

10-1-1983

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Recommended Citation

Barrett, Sidney R. Jr. (1983) "The Right to Bear Arms and Handgun Prohibition: A Fundamental Rights Analysis," *North Carolina Central Law Review*: Vol. 14 : No. 1 , Article 16.

Available at: <https://archives.law.nccu.edu/ncclr/vol14/iss1/16>

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The Right to Bear Arms and Handgun Prohibition: A Fundamental Rights Analysis

I. INTRODUCTION: STRANGE BEDFELLOWS

In the struggle between the historic police powers and the individual liberties secured by the federal Constitution, few recent controversies have been more bitterly contested than those regarding the regulation of firearms. The second amendment provides a deceptively clear guarantee that "the right of the people to keep and bear arms shall not be infringed." Yet the legislatures are imposing restrictions which cut deeper into the exercise of that "right" than ever before¹ moving from regulation to outright prohibition. In determining what, if any, constitutional limits exist on the legislature's ability to regulate arms, the courts face an exceptionally difficult task, for neither history nor precedent provides a clear guide.

It is the scope of this article to examine whether the right to keep and bear arms may be accorded the status of a "fundamental right,"² and what effect such a status would have on judicial scrutiny of legislative attempts to prohibit the private ownership of handguns.³ In so doing, three points are worth noting at the outset.

First, attempts to regulate firearms in the United States to date have been quite modest. A result of this has been a paucity of case law addressed directly to the nature of the "right to bear arms." The most far-reaching action taken by Congress thus far has been the Omnibus Crime Control Acts of 1968 and 1970, which were designed primarily to regulate firearms dealers and to provide for the registration of un-

1 See *infra* note 6.

2 Under a pure fundamental rights analysis, the United States Supreme Court has given heightened protection from legislative interference to certain rights, regardless of their presence or lack of mention in the Bill of Rights. See, e.g., *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to interstate travel). This analysis must be distinguished from that used to determine which of those rights enumerated in the first eight amendments are to be "incorporated" against the states. See, e.g., *Adamson v. California*, 332 U.S. 46 (1947). The importance of this distinction is that an attempt to "incorporate" the second amendment against the states would be restricted by the narrow historical circumstances that underlie the creation and meaning of that amendment.

3. It should be noted that several state constitutions grant the right to bear arms, and that these rights may well confer protection broader than that of the second amendment. Interpretation of state constitutional rights to bear arms figured prominently in the opinions in *Carson v. State*, 241 Ga. 622, 247 S.E.2d 68 (1978) and *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169 (N.D. Ill. 1981), *aff'd* 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 104 S. Ct. 194 (1983), *infra* note 6.

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usually dangerous weapons such as machine guns.⁴ Neither Act prohibits the licensed possession of *any* weapon.⁵ At present, only two cases have reached the merits of an unqualified prohibition of handguns.⁶

Second, although the recent trend in handgun regulation has provoked a steady stream of legal discussion, most of it has focused on the right to bear arms generally. The question which remains unanswered is how much protection a recognized "right to bear arms" will lend to the handgun specifically. In Part IV of this article, this subject is addressed by suggesting a model justification for restricting a fundamental right to bear arms, based on an analogy to first amendment jurisprudence.

Third, handgun control is an issue which has made for strange bedfellows in both the judicial and political arenas. It has placed the normally conservative pro-states-rights elements of the political right in the position of advocating an expansive concept of personal liberties. Attorneys for the National Rifle Association have gone so far as to invoke the "penumbra of unwritten rights surrounding the first, second, third, fourth, fifth and ninth amendments" which serve to make rights "incapable of surrender" to the legislature.⁷ Conversely, the liberal elements in favor of gun control have taken an uncharacteristic stand in favor of the historic police powers. For example, the architect of the "penumbral" theory, and perhaps the Supreme Court's greatest champion of individual liberties, has had this to say on the subject:

There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record.

4 18 U.S.C. §§ 921-928 (1976); 26 *id.* §§ 5801-5872 (Supp. V 1981).

5 The provisions of 26 U.S.C. § 5811 (1976) require a \$200 transfer tax to be paid upon the sale of any "firearm." The definition of "firearm" offered in Section 5845 excludes conventional rifles, shotguns and handguns, but specifically includes such items as silencers, rockets, machine guns and grenades. These latter items are available for private ownership upon proper registration and payment of the tax. The accompanying regulations of the Bureau of Alcohol, Firearms and Tobacco are set out in 27 C.F.R. § 179 (1981).

