

LEGAL THEORY OF THE RIGHT TO KEEP AND BEAR ARMS

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There is considerable confusion about the legal theory underlying the "right to keep and bear arms". This is a brief outline for a clarification of the discussion of this issue.

(1) The Second Amendment to the U.S. Constitution does not establish the right to keep and bear arms. None of the provisions of the Constitution *establish* any "natural" rights. They *recognize* such rights, but the repeal of such provisions would not end such rights. Such rights were considered by many of the Framers as obvious or "self-evident", but they were immersed in the prevailing republican thought of the day, as expressed in the writings of Locke, Montesquieu, Rousseau, Madison, Hamilton, and others, which discussed "natural rights" in some detail. Others argued that at least some of the rights needed to be made explicit in the Bill of Rights to avoid having future generations with less understanding of republican theory weaken in their defense of those rights. That has turned out to have been a good idea.

(2) The right to keep and bear arms is a natural right of individuals under the theory of democratic government. This was clearly the understanding and intent of the Framers of the U.S. Constitution and was a long-established principle of English common law at the time the Constitution was adopted, which is considered to be a part of constitutional law for purposes of interpreting the written Constitution.

(3) What the Second Amendment also does is recognize the right, power, and duty of able-bodied persons (originally males, but now females also) to organize into militias and defend the state. It effectively recognizes that all citizens have military and police powers, and the "able-bodied" ones -- the militia -- also have military and police duties, whether exercised in an organized manner or individually in a crisis. "Able-bodied" is a term of art established by English common law at the time the Constitution was adopted, and is the only qualification besides citizenship on what constitutes the "militia". While not well defined in modern terms, it is somewhat broader than just able-"bodied": implicit is also "able-minded" and "virtuous". In other words, persons might be excluded who

were physically able to bear arms but who were mentally or morally defective. Defense of the "state" *includes* self-defense and defense of one's family and friends who are, after all, part of the state, but by establishing the defense of the state as primary a basis is laid for requiring a citizen to risk or sacrifice his life in defense of the state and is thus a qualification on the implicit right of self-defense, which is considered to prevail in situations in which self-sacrifice is not called for.

(4) The U.S. Constitution does not adequately define "arms". When it was adopted, "arms" included muzzle-loaded muskets and pistols, swords, knives, bows with arrows, and spears. However, a common-law definition would be "light infantry weapons which can be carried and used, together with ammunition, by a single militiaman, functionally equivalent to those commonly used by infantrymen in land warfare." That certainly includes modern rifles and handguns, full-auto machine guns and shotguns, grenade and grenade launchers, flares, smoke, tear gas, incendiary rounds, and anti-tank weapons, but not heavy artillery, rockets, or bombs, or lethal chemical, biological or nuclear weapons. Somewhere in between we need to draw the line. The standard has to be that "arms" includes weapons which would enable citizens to effectively resist government tyranny, but the precise line will be drawn politically rather than constitutionally. The rule should be that "arms" includes all light infantry weapons that do not cause mass destruction. If we follow the rule that personal rights should be interpreted broadly and governmental powers narrowly, which was the intention of the Framers, instead of the reverse, then "arms" must be interpreted broadly.

(5) The right to keep and bear arms does indeed extend to the states. As do the other rights recognized by other Amendments, and as reinforced by the Fourteenth Amendment. It is not just a restriction on the powers of the central government. On the other hand, the citizens of a state can adopt a constitution that might restrict the exercise of such rights by delegating the power to do so to the state government. However, if the restriction of natural rights is unduly burdensome on those rights, then such a provision would be incompatible with the U.S. Constitution, its guarantee of the rights, and its guarantee that all states have a "republican" form of government - which such restrictions would compromise.

(6) The legal basis for a government not infringing on the right to keep and bear arms is not constitutional provisions like the Second Amendment, but that the power to do so is not one of the enumerated powers delegated to the government, whether Union or State. That delegation must be explicit as pertains to arms. They can't be regulated on the basis of general powers to tax or to regulate commerce. Arms have a special status under constitutional law. Some State constitutions may delegate such powers to the State government. The U.S. Constitution does not delegate such powers to the Union government. No powers are delegated to government by the preamble to a constitution, which is only a statement of purpose, only by provisions in the body of the document and its amendments.

