

# The Right to Keep and Bear Arms

Daniel J. McKenna

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Daniel J. McKenna, *The Right to Keep and Bear Arms*, 12 Marq. L. Rev. 138 (1928).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol12/iss2/5>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

# THE RIGHT TO KEEP AND BEAR ARMS

BY DANIEL J. MCKENNA<sup>1</sup>

THE right to keep and bear arms,<sup>2</sup> as interpreted in the opinions which have discussed it, presents many elements of confusion and uncertainty.

It is by no means a simple topic, to be settled by reference to the Second Amendment to the Constitution of the United States.<sup>3</sup> Because of the elementary rule that the first ten Amendments apply only to federal legislation,<sup>4</sup> the Second Amendment touches few of the cases which have arisen or are apt to arise. Congress has seldom taken steps which might lead to appropriate litigation concerning its own power thereunder. Most of the judicial disputes have arisen from state legislation.

Before discussing the cases themselves, it is necessary to examine and compare those clauses in the several State constitutions which correspond to the Second Amendment. These are set forth in detail in the footnote.<sup>5</sup>

---

<sup>1</sup>The author wishes to thank the editor of *Adventure* for permission to use material contained in a letter from the author to that magazine and printed in a section thereof devoted to such communications.

<sup>2</sup>For an interesting discussion of the historical aspects of the matter, see "The Constitutional Right to Keep and Bear Arms," by L. A. Emerey, 28 H.L.R. 473. See also *State v. Reid*, 1840, 1 Ala. 612.

<sup>3</sup>"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."

<sup>4</sup>*U.S. v. Cruikshank*, 1875, 92 U.S. 542, and many other cases.

<sup>5</sup>Alabama. Art. I, No. 28. "That every citizen has the right to bear arms in defense of himself and the state."

Arizona, Art. II, Sec. 26. "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men."

Arkansas. Art. II, No. 5. "The citizens of this State shall have the right to keep and bear arms for their common defense."

California. The Constitution says nothing upon this matter.

Colorado. Art. II, No. 13. "That the right of no person to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall be called into question; but nothing herein shall be construed to justify the practice of carrying concealed weapons."

Connecticut. Art. First, Sec. 17. "Every citizen has a right to bear arms in defense of himself and the State."

Delaware. Nothing.

The first impression a reader obtains from a perusal of these sections is that the framers of each constitution tried to make their own product as unlike the constitutions of all the other States as they could.

---

Florida. Declaration of Rights, Sec. 20. "The right of the people to bear arms in defense of themselves and the lawful authority of the State shall not be infringed, but the legislature may prescribe the manner in which they may be borne."

Georgia. Art. I, Para. 22. "The right of the people to keep and bear arms shall not be infringed but the General Assembly shall have power to prescribe the manner in which arms may be borne."

Idaho. Art. I, Sec. 11. "The people shall have the right to bear arms for their security and defense; but the Legislature shall regulate the exercise of this right by law."

Illinois. Nothing.

Indiana. Art. I, No. 77. "The people shall have a right to bear arms for the defense of themselves and the State.

Iowa. Nothing.

Kansas. Bill of Rights, No. 4. "The people have the right to bear arms for their defense and security; but standing armies in time of peace are dangerous to liberty; and shall not be kept up; and the military shall be in strict subordination to the civil power."

Kentucky. Bill of Rights, No. 1. "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

7. The right to bear arms in defense of themselves and the State subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons."

Louisiana. "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 abridged. This shall not prevent the passage of laws to punish those who carry concealed weapons."

Maine. Art. I, sec. 16. "Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned."

Maryland. Nothing.

Massachusetts. Declaration of Rights, Art. 17. "The people have a right to keep and bear arms for the common defense. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority and be governed by it."

Michigan. Art. II, sec. 5. "Every person has a right to bear arms for the defense of himself and the state."

Minnesota. Nothing.

Mississippi. Art. III, sec. 12. "The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called into question but the legislature may regulate or forbid carrying concealed weapons."

Missouri. Art. II, sec. 17. "That the right of no citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall be called into question; but nothing herein contained is intended to justify the practice of wearing concealed weapons."

Montana. Art. III, sec. 13. "The right of any person to keep or bear arms in

But further examination permits one to detect certain group similarities and lines of cleavage.

