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ARTICLE

THE RIGHT TO BEAR ARMS IN THE VIRGINIA CONSTITUTION AND THE SECOND AMENDMENT: HISTORICAL DEVELOPMENT AND PRECEDENT IN VIRGINIA AND THE FOURTH CIRCUIT

Stephen P. Halbrook[†]

I. INTRODUCTION

The right to keep and bear arms in Virginia is guaranteed by both the state and federal constitutions. Article I, section 13, of the Virginia Constitution provides in part: "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 . . . ."[1] The first clause dates to 1776, while the second clause was not adopted until 1971. The Second Amendment to the United States Constitution was adopted in 1791 and 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."[2]

The right to keep and bear arms has trod a rocky road in Virginia. While antebellum statutes only restricted the carrying of concealed weapons, the slave codes prohibited possession of firearms by African Americans. The latter continued to be enforced at the beginning of Reconstruction, and a pistol registration scheme adopted during the Jim Crow era had similar aims. Formal recognition of the right by jurists went unquestioned from the state's beginning through the adoption of the 1971 amendment, after which a point came when a dissident view emerged that the only "right" was that

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1. VA. CONST. art. I, § 13.

2. U.S. CONST. amend. II.

of a state's "collective" power to maintain the National Guard. That view came to be rejected by the Virginia Supreme Court.

The federal courts paid little attention to the Second Amendment until strong federal restrictions were adopted in the Gun Control Act of 1968. The United States Court of Appeals for the Fourth Circuit took the "collective" power view that no individual right existed, until the United States Supreme Court held in *District of Columbia v. Heller* (2008)[3] that the Amendment guarantees a fundamental, personal right to possess and carry firearms. Similarly, the Fourth Circuit opined that the Second Amendment does not apply to the states through the Fourteenth Amendment, until that view was overturned by the Supreme Court in *McDonald v. Chicago, Ill.* (2010).[4] The Fourth Circuit since then has read these precedents very narrowly.

This Article traces the above developments. It suggests that Virginia courts have paid little attention to the right, likely because it has not been the subject of stringent restrictions under state law. The Fourth Circuit has not had occasion to opine much on the state laws within its jurisdiction with the exception of those of Maryland, which are considerably more restrictive than the laws of Virginia, West Virginia, North Carolina, and South Carolina. As analyzed below, the Fourth Circuit has deferentially upheld federal restrictions together with Maryland's broad prohibitions, which were ratcheted up in 2013. Thus far, the Fourth Circuit has interpreted the Second Amendment narrowly.

II. THE RIGHT TO BEAR ARMS IN VIRGINIA

A. *The Founding*

The Virginia Declaration of Rights of 1776, authored by George Mason, did not include a specific clause recognizing a right to bear arms, but that right was implicit in 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; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military

3. District of Columbia v. Heller, 554 U.S. 570 (2008).

4. McDonald v. City of Chicago, Ill., 130 S. Ct. 3020 (2010).

> should be under strict subordination to, and governed by, the civil power.[5]

Thomas Jefferson drafted a bill of rights which explicitly stated: "No freeman shall ever be debarred the use of arms.... Printing presses shall be free ...."[6] While that draft was not proposed to the convention, no one questioned such rights during this period.[7]

That was exemplified when the federal Constitution was proposed in 1787 without a bill of rights. In *The Federalist* No. 46, James Madison contended that a potential federal tyranny "would be opposed [by] a militia amounting to near half a million of citizens with arms in their hands."[8] Alluding to "the advantage of being armed, which the Americans possess over the people of almost every other nation," 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."[9]

In the Virginia convention that ratified the United States Constitution, Patrick Henry argued that "the great object is, that every man be armed."[10] George Mason warned against "disarm[ing] the people; that it was the best and most effectual way to enslave them."[11] A compromise was reached to ratify the Constitution and recommend a bill of rights asserting "the essential and unalienable rights of the people,"[12] including: "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 ...."[13] The Bill of Rights would be ratified in 1791 with the familiar language of the Second Amendment.

5. VIRGINIA DECLARATION OF RIGHTS, art. XIII (1776).

6. 1 THE PAPERS OF THOMAS JEFFERSON 344 (Boyd ed., 1950).

7. *See* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT 129–33 (2008).

8. THE FEDERALIST NO. 46, at 90 (James Madison) (Hein ed., 1788).

9. *Id.* 90–91.

10. 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 386 (1836).

11. *Id.* at 380.

12. *Id.* at 657.

13. *Id.* at 659. For a comprehensive analysis of the Virginia convention, see HALBROOK, *supra* note 7, at 216–33.

B. *The Antebellum Period*

Virginia jurist St. George Tucker, known as "The American Blackstone," wrote in the first commentaries on the United States Constitution in 1803 the following about 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.[14]

Bearing arms was not only a right, it was a duty. Reflecting state laws, the federal Militia Act of 1792 required every "free able bodied white male citizen" aged 18 through 45 to "provide himself with a good musket or firelock," bayonet, and ammunition.[15] As Jefferson would write, most state constitutions provided "that all power is inherent in the people; . . . that it is their right and duty to be at all times armed; that they are entitled to freedom of person, freedom of religion, freedom of property, and freedom of the press."[16]

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14. 1 WILLIAM BLACKSTONE, COMMENTARIES Appendix 300 (St. George Tucker ed., 1803). *See also* Stephen P. Halbrook, *St. George Tucker's Second Amendment: Deconstructing "The True Palladium of Liberty,"* 3 TENN. J. OF L. & POL'Y, No. 2, 120 (2007).

15. Chap. 33, 1 *Statutes at Large of the United States* 271–72.

16. Letter from Thomas Jefferson to Major John Cartwright (June 5, 1824), *in* WRITINGS, at 1491–92 (Merrill D. Peterson ed., 1984).

