Michigan Law Review

Volume 88 | Issue 6

1990

The Privilege to Keep and Bear Arms: The Second Amendment and Its Interpretation

William A. Walker
University of Michigan Law School

THE PRIVILEGE TO KEEP AND BEAR ARMS: THE SECOND AMENDMENT AND ITS INTERPRETATION. By *Warren Freedman.* New York: Quorum Books. 1989. Pp. x, 135. $39.95.

> 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.[1]

Whether or not you read *Guns & Ammo,* listen to Guns 'n' Roses or see *Top Gun,* the pervasive presence of guns in American culture is unmistakable. At a time when the need to limit the proliferation of firearms (particularly those associated with criminal activity) seems more apparent than ever, opposition to such restrictions has never been greater.[2] In *The Privilege to Keep and Bear Arms,* Warren Freedman[3] sets out to "present[ ] the case for the anti-gun, anti-weapon, or anti-arms enthusiast" (p. ix). Following a common pro-regulation line of reasoning, Freedman's basis for arguing that firearm restrictions are constitutional is the assertion that the second amendment grants a "collective" rather than an "individual" right.[4] Because the second amendment safeguards keeping and bearing arms in the context of preserving a "well-regulated militia," he argues it is valid only to the extent that firearms are related to the collective activity of the militia of any given State. Therefore the right accrues to the States or State militia collectively, not to individual citizens.

The courts have supported Freedman's theory to the extent that they consistently hold that firearms which bear no relation to the preservation of a well-regulated militia are within the purview of legislative restriction. However, the cases fall short of foreclosing the possibility that the right is held or asserted by individuals (when personal arms are kept in furtherance of State militia activity).[5]

The Privilege to Keep and Bear Arms is divided into eight chapters.

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1. U.S. CONST. amend. II.

2. *See, e.g.,* Rierden, *A Child's Shooting Death Compels His Mother to Action,* N.Y. Times, Nov. 19, 1989, § 23 (Conn. weekly), at col. 1 (firearm death of child sparks personal gun control campaign); *Some in N.R.A. Seek Expulsion of Bush.* N.Y. Times, July 13, 1989, A13, col.1 (NRA members circulate petition to expel President Bush from the group due to his approval of a ban on imports of semiautomatic assault weapons).

3. Attorney, and author of FEDERAL STATUTES ON ENVIRONMENTAL PROTECTION (1987); FOREIGN PLAINTIFFS IN PRODUCTS LIABILITY ACTIONS (1988); FRIVOLOUS LAWSUITS AND FRIVOLOUS DEFENSES (1987); THE RIGHT OF PRIVACY IN THE COMPUTER AGE (1987); and PROFESSIONAL SPORTS AND ANTITRUST (1987).

4. *See generally* Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment,* 82 MICH. L. REV. 204, 206 (1983) (characterizing the traditional debate between the "state's right" view of anti-gun advocates and the "individual right" view of pro-gun advocates).

5. *See* Presser v. Illinois, 116 U.S. 252, 266 (1886) (citizen was barred from asserting a personal right, in part, because he did not belong to an organized militia); United States v. Miller, 307 U.S. 174 (1939) (same); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977) (defendant's firearm must have connection to the militia in order to assert the right); Cases v. United

These are essentially different settings for discussion of the collective right theory of the second amendment, which runs throughout. The chapters include a phrase-by-phrase annotation of the second amendment, a historical interpretation of the amendment's language, legislative and judicial treatment of gun control efforts, and theories of tort liability for gun manufacturers. Each is a step toward Freedman's stated mission: to provide "answers to the arguments set forth by the National Rifle Association and its satellites of members and of arms dealers who have products to sell," while making sure that the historical background to the second amendment is "nevertheless delineated as objectively as possible" (p. ix).

