . . permits the punishment of

192. Galax v. Appalachian E.P. Co., 12 S.E.2d 778, 779 (Va. 1941).

193. York v. City of Danville, 152 S.E.2d 259, 263 (Va. 1967). That case stated in more detail:

> We conclude that the provision in the ordinance requiring that application for a parade permit be filed with the chief of police "not less than thirty days nor more than sixty days before the date on which it is proposed to conduct the parade" is an arbitrary and unreasonable prior restraint upon the rights of freedom of speech and assembly guaranteed to the defendants under the provisions of the Constitution of Virginia and the Constitution of the United States.

*Id.* at 264.

194. Rabbitt v. Leonard, 413 A.2d 489, 491 (Conn. Super. Ct. 1979).

195. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33, 51 (1973), *approved in* Arlington County v. Richards, 231 S.E.2d 231, 234 (Va. 1977).

incidents fairly within the protection of the guarantee of a free press."[196]

The Virginia courts frequently look favorably at precedents from its sister state North Carolina. "North Carolina decisions have interpreted our Constitution as guaranteeing the right to bear arms to the people in a collective sense—similar to the concept of a militia—and also to individuals."[197] "'Pistol' ex vi termini is properly included in the word 'arms,' and that the right to bear such arms cannot be infringed."[198] Accordingly, a Virginia court should look askance at a law prohibiting distribution of arms to law-abiding persons.

## IV. THE POLITICS OF CONSTITUTIONAL INTERPRETATION: ATTORNEY GENERAL TERRY, HANDGUN RATIONING, AND THE "COLLECTIVE RIGHT" TO FORM MILITIAS

On January 4, 1993, Virginia Attorney General Mary Sue Terry announced support for legislation which would criminalize the purchase of two or more handguns per month. A press report explained:

> Attorney General Mary Sue Terry, the likely Democratic nominee for governor this year, threw her support Monday behind proposals to place a one-a-month limit on handgun purchases.
>
> In a prepared statement, Terry said the limit "is a sensible response to reduce the commonwealth's role in gun trafficking, while at the same time protecting the rights of law-abiding gun owners, sportsmen and collectors." . . .
>
> Gun control is expected to be hotly debated in the legislature. The issue could give [Virginia Governor Douglas] Wilder and Terry a chance to find common ground as the attorney general prepares her campaign to succeed Wilder as governor.[199]

Eight days later, Attorney General Terry issued an official opinion concerning whether a prohibition on purchase of more than one handgun per month would violate Article I, Section 13 of the Virginia

196. Robert v. City of Norfolk, 49 S.E.2d 697, 703-04 (Va. 1948).

197. State v. Dawson, 159 S.E.2d 1, 9 (N.C. 1968).

198. State v. Kerner, 107 S.E. 222, 224 (N.C. 1921).

199. *Terry Supports Monthly Limit on Gun Buying*, ROANOKE TIMES, Jan. 5, 1993 at B3.

Constitution.[200] Not surprisingly, Attorney General Terry found that such enactment would not violate what she repeatedly referred to as the "right to *bear* arms."[201] A right to purchase arms would be related more closely to the right to *keep* arms.

Terry set forth no analysis of the meaning of the words "the right of the people to *keep* . . . arms shall not be infringed" or the penumbras of this right. Not discussed in her opinion were the questions of whether handgun purchasers were "people," whether the purchase of handguns was necessary to "keep" them, whether handguns are "arms," and whether a purchase limitation of one per month would be an "infringement." Instead, the opinion relies on selective citations of authorities.

Terry first sought to show that Virginia's Article I, Section 13 is "coextensive" with the federal Second Amendment.[202] Terry quoted several statements in the General Assembly debate on what became the 1971 Constitution expressing the opinion that Virginia's arms proposal was similar to the Second Amendment.[203] Terry's quotations were identical to those set forth in Professor A.E. Dick Howard's treatise, which she also cited.[204]

Both Terry and Howard sought to show that Virginia's provision means the same as the federal Constitution and that the latter protects no individual right, thereby rendering the former lifeless. Yet the members of the General Assembly, in debating what became the 1971 Constitution, did believe that the Second Amendment guarantees individual rights, and that the Virginia provision would do the same. Terry and Howard both began by quoting Senator M.M. Long's statement that the proposal would protect the same rights as the Second Amendment, but ignored Long's explanation in the very same passage

200. Letter of Mary Sue Terry, Attorney General, to Delegate S. Vance Wilkins, Jr. (January 13, 1993) *to be published* as an official opinion in [Richmond] ANNUAL REPORT OF THE ATTORNEY GENERAL OF VIRGINIA (Richmond 1993) [hereinafter Letter of Mary Sue Terry].

201. *Id.*

202. *Id.* at 2.

203. *Id.* at 2-4.

204. *Id.* at 2 (citing 1 A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 274, 277 (1974)).

that it would protect "the sportsmen of this State," that the right "is guaranteed to the citizens by the second amendment," and that "some citizens feel that they should be permitted to have arms in their homes . . . ."[205] Not one member of the General Assembly suggested that the guarantee would protect not individuals but a "collective right" of the National Guard to exist, or that any segment of the public demanded recognition of such a right. The acknowledgment that the guarantee would still allow certain regulations concerning firearms possessed by individuals makes clear that its subject was individual rights, not state militia powers.

It is patently absurd to suggest that Virginia's guarantee was passed so that the state would not infringe on the "right" of the very same state to organize a National Guard. It goes without saying that the right to keep and bear arms had been viewed as an individual right by Virginians from George Mason, Thomas Jefferson, Patrick Henry, and James Madison in the eighteenth century, to St. George Tucker and J. Randolph Tucker in the nineteenth century, and to the members of the 1964 General Assembly.

Having equated the Virginia guarantee with the Second Amendment, Terry reduced the Second Amendment to utter oblivion in all but three sentences, each of which is adorned with authoritative dressing. Terry's first proposition is: "In 1876, the Supreme Court of the United States overturned a person's criminal conviction for an alleged violation of another person's Second Amendment right of 'bearing arms for a lawful purpose,' concluding that '[t]his is not a right granted by the Constitution.'"[206] Terry's apparent insinuation is that the right is not protected at all by the Constitution, an implication at odds with the text of the Second Amendment. In fact, *Cruikshank* stated of the First Amendment:

> The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is and always had been, one of the attributes of citizenship under a free

205. PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA *supra* note 173, at 393.

206. Letter of Mary Sue Terry, *supra* note 200, at 4 (citing United States v. Cruikshank, 92 U.S. 542, 553 (1876)).

> government . . . . It was not, therefore, a right granted to the people by the Constitution.[207]

The Supreme Court then subjected the Second Amendment to the same analysis as the First: "The right there specified [in the indictment] is that of bearing arms for a lawful purpose. This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence."[208]

In other words, *Cruikshank* recognized the First and Second Amendments both to protect fundamental rights which predated, and thus were not "granted" by, the Constitution. The protection of these ancient rights from *governmental* infringement is in no way diluted by the Supreme Court's holding that a private person cannot violate them.[209]

*Robertson v. Baldwin*[210] left no doubt that the right to bear arms is a fundamental, individual right which the states may reasonably regulate but may not infringe:

> The law is perfectly well settled that *the first ten Amendments* to the constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principle of government, but simply to *embody certain guarantees and immunities which we had inherited from our English ancestors* . . . . In *incorporating those principles into the fundamental law* there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, . . . the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons.[211]

Terry's second proposition meant to negate the Second Amendment is simple: "Since then, the federal courts consistently have held that the Second Amendment confers only a collective right upon the citizens of the states to form militias."[212] Terry then cites two United

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207. United States v. Cruikshank, 92 U.S. 542, 551 (1876).
208. *Id.* at 553.
209. *Id.* at 551-53.
210. 165 U.S. 275 (1897).
211. *Id.* at 281-82 (emphasis added).
212. Letter of Mary Sue Terry, *supra* note 200, at 4.

States Supreme Court cases and four federal appellate cases.[213] Neither one of the Supreme Court opinions make such a statement about this holistic and mystical "collective right," nor do they remotely suggest that "the right of the people to keep and bear arms" actually means "the power of the state to maintain a militia." The four appellate opinions were all rendered years or even decades after the Virginia General Assembly met in 1969-70.[214] It is disingenuous, at best, to insist that the members of the General Assembly agreed with assertions about the Second Amendment in federal opinions published long *after* the Assembly met.