---

defense of his own home, person and property or in aid of the civil power when thereto lawfully summoned, shall not be called into question, but nothing herein contained shall be held to permit the carrying of concealed weapons."

Nebraska. Nothing.

Nevada. Nothing.

New Hampshire. Nothing.

New Jersey. Nothing.

New Mexico. Art. II, sec. 6. "The people have the right to bear arms for their security and defense but nothing herein shall be held to permit the carrying of concealed weapons."

New York. There is no constitutional provision. However, Art. 2, No. 4 of the Civil Rights Law (a statute) reads as follows: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms cannot be infringed."

North Carolina. Art. I, sec. 24. "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; and, as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power. Nothing herein contained shall justify the practice of carrying concealed weapons or prevent the legislature from enacting penal statutes against said practice."

North Dakota. Nothing.

Ohio. Art. I, No. 4. "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty; and shall not be kept up; and the military shall be in strict subordination to the civil power."

Oklahoma. Art. 2, sec. 26. "The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereunto lawfully summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of concealed weapons."

Oregon. Art. I, sec. 27. "The people shall have the right to bear arms for the defense of themselves and the state, but the military shall be kept in strict subordination to the civil power."

Pennsylvania. Art. I, sec. 21. "The right of the citizens to bear arms in defense of themselves and the State shall not be questioned."

Rhode Island. Art. I, sec. 22. "The right of the people to keep and bear arms shall not be infringed."

South Carolina. Art. I, sec. 28. "The people have a right to keep and bear arms for the common defense. As in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the General Assembly. The military power ought always to be held in an exact subordination to the civil authority and be governed by it."

South Dakota. Art. VI, sec. 24. "The right of citizens to bear arms in defense of themselves and the state shall not be denied."

Tennessee. Art. I, sec. 26. "That the citizens of this state have a right to keep and bear arms for their common defense; but the legislature shall have the power, by law, to regulate the wearing of arms with a view to prevent crime."

Texas. Art. I, sec. 23. "Every citizen shall have the right to keep and bear

To begin with, fifteen constitutions are quite silent upon the matter of keeping or bearing arms.<sup>6</sup>

Sixteen (including that of the United States) refer to the right as existing in "the People."<sup>7</sup>

Two say that it rests in "Individual Citizens."<sup>8</sup>

Five use the single word "Citizens."<sup>9</sup>

Eleven use the word "Citizen" or "Person" with an individual connotation, apparently intending that the individual may bear arms in his own private defense.<sup>10</sup>

Two do not specify the purpose for which arms may be borne.<sup>11</sup>

Five say that the purpose is for the "Common Defense."<sup>12</sup>

Five more say that one of the purposes is "In Aid of the Civil Power."<sup>13</sup>

Another five say that it is for the people's "Defense and Security."<sup>14</sup>

arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime."

Utah. Art. I, sec. 6. "The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law."

Vermont. Chap. I, art. 16. "That the people have a right to bear arms for the defense of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power."

Virginia. Nothing.

Washington. Art. I, sec. 24. "The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men."

West Virginia. Nothing.

Wisconsin. Nothing.

Wyoming. Art. I, sec. 24. "The right of citizens to bear arms in defense of themselves and of the state shall not be denied."

<sup>6</sup> California, Delaware, Illinois, Iowa, Maryland, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Virginia, West Virginia and Wisconsin.

<sup>7</sup> United States, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Massachusetts, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Utah and Vermont.

<sup>8</sup> Arizona and Washington.

<sup>9</sup> Arkansas, Pennsylvania, South Dakota, Tennessee and Wyoming.

<sup>10</sup> Alabama, Arizona, Colorado, Connecticut, Michigan, Mississippi, Missouri, Montana, Oklahoma, Texas and Washington.

<sup>11</sup> Georgia and Rhode Island.

<sup>12</sup> Arkansas, Maine, Massachusetts, South Carolina and Tennessee.

<sup>13</sup> Colorado, Mississippi, Missouri, Montana and Oklahoma.

<sup>14</sup> Idaho, Kansas, New Mexico, Ohio and Utah.