By contrast, Virginia's 18th century slave codes provided that "[n]o negro or mulatto shall keep or carry any gun, powder, shot, club, or other weapon whatever" under penalty of 39 lashes, but "every free negro or mulatto, being a housekeeper, may be permitted to keep one gun, powder and shot," and a bond or free negro may "keep and use" a gun by license at frontier plantations.[17] These provisions remained in Virginia's 1819 Code, which also provided: "No free negro or mulatto, shall be suffered to keep or carry any fire-lock 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 . . . ."[18]

In 1838, Virginia enacted its first concealed-weapon restriction: "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."[19] Law enforcement officers were not exempt—the Virginia high court affirmed the conviction of a constable who "drew out a pistol and dirk" against one merely to levy an execution.[20]

C. *From Reconstruction to the Jim Crow Era*

The Fourteenth Amendment to the United States Constitution was intended and understood to protect fundamental Bill of Rights guarantees, including the individual right to keep and bear arms.[21] As in other Southern States, during Reconstruction, Virginia officials enforced slave code provisions prohibiting African Americans from carrying firearms without a license. For instance, a witness before a Congressional committee that would draft the Fourteenth Amendment testified that "attempts were made in that city [Alexandria] to enforce the old law against them [blacks] 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."[22] A U.S. military

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17. Acts of 1748, 6 Hening, *Statutes at Large* 109–10; 1792, 1 *Statutes at Large of Virginia, 1792–1806*, 123 (Samuel Shepherd ed., 1835).

18. 1 CODE OF VA. ch. 111, § 8 at 423 (1819).

19. CODE OF VA, tit. 54 ch. 196, § 7 (1849).

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

21. McDonald v. City of Chicago, Ill., 130 S. Ct. 3020, 3038–42 (2010). *See generally* STEPHEN P. HALBROOK, SECURING CIVIL RIGHTS: FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS (2010).

22. Report of the Joint Committee on Reconstruction, H.R. REP. NO. 30, pt. 2, at 21 (1866).

officer who assisted the Freedmen's Bureau and protected the rights of freed slaves testified that State officials "have entreated me to take the arms of the blacks away from them," which he refused to do.[23] The Freedmen's Bureau Act recognized the right "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 . . . ."[24]

As from the founding, at the turn of the century the right to bear arms continued to be interpreted as a fundamental right necessary for a free society. John Randolph Tucker, who served as Attorney General of Virginia, Representative to Congress, and president of the American Bar Association,[25] wrote of the Second Amendment: "This prohibition indicates that the security of liberty against the tyrannical 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."[26]

In a 1909 decision that came to be known as the "saddlebags defense," Virginia's high court ruled that a hunter who placed his revolver in latched saddlebags was not carrying it "about his person" since it was not readily accessible for immediate use.[27] 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 . . . . 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

23. *Id.* at 30.

24. *McDonald*, 130 S. Ct. at 3040 (quoting FREEDMEN'S BUREAU ACT § 14, 14 STATUTES AT LARGE 173, 176–77 (1866)).

25. *Biographical Directory of the United States Congress 1958* (1989).

26. 2 JOHN RANDOLPH TUCKER, CONSTITUTION OF THE UNITED STATES 671 (1899).

27. Sutherland v. Commonwealth, 65 S.E. 15 (Va. 1909). The Record filed with the Petition at page ten notes that the defendant had been chasing a squirrel through some brush with his revolver. *Sutherland* was overruled by Schaaf v. Commonwealth, 258 S.E.2d 574 (Va. 1979).

> 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.[28]

Registration and an annual tax of one dollar per pistol or revolver were enacted in 1926 in Virginia.[29] The expense and paperwork, similar to the poll tax for voting, would have made it difficult or impossible for the poor, including African Americans, to obtain or possess handguns. Those found in possession of unregistered handguns could be prosecuted and the handguns confiscated. A person convicted of not paying the tax "shall be fined not less than twenty-five nor more than fifty dollars, or sentenced to the State convict road force for not less than thirty or not more than sixty days, or both, in the discretion of the tribunal trying the case."[30]

Since poor persons convicted of possession of an untaxed handgun could not pay any such fine, they would likely have been sentenced to the convict road force, about which it was written:

> Here in Virginia, practically all of our common labor is performed by negroes. Five-sixths of our criminals are negroes and about three-fourths of the convict road force are negroes. About the only difference between the free negro laborer of the ordinary variety and the convict negro laborer is that the latter got caught.[31]

Disregarding the racist innuendo, African Americans who would not or could not register and pay the tax for exercise of the right to keep and bear arms—if they would even have been allowed to do so—were subject to being incarcerated and forced to work on roads for one to two months. The scheme seems reminiscent of slavery or involuntary servitude. The law also disarmed law-abiding African Americans who were the main victims of crime in their community.

The Virginia handgun tax would be declared unconstitutional because it imposed the same tax on all pistols regardless of value—"the pistol of little value and the revolver of the rich studded with diamonds are liable to the

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28. Editorial, *Carrying Concealed Weapons*, 15 VA. L. REG. 391–92 (1909).

29. 1926 VA. ACTS 285–87.

30. *Id.* at 286. The State convict road force was created by 1906 VA. ACTS 74.

31. ROBERT W. WITHERS, ROAD BUILDING BY CONVICTS, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION AT THE THIRTY-FIFTH ANNUAL SESSION HELD IN RICHMOND, VA., MAY 6TH TO 13TH 1908, 209 (Alexander Johnson ed., 1908).

same direct tax of one dollar"[32]—and was later repealed.[33] The right to keep and bear arms was not mentioned in the opinion.

The annual handgun tax of $1.00 had a ready precedent in Virginia's annual poll tax of $1.50,[34] payment of which was required to vote.[35] As the United States Supreme Court would hold: "The Virginia poll tax was born of a desire to disenfranchise the Negro."[36] The sponsor of the poll tax provision at the Virginia constitutional convention of 1902 explained:

> Discrimination! Why, that is precisely what we propose; that, exactly, is what this Convention was elected for—to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate.[37]

It was not until ratification of the Twenty-fourth Amendment in 1964 that Virginia's annual poll tax of $1.50 would be invalidated.[38]

D. *Adoption of the Arms Guarantee*

The political assassinations and urban unrest of the 1960's 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, 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

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32. Commonwealth v. O'Neal, 13 Va. L. Reg., N.S. 746 (Hustings Ct.—Roanoke 1928)).

33. 1936 VA. ACTS 486.

34. Bowen v. Commonwealth, 101 S.E. 232, 233 (1919).

35. Smith v. Bell, 75 S.E. 125, 125 (1912) (citing VA. CONST. art. II, § 21).

36. Harman v. Forssenius, 380 U.S. 528, 543 (1965).

37. *Id.* (quoting Statement of Carter Glass, *in* 2 VIRGINIA CONSTITUTIONAL CONVENTION (Proceedings & Debates, 1901–1902) at 3076–77).