One of the two Supreme Court cases cited by Terry is *Presser v. Illinois*.[215] Presser was indicted under an Illinois act for parading four hundred armed men in Chicago on public streets without a license from the governor. The Court rejected defendant's claim that the Second Amendment protects a right to form a private military unit:

> The sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, *do not infringe the right of the people to keep and bear arms.* But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation upon the power of Congress and the National government, and not upon that of the States.[216]

In short, the Court held that the armed paraders went beyond the individual right of keeping and bearing of arms, adding in dictum that the Second Amendment does not apply directly to the states. Similarly, the Court rejected a First Amendment right of assembly applicable to

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213. United States v. Miller, 307 U.S. 174 (1939); Presser v. Illinois, 116 U.S. 252 (1886); United States v. Nelson, 859 F.2d 1318 (8th Cir. 1988); Quilici v. Village of Morton Grove, 659 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); United States v. Warin, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976); United States v. Johnson, 497 F.2d 548 (4th Cir. 1974).

214. They also represent opinions of only four of the thirteen federal courts of appeals. And even one of those four circuits (the Eighth) has not been consistent. *See* United States v. Wiley, 309 F. Supp. 141, 145 (D. Minn. 1970), *aff'd*, 438 F.2d 773 (8th Cir. 1971).

215. 116 U.S. 252 (1886).

216. *Id.* at 265 (emphasis added).

Presser's band, because "the right voluntarily to associate together as a military company, or to drill or parade with arms . . . is not an attribute of national citizenship."[217]

*Presser* did, however, recognize that the states may not infringe on the right to keep and bear arms:

> All citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government . . . *the States cannot*, even laying the constitutional provision in question out of view, *prohibit the people from keeping and bearing arms*, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government. But . . . *the sections under consideration do not have this effect.*[218]

Finally, *Presser* simply did not consider whether the Fourteenth Amendment protects the right to keep and bear arms from State infringement. In fact, that issue has not been addressed by the Supreme Court to date.[219]

The other Supreme Court case cited by Attorney General Terry is *United States v. Miller*,[220] which concerned the status under the Second Amendment of the National Firearms Act, which required registration and taxation of certain narrowly-defined firearms. A district court found the National Firearms Act to be unconstitutional on its face as violative of the Second Amendment, and dismissed an indictment for transporting in interstate commerce a shotgun with a barrel

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217. *Id.* at 267.

218. *Id.* at 265 (emphasis added).

219. A year after *Presser* was decided, Chief Justice Waite, the author of *Cruikshank*, wrote the opinion in Spies v. Illinois, 123 U.S. 131 (1887). *Spies* cited *Cruikshank* and *Presser* as authority that the first ten amendments applied to the federal government but not the states. *Id.* at 166. A *separate* argument was made that the Fourteenth Amendment protected Bill of Rights guarantees from state infringement. *Id.* 151-52, 166-67. The Court did not suggest that the incorporation issue was already decided, but reviewed the record and then refused to decide the issue because it was not raised in the trial court. *Id.* at 181.

220. United States v. Miller, 307 U.S. 174 (1939).

less than eighteen inches without the required tax stamp.[221] The Supreme Court reversed based on the following:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[222]

Accordingly, the Court remanded the cause to the district court for further proceedings.[223] Consistent with the above, these proceedings would have entailed the taking of evidence about the nature of the shotgun. Since no factual record was made in the trial court that a "sawed-off" shotgun could have militia uses, the Court did not consider whether the tax and related registration requirements of the National Firearms Act violated the Second Amendment. The Court assumed that, if the shotgun was a protected "arm" under the Second Amendment, the tax and registration requirements may have been unconstitutional, for otherwise the Court could have disposed of that issue without remanding the case.

Further, the Court assumed that the Second Amendment protects all individuals, not just members of an organized force such as the National Guard. The test was not whether the person in possession of the arm was a member of a formal militia unit, but whether the arm "at this time" is "ordinary military equipment" or its use "could" potentially assist in the common defense. Had the Court assumed that the Second Amendment did not protect ordinary persons, it would not have remanded the case to determine the factual status of the arm.

The Court also discussed the meaning of the Second Amendment. Referring to the militia clause of the Constitution, the Court stated that "to assure the continuation and render possible the effectiveness of

221. United States v. Miller, 26 F. Supp. 1002, 1003 (W.D. Ark. 1939).
222. 307 U.S. at 178.
223. *Id.* at 183.

such forces the declaration and guarantee of the Second Amendment were made."[224] The Court then surveyed colonial and state militia laws to demonstrate that "the Militia comprised all males physically capable of acting in concert for the common defense" and that "these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[225]

The philosophy behind the Second Amendment was well articulated in the commentaries of Justice Joseph Story and Judge Thomas M. Cooley, which *Miller* approvingly cites.[226] Justice Story stated:

> The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against usurpation and arbitrary power of the rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.[227]

Judge Cooley's statement referenced by the Court is as follows:

> Among the other safeguards to liberty should be mentioned the right of the people to keep and bear arms . . . . The alternative to a standing army is 'a well-regulated militia'; but this cannot exist unless the people are trained to bearing arms. The federal and state constitutions therefore provide that the right of the people to bear arms shall not be infringed.[228]

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224. *Id.* at 178.

225. *Id.* at 179.

226. *Id.* at 183 n.3.

227. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION 646 (5th ed. 1891). "One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people, and making it an offense to keep arms . . . ." 2 J. STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1893).

228. T. COOLEY, CONSTITUTIONAL LIMITATIONS 729 (1874). T. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 281-82 (2d ed. 1891) states further:

> The right declared was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation.
>
> The right is General—It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent . . . . But the law may make provision for the enrollment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government

Thus, contrary to Attorney General Terry, neither *Miller* nor *Cruikshank* uses the term "collective right" or implies that the Second Amendment does not protect individual rights. Of the four federal appellate cases cited by Terry, one does not support her argument,[229] while three do so, but only in dictum.[230] While Terry claimed that federal courts "consistently" supported a "collective rights" theory, some federal courts have recognized the right to be an individual right.[231] More significantly, Terry wholly ignored the abundance of state precedents concerning the fundamental, individual character of the

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> it was meant to hold in check. The meaning of the provision undoubtedly is that the people from whom the militia must be taken shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.

*Id.*

229. Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982) (2-1 opinion), *cert. denied* 464 U.S. 863 (1983). The majority in this case decided that the Second Amendment does not apply to the states, but did *not* decide that the Second Amendment does not recognize an individual right. Instead, the court noted the *Miller* holding that "the right to keep and bear arms extends only to *those arms* which are necessary to maintain a well regulated militia." *Id.* at 270. While factually incorrect, the court asserted that "we do not consider individually owned handguns to be military weapons." *Id.* at 270 n.8. To the contrary, the federal Civilian Marksmanship Program encourages the purchase and use of .45 caliber military pistols or commercial pistols of the same type for "matches [which] are intended to promote the national defense." 32 C.F.R. §§ 544.4(b), 544.52(d) (1985).

230. None of those three cases, *see supra* note 213, include any scholarly analysis supportive of that thesis. *See, e.g.*, United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974) (explaining that a court appointed attorney made a preposterous argument that Second Amendment protects felon's purchase of firearm; unsupported dictum about "a collective right").