(7) The legal basis on which the states can regulate arms is in those situations in which they conflict with property rights. It is a fundamental principal in law that the owners or

managers of real property have the power to regulate who may enter their premises, and to set conditions upon their entry. That includes public property. Citizens have a right to keep and bear arms -- on their own property or property they control -- but not on someone else's property without his permission.

(8) In other words, citizens have a right to keep and bear arms in those places and situations where they have a right to *be*, unless such rights are *disabled* by due process of law. Fundamental natural rights can never be lost, as contractual rights can be, only the exercise of those rights restricted or "disabled", to use the legal term. The distinction is very important. Natural rights are those which the individual brings with him when he enters into the social contract, and reclaims if the social contract is broken. The right to keep and bear arms is such a natural right, as is the right of free speech, religious belief, and privacy. The alternative is a contractual right created by a contract, such as the social contract. The right to vote or to be judged by a jury of one's peers are examples of rights created by the social contract, albeit important ones that are also constitutionally protected. Because they are constitutionally protected, it is only proper to speak of them as disabled, rather than lost, so long as the subject remains a citizen or natural person, depending on whether it is a right of citizenship or personhood.

(9) It is unconstitutional to "disable" any rights by statute except one set: the rights of majority. The disabilities of minority do not need to be established by a court trial or hearing. However, they can be removed sooner than they would be removed by constitution or statute, by reaching a certain age. This means it is unconstitutional to disable the right to keep and bear arms to a class of persons by statute, including those, such as felons, who have been the subject of due process on another issue, except through a proceeding in which the court is explicitly petitioned to disable them, the subject has an opportunity to argue to the contrary, the petitioner has the burden of proof that the subject if armed would be a threat to himself or others, and the court grants that petition. Merely being convicted of a crime, or declared mentally incompetent, is not sufficient if the language of the judgement does not also explicitly disable the right to keep and bear arms, or set restrictions on such right.

(10) "General police powers" is not a constitutional basis for states or localities to regulate arms. "General police powers" are the powers to use the means necessary and sufficient to stop someone who threatens to commit a major crime, or to arrest someone who has done so. All citizens have such power. They differ from regular, professional police only in that the regular police also have "special police powers" in matters such as minor offenses, and in that they *outrank* civilians. Since citizens have general police powers, they also have the right to such means as they require to exercise such powers in situations in which they may be called upon to do so. That includes arms.

(11) To be constitutional, state laws restricting the bearing of arms must distinguish between public property, private commercial property which serves the public and which therefore confers certain rights to the public, and other private property with no public access rights. It is reasonable and constitutional to prohibit persons from bearing arms onto purely private property without notifying the owner or manager and obtaining his or

her permission, except over public easements, such as sidewalks or the walkway from the street to the front door. On the other hand, it would be an undue burden on the right to bear arms to forbid persons from traveling between places where they have a right to be, and to bear arms while they do so, along public pathways or private easements, and using their own or a public means of transportation. It may not, however, be an undue burden to prohibit the bearing of arms onto certain public property where persons do not have unrestricted access, such as office buildings and auditoriums, provided that authorities guarantee the safety of persons who enter unarmed. Owners of commercial property serving the public which confers some rights of access to the public may prohibit the bearing of arms by posting or giving a notice to that effect, but lacking such notice, bearing arms onto the premises would be permitted. The rule must be that laws must not burden the right to bear arms except to the extent that they would impose a greater burden on the right of property owners to exclude persons bearing arms.

(12) The law must presume that places of business that cater to arms, such as gun shops and shooting ranges, and events such as gun shows, offer presumptive permission to bear arms and that therefore it is not illegal to bear them there or to travel to and from them.

(13) A carry permit system essentially is a removal of restrictions against bearing arms on public and private property unless there is an express prohibition against doing so, either in the form of a posted sign or a directive from the owner or his agent. The rationale for issuing such permits is to equip persons of good character to more effectively function as militiamen or police in situations in which regular police are not available or insufficient. That also includes self-protection, but the key factor is the duty to perform police duties as necessary. There also needs to be explicit statutory protection of the state or other permit issuing authority against criminal or civil liability for any acts done by the permit holder. One kind of carry permit is that which is one of the "special police powers" of regular law-enforcement officers, which allows them to carry anywhere, even against the express wishes of a property owner.