38. *Id.* at 530–31.

> 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; . . .
>
> . . . .
>
> Resolved . . . , 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 . . . .[39]

In 1969, the Virginia Commission on Constitutional Revision solicited public views but rejected a proposal from George S. Knight of Alexandria, Virginia, "for a constitutional guarantee of the right to bear arms."[40] However, in 1969–1970, the Virginia General Assembly debated and proposed such an amendment. Recalling the above 1964 resolution, Senator George F. Barnes began by noting that "I dare say that not a person on this

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39. JOURNAL OF THE SENATE (VA.) 250–51, 472 (1964).

40. THE CONSTITUTION OF VIRGINIA: REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 98, 507 (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 lawabiding persons, and failure to issue permits to lawabiding persons to carry firearms not open to common observation for personal protection.

floor at the time we opened this session realized that these words were not in our state Constitution."[41] Senator M. M. Long explained that the proposal 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 . . . ."[42] 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.[43]

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.[44]

E. *Commentaries and Attorney General Opinions*

Virginia's arms guarantee lay dormant in the courts for the next forty years. Professor A.E. Dick Howard opined that it "guarantees the right of all citizens to serve in the armed militia of the Commonwealth and to bear arms in defense of their way of life," and that "it no more embodies an individual right to use or own weapons than does the Second Amendment."[45] He quoted debates in the General Assembly in which members opined that the Virginia guarantee would protect the same rights as the Second Amendment but disregarded that the same members had in mind an individual right for both. Further, no supporter said anything about a "right" to serve in the militia. Militia service is a duty imposed by law, and no person has a constitutional "right" actually "to serve" in the militia.

In a 1993 opinion, Attorney General Mary Sue Terry repeated Prof. Howard's interpretation, concluding:

> The "right to bear arms" phrase of Article I, § 13 of the Constitution of Virginia is synonymous with the Second

41. PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION, EXTRA SESSION 1969/1970, 391 (1970).

42. *Id.* at 393.

43. *Id.* at 393–94.

44. *Constitution of Viginia, Effective July 1, 1971, with Amendments – January 1, 2103*, at Forward III & n.4 (2013), *available at* http://constitution.legis.virginia.gov/Constitution-01-13.pdf (last visited Feb. 16, 2014).

45. 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 266, 277 (1974).

> Amendment to the United States Constitution. Under long-standing federal case law, the Second Amendment confers 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 thirty-day period would not violate either the Second Amendment or Article I, § 13.[46]

A prohibition on purchasing more than one handgun in thirty days passed, although it was later repealed.[47] Since it is now settled that both the Second Amendment and Article I, § 13, protect an individual right, not a "collective right," query whether the prohibition was constitutional.[48] Such a provision would never be countenanced regarding rights under other constitutional guarantees, such as the First Amendment. Imagine a law prohibiting the purchase of more than one book per month.

All subsequent Attorney General opinions interpreted the Virginia guarantee and the Second Amendment to protect individual rights. In 2006, Attorney General Judith W. Jagdmann opined that, while firearms may be restricted on a university campus, rights under these two guarantees "may not be summarily dismissed for transient reasons," and "[t]he universal prohibition of firearms by properly permitted persons other than students, faculty, administration, or employees, . . . is not allowed under law."[49]

Attorney General opinions thereafter have had the benefit of the 2008 United States Supreme Court ruling in *District of Columbia v. Heller* that the Second Amendment guarantees individual rights,[50] and in its 2010 ruling in *McDonald v. Chicago, Ill.* that the Second Amendment applies to the States through the Fourteenth Amendment.[51] In 2010, Attorney General Kenneth T. Cuccinelli, II opined that the right is not unlimited and that the Constitution restrains the government and not private actors, and thus "a private entity leasing government property for an event generally may

46. Opinion from Att'y Gen. Mary Sue Terry to Hon. S. Vance Wilkins, Jr., 1993 Va. Op. Att'y. Gen. 13, 1993 WL 355654, *3.

47. VA. CODE § 18.2-308.2:2(P), repealed by Acts 2012, cc. 37, 257.

48. *See* District of Columbia v. Heller, 554 U.S. 570, 624, 627 (2008).

49. Opinion from Att'y Gen. Judith W. Jagdmann to Hon. R. Creigh Deeds (No. 05-078), 2006 WL 304006, *2.

50. *Heller*, 554 U.S. at 624, 627.

51. McDonald v. City of Chicago, Ill., 130 S. Ct. 3020 (2010).

regulate or prohibit the carrying or possession of firearms on that property for such event."[52]

And in 2011, Cuccinelli opined regarding the prohibition on carrying a weapon to a place of worship "without good and sufficient reason," that—given the constitutional right to bear arms for self-defense—"carrying a weapon for personal protection constitutes a good and sufficient reason under the statute . . . ."[53] However, "the church can ban guns on its property if it so chooses," because the guarantee restrains government, not private parties who have property rights.[54]

In *DiGiacinto*, the Supreme Court of Virginia observed that, in *Heller* and *McDonald*, the United States Supreme Court held "that the right to carry a firearm is not unlimited,"[55] and indeed *Heller* specifically stated that "nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . ."[56] It is noteworthy that such exceptions confirm the rule that there is indeed, in the above words of *DiGiacinto*, a "right to carry a firearm." But "[t]he fact that GMU [George Mason University] is a school and that its buildings are owned by the government indicates that GMU is a 'sensitive place.'"[57]

Following the established premise that regulation of fundamental constitutional rights must be narrowly tailored, *DiGiacinto* further explained:

> The regulation does not impose a total ban of weapons on campus. Rather, the regulation is tailored, restricting weapons only in those places where people congregate and are most vulnerable—inside campus buildings and at campus events. Individuals may still carry or possess weapons on the open grounds of GMU, and in other places on campus not enumerated in the regulation. We hold that GMU is a sensitive

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52. Opinion of Att'y Gen. Kenneth T. Cuccinelli, II to Hon. Thomas A. "Tag" Greason (No. 10-009), 2010 WL 1129930.

53. Opinion of Att'y Gen. Kenneth T. Cuccinelli, II to Hon. Mark L. Cole (No. 11-043), 2011 WL 4429173, *1.

54. *Id.*

55. DiGiacinto v. Rector & Visitors of George Mason University, 704 S.E.2d 365, 369 (2011).

56. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)); *accord McDonald*, 130 S. Ct. at 3047.