231. Felons are "a separate class whose individual right to bear arms may be prohibited." United States v. Wiley, 309 F. Supp. 141, 145 (D. Minn. 1970), *aff'd*, 438 F.2d 773 (8th Cir. 1971); *see also* United States v. Bowdach, 414 F. Supp. 1346, 1353 n.11 (S.D. Fla. 1976) (explaining that "possession of the shotgun by a non-felon has no legal consequences. U.S. Const. Amend. II."), *aff'd*, 561 F.2d 1160 (5th Cir. 1977); Gilbert Equip. Co. v. Higgins, 709 F. Supp. 1071, 1090 (S.D. Ala. 1989) (explaining that the Second Amendment "guarantees to all Americans 'the right to keep and bear arms'"), *aff'd*, 894 F.2d 412 (11th Cir. 1990) (mem.); United States v. Swinton, 521 F.2d 1255 (10th Cir. 1975) (holding that "there is no *absolute* constitutional right of an individual to possess a firearm") (emphasis added); Cases v. United States, 131 F.2d 916, 921 (1st Cir. 1942) (holding that the statute "undoubtedly curtails to some extent the right of individuals to keep and bear arms"), *cert. denied sub nom.*, Velazquez v. United States, 319 U.S. 770 (1943).

right to keep and bear arms under the state constitutions,[232] including those with language identical with the federal Second Amendment.[233]

Attorney General Terry's third and final assertion about the Second Amendment states: "The Supreme Court's most recent pronouncement on the Second Amendment is its statement that 'legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties.'"[234]

Terry's deletion of the first word of the sentence of the Supreme Court opinion radically changed its meaning. In *Lewis*, the court was reviewing a conviction of receipt of a firearm by a convicted felon. In the footnote Attorney General Terry referenced, the Court actually stated: "*These* legislative restrictions [i.e., *a felon* may not receive a firearm in interstate commerce] on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties."[235] Since "a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm"—including the exercise of other civil liberties, and may even deprive a felon of life itself—felons have no fundamental right to keep and bear arms.[236] *Lewis* explicitly reaffirmed the *Miller* rule that the Second Amendment protects possession of "a firearm" with a militia nexus, and does not

232. *See* City of Princeton v. Buckner, 377 S.E.2d 139, 143 (W. Va. 1988) (explaining that "[i]n several cases where courts have considered the constitutionality of statutes and ordinances in light of constitutional provisions guaranteeing a right to bear arms for defensive purposes, proscriptive laws infringing on that constitutionally protected right have been voided."). In at least twenty reported cases, state courts have declared laws to be unconstitutional as violative of the right to keep and bear arms. Robert Dowlut, *Bearing Arms in State Bills of Rights, Judicial Interpretation, and Public Housing*, 5 ST. THOMAS L. REV. 203, 206 n.31 (1992).

233. *See, e.g.*, State v. Dawson, 159 S.E.2d 1, 8 (N.C. 1962); State v. Kerner, 107 S.E. 222 (N.C. 1921). Georgia courts have held that the federal Second Amendment guarantees an individual right which the states may not infringe. Nunn v. State, 1 Ga. 243, 250 (1846); Rhodes v. R.G. Indus., 325 S.E.2d 465, 466-67 (Ga. App. Ct. 1985).

234. Letter of Mary Sue Terry, *supra* note 200, at 4 (citing Lewis v. United States, 445 U.S. 55, 65 n.8 (1980)).

235. *Lewis*, 445 U.S. at 65 n.8 (emphasis added).

236. *Id.* at 66.

merely protect *a person* with a militia nexus.[237] *Lewis* did *not* say that the right to keep and bear arms is not a fundamental right of law-abiding citizens. As the Court stated elsewhere, a "fundamental right" includes a right "explicitly . . . guaranteed by the Constitution."[238]

Nor was Terry accurate concerning *Lewis* being the Supreme Court's "most recent pronouncement" on the Second Amendment. Ten years after *Lewis*, in the 1990 case of *United States v. Verdugo-Urquidez*,[239] the court made clear that the Second Amendment protects the rights of all law-abiding persons:

> *"The people" seems to have been a term of art employed in select parts of the Constitution . . . . The Second Amendment protects "the right of the people to keep and bear Arms,"* and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." *See also* U.S. Const. amend. I, ("Congress shall make no law . . . abridging . . . *the right of the people* peaceably to assemble") . . . . While this textual exegesis is by no means conclusive, it suggests that *"the people" protected by the* Fourth Amendment, and by the First and *Second Amendments*, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, *refers to a class of persons who are part of a national community* or who have otherwise developed sufficient connection with this country to be considered part of that community.[240]

Concurring, Justice Stevens added that "aliens who are lawfully present in the United States are among those 'people' who are entitled

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237. *Id.* at 65 n.8. *Miller* essentially follows the civilized warfare test followed in old and new cases. Andrews v. State, 50 Tenn. (3 Heisk.) 165 (1871); State v. Swanton, 692 P.2d 98 (Ariz. Ct. App. 1981).

238. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 35 (1973).

239. 494 U.S. 259 (1990).

240. *Id.* at 265-66. On the original meaning of the Second Amendment as a protection of individual rights, *see* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162-68 (1991); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VALPARAISO U. L. REV. 131 (1991).

Congress has recognized "the rights of citizens to keep and bear arms under the Second Amendment to the United States Constitution . . . ." Firearms Owners' Protection Act, Pub. L. No. 99-308, § 1, 100 Stat. 449 (1986). THE RIGHT TO KEEP AND BEAR ARMS, REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, SENATE JUDICIARY COMM., 97th Cong., 2d Sess. 12 (1982) concludes that "what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner."

to the protection of the Bill of Rights . . . ."[241] Dissenting, Justice Brennan noted that "the term 'the people' is better understood as a rhetorical counterpoint 'to the government,' such that rights that were reserved to 'the people' were to protect all those subject to 'the government.'"[242]

Moreover, the 1992 case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*[243] made clear that explicit substantive guarantees in the Bill of Rights are protected from state violation. The Court set forth the following broad interpretation of the Fourteenth Amendment's due process clause: "The controlling word in the case before us is 'liberty' . . . . Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States."[244]

The Court recognized that the Fourteenth Amendment extends its protection to, but is not limited by, the guarantees expressed in the Bill of Rights:

> The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights. We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States . . . . It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight amendments to the Constitution . . . . But of course this Court has never accepted that view.[245]

Fourteenth Amendment protections may be expanded (but certainly not reduced) beyond the practices which existed at the time it was ratified.[246] "It is a promise of the Constitution that there is a realm

241. 494 U.S. at 279.

242. *Id.* at 282.

243. 112 S. Ct. 2791 (1992).

244. *Id.* at 2804.

245. *Id.*

246. Seventeen of the twenty-eight states (61%) that ratified the Fourteenth Amendment by July 9, 1868 (the date it was ratified by a sufficient number of states) had constitutions which explicitly guaranteed the right to keep and bear arms. *See* STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT

of personal liberty which the government may not enter."[247] The Court stated:

> Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects . . . . As the second Justice Harlan recognized:
>
> > [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of *the specific guarantees elsewhere provided in the Constitution* . . . [such as] the freedom of speech, press, and religion; *the right to keep and bear arms* . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .[248]

Thus, *Planned Parenthood* recognizes "the right to keep and bear arms" as one of the "specific guarantees" provided in the Constitution. This right is protected from congressional infringement by the Second Amendment and, as noted above, from state infringement by the Fourteenth Amendment.[249]

After the above, which can be described at best as only a superficial analysis, Attorney General Terry concludes:

> The "right to bear arms" phrase of Article I, § 13 of the Constitution of Virginia is synonymous with the Second Amendment to the United States Constitution. Under long standing federal case law the Second Amendment covers only a collective right to bear arms. It is thus my opinion that legislation allowing a person to purchase no more than one handgun in a

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134 & nn. 202-07 (1984). To date, forty-three state constitutions protect the right to keep and bear arms.

247. 112 S. Ct. 2791 (1992).

248. *Id.* at 2805 (emphasis added).

249. Moreover, even for a right not specified in the Bill of Rights, one is entitled to "freedom from all substantial arbitrary intrusions and purposeless restraints." Limiting handgun purchases to one per month may be arbitrary and purposeless in view of the fact that the interstate trafficking problem could be addressed by requiring positive proof of identification and residence by persons obtaining driver's licenses.

> thirty-day period would not violate either the Second Amendment or Article I, § 13.[250]

Having advocated such legislation before rendering this opinion, the Attorney General gave the appearance that the opinion was based on political, not legal considerations. Terry's subsequent announcement that she was running for governor, and that "gun control" legislation would be a major campaign issue, lends credence to that appearance.