Unfortunately, Mr. Freedman's own enthusiastic anti-weapon position proves to be a stumbling block both to his ability to delineate an objective history and to provide the most persuasive answers to pro-gun arguments. While Freedman does present many strong arguments for gun control, his ultimate effectiveness is hampered by two major problems: his apparent belief in the absurdity of the pro-gun position, and his insistence that the collective nature of the second amendment right controls the debate.

I. A Dismissal of Pro-Gun Claims

Freedman's conviction that private ownership of guns hinders rather than facilitates personal liberties[6] (although plausibly correct) allows him to dismiss pro-gun arguments as absurd on their face, rather than disproving them explicitly. At times his argumentative style tends toward *ad hominem* attack rather than serious confrontation of pro-gun claims. His initial reference to the NRA's "gun-toting members" (p. 19) gradually turns to "[t]he wishful thinkers favoring no control over guns" (p. 60), and later to "[t]hese same zealots" (p. 60), and finally, he simply refers to them as "the zealots" (p. 61). While these people may actually *be* "zealots," Freedman's labeling them as such does not defeat their arguments.

This confidence in the pro-gun lobby's patent absurdity hinders Freedman's ability to present the necessary counterarguments to its claims. For example, in the section which explores the application of the second amendment to the States via the fourteenth amendment, he cites authority indicating that only rights which are " 'implicit in the concept of ordered liberty' " apply to the States through incorpora-

States, 131 F.2d 916, 923 (1st Cir. 1942) (defendant had no right to possess and use firearm "on a frolic of his own").

6. Freedman points to at least three ways in which guns threaten individual safety: first, the possibility that the presence of firearms could trigger an assault that otherwise would not occur; second, the possibility that firearms facilitate the commission of crimes that would not be possible without them; and third, the possibility that assaults with firearms will increase the severity of injury or deaths as compared to assaults without them. P. 6.

tion.[7] Without elaboration, he then declares: "It is incredible that these zealots could compare the right to keep and bear arms with the 'concept of ordered liberty,' much less argue that the Second Amendment delineates 'immunities that are valid as against the federal government,' the very antithesis of the Second Amendment" (p. 61).

Apart from indicating that gun enthusiasts are incredible zealots, his point is unclear. His own writing, as well as that of others, shows that the right to bear arms was, at least at one time, closely associated with the concept of ordered liberty.[8] Mr. Freedman also fails to explain *why* the notion that "the Second Amendment delineates immunities that are valid as against the federal government" is the "very antithesis of the Second Amendment" (p. 61). In fact, it seems clear that what little power the second amendment holds is mainly directed at disabling the *federal* government from infringing on the right to bear arms. The more tenuous argument made by pro-gun forces (which Mr. Freedman likely intended to discredit) is the assertion that the second amendment delineates immunities that are valid as against the *States.* (This is the question the chapter purports to address.) His willingness to let the outrageousness of "these zealots" speak for itself makes his argument unintelligible.

In his efforts to paint the pro-gun lobby as a band of gun-slinging, Wild-West cowboys, Mr. Freedman trivializes some of his own arguments. He asserts that those who claim that self-defense is one of the purposes behind the right to bear arms, "justify their conclusion by the uniquely American frontier experience of yesterday. Today, however, there is no such frontier, and people no longer depend upon guns for day-to-day survival" (p. 25). This argument is only valid as long as his implicit assertion (that people don't need guns for self-defense) remains unchallenged. Gun proponents are quick to claim, however, that people today are increasingly turning to gun ownership for self-defense.[9] While this claim may not hold up to the counterargument that public safety is decreased rather than increased by the keeping of guns,[10] Freedman's flip dismissal of the self-defense argument as a

7. P. 61 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937).

8. *See* p. 22 ("Formal state militia described in the Second Amendment was the vehicle to prevent the establishment of a standing federal army that could oppress the states and the citizens thereof."); *see also* Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security,* 9 HAMLINE L. REV. 69, 82 (1986) ("It seems clear that the Framers envisioned a right of the people to bear arms to oppose an oppressive government."); Kates, *supra* note 4, at 230 (1983) (finding that the founders believed that self-defense was an inalienable right, and derived from it the right to resist tyranny, therefore making the right to bear arms "necessary to the security of a free state").