6 The Georgia Supreme Court struck down a state law forbidding easily concealable "breast pistols" in *Nunn v. State*, 1 Ga. 243 (1846), on the grounds that a categorical prohibition of any class of arms violates the right to bear arms under the federal Constitution. However, in *Curson*, 241 Ga. 622, 247 S.E.2d 68 (upholding ban on unlicensed sawed-off shotguns), the court held that the right to bear arms as granted by the Georgia Constitution is not infringed so long as *some* weapon remains available to the citizen.

More recently, a city-wide ban on handguns was upheld against challenges under the United States and Illinois Constitutions in *Quilici*. A majority of the three-judge panel affirmed the trial court, over a strong dissent, while noting that the "vital importance" of the issue made the trial court's refusal to abstain as "appropriate in this case [as] in cases where fundamental rights are involved."

7 Senate Committee on the Judiciary, 97th Cong. 2d Sess., *Report on the Right to Keep and Bear Arms*, 95 (Comm. Print 1982) (Featherstone, General Counsel for the N.R.A.) (hereinafter cited as Senate Committee Report).

There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols should not be barred to everyone except the police.⁸

II. THE POLICE POWER

Where the acts of a legislature do not impinge on "fundamental rights," or draw lines based on "suspect classifications," the courts exercise a minimal degree of scrutiny in determining whether there has been an improper use of the police powers.⁹ This minimal scrutiny requires that the law, in order to satisfy due process, "not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained."¹⁰ A state law is to be presumed valid unless "it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."¹¹

Viewed in this light, a law which seeks to ban handguns in an attempt to reduce the toll of death through accident and homicide seems eminently defensible. The ease with which a handgun may be concealed makes it an ideal choice for the criminal seeking to elude detection. In addition, dozens of empirical studies, based primarily on FBI statistics, have underscored the growing contribution the handgun is making to crime and injury. Between the years 1960 and 1973, for example, the proportion of serious assaults involving handguns rose from 12.7 per cent to 29 per cent of all assaults.¹² Between 1966 and 1973, the percentage of homicides committed with handguns rose from 37 per cent to 52 per cent.¹³ In addition, it should be noted that although handguns account for an estimated 20-25 per cent of all firearms in the United States, they account for 90 per cent of all firearm-related deaths and accidents.¹⁴

In the popular war over handgun control, statistics have been the principal weapon for both sides. Yet what role do these often contra-

8. *Adams v. Williams*, 407 U.S. 145, 150 (1972) (dissenting opinion of Douglas, J., joined by Marshall, J.).

9. See generally Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court. A Model for a Newer Protection*, 86 HARV. L. REV. 1 (1972).

10. *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

11. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). In a footnote to this sentence, the celebrated footnote 4, the Court alluded to a "narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution." *Id.* at n.4.

12. Fields, *Handgun Prohibition and Social Necessity*, 23 ST. LOUIS L.J. 35, 37 (1979); Phillips, *Handguns and Homicide: Minimizing Losses and the Costs of Control*, 5 J. LEGAL STUD. 464, 468 (1976).

13. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 171-72 (1975).

14. See Fields, *supra* note 12.

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ditory statistics have to play in constitutional adjudication? The obvious answer is that they supply the "rational basis" necessary for the legislature's judgment to survive due process scrutiny. However, statistics are not a two-way street; it is highly unlikely that a handgun prohibition can be defeated in the courts by a statistical showing that the handgun is not directly related to the problem. As Justice Holmes warned in his famous dissent in *Lochner v. New York*, "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."¹⁵ The minimum rationality test requires that legislation have *some* rational basis, not that it be the only rational choice. Invalidation of anti-handgun laws must therefore occur on a level of scrutiny higher than this and must draw on sources other than social studies.

III. THE RIGHT TO BEAR ARMS AS A "FUNDAMENTAL RIGHT"

A. "Fundamental Rights" Analysis

Under the substantive due process approach developed by the United States Supreme Court, legislation which affects rights deemed to be "fundamental" is subjected to a much more demanding judicial scrutiny than the traditional "rationality" test of *Nebbia v. New York*.¹⁶ The enhanced protection owing to a particular "fundamental right" is not dependent on a specific constitutional guarantee, but is rather a function of the fourteenth amendment's requirement that no State shall "deprive any person of life, liberty or property without due process of law." As Justice Harlan wrote in *Poe v. Ullman*,

[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. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.¹⁷

15. *Lochner v. New York*, 198 U.S. 45, 75 (1904) (Holmes, J., dissenting). In *Quilley*, 532 F. Supp. 1169, the seventh circuit found a handgun ban to be neither "wholly arbitrary nor completely unsupported by any state of facts. Accordingly, we decline to consider plaintiff's arguments that Ordinance No. 81-11 will not make Morton Grove a safer, more peaceful place."