As for Professor Howard's argument that the Virginia guarantee and the Second Amendment do not protect an individual right to own arms but "guarantees all citizens the right to serve in the militia,"[251] it is difficult to understand why the citizenry would have demanded recognition of such a right, why the General Assembly would have been concerned with such a right, or on what theory a court could recognize such a right. Citizens have feared that legislators would confiscate or interfere with their possession of private arms. No one has claimed a constitutional right to job entitlement in the National Guard. Is every individual guaranteed employment by the Guard, regardless of the Guard's needs or lack thereof? Professor Howard makes no attempt to articulate exactly what is entailed in this supposed "right to serve in the militia," or to expose the contours of this "right."

No constitutional right deserves to be treated with such superficiality as has the right to keep and bear arms. The unpopularity of this right with certain segments of the political elite recalls St. George Tucker's point that a bill of rights is meant to give information to the people, the ultimate guardians of liberty.

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250. Letter of Mary Sue Terry, *supra* note 200, at 5.

251. A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 266, 273, 277 (1974). [hereinafter HOWARD]. HOWARD relies principally on a 1966 law review article for his conclusions about the Second Amendment. *See id.* at 266 n.2. Far more comprehensive and current scholarship demonstrates the individual character of the right to keep and bear arms. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L. REV. 637 (1989).

Nonetheless, HOWARD recognizes that United States v. Miller, 307 U.S. 174, 178 (1939), "could be read to imply that a citizen has a right to possess any weapon which could be shown to be an effective military instrument." *Id.* at 277.

## V. KEEPING ARMS FOR DEFENSE, HUNTING AND RECREATION: WEST VIRGINIA'S 1986 CONSTITUTIONAL AMENDMENT

### A. *The Status Quo Ante*

Virginia's secession from the United States in 1861 sparked West Virginia's secession from Virginia. The Wheeling convention which effected the latter act depicted itself as the true heir to the Virginia Bill of Rights, which reserved to the people, not a convention, such as the one that met at Richmond, the power to alter or abolish government.[252] Accusing Confederacy supporters of treason, the Wheeling convention issued its statement as "[a] Declaration of the People of Virginia."[253]

Framed in the midst of war, the West Virginia Constitution of 1863 was rather short on declaring rights, and the right to keep and bear arms was not proposed at the convention that framed it.[254]

At the convention which framed the constitution of 1872, only one pertinent proposal was made. Delegate Hagans submitted a motion resolving:

> That the Committee on the Bill of Rights be requested to inquire into the expediency of reporting in connection with a provision that citizens of this State are authorized to bear and carry arms, that any person who carries concealed weapons shall be guilty of a felony, and be punished by confinement in the penitentiary, on conviction thereof, not less than five nor more than twenty years.[255]

The committee reported back, mentioning only the criminal provision, that it was "inexpedient to report such a provision in the Con-

252. ORDINANCES OF THE CONVENTION ASSEMBLED AT WHEELING 1 (Wheeling, W. Va. 1861).

253. *Id.*

254. *See* DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF WEST VIRGINIA (Huntington, W. Va. 1939).

255. JOURNAL OF CONSTITUTIONAL CONVENTION 61 (Charleston, W. Va. 1872).

stitution,"[256] and the convention concurred.[257] There things would remain for over a century.

In *State v. Workman*,[258] the West Virginia Supreme Court affirmed the conviction and $25.00 fine of a person for carrying a concealed weapon.[259] At trial, the defendant relied on that part of the statute allowing the defense that he did so believing that he was in danger of death at the hands of a certain person, but failed to prove his own good character.[260]

On appeal, not having a state arms guarantee on which to rely, the defendant urged that the statute violated the federal Second Amendment. The Supreme Court replied:

> Supposing this to be a restriction upon legislation by the several states, as well as by the congress (a question upon which authorities differ,) we may still conclude that by law to regulate a conceded right is not necessarily to infringe the same. Thus, a prohibition against passing any law abridging the freedom of speech or of the press would scarcely be so construed as to prohibit all statutes defining and punishing slander or criminal libel . . . . The second amendment of our federal constitution should be construed with reference to the provisions of the common law upon this subject as they then existed, and in consonance with the amendment itself, as defined in what may be called its "preamble."[261]

While assuming that the Second Amendment applied to the states directly, the court did not mention whether the Second Amendment might apply to the states indirectly through the Fourteenth Amendment, an issue the United States Supreme Court explicitly refused to decide three years after *Workman* was decided.[262] The above comment that the Second Amendment must be construed in accord with the common

256. *Id.* at 69.

257. *Id.* at 90.

258. 14 S.E. 9 (W. Va. 1891).

259. W. VA. CODE, ch. 148, § 7 (2d ed. 1887), made it unlawful to "carry about his person any revolver or other pistol, dirk, bowie knife, razor, slung shot, billy, metallic or other false knuckles, or any other dangerous or deadly weapon of like kind or character . . . ." Both concealed and open carrying were thus proscribed.

260. 14 S.E. at 10.

261. *Id.* at 11.

262. Miller v. Texas, 153 U.S. 535, 538-39 (1894).

law assumed that the right is individual, for the power of states to maintain militias was no part of the common law. The court quoted a statute passed in the reign of Edward III,[263] but failed to mention that the statute was construed only "to punish people who go armed *to terrify the King's subjects.*"[264] It required a showing of "*malo animo* [evil intent]" and allowed "gentlemen to ride armed for their security . . . ."[265] An antebellum Virginia authority explained:

> In the exposition of the statute of Edward, it has been resolved, that no wearing of arms is within its meaning, unless it be accompanied with such circumstances as are apt to terrify the people; that no person is within its meaning, who arms himself to suppress dangerous rioters, rebels, or enemies, and endeavors to suppress or resist such disturbers of the peace: . . . no one will incur the penalty of the statute, for assembling his neighbors and friends in his own house, against those who threaten to do him any violence therein, because a man's house is as his castle.[266]

Yet *Workman* did correctly state the rule of these cases that "at common law the 'going around with unusual and dangerous weapons to the terror of the people' was a criminal offense."[267] Carrying a concealed pistol was a common law right, because a pistol was not an unusual weapon and its concealment precluded causing terror to others. Indeed, *Workman* stated:

> The keeping and bearing of arms therefore, which at the date of the amendment was intended to be protected as a popular right, was not such as the common law condemned, but was such a keeping and bearing as the public liberty and its preservation commended as lawful, and worthy of protection.[268]

The court then discussed which "arms" are protected by the Second Amendment as follows:

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263. 14 S.E. at 11.
264. Rex v. Knight, 87 Eng. Rep. 76 (K.B. 1686).
265. *Id.*, Comb. 38-39, 90 Eng. Rep. 30.
266. J. DAVIS, A TREATISE ON CRIMINAL LAW 32 (Philadelphia 1838).
267. 14 S.E. at 11.
268. *Id.*

> So, also, in regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets,—arms to be used in defending the state and civil liberty,—and not to pistols, bowie-knives, brass knuckles, billies, and such other weapons as are usually employed in brawls, street fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the state.[269]

Thus, the Second Amendment guarantees the individual to keep and bear hand-carried, militia-type arms, including rifles, muskets, guns, and swords. The court does not state how it arrived at the conclusion that pistols were not militia arms. The federal Militia Act of 1792 required every "free able bodied white male citizen" to "provide himself with a good musket or firelock" or, if a horseman, to keep "a pair of pistols."[270] The term "white" was stricken out in 1867,[271] but the Act was otherwise still law when *Workman* was decided.[272] Indeed, pistols, bowie knives, metal knuckles, and billies were all used during the Civil War,[273] and are "arms" which could be used for personal defense by soldiers, policemen, and citizens.[274] In any event, *Workman* solidly asserts the right to keep military-type rifles, a type of arm targeted for prohibition by anti-gun lobbyists in the 1990s.