Eight say that the right is to bear arms in defense of "Themselves (i.e., the people or citizens, using the plural or the collective noun) and/or the State."<sup>15</sup>

Nine constitutions directly or indirectly discuss the matter of an army or militia in the clause in which they discuss the right to keep and bear arms, thus showing that they considered the matters to be related.<sup>16</sup> (Those which do not mention both subjects in the same clause contain elsewhere similar references to armies or militia.)

Nine expressly except concealed weapons from the constitutional protection.<sup>17</sup>

Six authorize the legislature to regulate the right.<sup>18</sup>

Two expressly except private armies from the protection.<sup>19</sup>

Although it is commonly said that the right to keep and bear arms is not created by constitutions but that only its infringement is forbidden,<sup>20</sup> eighteen constitutions appear to be broad enough to create such a right, even if it were theretofore non-existent.<sup>21</sup>

The expectation of a judicial uniformity based upon such constitutional diversity is plainly unreasonable.

For purposes of elimination, one should first consider those States in which there is no constitutional reference to the keeping or bearing of arms.

In New York, the validity of the Sullivan Anti-Weapon Law seems to have been expressly affirmed in the cases of *People v. Warden*<sup>22</sup> and *People v. Persce*,<sup>23</sup> although these decisions hardly express the true situation, namely, that there is no restriction whatever upon this kind of legislation in New York. True, New York has a statutory Bill of Rights which embodies the same wording as the Second Amendment. But this was enacted only by the legislature itself. A later contradictory statute, being of equal dignity, will supersede the former one.

<sup>15</sup> Florida, Indiana, Kentucky, Oregon, Pennsylvania, South Dakota, Vermont and Wyoming.

<sup>16</sup> Kansas, Louisiana, Massachusetts, North Carolina, Ohio, Oregon, South Carolina, Vermont and the United States.

<sup>17</sup> Colorado, Kentucky, Louisiana, Mississippi, Missouri, Montana, New Mexico, North Carolina and Oklahoma.

<sup>18</sup> Florida, Georgia, Idaho, Tennessee, Texas and Utah.

<sup>19</sup> Arizona and Washington.

<sup>20</sup> *U.S. v. Cruikshank*, 1875, 92 U.S. 542. *Presser v. Ill.*, 1885, 116 U.S. 252.

<sup>21</sup> Alabama, Arkansas, Connecticut, Idaho, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, New Mexico, Ohio, Oregon, South Carolina, Tennessee, Texas, Utah and Vermont.

<sup>22</sup> 1913, 139 N.Y. Supp. 277.

<sup>23</sup> 1912, 204 N.Y. 397.

In a California case,<sup>24</sup> the Court recognized the true doctrine that "the absence of such a guarantee (i.e., of the right to keep and bear arms) in the State Constitution leaves the legislature entirely free to deal with the subject."

In the famous case of *Presser v. Illinois*,<sup>25</sup> in which the Supreme Court of the United States upheld the right of Illinois to forbid the parading of unauthorized bodies of armed men, the Court properly rejected the argument that the Second Amendment was violated. And Illinois has no similar clause in its own constitution.

In the New Hampshire case of *State v. Rheau*,<sup>26</sup> no argument was even offered upon the right to keep and bear arms. Evidently, counsel realized that the Second Amendment did not apply. New Hampshire has no similar guarantee.

Admitting that the Second Amendment applies only to Congress, what does it forbid Congress to do? That is a question as yet unanswered in full. Judging from the prevailing trend of the cases, it would seem as if the Second Amendment only forbids Congress so to disarm citizens as to prevent them from functioning as state militiamen. Under Paragraph 16 of Section 8 of Article I, the Federal Government exercises a paramount control over, but may not destroy, the militia of the States and the latter may legislate concurrently, provided they do not contradict this Federal control.<sup>27</sup>

The next problem is that of the State legislatures under their local constitutional restrictions. It is conceded that no American constitution robs its State of the latter's general power to regulate the welfare of its citizens, protect the public peace, etc. In other words, the constitutional clause, if any, should be read in the light of the police power. The latter may be curtailed. It is not completely destroyed. It still exists, in some degree.<sup>28</sup>

There are certain forms of weapon regulation so proper and necessary that they are universally conceded. The most noticeable of these is the restriction of the carrying of concealed weapons. Many of the constitutions expressly concede this right of legislation, but even in the absence of express constitutional provision, it exists everywhere. One old Kentucky case<sup>29</sup> imagined that legislation forbidding the carrying

<sup>24</sup> Ex Parte Ramirez, 1924, 226 P. 914. Accord, *People v. Camperlingo*, Calif., 1924, 231 P. 601.