57. *DiGiacinto*, 704 S.E.2d at 370.

> place and that [the regulation] is constitutional and does not violate Article I, § 13 of the Constitution of Virginia or the Second Amendment of the federal Constitution.[58]

DiGiacinto has been applied in two Attorney General opinions. In contrast to the regulation at GMU prohibiting firearms at specified locations, the University of Virginia (UVA) had a policy of forbidding firearms on its entire grounds. Attorney General Cuccinelli opined that UVA's policy may be applied against a person openly carrying a firearm, but it may not be applied against a person with a concealed weapon permit, which authorizes the carrying of a handgun state-wide unless "otherwise prohibited by law."[59] Unlike a regulation, a policy fails to have the status of something "prohibited by law," and moreover the UVA policy was broader than the regulation in *DiGiacinto*:

> For example, the [UVA] Medical Center policy includes within the ban a "controlled outdoor area" and both policies include virtually all University buildings and property. The Court in *DiGiacinto* noted as a consideration in favor of the constitutionality of George Mason University's regulation the fact that the regulation was "tailored" and allowed individuals to "carry or possess weapons on the open grounds of GMU, and in other places on campus not enumerated in the regulation." Bans that are broader than the one expressly approved by the Supreme Court of Virginia in *DiGiacinto*, while likely facially constitutional, are vulnerable to "as applied" challenges with respect to particular places.[60]

The above opined on the legality, not the wisdom, of restricting firearm possession on campus, but the opinion remarked: "It certainly can be argued that such policies are ineffectual because persons who wish to perpetrate violence will ignore them, and that the net effect of such policies is to leave defenseless the law-abiding citizens who follow these policies."[61] That, of course, was the bitter lesson of the 2007 Virginia Tech massacre.

DiGiacinto was also applied in an opinion agreeing with the validity of a Hanover County ordinance prohibiting discharge of a firearm in or along a

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58. *Id.*

59. Opinion of Att'y Gen. Kenneth T. Cuccinelli, II to Hon. Emmett W. Hanger, Jr. (No. 11-078), 2011 WL 4429187, *4 (citing VA. CODE § 18.2-308(O)).

60. *Id.* at *3.

61. *Id.* at *4.

public road or within 100 yards thereof, or within 100 yards of a building occupied or used as a dwelling or place where the public gathers, with exceptions for one's own dwelling or "in the lawful defense of his own person or property or that of a member of his family."[62] Attorney General Cuccinelli reasoned that the ordinance does not violate the right to bear arms because:

> First, it specifically exempts from its scope actions taken in defense of self, others or property. Therefore, it does not implicate one of the core concerns of the right to bear arms. Second, it does not preclude anyone from carrying a firearm. Instead, it simply prohibits certain *uses* of a firearm. Moreover, the ordinance serves a proper purpose, to protect the public safety, by prohibiting firearm discharges on roads or near occupied buildings.[63]

While the right to bear arms has not been the subject of a further holding by the Virginia Supreme Court, that right was mentioned in a case regarding when a circuit court evaluates whether a person meets the requirements for involuntary commitment to a mental institution.[64] The answer is the date of the *de novo* hearing in the circuit court, not the date of admission or the date of the lower court's hearing.[65] In a concurring opinion, Justice Mims observed that the case was not moot based on the collateral consequences for which relief was sought, which were "real, and potentially of constitutional magnitude."[66] Those collateral consequences specifically involved the prohibition on possession of a firearm by a person involuntarily admitted.[67] Noting that "the General Assembly shows great respect for the constitutional right to keep and bear arms,"[68] he concluded that part of the opinion: "Due process requires that there be an avenue for constitutionally cognizable collateral consequences to be addressed."[69]

62. Opinion of Att'y Gen. Kenneth T. Cuccinelli, II to Hon. Christopher K. Peace (No. 11-065), 2011 WL 2583851, *2.

63. *Id.* at *3.

64. Paugh v. Henrico Area Mental Health & Developmental Servs., 743 S.E.2d 277 (2013).

65. *Id.* at 278.

66. *Id.* at 280 (Mims, J., concurring).

67. *Id.* at 281 n.2 (citing VA. CODE § 18.2–308.1:3(A)).

68. *Id.*

69. *Id.* at 281.

As noted, the Virginia arms guarantee has been interpreted consistent with the federal Second Amendment as interpreted by the United States Supreme Court in *Heller* and *McDonald*. The following discusses the status of the Second Amendment in the rulings of the United States Court of Appeals for the Fourth Circuit, which includes Virginia within its jurisdiction.

III. THE SECOND AMENDMENT IN THE FOURTH CIRCUIT: FROM A "COLLECTIVE RIGHT" TO NO RIGHT TO "BEAR ARMS"?

A. *The Pre-*Heller/McDonald *Fourth Circuit*

Back in the 1980's, a young man and his girlfriend were driving in Alexandria, Virginia and stopped at a federal enclave along the Potomac River for a stroll.[70] In compliance with Virginia law, the man carried a revolver in plain sight in the truck. A federal park police officer came by, noticed the revolver, and left the immediate area to call backup. The couple returned to the truck and drove away at a normal speed, leaving the federal property.

The officer pursued the truck, turned on his flashing lights, and stopped the couple. Suddenly, two Fairfax County police cars arrived. The man and woman were pulled from the truck, thrown down on their stomachs, and handcuffed behind their backs. Officers pointed pistols and shotguns at their heads. The man was charged with possession of a firearm on park property.

I represented the man in United States District Court in Alexandria. Judge Albert Bryan denied my motion to dismiss under the Second Amendment as "frivolous," a not unexpected decision given Fourth Circuit precedent. In a 1973 decision, the Fourth Circuit had written off the Second Amendment in one sentence: "The courts have consistently held that the Second Amendment only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well regulated militia.'"[71] The court cited the 1939 Supreme Court decision in *United States v. Miller*, but *Miller* made no reference to a "collective" right, and—the Supreme Court wrote in *Heller*—"positively

70. Portions of sections III.A and III.C are adapted from Stephen P. Halbrook, *No Right to 'Bear Arms'? A Critical Analysis of* United States v. Masciandaro, 1 WAKE FOREST L. REV. ONLINE 94 (2011).