A massacre of miners in Mingo County touched off West Virginia's coal wars of 1920-21. The governor's declaration of a state of war in Mingo County was the subject of *Ex parte Lavinder*,[275] decided by the West Virginia Supreme Court in 1921. The martial law declaration included "regulations inhibiting the possession and carrying of arms in the county . . . ."[276] The persons arrested and then petitioning for writs of habeus corpus in that case included a man who

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269. *Id.*
270. 1 STAT. 271 (1792).
271. 14 STAT. 423 (1867).
272. The Militia Act of 1792 was repealed by the Dick Act, 32 STAT. 775 (1903).
273. *See, e.g.*, C. CLARK, GETTYSBURG 148-49 (1985).
274. State v. Kessler, 614 P.2d 94 (Or. 1980); State v. Delgado, 692 P.2d 610 (Or. 1984).
275. *Ex parte* Lavinder, 108 S.E. 428 (W. Va. 1921).
276. *Id.* at 429.

carried a pistol and was licensed to do so, another who carried pistol cartridges, and a third who passed through a tent colony of striking coal miners.[277]

The court found that the adjutant general enforced the above rules though the sheriff, policemen and others instead of, as would have been proper, the "military force in the state and county, the unorganized militia."[278] Far worse, the declaration of martial law was unlawful in the first place as "[i]ts sole justification is the failure of the civil law fully to operate and function for the time being, by reason of the paralysis or overthrow of its agencies, in consequence of an insurrection, invasion, or other enterprise hostile to the state, and resulting in actual warfare."[279]

The court found no state of war and no justification of a declaration of martial law to exist. "Power in a chief magistrate, to effect such result under ordinary circumstances, would be suggestive of the despotism of unrestrained monarchial government . . . ."[280] Finding the petitioners not to have violated any civil laws, the court ordered the prisoners discharged.[281]

While the Court vindicated the workers in that case, the lack of an arms guarantee may have made it easier for one class to manipulate the state power and to use official police violence against other classes. Perhaps having in mind such incidents as the Mingo County Massacre, in a 1921 decision the North Carolina Supreme Court reviewed the progressive historical character of the right to keep and bear arms, including the defense of workers from corporate violence:

> This is not an idle or an obsolete guaranty, for there are still localities, not necessary to mention, where great corporations, under the guise of detective agents or private police, terrorize their employees by armed force. If the people are forbidden to carry the only arms within their means, among

277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.* at 430-31.
281. *Id.* at 431. *See* Franks v. Smith, 134 S.W. 484 (Ky. 1911) (upholding damages against militiamen for arrest of person for carrying concealed weapon, where revolver was found in carriage and not on the person; military may not supplant the civil power).

> them pistols, they will be completely at the mercy of these great plutocratic organizations. Should there be a mob, is it possible that law-abiding citizens could not assemble with their pistols carried openly and protect their persons and their property from unlawful violence without going before an official and obtaining license and giving bond?[282]

### B. *Adoption of the 1986 Guarantee*

On November 4, 1986, the people of West Virginia voted 342,963 to 67,168 to add a guarantee of the right to keep and bear arms, ballot Amendment No. 1, to the West Virginia Constitution. Article 3, Section 22 of the Bill of Rights now guarantees: "A person has the right to keep and bear arms for the defense of self, family, home, and state, and for lawful hunting and recreational use."

The amendment had a historical counterpart in the 1787 proposal by the Pennsylvania minority for a guarantee to the United States Constitution protecting arms use for defense of self and state and for killing game.[283] However, its detailed language was calculated to defeat a more contemporary problem: the argument that the "people" who have the right to arms only include the National Guard, not the people at large. Thus, the guarantee protects "a person," not "the people," and self defense, hunting, and recreation take the place of traditional militia language, thereby also protecting all "arms" used for the purposes, i.e., rifles, pistols, shotguns, and well as other instruments.

Amendment No. 1 was promoted by the United Sportsmen of West Virginia[284] and the National Rifle Association.[285] A three page legal memorandum on the proposed amendment, prepared by

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282. State v. Kerner, 107 S.E. 222, 225 (N.C. 1921) (invalidating requirement that permit be obtained from sheriff before openly bearing a pistol).

283. *See supra* note 41 and accompanying text.

284. United Sportsmen, a registered political action committee, was chaired by Phillip L. Burns of Williamstown, president of the West Virginia Rifle and Pistol Association. United Sportsmen supported voter adoption of the amendment in a coalition including the West Virginia Wildlife Federation, the West Virginia Trappers' Association, and organizations of firearm owners.

285. The NRA had 40,102 individual members and 95 organizational members in West Virginia.

Robert Dowlut, an attorney for the National Rifle Association, was sent by Charles H. Cunningham, NRA's State Liaison, on February 6, 1985, to all thirty-four senators and on March 15, 1985, to all one hundred delegates.[286] Supported by dozens of citations to decisions of courts of other states, the document analyzed each term of the proposal. The term "a person" means that the amendment "guarantees an individual right." However, felons, minors, and the mentally infirm are not protected.[287] "Constitutionally protected arms would include the rifle, shotgun, and pistol."[288] The analysis asks: "What, then, is involved in this right of keeping arms? It necessarily involves the right to purchase and use them in such a way as is usual, or to keep them for the ordinary purposes to which they are adapted."[289]

The keeping of bombs, cannon, and poison gas is not protected, and the concealed carrying of arms, or being armed at a court, church, or other specified place may be prohibited.[290] The purposes for which arms could be used were explained in part as follows:

> The proposed guarantee is a victims' rights measure. It will guarantee that a person may exercise the choice to have arms to lawfully and effectively resist violent criminal aggression against self, family, or home . . . .
>
> During World Was II . . . the people served in the militia and used their personally owned firearms to protect the state . . . .
>
> The term "lawful" was inserted as a matter of superabundant caution to indicate that hunting and recreational use may be regulated by law.[291]

The arms guarantee was introduced as House Joint Resolution No. 18 by Delegates Joe E. Martin, a Democrat from Elkins, and William F. Carmichael, a Republican from Ripley, on February 21, 1985.[292]

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286. The cover letters are included in City of Princeton v. Buckner, 377 S.E.2d 139 (W. Va. 1988), Appendix to Brief of Amicus Curiae National Rifle Association, A4-A5.

287. "Analysis of Proposed West Virginia Constitutional Guarantee to Keep and Bear Arms," reprinted in James W. McNeely, *The Right of Who to Bear What, When, and Where—West Virginia Firearms Law v. The Right-to-Bear-Arms Amendment*, 89 W. VA. L. REV. 1125, 1176 (1987) [hereinafter McNeely, *Right of Who to Bear What*].

288. *Id.*

289. *Id.* at 1177 (quoting Andrews v. State, 50 Tenn. 165, 178 (1871)).

290. *Id.*

291. *Id.* at 1177-78.

292. W. VA. HOUSE J. 216 (Feb. 21, 1985).

On March 18, 1985, the House Committee on Constitutional Revision reported and recommended unanimously that H.J. Res. 18 be adopted.[293]

On motion of Delegate James W. McNeely, a Democrat from Mercer, the guarantee was amended by voice vote two days later, so that the word "lawful" was placed before "defense of self, family, home . . . ."[294] One delegate reportedly voted against this amendment because "[h]e's afraid that means unless there are specific laws authorizing the use of guns for whatever purpose, guns won't be legal."[295] The following day, the House rejected the motion of Delegate Thomas Knight, Democrat of Kanahwa, to make the right explicitly subject to the police power of the state,[296] a clause that was held in reference to another state's constitution to authorize a handgun ban.[297] The House then adopted the guarantee by a vote of ninety-one to seven.[298]

On April 2, 1985, after passing Senator White's motion to delete the term "lawful" from the clause "lawful defense of self, family, home," the Senate Judiciary Committee adopted H.J. Res. 18.[299] When the full Senate considered the measure two days later, Charleston Democratic Senator Mario J. Palumbo moved that the guarantee be amended to read: "Subject only to the police power, a well-regulated militia being necessary to the security of a free state, a person has the right to keep and bear arms for the defense of self, family, home, and state, and for lawful hunting and recreational use."[300] Palumbo inserted into the record the following explanation:

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293. *Id.* at 515 (Mar. 18, 1985).

294. *Id.* at 583-84 (Mar. 20, 1985).

295. Deborah Baker, *Amendment Is Pushed Protecting Gun Rights*, PARKERSBURG NEWS, Mar. 25, 1985, at 4.

296. McNeely, *Right of Who to Bear What*, *supra* note 287, at 1143 (citing W. Va. House J. 599-600 (Mar. 21, 1985) and interview with Delegate Knight).