16. See *supra* text accompanying note 10.

17. *Poe v. Ullman*, 367 U.S. 497, 542-43 (1960) (dissenting opinion). More recently, Justice Powell pointed to the *Poe* dissent as one which "most accurately reflects the thrust of our prior decisions" and "expressly points to history and tradition as the source for supplying content to [substantive due process]." *Moore v. East Cleveland*, 431 U.S. 494, 504 n.12 (1977) (Powell, J., plurality opinion).

In order to implicate the right to bear arms as a fundamental right, the sources the courts must draw from include the history and traditions of the American people, as well as judicial decisions. The Court has recognized that the due process clause protects basic rights "implicit in the concept of ordered liberty,"¹⁸ rights whose contours are to be shaped by the court "by continual insistence upon respect for the teachings of history, [and] solid recognition of the basic values that underlie our society."¹⁹

Application of the fundamental rights analysis to the right to bear arms, then, is not dependent upon the scope or nature of any rights guaranteed by the second amendment. In fact, as discussed below, this amendment has been construed as not granting an individual right at all. Rather, the relevance of the second amendment lies in its value as evidence of the important role played by private ownership of firearms in the traditions of our country, and in the thought of the Founders. The question of whether the right to bear arms is fundamental is to be answered outside the language of the Constitution itself.

B. *The Second Amendment: History and Policies*

The second amendment to the United States Constitution 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." The origins and policies of the second amendment sprang from a military and political milieu which has changed radically in the intervening two centuries. Organized military power came in three forms at the time of the Framers: the standing army, the "select" militia, and the sedentary militia. A standing army of 1776 was no different from its modern counterparts, an organization of professional, fulltime soldiers equipped and paid by the government. The select militia corresponds closely with our modern National Guard, being comprised of a select group of individuals who spend a limited time each year in training. The rest of the year these "citizen-soldiers" are employed in civilian pursuits and remain on call for duty. The sedentary militia was different in that it consisted of *all* able-bodied men, who were expected to provide their own weapons, and to serve in case of an emergency.

It was the purpose of the second amendment to protect from federal infringement the right of the several states to maintain their own sedentary militias. The Founding Fathers' fear and distrust of a federal standing army is well-documented. In 1774 the Continental Congress declared that maintaining a "standing army in these colonies, in time of

18. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

19. *Griswold v. Connecticut*, 381 U.S. 479, 501 (1964) (Harlan, J., concurring).

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peace, without the consent of the legislature of that colony, in which such army is kept, is against law."²⁰ Similarly, in 1776 Samuel Adams wrote to James Warren that "a standing army, however necessary it may be at some times, is always dangerous to the liberties of the people."²¹

This fear of standing armies, whether foreign or domestic, was a national reaction to the colonists' experience with the British. The states feared that an army under the control of the federal government would threaten the political independence of the States.²² In this respect, the Framers saw no distinction between a standing army and a select militia, as both were equally capable of allowing a small segment of the population to impose its will on the majority. Thus was Baron von Steuben's proposal for a dual select and sedentary militia system roundly defeated by the Continental Congress.²³

The solution favored was that put forward by Richard Henry Lee: "[T]he Constitution ought to secure a genuine, and guard against a select militia, by providing that the militia shall always be kept well organized, armed and disciplined, and include, according to the past and general usage of the states, all men capable of bearing arms. . . ."²⁴

This proposal was incorporated directly into the Constitution as the second amendment. It was, in a sense, a dual compromise—first, a compromise between the need to provide national security and the fear of tyranny by the government, and second, a compromise between the military power of the states and that of the Federal government.²⁵

At the same time, several of the States were writing into their own constitutions identical provisions barring the establishment of standing armies and placing military power in the hands of the sedentary militia. Typical of these was Maryland, which resolved:

XXV. That a well-regulated militia is the natural and proper defense of a free government.

XXVI. That standing armies are dangerous to liberty, and ought not to be raised or kept up, without the consent of the Legislature.²⁶