<sup>25</sup> 1885, 116 U.S. 252.

<sup>26</sup> 1922, 80 N.H. 319, 116 A. 758.

<sup>27</sup> *Presser v. Ill.*, 1885, 116 U.S. 252; *Dunne v. People*, 1879, 94 Ill. 120; *Houston v. Moore*, 5 Wheat. 1; *People v. Warden*, 1913, 139 N.Y. Supp. 277.

<sup>28</sup> *Strickland v. State*, 1911, 137 Ga. 1; 72 SE 260, 36 LRA (NS) 115; *Andrews v. State*, 1871, 3 Heisk. (Tenn.) 165; *State v. Reid*, 1840, 1 Ala. 612.

<sup>29</sup> *Bliss v. Commonwealth*, 2 Litt. 90.

of concealed weapons was unconstitutional but this decision was followed by a constitutional amendment authorizing such legislation. Other similar laws, which are not seriously questioned, are those against the pointing of weapons at people, against wearing arms in church, court, polling-place, etc., against the possession of arms by tramps, minors, convicts, insane or intoxicated persons, and against shooting within the city limits.<sup>30</sup>

It is usually said that the only kind of weapons meant by the word "Arms" in the constitutions is the type of weapon suitable for use in civilized warfare. This means that sword-canes, bowie-knives, loaded canes, slung-shots, dirks, brass knuckles, pocket-pistols and *Arkansas tooth-picks* (which seem to have been very popular a few decades ago) do not come beneath the ægis of the guarantee. Only such weapons as swords, bayonets, muskets, horseman's pistols, field-pieces, mortars, etc., were intended to be protected.<sup>31</sup> The few exceptions to this rule will be discussed later.

When a court says that only weapons suitable for warfare are protected, it is a fair inference that the Constitution expects the citizens to carry such weapons only as actual or potential members of the local militia. Some courts expressly enunciate this rule.<sup>32</sup> Others, although not so definite in their phraseology, seem to mean the same thing when they say that the guarantee protects the people against oppression and aggression, since that connotes the citizenry acting as an organized unit

---

<sup>30</sup> Concealed weapons—*Com. v. Murphy*, 1896, 166 Mass. 171, 44 NE 138; *State v. Gohl*, 1907, 46 Wash., 408; *Hill v. State*, 1874, 53 Ga. 472; *Nunn v. State*, 1846, 1 Ga. 243; *State v. Jumel*, 1858, 13 La. Ann. 399; *State v. Kerner*, 1921, 107 SE 222 (N.C.); *State v. Keet*, 1916, 190 SW 573 (Mo.); *State v. Reid*, 1840, 1 Ala. 612; *State v. Boone*, 1903, 132 S.C. 1107, 44 SE 595; *Wright v. Com.*, 1875, 77 Pa. St. 470; *Orrick v. Akers*, 1904, 109 Mo. App. 662, 83 SW549; *Haile v. State*, 1882, 38 Ark. 564; *Matthews v. State*, 1926, 244 P. (Okla.) 56; *State v. Angelo*, 1925, 130 A. (N.J.) 458; *State v. Nieto*, 1920, 101 O.S. 409, 130 NE 663. Other nuisances—*Hogan v. State*, 1900, 63 O.S. 202, 52 LRA 863, 58 NE 572; *Hill v. State*, 1874, 53 Ga. 472; *Parman v. Lemmon*, 1926, 244 P. 930; *Coleman v. State*, 1858, 32 Ala. 581; *State v. Shelby*, 1886, 90 Mo. 302; *Davenport v. State*, 1895, 112 Ala. 49, 20 S 971; *State v. Johnson*, 1906, 76 S.C. 39; *Walter v. State*, 1905, 35 O.C.C. 567; *People v. McCloskey*, 1926, 244 P. (Calif.) 930.