297. Kalodimos v. Village of Morton Grove, 470 N.E.2d 266 (Ill. 1984).

298. W. VA. HOUSE J. 599-600 (Mar. 21, 1985).

299. McNeely, *Right of Who to Bear What*, *supra* note 287, at 1144 (citing unpublished committee minutes).

300. W. VA. SENATE J. 910 (April 4, 1985).

> The right of an individual to bear arms should not be superior to the State's obligation to protect its people under its police power and through its National Guard forces. In my opinion, House Joint Resolution No. 18 will cast considerable doubt on whether the State's police power and National Guard forces will continue to be superior to an individual's right to bear arms.[301]

The amendment was defeated 4 to 29,[302] and the following day the Senate adopted H.J. Res. 18 by a vote of thirty-two to two.[303]

A conference committee of House and Senate members voted to adopt the Senate version of H.J. Res. 18. On April 12, 1985, the House adopted the conference report, and then adopted H.J. Res. 18 by a vote of ninety-one to six.[304] The Senate passed the guarantee again that day thirty-one to three.[305]

Upon legislative passage, newspapers published the guarantee's language and quoted supporters as stating that it would prohibit "gun bans, such as the one enacted in Morton Grove, Ill."[306] Delegate James W. McNeely opposed the guarantee, stating that "[t]he effect may be anything from cancellation of existing law to depriving citizens of this state from bearing arms other than for defense or recreation."[307]

On October 26, 1986, full page newspaper advertisements exhorted "PROTECT YOUR RIGHTS VOTE YES ON #1." Placed by United Sportsmen of West Virginia and the NRA, the notices quoted the language of the arms guarantee, advised that it "will protect your *right* to own and use firearms," and concluded with a list of supporters, including Governor Arch Moore, elected officials, and law enforcement officials.[308]

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301. *Id.* at 2638 (1985).
302. W. VA. SENATE J. 910 (April 4, 1985).
303. *Id.* at 946-47 (April 5, 1985).
304. W. VA. HOUSE J. 1484-87 (April 12, 1985).
305. W. VA. SENATE J. 1640-42 (April 12, 1985).
306. *W. Va. Voters To Decide Arms Issue in 1986*, THE PARKERSBURG NEWS, Apr. 13, 1985, at 12; Patrick McMahon, *Amendment On Guns On Ballot*, THE PARKERSBURG SENTINEL, Apr. 13, 1985, at 12.
307. *Id.*
308. *See* CHARLESTON GAZETTE MAIL, Oct. 26, 1986, at 13D; HUNTINGTON HERALD-

In another paid political advertisement entitled "Intent of Constitutional Amendment 1," the voters were advised two days before the election on the scope of the arms guarantee as follows:

> * Yes on Amendment #1 guarantees that arms may be kept or carried for traditional purposes, such as hunting, target shooting, and self-defense. This includes the right to purchase arms and ammunition and to keep arms in a state of repair.
> * Yes on Amendment #1 means that the individual right to keep and bear arms for a Constitutionally protected purpose may not be infringed. Thus, laws banning the possession or sale of Constitutionally protected arms, laws requiring a license to possess or acquire such arms, requiring the registration of such arms or imposing special taxation on such arms would not be permitted.
> * Yes on Amendment #1 does not extend to every conceivable weapon or instrument. Constitutionally protected arms include rifles, shotguns, revolvers, pistols and hunting knives, thus, weapons not commonly kept by the people, such as instruments of mass destruction such as bombs or rockets, find no protection under this guarantee.
> * Yes on Amendment #1 extends to open carrying of Constitutionally protected arms. The bearing of arms concealed may be regulated by, for example, requiring a license to carry arms concealed. However, licensing would have to be administered with the right to bear arms in mind. Furthermore, the carrying of arms may be restricted in places such as courtrooms or polling places.
> * Yes on Amendment #1 does not protect those who misuse firearms. The types of misconduct that the state legislature may forbid and punish are well-known and self-evident. Examples of such misconduct include using arms to commit robbery, rape, burglary, assault; carrying arms while intoxicated; using arms to unlawfully harass, intimidate, or recklessly endanger someone; shooting in an unsafe place or manner; and poaching. Also excluded from the enjoyment of this right would be convicted felons, mental incompetents, minors and illegal aliens. That such persons may be excluded is a well-established principle of law.[309]

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DISPATCH, Oct. 26, 1986, at A6. The same advertisement also appeared on Oct. 26, 1986, in the BECKLEY REGISTER/HERALD, BLUEFIELD TELEGRAPH, CLARKSBURG EXPONENT TELEGRAM, FAIRMONT TIMES, LOGAN BANNER, MORGANTOWN DOMINION POST, PARKERSBURG NEWS SENTINEL, and WHEELING INTELLIGENCER. Paid radio announcements in favor of Amendment No. 1 were broadcast on Charleston radio stations during the week before the election.

309. On Nov. 2, 1986, the advertisement, which noted that it was paid for by the United Sportsmen of West Virginia and the NRA, appeared in the BECKLEY REGISTER/HERALD, at 7E; FAIRMONT TIMES, at 8B; HUNTINGTON HERALD-DISPATCH, at B15;

One editorial commented that the amendment would only clutter the state constitution, for "with or without this amendment, nobody will ever be able to take the shotguns and rifles from West Virginia's hunters or handguns from those folks 'intent' on protecting their homes and businesses."[310] Another ridiculed Delegate, Joe Martin, introduced the amendment by stating that "the right to keep and bear arms is a part of the heritage of West Virginia."[311] Delegate James W. McNeely, identified as a law student and the amendment's most vocal opponent, claimed that it "could have a drastic impact on existing gun permit laws," and could be used to challenge denying gun permits to "aliens or convicted felons."[312] One newspaper stated:

> McNeely said that the proposal described in the [NRA] advertisements would change "the present law in connection with the right of people to openly carry firearms or hunting knives without a permit."
>
> "It opens the right to anybody to carry rifles, shotguns, revolvers, pistols and hunting knives out in the open without any restraint," he said.[313]

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MORGANTOWN DOMINION POST, at 12D; and WHEELING NEWS-REGISTER, at 16. On Nov. 2, 1986, the same advertisement also appeared in the BLUEFIELD TELEGRAPH, CHARLESTON GAZETTE MAIL, CLARKSBURG EXPONENT TELEGRAM, LOGAN BANNER, and PARKERSBURG NEWS SENTINEL.

310. *What's the Point?*, THE HUNTINGTON HERALD-DISPATCH, Oct. 15, 1986, at A4.

311. Don Palmerine, *An Absurd Amendment*, FAIRMONT TIMES, Nov. 1, 1986, at 4, lambasted the amendment as a "brainless notion," and claimed that it would prevent handgun bans, would increase crime and accidents, and would remind people of a heritage that should be forgotten. He referred to the National Rifle Association as the National Ridiculous Association "that is probably responsible for more deaths (both accidental and criminal) by firearms than the criminals," and urged a no vote to show "that you possess more common sense than the average legislator."

312. Martin Berg, *Gun Amendment Seen Having Drastic Effect in State*, CHARLESTON GAZETTE, Oct. 30, 1986, at 4A, col. 1. The same appeared in *Gun Amendment Could Affect Permit Law, Delegate Says*, HUNTINGTON HERALD-DISPATCH, Oct. 31, 1986, at C10, col. 1.

Both newspapers quoted Delegate McNeely as claiming that in 1979 the Colorado Supreme Court struck down, on right-to-bear-arms grounds, a law banning gun permits to felons. On the contrary, that court upheld the prohibition on possession of firearms by convicted felons. People v. Blue, 544 P.2d 385 (Colo. 1975).

313. *Mercer Delegate Criticizes NRA Ads*, Associated Press release published on Nov. 3, 1986 in unidentified newspaper, in Appendix to Brief, *supra* note 286, at A23.

The *Charleston Gazette* published the following balanced exchange on the proposed amendment:

> Effect of Passage: Would authorize the right of a person to keep and bear arms for defense of self, family, home and state, and for lawful hunting and recreational use.
>
> Background: The United States Constitution says Congress shall make no law restricting the ability of the people to keep and bear arms. The state constitution has no such provision.
>
> Pro—Sen. Larry Tucker, D-Nicholas: "We are one of only 15 or 16 states who have not adopted a measure to make sure that right is guaranteed on the state level. The amendment enhances and enforces the (federal) constitutional right to bear arms. It heads off any attempt by a municipality to ban handguns, as they did in Elk Grove, Ill."
>
> Con—Sen. Mario Palumbo, D-Kanawha: "The problem with the amendment is that it may take away the legislative power to regulate handguns. I think if you give it the literal interpretation it would. Existing laws covering registration and licensing of pistols could be stricken by the Supreme Court."[314]

On November 4, 1986, the people voted on Amendment No. 1, which the official ballot's described as follows: "To allow a person to keep and bear arms for defense of self, family, home, and state and for recreation." A total of 410,131 votes were cast, with 83.6% voting in favor and 16.4% opposed.