71. United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974) (quoting United States v. Miller, 307 U.S. 174, 178 (1939)).

suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that 'have some reasonable relationship to the preservation or efficiency of a well regulated militia')."[72] But in my case, the Fourth Amendment was alive and well—Judge Bryan ruled the arrest and seizure to be illegal because the officer was outside his jurisdiction when he arrested the defendant (who was not fleeing) and seized the defendant's firearm.

The above "collective right" theory was repeated in a 1995 Fourth Circuit opinion upholding denial of a permit to carry a handgun under Maryland law.[73] Noting that the applicant argued "that she has an individual federal constitutional right to 'keep and bear' a handgun, and Maryland may not infringe upon this right," the court responded: "She is wrong on both counts. The Second Amendment does not apply to the states.[74] ... Moreover, even as against federal regulation, the amendment does not confer an absolute individual right to bear any type of firearm."[75] Finding that the applicant had "not identified how her possession of a handgun will preserve or insure the effectiveness of the militia," the court upheld the denial.[76]

B. Heller *and* McDonald

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment "right of the people to keep and bear arms" really does refer to the actual people and really does recognize their right to possess and carry firearms for self defense, militia use, and hunting.[77] That was followed by *McDonald v. Chicago, Ill.*, which extended the right through the Fourteenth Amendment to states and localities.[78] But since the specific laws that *Heller* and *McDonald* invalidated were bans on possession of handguns even in the

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72. District of Columbia v. Heller, 554 U.S. 570, 622 (2008).

73. Love v. Pepersack, 47 F.3d 120 (1995).

74. *Id.* at 123. The court cited two inapposite precedents for that proposition. *United States v. Cruikshank*, 92 U.S. 542, 553 (1876), only held that the Second Amendment does not protect persons from "violation by their fellow-citizens"—no state action was involved. *Presser v. Illinois*, 116 U.S. 252, 265 (1886), held that the Second Amendment does not apply directly to the states but did not consider whether it so applies through the Fourteenth Amendment.

75. *Love*, 47 F.3d at 123–24.

76. *Id.* at 124.

77. *Heller*, 554 U.S. at 599.

78. McDonald v. City of Chicago, 130 S. Ct. 3020, 3051 (2010).

home, some lower courts, including the Fourth Circuit, have been reluctant to recognize the Amendment's protection of the right to "bear arms," which the text does not limit to the home.

C. Masciandaro

The Fourth Circuit's decision in *United States v. Masciandaro*[79] exemplifies this reluctance. While the panel was divided on whether a right to bear arms outside the home exists, it was unanimous in upholding the conviction of a man for possessing a loaded firearm in one of the same federal enclaves along the Potomac River as in my case in the 1980's.[80] The *déjà vu* facts were just as innocuous: a man and his girlfriend were dozing in his automobile at a recreational area known as Daingerfield Island; a park police officer noticed that the vehicle was not parked exactly right by the painted lines, asked if any weapons were in the vehicle, was freely told yes, and arrested the man for possession of a loaded firearm.[81]

The decision does not reflect that, as in my case, the officer manhandled the couple and pointed his pistol at their heads for the "crime" of exercising Second Amendment rights. Indeed, by the time the case got to trial, the law had changed to allow carrying loaded firearms in compliance with state law.[82] One wonders what the prosecutor was thinking, other than the proverbial "batting average," when not dismissing the charge for lack of prosecutorial merit.

In *Masciandaro*, Judge Niemeyer wrote the opinion for the court except for the critical Part III.B, which Judge Wilkinson authored and Senior Judge Duffy joined.[83] Judge Wilkinson said that, if the Supreme Court wanted the right to bear arms outside the home to be recognized, it would have to say so more explicitly.[84] Judge Neimeyer said that the right to bear arms exists, but the ban on possession of a loaded firearm was consistent with the Second Amendment, applying an intermediate level of scrutiny.[85]

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79. United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011).

80. *See supra* part III.A.

81. *Masciandaro*, 638 F.3d at 460.

82. *Id.* at 461.

83. *Id.* at 467, 474.

84. *Id.* at 475.

85. *Id.* at 473–74.

D. *A Right to Possess a Loaded Handgun Outside the Home for Self-Defense?*

In his version of Part III.B, Judge Niemeyer would have held that "there is a plausible reading of *Heller* that the Second Amendment provides such a right" to "possess a loaded handgun for self-defense outside the home."[86] Indeed, there is more than a plausible reading of the Second Amendment itself to that effect, in that it provides that "the right of the people to . . . bear Arms, shall not be infringed."[87] When a provision of the Bill of Rights relates to a house, it says so.[88] Nothing in the Amendment's text limits bearing arms to one's house, a place where the right to "keep" arms fits more appropriately.

This plain textual reference prohibiting infringement on the right to "bear arms" should be respected given that "general statements of the law are not inherently incapable of giving fair and clear warning . . . ."[89] This is because "broad constitutional requirements [may be] 'made specific' by the text or settled interpretations," not just by the latter.[90] To disregard explicit constitutional text based on supposedly insufficient judicial precedent ignores the primacy of the Constitution and the fundamental rights it protects.[91]

As Judge Niemeyer wrote, *Heller* explicitly stated that bearing arms outside the home could take place for self-defense, militia activity, and hunting, which are not "home-bound" activities.[92] *Heller*'s statement that the need for self defense is "most acute" in the home suggests that it may

86. *Id.* at 467.

87. U.S. CONST. amend. II.

88. *See* U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."); U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

89. United States v. Lanier, 520 U.S. 259, 271 (1997).

90. *Id.* at 267 (citation omitted). As stated in the Fourth Amendment context: "Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid." Groh v. Ramirez, 540 U.S. 551, 563 (2004).

91. "This constitutional protection must not be interpreted in a hostile or niggardly spirit." Ullmann v. United States, 350 U.S. 422, 426 (1956). "To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution." *Id.* at 428–29.

