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David I. Caplan

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HANDGUN CONTROL: CONSTITUTIONAL OR UNCONSTITUTIONAL? —A REPLY TO MAYOR JACKSON*

DAVID I. CAPLAN**

In a previous article¹ by Mayor Maynard H. Jackson of Atlanta, Georgia, a number of statements were made which are at best questionable:

A. It is instructive to note that in the “legislative history of the second amendment”² set forth in the article by Mayor Jackson, the statement made on the floor of the first Congress by Elbridge Gerry (which had been reproduced in full in the article by the present author,³ and which had been reproduced in part by other authorities⁴ prior to that article, clearly supporting a private individual right to keep and bear arms) was completely omitted. Yet, Congressman Gerry’s exposition on the right to be vouchsafed by the second amendment is crucial to understanding the underlying assumptions behind just what “right” was being referred to in the then proposed second amendment.⁵

B. The language of the second amendment contains several ideas: (1) the militia, (2) the security of a *free* state, and (3) *the* right of the people to *keep* and bear arms.⁶ From the language and history of the second amendment, it seems beyond question that the Framers of that amendment believed that “the right of the people to keep and bear arms” would, *inter alia*, constitute insurance of the continued existence of a “free State” through the “militia.”⁷ But just what was “the right of the people to keep and bear arms” referred to in this amendment? The answer to this question is the same as for all of the other constitutional rights in the Bill of Rights: the pre-existing common law right.⁸ And just what was this pre-existing common law right? It was simply the right of every citizen to *keep*

*Editor’s Note: This commentary examines an article by Mayor Maynard H. Jackson on handgun control which appeared in a previous issue of the North Carolina Central Law Journal, cited below. Mayor Jackson has been invited to reply to Mr. Caplan’s comments.

**Attorney and Counselor at Law, New York, N.Y., B.S. Worcester Polytechnic Institute; M.S., Ph.D., Purdue Univ.; LL.B. New York Univ.; Member, New York Bar. Dr. Caplan serves as voluntary counsel to the Federation of Greater New York Rifle & Pistol Clubs, Inc.

1. Jackson, *Handgun Control: Constitutional and Critically Needed*, 8 N.C. CENT. L.J. 189 (1977) [hereinafter cited as Jackson].

2. *Id.* at 190 n.5.

3. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31, 38 n.54 (1976) [hereinafter cited as Caplan].

4. See Feller & Gotting, *Second Amendment: A Second Look*, 61 NW. U. L. REV. 46, 61-62 (1966); *Memorandum of Dept. of Justice, Re: Federal Firearms Control and the Second Amendment, Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 90th Cong., 1st Sess., *Anti-Crime Program*, 242, 248 (1967).

5. Caplan, *supra* note 3, at 38-40.

6. “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.” U.S. CONST. amend. II.

7. Caplan, *supra* note 3, at 36-43; see also, *United States v. Miller*, 307 U.S. 174, 179 (1939).

8. See Caplan, *supra* note 3, at 33 n.16; see also, *Ingraham v. Wright*, 430 U.S. 651, 659 (1977) (“traditional common law concepts”).

and bear arms, with the only exception being the ban on “riding or going armed with dangerous or (and?) unusual weapons, . . . terrifying the good people of the land.”⁹ Whatever this ban at common law means regarding the *carrying* of various arms, the private keeping of arms was completely guaranteed by the common law as an “absolute right of individuals.”¹⁰ Indeed, in England it required a statute¹¹ enacted in 1689 to ban any “papist or reputed papist,”¹² who refused to take a loyalty oath against both the doctrine of transubstantiation and the adoration of saints by the church of Rome, from keeping any arms at all except upon a demonstration before the justices of the peace that such arms were “necessary”¹³ for the “defense of his house or person.”¹⁴ This statute was repealed¹⁵ in 1844, thereby extending the then pre-existing 1689 English Bill of Rights provision for the right of the “subjects which are protestant to . . . have arms”¹⁶ to all British citizens, until subsequent British gun control laws in this century.¹⁷ However, whereas in Britain the Parliament may abrogate all rights with no opportunity of the citizen for judicial review,¹⁸ the same is not true in our nation in which the United States Supreme Court has struck down as unconstitutional over a hundred acts of Congress, over 870 state acts, and over 95 municipal ordinances.¹⁹