Two points are noteworthy with respect to the sedentary militia. The

20. R. PIRRY & J. COOPER, SOURCES OF OUR LIBERTIES 288 (1959).

21. M. JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 29 (1962).

22. LEVIN, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV., 148, 151 (1971).

23. Senate Committee Report, *supra* note 7, at 57-59 (Hardy).

24. LETTERS FROM THE FEDERAL FRAMER TO THE REPUBLICAN 21 (W. Bennett ed. 1978).

25. The catalyst for the fear of the States for their own sovereignty was the adoption of Article I, Section 8 of the Constitution, giving Congress the power to "raise and support Armies." Levin, *supra* note 22, at 156.

26. *Id.* at 152.

first is that the weapons were not provided by the government but by the citizens themselves. As the United States Supreme Court recognized in *United States v. Miller*,²⁷ it was common for the states to require, upon criminal penalty, each citizen to maintain his own rifle and supplies. This was a practical system in 1776, when ammunition was not standardized and the same powder, flint and lead would satisfy the needs of almost any particular weapon. Second, the men of the sedentary militia were expected to devote a certain amount of time each year in training and drill. The concept of the militia as an inchoate mass, not subject to state regulation and taking shape only in time of war, is historically incorrect.²⁸

From the foregoing discussion, the contours of the second amendment's guarantee of the "right to keep and bear arms" are clear. The second amendment, like the first amendment, may be said to have a "core content" of a political nature.²⁹ It was designed to secure a measure of individual liberty, and state independence, by fostering a specific type of military organization, the sedentary militia. Due to the peculiar nature of this long-outdated organization, the guarantee fashioned by the second amendment necessarily sought to protect its basic characteristics—that it be well-regulated,³⁰ that its weapons be supplied by the citizens themselves, and that its scope encompass all those subject to serve, namely, the "whole body of the people."

The role of firearms in the political thought of the Framers has its roots far deeper than the second amendment, which may be said to be merely illustrative of that role. The prevailing view at the time the Constitution was written was that the individual's right to arm himself was an indispensable element of free democracy, a view shaped by the early English experience.

It had been the practice of the seventeenth century English monarchs to consolidate their political power through laws disarming the populace and religious opposition in particular. Charles II, in 1670, enacted laws prohibiting the possession of "Guns, Bows or other Engines." James II, shortly thereafter, embarked on an extensive program to dis-

27 307 U.S. 174, 179 (1939).

28 See *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976), in which a criminal defendant's contention that his standing in the sedentary militia gave him the right to own an unlicensed machine gun was summarily dismissed.

29. See MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* (1948), which sets out the theory that the protection afforded by the first amendment guarantee of freedom of speech can be determined with reference to the "core" purpose of that guarantee—to promote the exchange of political ideas.

30. In Art. I, § 8 of the United States Constitution, it is interesting to note that the Federal government retained for itself the power to regulate the militias. In that section, the states are given the "Authority of training the Militia according to the discipline prescribed by Congress."

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arm his Protestant rivals while arming the Catholics.³¹ Blackstone recognized the purpose of these acts to be "the prevention of popular insurrection and resistance to the government by disarming the bulk of the people."³² Against this background, the English Bill of Rights of 1689 was adopted to give all Englishmen "the right of having and using arms for self preservation and defense."³³ It was to this Bill of Rights that the American Framers looked when drafting the Constitution.³⁴

From this experience, the value placed on an armed populace may perhaps best be described as a general "deterrent value." This value is reflected strongly in the political writings of the various Framers, both Federalist and anti-Federalist. Richard Henry Lee, arguing for the adoption of the American Bill of Rights, wrote that "to preserve liberty, it is essential that the whole body of the people always possess arms."³⁵ Similarly, Noah Webster wrote that:

Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom of Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed and constitute a force superior to any bank of regular troops that can be, on any pretense, raised in the United States."³⁶

To this end, Samuel Adams proposed to the Massachusetts Convention of 1788 an amendment that the "Constitution be never construed to authorize Congress to prevent the people of the United States, who are peaceable citizens from keeping their own arms."³⁷ Patrick Henry urged that "the great object is that every man be armed Everyone who is able may have a gun."³⁸

It seems unquestionable that the Framers would have provided an affirmative answer to the question whether arms are "implicit in the concept of ordered liberty."³⁹ Alexander Hamilton, in Federalist No. 46, noted that

Americans possess ["the advantage of being armed"] over the people of almost every other nation. The existence of subordinate governments to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can

31. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 G.M.U. L. REV. 1, 7-9 (1981).