### C. *City of Princeton v. Buckner*

Defeat at the polls did not deter Delegate McNeely, who proceeded to publish a law review article pontificating on the nature of the arms guarantee.[315] Despite its clear language, he wrote that "a person" only includes a citizen,[316] "the right to keep and bear" is actu-

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314. *Election '86—Proposed State Constitutional Amendments*, CHARLESTON GAZETTE, Oct. 24, 1986 at 5A. At that time, W. VA. CODE § 61-7-1 required a license to carry concealable arms and § 61-7-8 a permit to carry, transport, or possess a high-powered rifle or machine gun. The sporting and premises exemptions had the effect of excluding rifles from the permit requirement in most cases.

315. McNeely, *Right of Who to Bear What*, *supra* note 287.

316. *Id.* at 1155.

ally limited to one's own property or premises,[317] and the term "arms" excludes handguns.[318] In fact, "arms" only includes "firearms of a kind and character determined by the state . . . . Handguns . . . would not be included as constitutionally-protected weapons . . . ."[319] Nonetheless, McNeely also concedes that the amendment protects "a virtually unlimited right to purchase and possess weapons upon one's own premises"[320]—which would preclude a prohibition of the purchase of more than a one gun per month.

McNeely concludes with an exhortation to the judiciary to nullify the plain language of the amendment:

> The lack of formal legislative intent creates a situation in which the judicial branch of the state government must chart the public policy of the state in weapons regulation. A literal reading of the amendment would certainly seem at odds with the clear intent of the legislature (although informally expressed) and the voters.[321]

The clearest intent of the legislature and the voters is the actual language of the amendment, not some isolated newspaper interview by a partisan. Instead of protecting constitutional rights, the judiciary is to be enlisted to destroy them, presumably using sophistry to construe a right into oblivion.

The Supreme Court of Appeals of West Virginia refused to swallow the bait. *State ex rel. City of Princeton v. Buckner*[322] declared as unconstitutional the state prohibition on carrying a pistol without a license. That case involved a person in whose pocket police discovered a .22 caliber semi-automatic pistol. The magistrate refused to issue an arrest warrant, and was sustained by the circuit court, which then certified the issue to the high court.[323]

The Court read the 1891 *Workman*[324] precedent as having recog-

317. *Id.* at 1156.
318. *Id.* at 1157.
319. *Id.* at 1159.
320. *Id.* at 1161.
321. *Id.* at 1162.
322. 377 S.E.2d 139 (W. Va. 1988).
323. *Id.* at 140-41.
324. State v. Workman, 14 S.E. 9 (W. Va. 1891). *See supra* notes 258-69 and accom-

nized that the right to self-defense is protected by the right to due process,[325] and that the right to keep and bear arms subjects regulations to the same rigorous scrutiny as would apply to the regulation of a First Amendment right.[326] But the Court rejected *Workman's* statement that pistols are not constitutionally protected arms:

> However, it is important to note that the definition of "arms" presented in *Workman* focuses on the "well regulated militia" language of the second amendment. No parallel language appears in our state constitutional amendment. Because the second amendment does not operate as a restraint upon the power of states to regulate firearms, . . . the definition of "arms" set forth in *Workman* is not particularly helpful in the case now before us. Moreover, the broad language embodied in our current Right to Keep and Bear Arms Amendment makes any further reexamination of the *Workman* definition unnecessary.[327]

The Court referenced seven cases from other states which voided proscriptive laws infringing on arms guarantees.[328] The Court added:

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panying text.

325. 377 S.E.2d at 142.

326. *Id.* at 142-43.

327. *Id.* at 143.

328. *Id.* at 143. The court's summary is worth quoting, for its approval of a particular precedent suggests how it might dispose of a similar issue:

> *See, e.g., City of Lakewood v. Pillow*, 180 Colo. 20, 23, 501 P.2d 744, 745-46 (1972) (ordinance prohibiting possession of dangerous or deadly weapon unconstitutionally overbroad where it prohibited activities which under police power could not be reasonably classified as unlawful); *In Re Brickey*, 8 Idaho 597, 599, 70 P. 609, 609 (1902) (statute prohibiting carrying of weapons in any manner in cities, towns or villages was unconstitutional); *People v. Zerillo*, 219 Mich. 635, 642, 189 N.W. 927, 929 (1922) (statute prohibiting possession of pistol by unnaturalized foreign born resident unconstitutional because of broad term "person" in the constitutional provision); *State v. Delgado*, 298 Or. 395, 403-04, 692 P.2d 610, 614 (1984) (constitutional right to bear arms violated by statute prohibiting mere possession and mere carrying of a switchblade knife); *State v Blocker*, 291 Or. 255, 261-62, 630 P.2d 824, 827 (1981) (statute prohibiting possession of billy club in public unconstitutional infringement of right to bear arms); *State v. Kessler*, 289 Or. 359, 372, 614 P.2d 94, 100 (1980) (statute prohibiting possession of billy club in home unconstitutional infringement of right to bear arms); *State v. Rosenthal*, 75 Vt. 295, 299, 55 A. 610, 611 (1903) (ordinance prohibiting carrying dangerous concealed weapon without written permission of mayor or police chief unconstitutional).

*Id.*

> The language embodied in art. III § 22 of our State *Constitution* is sweeping, and we look to the well established rules of constitutional construction in order to ascertain its meaning.
>
> At the outset we note that the fundamental principle in constitutional construction is that effect must be given to the intent of the framers of the constitutional amendment and of the people who ratified and adopted it.[329]

The Court relied on three further principles of constitutional interpretation. First, when a constitutional provision "is clear in its terms and of plain interpretation . . . it should be applied and not construed."[330] Second, effect must be given "to every word or phrase within the provision."[331] Third, a constitutional amendment, as "the latest expression of the will of the people," supersedes any previous provision or statute.[332] "Because the constitutional provision in the case before us is clear and unambiguous, this Court must apply the amendment rather than construe it."[333] The Court thus held:

> W. Va. Code, 61-7-1 [1975] is written as a total proscription of the carrying of a dangerous or deadly weapon without a license or other authorization. W. Va. Code, 61-7-1 [1975] thus prohibits the carrying of weapons for defense of self, family, home and state without a license or statutory authorization. Article III, section 22 of the West Virginia Constitution, however, guarantees that a person has the right to bear arms for those defensive purposes. Thus, the statute operates to impermissibly infringe upon this constitutionally protected right to bear arms for defensive purposes.[334]

In support of the above, the Court cited *City of Lakewood v. Pillow*,[335] in which the Colorado Supreme Court invalidated a local ordinance which purported to ban possession of a firearm except within one's domicile or at a target range, unless licensed by the city.[336]

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329. *Id.* at 143 (quotation marks, brackets and citation omitted).
330. *Id.* at 144.
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.* at 144.
335. City of Lakewood v. Pillow, 501 P.2d 744, 745 (Colo. 1972) (en banc).
336. Article II, § 13 of the Colorado Constitution states: "The right of no person to

Finding the ordinance to be "unconstitutionally overbroad," the Court explained:

> An analysis of the foregoing ordinance reveals that it is so general in its scope that it includes within its prohibitions *the right to carry on certain businesses and to engage in certain activities which cannot under the police powers be reasonably classified as unlawful and thus, subject to criminal sanctions. As an example, we note that this ordinance would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on a substantial part of their business.* Also, the ordinance appears to prohibit individuals from transporting guns to and from such places of business for the purpose of self-defense. Several of these activities are constitutionally protected, Colo. Const. art. II, § 13. Depending upon the circumstances, all of these activities and others may be entirely free of any criminal culpability yet the ordinance in question effectively includes them within its prohibitions and is therefore invalid.[337]

The Colorado Court explained why such restrictions on firearms are not proper under the police power as follows:

> A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms . . . . Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[338]

Thus, the Colorado Supreme Court explicitly stated that commercial dealings in firearms could not be criminalized, and that only the least restrictive method of regulation is permissible in relation to a fundamental right. Under these principles, a prohibition on purchase of more than one gun each month would be unconstituitonal.