<sup>31</sup> *Dabbs v. State*, 1882, 39 Ark. 355; *Fife v. State*, 1876, 31 Ark. 633; *State v. Wilburn*, 1872, 66 Tenn. 57; *Aymette v. State*, 2 Humph. (Tenn.) 154; *Andrews v. State*, 1871, 2 Heisk. (Tenn.) 165; *Hill v. State*, 1874, 53 Ga. 472; *Ex Parte Thomas*, 1908, 21 Okla. 770, 97 P. 260, 20 LRA (NS) 1007.

<sup>32</sup> *Strickland v. State*, 1911, 137 Ga. 1, 72 SE 260, 36 LRA (NS) 115; *People v. Warden*, 1913, 139 N.Y. Supp. 277; *Salina v. Blacksley*, 1905, 72 Kan. 230, 83 P 619, 3 LRA (NS) 168; *State v. Hogan*, 1900, 63 O.S. 202, 58 NE 572, 52 LRA 863; *Andrews v. State*, 1871, 3 Heisk. (Tenn.) 165.



in defense of its liberties.<sup>33</sup> The leading case of *Salina v. Blacksley*, *supra*, goes so far as expressly to decide that the word "people" means only the collective body and that individual rights are not protected by the constitutional clause. The only time that people are protected, according to this case, is when they are acting under the express authority of the State, as members of a military organization. According to the language of the opinion, "in some of the states, where it has been held, under similar provisions, that the citizen has the right to carry such arms as are ordinarily used in civilized warfare, it is placed on the ground that it was intended that the people would thereby become accustomed to handling and using such arms, so that in case of an emergency, they would be more or less prepared for the duties of a soldier. The weakness of this argument lies in the fact that in nearly every State in the Union, there are provisions for organizing and drilling State militia in sufficient numbers to meet any emergency." This case said that the carrying even of *unconcealed* weapons might be forbidden. But this last point is by no means clear from the decisions.<sup>34</sup>

A number of the constitutional provisions say that the guarantee of the right to keep and bear arms is to enable a man to defend his person, property, etc. Under American legal theory, clearly such a right of defense exists. The only difficulty is to discover how far the States may restrict his exercise of it through the employment of dangerous weapons. A few cases are quite liberal in allowing the use of firearms. But they are in the minority. They will be discussed later.<sup>35</sup>

Whether or not a person may have weapons for self-defense, he clearly has no protection if he becomes the aggressor.<sup>36</sup> In *Carlton v. State*,<sup>37</sup> the Court, in pithy and forceful language, said that the guarantee in the Florida Constitution "was intended to give people means of protecting themselves against aggression and outrage and was not designed as a shield for the individual man who is prone to load his stomach with liquor and his pockets with revolvers or dynamite and make of himself a dangerous nuisance to society."

There are a few decisions, to which reference was made in the second last paragraph, which, for want of a better adjective, can be described as liberal, in the sense that they do not try to whittle down the rights of the individual citizen.

<sup>33</sup> *Haile v. State*, 1882, 38 Ark. 564; *Carlton v. State*, 1912, 63 Fla. 1; *Walter v. State*, 1905, 35 O.C.C. 567; *Smith v. Isenhour*, 1866, 43 Tenn. (3 Coult.) 214.

<sup>34</sup> *Num v. State*, 1846, 1 Ga. 243; *State v. Duke*, 1875, 42 Tex. 455; *Isaiah v. State*, 1912, 176 Ala. 27.

<sup>35</sup> *People v. Zerillo*, 1922, 219 Mich. 635, 189 NW 927, etc.

<sup>36</sup> *State v. White*, 1923, 253 SW (Mo.) 724; *State v. Hogan*, 1900, 63 O.S. 202, 58 NE 572 52 LRA 863.

<sup>37</sup> 1912, 63 Fla. 1.

Thus, in the case of *Wilson v. State*,<sup>38</sup> the Court said, after admitting that certain necessary restrictions might be imposed:

But to prohibit the citizen from wearing or carrying a war weapon, except on his own premises, or when on a journey traveling through the country with baggage, or when acting as, or in aid of, an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms.

A Texas case,<sup>39</sup> decided in the same year, said that the legislature could not cause a person convicted of carrying arms illegally to forfeit them. "One of his most sacred rights is that of having arms for his own defense and that of the State," said the Court.