32. 1 W. BLACKSTONE, COMMENTARIES 412 (1766).

33. An Act Declaring the Rights and Liberties of the Subject, 1 William and Mary, st. 2 ch. 2 (1689).

34. Senate Committee Report, *supra* note 7, at 51 (Hardy).

35. *Letters*, *supra* note 24, at 170.

36. Senate Committee Report, *supra* note 7, at 56 (Hardy).

37. *Id.* at 89 (Featherstone).

38. 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 386 (2d ed. 1836).

39. *Palko v. Connecticut*, 302 U.S. at 325.

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admit of.⁴⁰

Yet it is questionable whether even this general philosophy, that an armed populace deters tyranny, would grant the right to bear arms outside the context of the organized militia. It remains problematical whether they would attach the same value to arms in a world where, due to the increasing cost, sophistication and destructive potential of modern weapons, the militia is no longer a feasible concept.

C. *The Judicial Response*

As might be expected from the foregoing, the courts have given a narrow construction to the guarantees of the second amendment and the right to bear arms in general. The amendment has been generally construed as granting a collective right in the several states for the purposes of maintaining their militias, rather than an individual right to keep and bear arms. Similarly, it is considered solely a restriction on Congress and not the States. There does seem to be an early recognition of the right as one which is "fundamental" and thus not dependent upon any specific Constitutional guarantee for protection. However, courts from common law times to the present have always tolerated significant restrictions on the exercise of this right.

1. The Federal Courts

The United States Supreme Court has never dealt with the second amendment in a comprehensive fashion, although the issue has been treated in a few older cases. In *United States v. Cruikshank*,⁴¹ the Court reversed the conviction of several whites for conspiring to deprive blacks of their constitutional rights. The rights alleged to have been deprived included the right of assembly and the right to bear arms. The Court stated that the right to bear arms, like the right to assemble, was "not a right granted by the Constitution. *Neither is it in any manner dependent on that instrument for its existence.*"⁴² This latter quote indicates that the Court was aware of a fundamental right to bear arms, linking it with the right of assembly and speech as deriving its "source from those laws whose authority is acknowledged by civilized man

40. THE FEDERALIST No. 46, at 8 (J. Madison).

41. 92 U.S. 542 (1875).

42. *Id.* at 553 (emphasis added). *Cruikshank* is often cited for the proposition that the second amendment restricts only Congress and thus does not "apply" to the States. However, this case was decided under the theory of the fourteenth amendment set forth in the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873). That theory, which supports the proposition that the fourteenth amendment protects only "incidents of national citizenship," has long been discarded in favor of the incorporation approach of *Palko v. Connecticut*, 302 U.S. 319.

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throughout the world."⁴³

In *Presser v. Illinois*,⁴⁴ the Court upheld the convictions of several private citizens for violating a State law which forbade the parading of armed military organizations without a license from the governor. There the second amendment was held to be a limitation only upon the power of Congress and not of the states.⁴⁵ However, the Court warned that "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."⁴⁶

The most recent decision from the United States Supreme Court came in 1939 with *United States v. Miller*.⁴⁷ Miller had been indicted for violating the Federal Firearms Act of 1934, which requires a \$200 transfer tax to be paid prior to the interstate transportation of certain weapons, such as Miller's sawed-off shotgun. The district court sustained a demurrer to the indictment on the grounds that the Act violated the second amendment; the Supreme Court reversed.

The *Miller* opinion provides uncertain guidance, containing little legal reasoning, a great deal of interesting but largely irrelevant history on the militia system, and no discussion of *Cruikshank* or *Presser*. The Court dismissed defendant's claim by stating:

In the absence of any evidence tending to show that possession or use of a 'shot-gun having a barrell 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.⁴⁸

Anti-gun-control writers have seized upon this passage as a "test" for second amendment protection, or at least an invitation to submit proof on the issue of a weapon's "reasonable relationship" to a militia.⁴⁹ However, the courts have treated it as a rhetorical flourish rather than an attempt to formulate any kind of test.⁵⁰

The lower federal courts have been uniform in their treatment of the

43. 92 U.S. at 551 (quoting Marshall, C.J., in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)).

44. 116 U.S. 252 (1886).

45. *Id.* at 265.