The limitation of the right of the people to keep arms solely to the organized militia was far from the minds of the Framers of the second amendment, simply because at the time of its framing in 1789, there was no such organized militia. The first federal organized militia statute²⁰ of any kind was not enacted until 1792. To the Framers of the Bill of Rights, the term “militia” meant: “the whole people, except a few public officers.”²¹ As made clear by the U.S. Supreme Court in *United States v. Miller*,²² the well regulated militia comprised all able-bodied citizens, “civilians primarily, soldiers on occasion.”²³ These citizens, ordinarily when called for service, “were expected to appear bearing arms *supplied by*

9. *State v. Huntly*, 25 N.C. (3 Ired.) 418, 420-21 (1843); 4 W. BLACKSTONE, COMMENTARIES *149.

10. 1 W. BLACKSTONE, COMMENTARIES *121, *144.

11. An act for the better securing the government by disarming papists and reputed papists, 1 W. & M. 1, c.15 (1688).

12. *Id.* §1, referring to the earlier oath enacted in 1677, *i.e.*, an act for the more effectual preserving the King's person and government, by disabling papists from setting in either House of Parliament, 30 Car. 2, c.1 (1677).

13. *Id.* 4.

14. *Id.*

15. 7 & 8 Vict., c.102, §1 (1844).

16. 1 W. & M. 2, c.2, §7 (1688): “The subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by [common] law.”

17. Notably, the British Firearms Act, 1937, 1 Edw. 8 & 1 Geo. 6, c.12 (1937), as amended by the Firearms, act, 1967, 16 Eliz. 2, c.80 (1967).

18. 1 W. BLACKSTONE, COMMENTARIES *160.

19. LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 92-82, 92d Cong., 2d Sess., 189 201, 203 (Supp. 1976).

20. Militia Act of 1792, 33, 1 Stat. 271 (1792).

21. 3 R. RUTLAND, THE PAPERS OF GEORGE MASON 1081 (1970).

22. 307 U.S. 174 (1939).

23. *Id.* at 179.

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themselves and of the kind in common use at the time.”²⁴ Accordingly, the second amendment pre-supposes the prior *keeping* of arms by the citizenry at large—that is, those arms whose mere keeping does *not* “naturally cause a terror to the people.”²⁵ This was the substance and objective of the common law: “The wisdom of the common law, which made it a crime to go armed to the terror of the people, inures to our benefit today.”²⁶

C. The theory presented in Mayor Jackson’s article²⁷ that the phrase “for the common defence” was deleted by the first Senate of the United States in 1789 merely for “a technical reason”²⁸ is entirely novel. A more neutral scholar, Julius Goebel, Jr., writing for the Oliver Wendell Holmes devise series, *History of the Supreme Court of the United States*, made the following point: “The Senate refused to limit the right to bear arms by voting down the addition of the words ‘for the common defense.’”²⁹ Accordingly, Mayor Jackson’s theory that the second amendment’s “people,” prior to the first Senate’s deletion of “for the common defense,” already was limited to “the right of the people of a well-regulated militia”³⁰ is unsupported either by history or current authority. It contradicts the entire scheme of the Bill of Rights usage of the term “people” and purpose of guaranteeing the continuation of pre-existing common law rights of the subjects of Great Britain which the Crown had refused to extend to the colonists.³¹

D. Viewed in the light of the foregoing as well as its own context, the statement of James Madison in *The Federalist Papers* (No. 46), as quoted in Mayor Jackson’s article,³² was clearly and unequivocally founded upon the explicit assumption that the “militia” meant something other than a formally organized militia by statute. Madison wrote of “a militia amounting to near half a million citizens with arms in their hands, offered by men chosen from among

24. *Id.* (emphasis added). That is to say, the arms which the citizen already had the right to keep at common law.

25. *State v. Huntly*, 25 N.C. (3 Ired.) 418, 421 (1843).