(14) With the high levels of crime we now endure, the only effective way to extend police protection to a level that might deter crime is to recruit a substantial proportion of the public to go armed, by issuing them carry permits, offering them police training, and organizing them into a network of militia units closely coordinated with regular law enforcement agencies. It is likely that as many as 25% of the adult public could serve in this way on a regular basis, and another 25% on an occasional basis, and that if they did, we might expect it to have a significant positive impact on crime. Some such citizens might even be granted higher police rank, and perform regular police duties on a part-time basis. Such involvement of the public in law enforcement would also have other benefits: breaking down the social and psychological barriers that now separate the regular police from civilians, and deterring some of the abuses of authority that police have sometimes fallen into.

(15) That the militia should be "well-regulated" is not a basis for restricting the keeping or bearing of arms. The term originally meant "self-regulated" and militias could be independent of state or national authority if not called up by such authority. Militia

members may be required to carry certain standard arms during formations, but they cannot be forbidden from carrying additional arms of their own unless doing so would impair normal militia operations. State-appointed officers may direct when, where and in what manner members of the militia are to train and perform their duties, but may not forbid them to meet on their own.

(16) The Union government has the power, under the U.S. Constitution, to regulate imports and interstate commerce in arms, but the Framers would not agree with how the "interstate commerce" clause (Art. 1, Sec. 8) of the Constitution has been broadly interpreted to include regulation of manufacture, possession, and local sales and use of items. A strict constitutional interpretation requires that the Union government has authority only over transactions that cross state lines, and not over actions or transactions that occur within state borders, even if they involve items that may someday cross state borders or may have once done so. If we want the Union government to have such authority, and a good case can be made for that, then the U.S. Constitution needs to be amended to delegate that authority to it.

(17) The Union government also has excise taxing power, but since arms have special status under the Constitution, no tax may be levied that imposes an undue burden on the right to keep and bear arms. Rights are more fundamental than taxing powers, particularly since the right to keep and bear arms is recognized in an amendment which supersedes any prior provisions that conflict with it, which includes all taxing powers except the income tax (which does not provide a basis for taxing arms). Arms may be taxed as general merchandise is, such as with a sales tax, but any tax law which specifies arms for special taxes, other than reasonable use fees for public services related to them, must be considered unconstitutional. That would include taxes on ammunition and the ingredients to make it. The analogy is to taxes on newsprint, which may be taxed like other merchandise, but not in a way that would impose an undue burden on the right of a free press.

(18) This means that no government has the power, unless that power is specifically granted to it under its constitution, to prohibit any person from manufacturing or possessing any gun or ammunition for it on his own premises or where he has a right to be, or against using it in a safe and responsible manner, or against selling or giving it to another person within the borders of a state.

(19) Since the common law prevailing at the time the Constitution was adopted defined "militia" to consist of "able-bodied" citizens, including persons younger than the usual age of majority, any law restricting the possession, sale or gift of guns or ammunition to persons under the age of majority or any other particular age, or to minors (since persons under the age of majority may have their disabilities of minority removed by a court), is also unconstitutional, unless the constitution explicitly includes a disability of the right to keep and bear arms among the disabilities of minority. The proper test for being "able-bodied" must involve meeting certain standards that are independent of age, such as skill, judgement, and level of maturity. It is possible for persons to be "able-bodied" at quite a young age, and the law must recognize that competence where it exists. All citizens

above the age of majority would have to be presumed able- bodied unless they or the state petitioned a court to rule otherwise and it granted the petition. However, it would be constitutional to require a reasonable test of competence to citizens below the age of majority, and to issue credentials to those qualifying which they would be required to show when answering calls of the militia or, if the right to keep and bear arms were included among the rights disabled by minority, when bearing arms. Early removal of the disabilities of minority would then also remove the disabilities of the right to keep and bear arms.

(20) The "full faith and credit" clause of the U.S. Constitution requires that persons issued a carry permit by one state must have that permit recognized in other states. This suggests a uniform standard for qualifying persons for issuance.

REFERENCE: Stephen P. Halbrook, *That Every Man be Armed*, available from The Independent Institute, 134 98th Av, Oakland, CA 94603, 510/568-6047.

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