The West Virginia Court noted that the right to bear arms is not "absolute" and may be regulated.[339] "We stress, however, that the le-

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keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons."

337. *City of Lakewood*, 501 P.2d at 745 (emphasis added).

338. *Id.*

339. 377 S.E.2d at 145.

gitimate governmental purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved."[340]

The legislature responded to the constitutional mandate by revising the firearms statutes. It first declared:

> The Legislature finds that the overwhelming support of the citizens of West Virginia for article three, section twenty-two of the Constitution of this State, commonly known as the "Right to Keep and Bear Arms Amendment", combined with the obligation of the state to reasonably regulate the right of persons to keep and bear arms for self-defense requires the reenactment of this article.[341]

The open carrying of firearms was no longer a crime, while carrying a concealed weapon without a license, with exceptions for persons on their own premises and elsewhere, was a misdemeanor.[342]

The legislature enacted a provision for a state license to carry a concealed deadly weapon to any citizen meeting specified requirements, including "that the applicant desires to carry such deadly weapon for a defense of self, family, home or state, or other lawful purpose . . . ."[343] In *Application of Metheney*,[344] the West Virginia Supreme Court held that this provision "in no way infringes upon a citizen's right to keep and bear arms. It merely regulates the manner in which a citizen may do so . . . ."[345] The same year, in *State v. Daniel*,[346] the court found that the prohibition on brandishing or otherwise misusing a firearm does not violate the guarantee.[347]

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340. *Id.* at 146 (citing *City of Lakewood*, 501 P.2d 744). The court in *Buckner* repeated the proposition and citation once more. *Id.* at 149.

341. W. VA. CODE § 61-7-1 (1992).

342. W. VA. CODE § 61-7-3 (1992).

343. W. VA. CODE § 61-7-4 (1992).

344. 391 S.E.2d 635 (W. Va. 1990).

345. *Id.* at 638.

346. 391 S.E.2d 90, 96-97 (W. Va. 1990).

347. *See* United States v. Stump, 784 F. Supp. 326, 330 (N.D.W. Va. 1992) (regarding felon whose civil rights were restored).

## VI. THE JURISPRUDENCE OF RATIONING A CONSTITUTIONAL RIGHT

Does a limit on the purchase of handguns to one each month violate the right to keep arms? An obvious penumbra of that right is the right to obtain them, and as Tennessee's high court noted when it invalidated a prohibition on carrying a pistol, "*the right to keep arms necessarily involves the right to purchase them*, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair."[348]

This statement was quoted in the explanation of the West Virginia guarantee when the latter was debated in the public forum, and should be persuasive in construing any of the state arms guarantees or the federal Second Amendment. Moreover, since the framers of the Fourteenth Amendment sought to eradicate restrictions on the purchase and keeping of firearms by freedmen, a court could find state purchase prohibitions to be violative of the Fourteenth Amendment.

Upholding a substantial jury verdict and attorneys' fees under the federal Civil Rights Act, 42 U.S.C. § 1983, for violation of the right to bear handguns under a state constitution, Indiana's Supreme Court held:

> Article 1, § 32 of the Indiana Constitution is entitled "Bearing arms" and provides as follows:
> The people shall have a right to bear arms, for the defense of themselves and the State.
> . . . The right of Indiana citizens to bear arms for their own self-defense and for the defense of the state is an interest in both liberty and property which is protected by the Fourteenth Amendment to the Federal Constitution . . . . This interest is one of liberty to the extent that it enables law-abiding citizens to be free from the threat and danger of violent crime. There is also a property interest at stake, for example, in protecting one's valuables when transporting them, as in the case of a businessman who brings a sum of cash to deposit in his bank across town.[349]

348. Andrews v. State, 50 Tenn. (3 Heisk.) 165, 178 (1871) (emphasis added).
349. Kellogg v. City of Gary, 562 N.E.2d 685, 694 (Ind. 1990).

At least two courts have, based on state arms guarantees, rejected absolute product liability claims against handgun manufacturers, indicating that sale and purchase of handguns are constitutionally protected. The United States Court of Appeals for the Seventh Circuit held:

> We are also concerned that plaintiffs' argument would thwart Illinois' policy regarding possession of handguns. The right of private citizens in Illinois to bear arms is protected, at least against all restrictions except those imposed by the police power, by the Illinois Constitution.[350]

Similarly, a Georgia appellate court found that the federal Second Amendment and that state's arms guarantee protected the right to market handguns to the general public, and that such marketing, in and of itself, could not give rise to tort liability:

> Appellant first contends that "the trial court erred in holding as a matter of law that handguns are exempt from Georgia's product liability law because the lack of safety connected with such weapons raises a political, nonjustifiable question." Her last contention is that the trial court erroneously held as a matter of law that the R.G. revolver is not unreasonably dangerous when marketed to the general public. We disagree on both points. The Second Amendment to the U.S. Constitution guarantees the right of the people to keep and bear arms, as does Art. I, sec. I, Par. VIII of the Georgia Constitution 1983, which states that that right "shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne."[351]

Proponents of the criminalization of the purchase of more than one handgun each month argue that citizens do not "need" to purchase more. An Indiana appellate court wrote about state determinations that persons do not "need" to exercise the right to keep and bear handguns as follows:

> We think it clear that our constitution provides our citizenry the right to bear arms for their self defense . . . .
>
> In Schubert's case it is clear from the record that the superintendent decided the application on the basis that the statutory reference to "a prop-

350. Martin v. Harrington, 743 F.2d 1200, 1204 (7th Cir. 1984).

351. Rhodes v. R.G. Indus., 325 S.E.2d 465, 466-67 (Ga. App. Ct. 1985).

> er reason" vested in him the power and duty to subjectively evaluate an assignment of "self-defense" as a reason for desiring a license and the ability to grant or deny the license upon the basis of whether the applicant "needed" to defend himself.
>
> Such an approach contravenes the essential nature of the constitutional guarantee. It would supplant a right with a mere administrative privilege which might be withheld simply on the basis that such matters as the use of firearms are better left to the organized military and police forces even where defense of the individual citizen is involved.[352]

The court went on to find the ordinary citizen's interest in self-defense to be a proper reason for bearing arms, and rejected the following "Catch-22":

> Any ordinary citizen applying for a license could be "factually" denied a permit because no one had actually threatened him. Thus, he would have no "need" to defend himself. Similarly, if threatened, the permit could be denied on the basis that the official police agencies were capable of handling the matter so that he had no "need" to defend himself.[353]

The above is particularly relevant because no duty exists by the police to protect specific persons. "There simply is no constitutional right to be protected by the state against criminals or madmen."[354] Restrictions on the right of the people to keep and bear arms must be tailored to have impact only on violent criminals and not to affect law-abiding citizens.

No principled jurisprudence can justify the criminalization of the exercise of a constitutional right to once per month or to any other arbitrarily-selected period. As the institution against which a bill of rights protects individuals, government cannot determine that the individual does not "need" to exercise a right other than when the government allows. The power which decides that a person does not need to purchase more than one handgun each month might as well subjectively determine that a person does not need to purchase more than one handgun in a year or in a lifetime. Indeed, if the power to decide when a person "needs" to exercise a constitutional right resides in the

352. Schubert v. De Bard, 398 N.E.2d 1339, 1341 (Ind. App. 1980).
353. *Id.* at 1341 n.5.
354. Fox v. Custis, 712 F.2d 84, 88 (4th Cir. 1983).

state, the state may determine that one has no need to exercise the right at all—ever.

The essence of a bill of rights is that the issue of whether a person "needs" to do a protected act is removed from legislative proscription. Elevation of an activity to the status of a constitutional right removes that activity from subjecting a person to imprisonment or other deprivations of life, liberty, or property. While the criminal law naturally addresses the abuse of a right, something which is a fundamental right once a month must still be a fundamental right every day of the month.