26. *State v. Dawson*, 272 N.C. 539, 549, 159 S.E.2d 1, 11 (1968). Under this common law principle, the private possession of such new and terrifying weapons as nuclear bombs is clearly outside the guarantees of the second amendment; the mere keeping of such weapons naturally causes terror and alarm. The failure to make this point, not having been mentioned by the parties, may explain contrary language in *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1979), *cert. denied*, 426 U.S. 948 (1976). This *Warin* case also repeats the error, apparently begun in *United States v. Tot*, 131 F.2d 261, 266 (3rd Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943), of focusing solely on the right to bear arms instead of *keep* arms at common law: “[W]eapon bearing was never treated as anything like an absolute right by the common law. It was regulated by statute as to time and place as far back as the Statute of Northampton in 1328 and on many occasions since.” *United States v. Wain*, 530 F.2d at 107, *citing*, *United States v. Tot*, 131 F.2d at 266.

27. Jackson, *supra* note 1, at 193.

28. *Id.*

29. 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 450 (J. Goebel, Jr. ed. 1971) (emphasis added).

30. *Id.*

31. See I B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 217 (1971) (declarations and resolves of the First Continental Congress); *Id.* at 445-46 (George Mason’s objections to the proposed federal constitution, 1787).

32. Jackson, *supra* note 1, at 194.

themselves."³³ In those days arms were so expensive that not all could afford them. Yet, Madison was willing to trust this relatively large number of people with arms, the entire population of this nation then amounting to only four million.³⁴ In any event, Madison in *The Federalist* No. 24 never dreamed that the government in this nation would attempt to disarm its citizenry. The whole presentation of Madison, as well as all the other Framers of the Bill of Rights, *assumes* prior common law keeping of arms among the populace,³⁵ and that our government would continue to trust the people with arms.

E. The attempt to tie the second amendment's guarantee of "the right of the people to keep and bear arms" to an organized militia alone, that is, to the National Guard, suffers from several fundamental defects. First, an organized militia of any kind depends upon statutes, but statutes cannot create or destroy constitutional rights. If there is no statute concerning militia, does this mean that the private individual's right to keep arms is in full force, only to be abolished by enactment of a militia statute, and then to spring back into existence by the repeal of such a statute? Of course not; and therein lies the defect in tying the second amendment right of the people to the National Guard, a mere creature of legislation.

Second, contrary to the assertion of Mayor Jackson that "the preservation of public peace and the protection of the people against violence . . . are also constitutional duties,"³⁶ our U.S. Supreme Court has made it clear that even the states and municipalities have no such duties, and that the Framers of the fourteenth amendment believed that it would be unconstitutional for the Federal Government to impose such duties upon these local governments.³⁷ The problem of protection of the people with arms during riots, as was their common law right,³⁸ thus is acute and remains to this day. For example, in a case arising out of a riot in New York City during 1968, a trial judge overturned a jury verdict in favor of a victimized shopkeeper who heeded the warning of the police to put his firearms away and not protect his shop even when the police did not arrive as they had promised:

[R]esponding to protect the interests of one isolated individual under such circumstances of widespread crisis would have been impractical and, more significantly, might have resulted in a neglect of the public at large, to whom the duty was owed. Reasonableness demanded that the need for special police protection and its concomitant particular

33. A. HAMILTON, J. MADISON & J. JAY, I THE FEDERALIST 327 (1901); THE FEDERALIST No. 46, at 299 (Mentor ed. 1961) (J. Madison).

34. U.S. DEP'T OF COMMERCE, I HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 8 (1975). One of the barriers against forming an effective militia in those days was the reluctance and "failure to possess the stipulated arms or accoutrements" of the organized militia. See R.H. KOHN, *The Murder of the Militia System in the Aftermath of the American Revolution*, printed in MILITARY HISTORY OF THE AMERICAN REVOLUTION, PROCEEDINGS OF THE SIXTH MILITARY HISTORY SYMPOSIUM, USAF ACADEMY, 1974, 110, 115 (U.S. Gov't Printing Office).

35. *Accord*, *State v. Dawson*, 272 N.C. 535, 546, 159 S.E.2d 1, 9 (1968).

36. Jackson, *supra* note 1, at 195.

37. *Monell v. Dep't of Social Services of City of N.Y.*, 436 U.S. 658, 673-82, 705 (1978).