92. United States v. Masciandaro, 638 F.3d 458, 468 (4th Cir. 2011).

also be needed outside the home, albeit perhaps less acutely.[93] The "presumptive validity" of "laws forbidding the carrying of firearms in sensitive places such as *schools and government buildings*" assumes a right to carry firearms in non-sensitive places.[94] As Judge Niemeyer observed:

> What the *Heller* Court describes as the general preexisting right to keep and bear arms for participation in militias, for self-defense, and for hunting is thus not strictly limited to the home environment but extends in some form to wherever those activities or needs occur, just as other Amendments apply generally to protect other individual freedoms.[95]

E. *Strict or Intermediate Scrutiny?*

In the next part of the opinion, joined by the full court, Judge Niemeyer proceeded to consider the government interest in the restriction under the appropriate level of scrutiny. The Fourth Circuit had applied intermediate scrutiny to the prohibition on possession of a firearm by a person convicted of a misdemeanor crime of domestic violence.[96] That prohibition on exercise of Second Amendment rights by a misdemeamt was itself unprecedented—before its passage only felons were denied such rights.

The court "assume[d] that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny."[97] Limiting the core right to the home, as noted, disregards that the Amendment's text refers not just to keeping, but also bearing arms, and does not mention the home. Carrying concealed handguns had become regulated in the nineteenth century, but the decision in that period that supposedly "appl[ied] review of a decidedly less-than-strict nature"[98] actually found the right to carry arms to be broad indeed: "The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 469 (citing United States v. Chester, 628 F.3d 673, 677 (4th Cir. 2010)).

97. *Id.* at 470.

98. *Id.*

merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree . . . ."[99]

The court announced a policy-driven level of scrutiny because: "Were we to require strict scrutiny in circumstances such as those presented here, we would likely foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers' ability to 'prevent[ ] armed mayhem' in public places . . . ."[100] This failed to distinguish the law-abiding populace (the defendant here had a Virginia concealed weapons permit, albeit expired) from those who would actually commit mayhem. Still, the court found "the application of strict scrutiny important to protect the core right of the self-defense of a law-abiding citizen in his home," but then "conclude[d] that a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside of the home."[101] Thus, the prohibition would be upheld if it passed intermediate scrutiny, i.e., "is reasonably adapted to a substantial governmental interest."[102]

Intermediate scrutiny, however, is Justice Breyer's "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'"[103] *Heller* rejected that test: "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."[104]

The place in question—a parking lot—could hardly be classified as "sensitive," so the *Masciandaro* court saw no need to conduct that analysis.[105] Intermediate scrutiny would, as it often does, ensure the government's victory. Naturally, "the government has a substantial interest in providing for the safety of individuals who visit and make use of the national parks . . . ."[106] Also naturally, the prohibition "is reasonably adapted

99. Nunn v. State, 1 Ga. 243, 249 (1846). This quotation was relied on in *District of Columbia v. Heller*, 554 U.S. 570, 612 (2008).

100. *Masciandaro*, 638 F.3d at 471.

101. *Id.*

102. *Id.*

103. *Heller*, 554 U.S. at 634. Justice Breyer cited intermediate scrutiny cases as embodying his proposed "interest balancing" test. *Id.* at 690 (Breyer, J., dissenting) (citing Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 195–96 (1997); Burdick v. Takushi, 504 U.S. 428, 433 (1992)).

104. *Id.* at 634.

105. *Masciandaro*, 638 F.3d at 473.

106. *Id.*

to that substantial governmental interest."[107] That was because loaded firearms are more dangerous than unloaded ones, "as they could fire accidentally or be fired before a potential victim has the opportunity to flee."[108] Ignoring that no record of accidents existed here, that latter comment would give incentive to law-abiding persons to carry arms for self-defense to keep from being victims.

The hypothetical character of these dangers in this interest-balancing analysis ignored that the department's regulation had been repealed and Congress, with President Obama's signature, had changed the law to allow the previously prohibited conduct.[109] In short, the government itself (other than the prosecutor and the court) had concluded that carrying a loaded firearm consistent with state law was not a public danger.

To be sure, unloaded firearms could be carried, and although "the need to load a firearm impinges on the need for armed self-defense," that is okay under intermediate scrutiny.[110] But the Second Amendment states that "the right of the people to ... bear Arms, shall not be infringed." That is a categorical command requiring some exception more than a general reference to public safety.

F. *No Second Amendment Protection Outside the Home?*

Judge Wilkinson,[111] joined by Judge Duffy, wrote the majority's version of Part III.B of the opinion, holding that "it is unnecessary to explore in this case the question of whether and to what extent the Second Amendment right recognized in *Heller* applies outside the home."[112] The court explained:

> On the question of Heller's applicability outside the home environment, we think it prudent to await direction from the Court itself. *See Williams v. State*, [10 A.3d 1167, 1177 (Md.

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107. *Id.*

108. *Id.*

109. 36 C.F.R. § 2.4(h), 16 U.S.C. § 1a–7b(b).

110. *Masciandaro*, 638 F.3d at 474.

111. Judge Wilkinson previously wrote a lengthy article arguing that *Heller* was wrongly decided, commenting: "*Roe* [*v. Wade*, 410 U.S. 113 (1973)] and *Heller* share a significant flaw: both cases found judicially enforceable substantive rights only ambiguously rooted in the Constitution's text." J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 257 (2009). *But see generally*, Nelson Lund & David B. Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson, III*, 25 J.L. & POL. 1 (2009).

112. *Masciandaro*, 638 F.3d at 474.

> 2011)] ("If the Supreme Court, in [*McDonald*'s] dicta, meant its holding to extend beyond home possession, it will need to say so more plainly.").[113]

Yet *McDonald* could not have been plainer when it stated "our central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."[114] As regarding the First Amendment, speech that is most-notably protected does not imply that other speech enjoys no protection.[115]

Masciandaro added that "[t]here may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are"[116]—perhaps non-sensitive places? While resolution of such issues would be helpful to the Supreme Court in deciding cases, the Fourth Circuit decided "to await that guidance from the nation's highest court."[117] The policy-driven reason: "We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights."[118] But that was the very approach rejected by *Heller*:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.[119]

Moreover, disagreeing with the *policy* of the Second Amendment "and thus not enforcing it" disarms potential victims and ignores that criminals do not recognize laws imposing "gun-free zones," or indeed laws against

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113. *Id.* at 475. This author filed a petition for a writ of certiorari in *Williams* case cited by the *Maciandaro* court. *Charles F. Williams v. Maryland*, No. 10-1207, 2011 WL 1296148 (Apr. 5, 2011). The petition was denied. 132 S. Ct. 93 (2011).

114. McDonald v. City of Chicago, Ill., 130 S. Ct. 3020, 3044 (2010).

115. "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." Snyder v. Phelps, 131 S. Ct. 1207, 1211 (2011) (citation omitted) (internal quotation marks omitted).