46. *Id.*

47. 307 U.S. 174 (1939).

48. *Id.* at 178.

49. Senate Committee Report, *supra* note 7, at 92 (Featherstone).

50. See *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. den. sub nom.*, *Velasquez v. United States*, 319 U.S. 770 (1943); *United States v. Warin*, 530 F.2d at 106.

right to bear arms, dealing only with the second amendment in the context of the *Miller* decision. Two main points have been stressed in these decisions. First, it has been consistently held that the second amendment guarantees a collective right held by the states, and not an individual right. Typical of these decisions is the Sixth Circuit's ruling in *Stevens v. United States*,⁵¹ rejecting a challenge to the Omnibus Crime Control and Safe Streets Act of 1968:

Since the Second Amendment right 'to keep and bear Arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm.⁵²

This is consistent with the historical background of the amendment, in that the reference to the "right of the people" appears to be merely incidental to the fact that, in 1776, militiamen customarily supplied their own weapons.

Secondly, the second amendment has been construed to limit the federal government only and not the states. The First Circuit, in *Cases v. United States*,⁵³ held that any right to bear arms "depends on local legislation; the only function of the Second Amendment being to prevent the federal government, and the federal government only, from infringing that right."⁵⁴

2. The State Courts

The decisions of the state courts have largely paralleled those of the federal courts. Several opinions of the nineteenth century wax eloquently on the fundamental nature of the right to bear arms. In 1846, the Georgia Supreme Court's decision to strike down a state law barring pocket pistols contained the following passage:

When, I would ask, did any legislative body in the Union have the right to deny to its citizens the privilege of keeping and bearing arms in defence of themselves and their country?

If this right, 'inestimable to freemen,' has been guaranteed no British subjects since the abdication and flight of the last of the Stuarts and the ascension of the Prince of Orange, did it not belong to our colonial ancestors in this western hemisphere? Has it been a part of the *English* Constitution ever since the bill of rights and act of settlement? and been forfeited here by the substitution and adoption of our own Constitution? No notion can be more fallacious than this! On the contrary, this is one of the fundamental principles, upon which rests the great fabric

51 440 F.2d 144 (6th Cir. 1971).

52 *Id.* at 149. See also *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943).

53 131 F.2d 916 (1st Cir. 1942).

54 *Id.* at 921. See also *Eckert v. City of Philadelphia*, 329 F. Supp. 845 (E.D. Pa.), *aff'd*, 477 F.2d 610 (3d Cir. 1971).

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of civil liberty, reared by the fathers of the Revolution and of the country.⁵⁵

Similarly, the Texas Supreme Court in 1859 wrote that "the people cannot be effectually oppressed and enslaved who are not first disarmed."⁵⁶ There the court held that the right to bear arms does not derive from the State government. It is one of the 'high powers' delegated directly to the citizen, and 'is excepted out of the general powers of government.' A law cannot be passed to infringe upon or impair it, because it is above the law, and independent of the lawmaking power.⁵⁷

More recent decisions, however, have followed the lead of the federal courts in deciding that the second amendment provides only a collective right⁵⁸ and that it restricts only Congress.⁵⁹

In addition, the state courts have long upheld reasonable restrictions on the right to bear arms. In *Burton v. Sills*,⁶⁰ the New Jersey Supreme Court noted that the right at common law was far from absolute, and restricted as far back as the Statute of Northampton in 1328. The most common forms of regulation were, and still are, those regarding the carrying of concealed weapons; possession by certain classes of people, such as felons or the insane; and registration or licensing provisions.⁶¹

The picture in both federal and state court systems is the same: an initial acceptance of the right to bear arms as a fundamental right pre-dating the Constitution, followed by a growing reluctance to extend constitutional protection to the right. In part, this may be due to simple changes in social climate. In the transition from the early 1800's to the present century, the value of the firearm as a provider of food and self-defense has dropped considerably.

D. *Are Arms Still "Fundamental"?*

Even if one takes it for granted that the Framers would have considered arms "fundamental" without hesitation, the inquiry is not complete. Social and technological change, along with a reluctance on the part of the modern Supreme Court to further expand the boundaries of

55. *Nunn v. State*, 1 Ga. 243, 249 (1846).

56. *Cockrem v. State*, 24 Tex. 394, 402 (1859).