38. I W. HAWKINS, *PLEAS OF THE CROWN*, ch. 28, §14 (7th ed. 1795), *cited in* Caplan, *supra* note 1, at 34.

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allocation of resources, as well as the means selected to cope with the greater burden of safeguarding the public welfare, be left to the discretion of the police department. It is this concept of reasonableness which excuses a municipality from liability when in the exercise of high administrative judgment the overriding interest of the public requires that rioting be permitted.³⁹

Accordingly, the people are completely defenseless in our modern cities against riots unless they have their own arms as is their common law and constitutional right.

Third, if the National Guard really is the well regulated militia of the second amendment, then it would follow that every member of the Guard would have the constitutional right to keep his National Guard arms at home, and that he could own his National Guard arms. However, all this is contrary to the relevant statute,⁴⁰ providing that all National Guard arms are owned by the federal government through the Secretary of the Army. In no way therefore, can the right of the people to *keep* arms be repositied in our National Guard, at least not under its present statutory scheme.

F. The question of the right to keep (as opposed to bear) a handgun may indeed be answered by some of the very same cases cited in the article⁴¹ by Mayor Jackson himself. More specifically, under these cases, the class of arms protected by the second amendment guaranty included the "revolver,"⁴² "musket, . . . holster pistols and carbine,"⁴³ as well as ordinary "pistols."⁴⁴ Prior restraint on the possession of these arms, as by licensing or bond requirements, is prohibited in North Carolina, for example, by definitive interpretation of the constitution of that state.⁴⁵ Therefore, the constitutional right of the citizen to *keep* arms extends to all arms whose mere possession does not naturally cause terror to the people.⁴⁶

G. Although there are admittedly more modern federal decisions holding that the second amendment guaranty does not extend to the private individual,⁴⁷ nevertheless, it must be noted that none of these cases has considered at all the common law on the subject of *keeping* arms, nor the historical background on the *keeping* of arms.⁴⁸ In this vein, moreover, it should be remembered that not

39. *Bloom v. City of N. Y.*, 174 N.Y.L.J. 6 (1975). Interestingly, there is no liability in a municipality in New York State for "property destroyed or injured by mobs or riots." N.Y. UNCONSOL. LAWS §9193 (McKinney).

40. 32 U.S.C. § 105(a) (1) (1970).

41. Jackson, *supra* note 1, at 196 nn.43 & 44.

42. *In re Brickey*, 8 Idaho 597, 598, 70 P. 609, 609 (1902) (holding unconstitutional under the second amendment and the Idaho state constitution a ban on the carrying of deadly weapons).

43. *English v. State*, 35 Tex. 473, 476 (1872).

44. *State v. Kerner*, 181 N.C. 574, 578, 107 S.E. 222, 225 (1921).

45. *Id.* at 575-76, 578-79. 107 S.E. at 223-25.

46. See notes 8, 9, 10, 25 & 26 *supra* and accompanying text.

47. Jackson, *supra* note 1, at 194 n.26; *but see*, *Moore v. City of E. Cleveland*, 431 U.S. 494, 502, 542 (1977), where a majority of the justices approved of the earlier list of individual constitutional rights by the late Justice Harlan dissenting in *Poe v. Ullman*, 367 U.S. 497, 543 (1961), this list explicitly including "the right to keep and bear arms."

too long ago it was the consensus in this nation that the “separate but equal” doctrine was the law of the land, only to be rudely awakened by *Brown v. Board of Education*⁴⁹ and its progeny. Similarly, the present day legal situation with respect to “the right of the people to keep and bear arms” of the second amendment may well be in the same state as was the equal protection clause of the fourteenth amendment⁵⁰ in pre-*Brown* days, but with one notable distinction: Over 40 million Americans⁵¹ actually practice the right to keep handguns, untold numbers practice the right to keep rifles and shotguns, and still more Americans who do not choose to own arms rely on others who do.

48. See note 26 *supra*.

49. 347 U.S. 483 (1954), *rev'g*, *Plessy v. Ferguson*, 163 U.S. 537 (1896).

50. U.S. CONST. amend XIV states in part: “No State shall deny to any person within its jurisdiction the equal protection of the laws.”

51. Jackson, *supra* note 1, at 198.