116. *Masciandaro*, 638 F.3d at 475.

117. *Id.*

118. *Id.*

119. District of Columbia v. Heller, 554 U.S. 570, 634 (2008).

murder. An "unspeakably tragic act of mayhem" occurred at Daingerfield Island in 2005 when a robber strangled a bicyclist to death and assaulted other bicyclists in nearby locations.[120] While not everyone would exercise the right to bear arms and doing so is no guaranteed panacea against attack, armed self-defense can be and is successful in many cases.

G. *Recognition of the Right to Bear Arms in Historical Context*

The state courts were well aware of the meaning of the right to "bear arms" long before the Supreme Court decided *Heller* and *McDonald*. Just to cite a decision rendered in a state in the Fourth Circuit, the North Carolina Supreme Court in 1921 invalidated a ban on carrying handguns outside the home because it is "the ordinary private citizen, whose right to carry arms cannot be infringed upon," and further:

> To him the rifle, the musket, the shotgun, and the pistol are about the only arms which he could be expected to "bear," and his right to do this is that which is guaranteed by the Constitution. To deprive him of bearing any of these arms is to infringe upon the right guaranteed to him by the Constitution.[121]

Both *Heller* and *McDonald* provided a detailed guidebook regarding the text of the Second Amendment, its original understanding, the protection of Second Amendment rights through the Fourteenth Amendment, and general guidance that the lower federal courts could utilize to develop a jurisprudence of Second Amendment rights as a applied to laws not specifically at issue in those precedents. To the extent that the majority in *Masciandaro* eschewed ruling on—indeed, even recognizing—the right to "bear arms" pending further explicit guidance from the Supreme Court, the Fourth Circuit missed an opportunity to contribute to this jurisprudence.

H. *No "Lawful Firearm Exception" to the Fourth Amendment*

Despite its seeming timidity on recognizing Second Amendment rights, the Fourth Circuit has not hesitated to resist watering down Fourth Amendment rights where lawful firearms are concerned. It did so in the context of a no-knock search case and in an open carry case.

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120. *The United States Park Police Advises a Homicide on Daingerfield Island, available at* http://www.nps.gov/uspp/528homdanis&arr.htm (visited June 5, 2011).

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

While he did "not wish to be even minutely responsible for some unspeakably tragic act of mayhem" in recognizing the right to bear arms,[122] Judge Wilkinson took a more real-world approach in his opinion in *Bellotte v. Edwards.*[123] That decision upheld a civil rights action and rejected police officers' claim of qualified immunity for executing a late-night, no-knock entry into a family's home.[124] No indication existed that the occupants "had any tendency to violence in general. . . . To the contrary, the officers admit that holding concealed carry permits showed the Bellottes to be citizens in good standing who passed a background check."[125] The court continued: "It should go without saying that carrying a concealed weapon pursuant to a valid concealed carry permit is a lawful act. The officers admitted at oral argument, moreover, that 'most people in West Virginia have guns.'"[126]

Since its founding, Virginia has not restricted the open carrying of firearms other than in limited circumstances and places. However, as this author knows from representing defendants in such cases, it has not been unusual for police to stop and detain, and sometimes to arrest for disorderly conduct, persons doing so. *United States v. Black,*[127] an opinion by Judge Gregory, held that openly carrying a handgun in a state (North Carolina) where lawful to do so cannot give rise to a *Terry* stop.[128] Speculation that the person might be a felon did not suffice:

> Being a felon in possession of a firearm is not the default status. More importantly, where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention. Permitting such a justification would eviscerate Fourth Amendment protections for lawfully armed individuals in those states.[129]

Nor did presence in a high crime area at night suffice, which would imply "that Fourth Amendment protections are reserved only for a certain race or class of people."[130] The court also rejected the "Rule of Two" under

122. *Masciandaro*, 638 F.3d at 475.
123. Bellotte v. Edwards, 629 F.3d 415 (4th Cir. 2011).
124. *Id.* at 418.
125. *Id.* at 420.
126. *Id.* at 423.
127. United States v. Black, 707 F.3d 531 (4th Cir. 2013).
128. *Id.* at 540; *see generally* Terry v. Ohio. 392 U.S. 1 (1968).
129. *Black*, 707 F.3d at 540.
130. *Id.* at 542.

which the presence of one armed person justifies a *Terry* search of other persons who are nearby:

> Such a rule subjects to seizure or search anyone who actively or passively associates with a gun carrier.... The absurdity of this rule may be gleaned from scenarios where an individual carrying a firearm walks into a monastery subjecting to seizure all of the nuns and priests, or an ice-cream shop subjecting all of the patrons to a seizure. Or could police officers apply this rule to seize all individuals at a shooting range or on a hunting trip?[131]

I. *Maryland May Prohibit the Bearing of Arms*

Unlike Virginia and the other states within the Fourth Circuit, Maryland has no state guarantee of the right to keep and bear arms. As of 1860, Maryland law provided that "[n]o slave shall carry any gun" without a license from his master,[132] and "[n]o free negro shall be suffered to keep or carry a firelock of any kind, any military weapon, or any powder or lead," without a license.[133] These slave code provisions were repealed in 1865 after slavery was abolished.[134]

At the Maryland constitutional convention of 1867, it was proposed that "every citizen has the right to bear arms in defence of himself and the State."[135] After a delegate moved that it should be restricted to "every white citizen," delegate Isaac Jones stated: "Every citizen of the State means every white citizen, and none other."[136] Referring to the Second Amendment, Jones added that "[w]e did not want any such declaration in the State of Maryland."[137] Jones had called emancipation of slaves "a violent, ruthless, outrageous act,"[138] and persuaded the convention to make a demand for compensation to ex-slave owners a part of the Maryland Constitution.[139]

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131. *Id.* at 541.

132. MD. CODE art. 66, § 22 at 454 (1860).

133. *Id.* at 464.

134. 3 SUPPLEMENT TO THE CODE OF MARYLAND 52 (1865).

135. PERLMAN, DEBATES OF THE MARYLAND CONVENTION OF 1867 79, 151 (1867).

136. *Id.* at 150–51.

137. *Id.* at 151.