57. *Id.*

58. *See, e.g.*, *Application of Cassidy*, 268 A.D. 282, 51 N.Y.S.2d 202 (1944), *aff'd*, 296 N.Y. 926, 73 N.E.2d 41 (1947); *Photos v. Toledo*, 48 Ohio Op. 2d 274, 250 N.E.2d 916 (1967).

59. *See, e.g.*, *People v. Seale*, 274 Cal. App. 2d 107, 73 Cal. Rptr. 811 (1969); *Harris v. State*, 83 Nev. 404, 432 P.2d 929 (1967).

60. 53 N.J. 86, 248 A.2d 521 (1968).

61. A considerable number of state cases are collected on these three areas in Annot., 37 A.L.R. Fed. 696, 718-27 (1978). *See also* *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) in which the Court notes by way of dicta that the rights guaranteed in the Bill of Rights included with them "certain well-recognized exceptions arising from the necessities of the case."

substantive due process, will probably conspire to prevent judicial recognition of the "fundamental" nature of the right to possess arms.

The "sedentary militia" of 1776 is an idea whose time is long past. Modern military weapons require standardized ammunition, training and maintenance far beyond the ability of "the whole body of the people" to provide. The Armed Forces Reserves have replaced the militia as the primary reserve force for the defense of the United States. The United States had fielded a standing army even before the War of 1812, and its good behavior has shown the Framers' fears to be groundless. Even Baron von Steuben's hated "select militia" lives today in the form of the National Guard.

The concern for a military balance between the states and the federal government has also become largely moot. Today both federal and state authorities share control over the National Guard. The political process has worked well enough to relax concern of a tyrannical government using its armed might to destroy liberty.⁶² The hypothetical deterrent effect of an armed populace seems a powerful and unwelcome force to tolerate in a society which has remained fairly stable. As Justice Frankfurter wrote in *Dennis v. United States*,⁶³ "no government can recognize a 'right' of revolution."

Yet it is possible to argue for at least a limited recognition of the right. Arms have played an historic role in our society, in hunting and recreation. Such material may not seem the stuff of constitutional law but it must be borne in mind that the focus of the "fundamental rights" analysis is whether a right is "rooted in the traditions and conscience of our people."⁶⁴ Considerations as nebulous as the "sanctity of a man's home and the privacies of life"⁶⁵ have provided the foundation for the constitutional protection of contraceptive use and abortion. Similarly, it may well be true that the deterrent of arms has had a modern role to play in checking police misconduct in the highly charged racial confrontations and mass protests against the government that have characterized dissent in the past two decades.

In any event, the deciding factor will most probably be the reluctance of the United States Supreme Court to continue the expansive policies of the Warren Court. Since the 1969 decision in *Shapiro v. Thompson*,⁶⁶ recognizing a fundamental right to interstate travel, the Burger Court has not accorded fundamental status to any "new" rights. Instead it has pursued a policy of guarding those recognized in earlier

62 One might cite the Civil War as an exception to this generalization.

63. 341 U.S. 494, 549 (1951) (concurring opinion).

64 *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

65 *Griswold v. Connecticut*, 381 U.S. at 484.

66 394 U.S. 618 (1969).

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decisions such as privacy,⁶⁷ but has apparently "drawn the line." In *San Antonio Independent School District v. Rodriguez*,⁶⁸ the Court refused to accept the "right to an education" as fundamental. In that case, Justice Powell's majority opinion struck hard at the dangers of the substantive due process approach, warning that socially desirable goals are not necessarily "values to be implemented by judicial intrusion into otherwise legitimate state activities."⁶⁹ Considering the historical role the Court played in shaping education, through its desegregation decisions, a reluctance to characterize education as fundamental suggests a poor chance for a social issue as controversial as arms.⁷⁰ In a footnote to a recent decision upholding the 1968 Gun Control Act, the Court even stated that "restrictions on the use of firearms are neither based on constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties."⁷¹

IV. REGULATION OF A FUNDAMENTAL RIGHT TO BEAR ARMS

In Part II of this article it was suggested that a prohibition of private handgun ownership would have little difficulty clearing the hurdles of the traditional "rational basis" scrutiny under the due process clause. Assuming for the sake of argument, however, that a modern Supreme Court were to extend "fundamental right" status to the right to bear arms, it might still be possible to defend legislative attempts to ban handguns. An analogy may be drawn between the second and first amendments, in that both may be said to contain a "core content" of a political nature which justifies a lesser degree of protection to the exercise of that right outside of that scope. Thus, just as it is possible to regulate certain categories of speech due to their minimal contribution to the political process and their adverse effects on society, so may it be possible to regulate certain categories of weapons through the same considerations.