The well known Texas case of *State v. Duke*<sup>40</sup> went so far as to say that the Texas Constitution did not necessarily contemplate only the formation of

a well-regulated militia [and that] the arms which every person is secured the right to keep and bear [in the defense of himself or the State, subject to legislative regulation,] must be such arms as are commonly kept according to the customs of the people and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State. If this does not include the double barrelled shot-gun, the huntsman's rifle, and such pistols at least as are not adapted to being carried concealed, then the only arms which the great mass of the people of the State have, are not under constitutional protection.

But one must confront the last case with the much later one of *Caswell v. State*,<sup>41</sup> in which the Court intimated that the selling of fire-arms had a baneful influence and that the legislature could tax the business out of existence. Thus doth a frontier point of view change to an urban one!

The North Carolina case of *State v. Kerner*<sup>42</sup> shows a Court taking a common-sense view of the militia criterion. Chief Justice Clark said, in reference to the State Constitution, that, although the legislature could reasonably regulate the carrying of arms, it had to respect the customary weapons which people had possessed when the Constitution had been adopted.

It is true, [he said] that the invention of guns with a carrying range of probably 100 miles, submarines, deadly gases, and of airplanes carrying bombs and other modern devices, have much reduced the importance

<sup>38</sup> 1878, 33 Ark. 557.

<sup>39</sup> *Jennings v. State*, 5 Tex. App. 298.

<sup>40</sup> 1875, 42 Tex. 455.

<sup>41</sup> 1912, 148 SW (Tex.) 1159.

<sup>42</sup> 1921, 107 SE 222.

of the pistol in warfare except at close range. But the ordinary private citizen, whose right to carry arms cannot be infringed upon, is not likely to purchase these expensive and most modern devices just named. To him the rifle, the musket, the shot-gun 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.

The Michigan case of *People v. Zerillo*<sup>43</sup> stated that aliens as well as citizens had a right, under the Michigan Constitution, to possess fire-arms, whether revolver, rifle or shot-gun, for the defense of themselves and their property. The Court distinguished this case from the Pennsylvania decision of *Commonwealth v. Patson*,<sup>44</sup> which involved a Pennsylvania law against the possession of fire-arms by aliens. The Pennsylvania Constitution protects the rights only of *citizens* and the statute involved only forbade aliens to have long-range weapons, not interfering with their possession of short-range arms, such as revolvers and pistols. The Pennsylvania case is not mentioned further in this article because the opinion did not touch upon the right to keep and bear arms.

Most of the cases cited have discussed other topics in addition to the one which is the subject of this article. By way of brief explanation, without further detail, it may be said that the Supreme Court of the United States, in *Miller v. Texas*,<sup>45</sup> upheld a Texas law which for-

---

<sup>43</sup> 1922, 219 Mich. 635, 189 NW 927. In the course of his opinion, Judge Wiest said:

"Must an alien owner of a farm sit with folded arms and watch hen-hawks steal his chickens? No; the act permits him to kill noxious birds and animals, when necessary, in defense of his person or property. But what is he going to use for that purpose? Until the occasion arises, if this statute is given the construction contended for by the people, it is a crime for him to possess a firearm, and he therefore cannot be prepared to exercise the leave granted without committing a crime. Woodchucks could burrow in his yards and meadows with impunity, owls rob his henroost, rats run about his feet at chore time, and in some sections of the state wolves could sit on his very doorstep and howl defiance. Even the predatory skunk, in the open season, would be more offensively armed than the unnaturalized farmer faring forth to drive it away. Must such a farmer whistle off the dog discovered in the act of killing his sheep? Another statute gives him the right to kill such a dog discovered in the act. Must he request the burglar to come unarmed because he is unarmed by the law? This act, if construed as contended for by the people, is so sharp shod as to calk itself. The right to kill noxious birds and animals, in defense of person or property would be but a joke if the means of exercising the right are taken away by the general prohibition against possessing any firearms."

<sup>44</sup> 1911, 231 Pa. 46; affirmed, 232 U.S. 138.