138. BALTIMORE GAZETTE, May 29, 1867, at 4, col. 3.

139. MD. CONST. art. III, § 37 (1867). On Jones' authorship of the "emancipation compensation" amendment, see MARYLAND JOURNAL (Towson), May 30, 1867, at 2, col. 1; THE SUN (Baltimore), May 30, 1867, at 1, col. 2. Similarly, delegate George Brown, who

After rejection even of a proposal that "the citizen shall not be deprived of the right to keep arms on his premises," the original arms proposal was rejected.[140] It seems apparent that the slaveocracy remained in power in Maryland, and it was not about to recognize a right to keep and bear arms by blacks. Maryland remains one of the few states without an arms guarantee today.

Currently, Maryland makes it a felony to carry a handgun and limits the issuance of permits to carry a handgun to persons who convince the state police that they have a "good and substantial reason" to do so. A federal district court invalidated this law as violative of the Second Amendment right to bear arms. In an opinion by Judge King, *Woollard v. Gallagher*[141] reversed, rejecting what it called the district court's "trailblazing pronouncement that the Second Amendment right to keep and bear arms for the purpose of self-defense extends outside the home, as well as its determination that such right is impermissibly burdened by Maryland's good-and-substantial-reason requirement."[142]

Since the citizens at large are not deemed by the State Police as having any need to bear arms, few permits are issued. To justify this policy, *Woollard* noted that Maryland had the "eighth highest violent crime rate," "the third highest homicide rate," and "the second highest robbery rate of any state in 2009."[143] Those applying for and denied permits, needless to say, saw this as reason enough. The court disagreed, holding: "The State has clearly demonstrated that the good-and-substantial-reason requirement advances the objectives of protecting public safety and preventing crime because it reduces the number of handguns carried in public."[144] The court rejected arguments distinguishing the types of persons who would carry handguns as permit holders and those who would do so for criminal

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condemned the abolition of slavery as "a great wrong," BALTIMORE GAZETTE, May 29, 1867, at 4, col. 3, opposed the arms guarantee because "he did not see how you could disarm any man, drunk or sober, as he could throw himself on his reserved rights." PERLMAN, *supra* note 137, at 151.

140. PERLMAN, *supra* note 137, at 151.

141. Woollard v. Gallagher, 712 F.3d 865, 867 (4th Cir. 2013), *rev'g* 863 F. Supp. 2d 462 (D. Md. 2012).

142. *Id.* Certiorari was denied. 2013 WL 3479421 (2013). The Fourth Circuit followed a Second Circuit decision upholding New York's discretionary licensing scheme. *See* Kachalsky v. Cnty of Westchester, 701 F.3d 81 (2d Cir. 2012).

143. *Woollard*, 712 F.3d at 877.

144. *Id.* at 879.

purposes, and that reducing the number of persons who exercise a constitutional right is impermissible.[145]

Thus, while the "Second Amendment right is burdened by the good-and-substantial-reason requirement, . . . such burden is constitutionally permissible. That is, under the applicable intermediate scrutiny standard, the State has demonstrated that the good-and-substantial-reason requirement is reasonably adapted to Maryland's significant interests in protecting public safety and preventing crime."[146] One might suggest that this would reword the Second Amendment to say that "the right of the people to keep and bear arms, shall not be infringed, if government officials deem any of them as having a good and substantial reason for doing so."

J. *Circuit Split?*

Until recently, Illinois was the only state in the United States that made no provision, not even a discretionary licensing scheme, to carry firearms off of one's premises. The prohibition was invalidated by the Seventh Circuit in *Moore v. Madigan* (2012).[147] Reviewing text, history, and precedent, the court concluded: "To speak of 'bearing' arms within one's home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home."[148]

The above inexorably stems from the fundamental right of self-defense, about which the court wrote:

> [A] Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress.[149]

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145. *Id.* at 879–80.

146. *Id.* at 882.

147. Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012).

148. *Id.* at 936.

149. *Id.* at 937.

Finally, in response to arguments that allowing the bearing of arms will increase crime, *Moore* responded that "the Supreme Court made clear in *Heller* that it wasn't going to make the right to bear arms depend on casualty counts. If the mere possibility that allowing guns to be carried in public would increase the crime or death rates sufficed to justify a ban, *Heller* would have been decided the other way, for that possibility was as great in the District of Columbia as it is in Illinois."[150] As required by that decision, Illinois has passed legislation providing for shall-issue carry licenses.[151]

IV. CONCLUSION

It is yet to be seen whether and when the United States Supreme Court will further resolve the nature of the right to bear arms, specifically the extent to which state laws restricting the carrying of firearms are consistent with the right. However, state laws are judged in the first instance by state constitutions. While the Virginia Supreme Court has said little about the state arms guarantee, that may be in part because Virginia statutes have not been unduly restrictive. Where a constitutional right is respected by the legislature, it would seem to be a virtue that few judicial decisions are necessary.

The historical understanding of the Second Amendment as guaranteeing just what the text specifies—that "the right of the people to keep and bear arms, shall not be infringed"—was called into question by the mid-20th century "collective rights" view. The original understanding that the Fourteenth Amendment incorporated Second Amendment rights and protected them from state infringement also came to be rejected. The Fourth Circuit accepted both of these views in the pre-*Heller/McDonald* period. Specifically, it held that the Second Amendment did not protect individual possession of a firearm and that a state (Maryland) could deny a permit to carry a handgun because the Amendment does not apply to the states.

The Supreme Court in *McDonald* noted "our central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."[152]

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150. *Id.* at 939 (citation omitted).

151. Overturning lower state court decisions, including one rejecting *Moore*, the Illinois Supreme Court agreed with the Seventh Circuit decision. People v. Aguilar, 2 N.E.3d 321 (Ill. 2013).

152. McDonald v. City of Chicago, Ill., 130 S. Ct. 3020, 3044 (2010).

However, the decisions rendered by the Fourth Circuit since those opinions have reached the same results as its pre-*Heller/McDonald* precedents. The Second Amendment fails to protect possession of a firearm outside the home not because it only guarantees a "collective right," but because no right to bear arms outside the home exists. Further, a state (Maryland) may deny permission to carry a handgun outside the home not because the Amendment fails to apply to the states, but because the state may decide that an applicant does not have a "good and substantial reason" for doing so. Do these decisions stem from lack of clarity in the Supreme Court decisions, or are they push-back against those decisions? That will ultimately be for the Supreme Court to decide.