In *Chaplinsky v. New Hampshire*,⁷² the United States Supreme Court recognized that the first amendment does not extend its protection over certain types of speech: libel, obscenity and so-called "fighting

67. Perhaps the most obvious example of the Burger Court's commitment to the fundamental rights of the Warren Court was *Roe v. Wade*, 410 U.S. 113 (1973), interpreting the right of privacy to protect a woman's interest in having an abortion.

68. 411 U.S. 1 (1973).

69. *Id.* at 36. *But cf.* *Plyler v. Doe*, — U.S. — 102 S. Ct. 2382 (1982) wherein education, though not a fundamental right, is found to be deserving of an intermediate level of scrutiny.

70. The addition to the Court of Justice O'Connor, whose views favoring State power are well known, serves to increase the chances of a decision in favor of State regulation of arms. See O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981).

71. *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980).

72. 315 U.S. 568 (1942).

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words."⁷³ Although this theory has been restricted somewhat in recent years,⁷⁴ it has largely survived intact.⁷⁵ The rationale remains, in the words of the *Chaplinsky* Court, that certain types of speech are "of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."⁷⁶ The reference point for determining "social value" is the purpose for which the first amendment was enacted: to guarantee free and open discussion of social and political issues.⁷⁷

Similarly, the validity of laws which restrict the right to keep and bear arms may be determined with reference to the "core" content of that right, as embodied in the history of the second amendment and the political thought of the Framers of the Constitution. That content, as noted above, may be described as the preservation of the generalized deterrent effect an armed populace creates against a government which abuses its limited powers. Thus, incidents of firearms ownership which do not contribute significantly to this goal may be regulated in view of the increasingly serious contribution firearms, and handguns in particular, make to crime and injury.

The role of the handgun in organized military conflict, whether en masse or in guerilla warfare, is negligible. The handgun has never been used for more than a personal sidearm for officers and since World War II has been gradually abandoned in favor of light-weight carbines.⁷⁸ Its short range and low accuracy, when compared to long guns, make it a decidedly impractical choice for any type of conventional hunting. Yet it is precisely this concealability and close-range effectiveness that make the handgun such a danger, particularly in dense urban areas.⁷⁹

Thus the central concern of the right, to provide the "deterrent effect" would be relatively unaffected by laws which would prohibit handgun ownership but leave untouched other categories of weapons.

73. *Id.* at 573.

74. *See, e.g.* *New York Times v. Sullivan*, 376 U.S. 254 (1964), in which the Court held that the first amendment protects even defamatory speech directed at public officials absent evidence of malicious intent. *But see* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (refusing to extend *Sullivan* to defamation of private persons).

75. *See* *Miller v. California*, 413 U.S. 15 (1973) (no first amendment protection for obscenity).

76. *Chaplinsky v. New Hampshire*, 315 U.S. at 572.

77. *See* Meiklejohn, *What Does the First Amendment Mean?* 20 U. CHI. L. REV. 461, 479 (1953).

78. G. DUNNEGAN, *HOW TO MAKE WAR* 27 (1982).

79. Phillips, *supra* note 11, at 468-74, makes the point that a higher handgun density per capita population is significantly related to a higher incidence of aggravated assault and homicide, thus tending to refute the oft-repeated argument that handguns are "just another weapon, like knives or rocks." *Id.* at 469. Evidently, not all of those who would assault with a gun would assault with a rock or knife.

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such as the traditional rifle and shotgun. The reasonable mind may well balk at the prospect of our courts actively protecting the right to maintain weapons of appropriate tactical utility. However, the "core content" approach does offer a principled basis on which to resolve the libertarian traditions of the Framers and the need of an evolving society to protect itself from the criminal's hidden arsenal. The most acceptable balance may be that struck by the Georgia Supreme Court in its 1978 decision in *Carson v. State*:

It was not arbitrary or unreasonable to prohibit the keeping and carrying of sawed-off shotguns, which are of a size such as can easily be concealed and which are adapted to and commonly used for criminal purposes. The Act does not prohibit the bearing of *all* arms . . . a law is unconstitutional so far as it cuts off the exercise of the right of the citizen *altogether* to bear arms.⁸⁰

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⁸⁰ 241 Ga. at 628, 247 S.E.2d at 73 (emphasis in original).

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