<sup>45</sup> 1893, 153 U.S. 535.

bade the carrying of dangerous weapons on the person. The Court said that this law did not violate the Second Amendment, of course, and also that it did not deprive anyone of due process of law or abridge the privileges and immunities of citizens of the United States.

The case of *State v. Nieto*<sup>46</sup> said that a man might violate an Ohio statute against carrying concealed weapons by carrying a revolver in his pocket within a bunkhouse where he was living and that the popular maxim, "A man's house is his castle," had no application.

There is great room for speculation as to the future law upon the right to keep and bear arms. One may assume that the constitutional guarantee refers to the preparedness of citizens to take their places in the militia. And yet, as the Court pointed out in *State v. Kerner*, the fashions in war weapons have undergone great change. The simple equipment of sword, pistol, musket and bayonet, etc., which once was adequate, is adequate no longer.<sup>47</sup>

As early as 1871, Judge Freeman, in *Andrews v. State*,<sup>48</sup> said:

We may for a moment pause to reflect on the fact that what was once deemed a stable and essential bulwark of freedom, "a well-regulated militia," though the clause still remains in our Constitution, both State and Federal, has, as an organization, passed away in almost every State of the Union, and only remains to us as a memory of the past, probably never to be revived.

Judge Freeman was speaking of the Tennessee of the early seventies, just emerging from the terrible aftermath of the Civil War. In spite of his dictum, "well-regulated militia" organizations do exist and they probably are more efficient than at any period in the past. But whether they may be considered "a stable and essential bulwark of freedom," to a greater degree than is the regular army, may be doubted. To this extent, Judge Freeman was correct, for in times of stress, the local militia invariably tends to submerge its identity in the national organization.

Judge Green<sup>49</sup> echoed a similar thought when he pointed out that no longer do states rely upon raw levies to turn out over night in case of an emergency, but carefully organize and drill their militia.

In other words, the day of the frontiersman, who leaped to the defense of his town or state when the savage raised his howl, is past. The modern soldier, be he militiaman or regular, is a cog in a well-drilled, smoothly running machine. He is not expected to develop his natural ability by unorthodox means. He falls into line and obeys

<sup>46</sup> 1920, 101 O.S. 409, 130 NE 663.

<sup>47</sup> *Hill v. State*, 1874, 53 Ga. 472.

<sup>48</sup> 3 Heisk. (Tenn.) 165. 1871.

<sup>49</sup> *Salina v. Blacksley*, 1905, 72 Kan. 230, 83 P 619, 3 LRA (NS) 168.

his officers. The spirit of the free-lance pioneer is incompatible with modern military discipline.

Fashions in war change. The weapons which the fathers of the nation knew may become obsolete within the century, like cross-bows, fauchards, misericordes or morgensterns. At one time, during the Middle Ages, cross-bows were condemned by the Church as inhumane. Yet they later became recognized weapons of warfare and then were forgotten. May one assume that gunpowder will never share the same fate? And if this would happen, would the constitutional guarantee be broad enough to cover new weapons as they become common and to leave old ones unprotected as they become obsolete? Or might the courts say that the states may have their well-regulated militia even though individuals possess no weapons of their own, provided the states supply the necessary armament upon mobilization?

Furthermore, leaving out of the discussion those states mentioned in Note 21, will future lawyers and judges admit that there *is* a right to keep and bear arms? One must remember that in such instances where the courts have discussed the matter at all, they have said that constitutions do not *create* the right, but only *protect* it, and that its origin may be found in man's very nature.

In view of the fluidity of modern philosophic thought and in spite of the notorious conservatism of the legal profession, it is quite possible that jurists and publicists may some day universally deny that man has any inherent natural right to keep and bear arms. To put the case concretely, they may express themselves as follows: "Our ancestors thought that such a right existed but we now realize that they were mistaken." Perhaps the Court in *People v. Camperlingo*<sup>50</sup> had some idea of this nature in mind when it said: "It is clear that, in the exercise of the police power of the state, that is, for the public safety or the public welfare generally, such right may be either regulated or in proper cases, entirely destroyed."

In other words, will the courts ever say that the Constitutions would protect the right to keep and bear arms, if there were such a right, but that it does not exist and never did exist except in the minds of discredited theorists? Who knows?

---

<sup>50</sup> 1924, 231 P (Calif.) 601.