9. *See* Kates, *supra* note 4, at 268-69 (discussing the need for personal gun ownership as the police become less and less able to ensure safety).

10. Many studies have shown that individual ownership of firearms increases the likelihood of personal injury or death rather than insuring personal safety. *See, e.g.,* J. WRIGHT, P. ROSSI & K. DALY, UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA 139-48 (1983) (collecting studies, but ultimately disagreeing with their conclusions); Zimring, *Street Crime and*

relic of bygone times avoids the entire issue.

II. TOTAL ADHERENCE TO THE COLLECTIVE RIGHT THEORY

The book's second problem is that Freedman's exclusive reliance on the "collective" right theory to justify constitutional gun control[11] forces him into a corner where he must deny that any individual characteristics of the right to bear arms ever existed. Unfortunately, the history of the second amendment seems to show that even if the right to bear arms were only applicable to weapons intended for collective use (*i.e.,* the militia), it inhered in the individual.

The militia at the time of the second amendment's adoption was comprised of every adult male, and each was expected to supply his own weapon and be on call for periodic duty.[12] Therefore, even if the right to keep and bear arms is only valid in the context of maintaining a well-regulated militia (as the case law implies), the right originally applied to the individual citizen who was required to keep his militia weapons at home.[13] By refusing to credit even a partially personal aspect of what may be a largely collective right, Freedman is forced to deny a historical reality that virtually everyone (even himself, on occasion) seems to acknowledge. Freedman ignores his own admission that the militia required individuals to supply their own guns (pp. 22, 45), and baldly asserts that "the militia 'keep' arms in that the arms are not private property but belong to the governments" (p. 26). The statement appears to be his own linguistic interpretation since he offers no authority to back it up.

Mr. Freedman is so emphatically opposed to conceding that the second amendment grants citizens any individual rights at all that he occasionally makes claims that cannot be supported. For example, in section 2.4 he interprets the second amendment language: "the right of the people," to mean: "at most a privilege" (pp. 25-26). His logic is as follows:

> [A] "right" can be qualified by reference to reasonableness, as illustrated by the Fourth Amendment, which balances the "right of the people to be secure in their persons, houses, papers and effects" against "unreasonable searches and seizures." The Second Amendment also balances the "right of the people" in the sense that collective action and not individual action is necessary to protect it. Thus, the entitlement is at most a "privilege" to keep and bear arms. [p. 26; footnote omitted]

New Guns: Some Implications for Firearms Control, 4 J. CRIM. JUST. 95 (1976) (privately purchased firearms are likely to enter the stream of guns used in crimes).

11. *See supra* notes 4-5 and accompanying text.

12. *See* Kates, *supra* note 4, at 214-15. Even Freedman himself admits that, in the first years after the passage of the Bill of Rights, the militia was defined as "the entire able-bodied military-age male citizenry of the United States [which] required those males to own their own firearms." P. 22.

13. *See* Kates, *supra* note 4, at 214-15.

His analogy to the fourth amendment clearly fails since that amendment contains a reasonableness standard *in the text*, whereas the language of the second amendment is most notable for its absoluteness ("shall not be infringed").[14] Furthermore, the "balance" he implies is not really a balance at all. The collective action to which he refers is presumably that of the state militia. Yet this collective action is not *balanced* against the right to bear arms, but rather defines the context in which the right exists at all.[15]

Additionally, Freedman makes assertions that may or may not be provable, but makes no attempt to support them. In his survey of the state constitutions that contain rights to bear arms, he lists fifteen states with provisions that (in their text) clearly give individuals a right to bear arms, and lists twenty-two other state constitutional provisions as "holding to the collective right theory" (p. 29). Those which he claims adopt his "collective" theory include states which have provisions identical to the second amendment (and are therefore subject to the same debate which produced Mr. Freedman's book), and even one (Vermont) that provides that "the people have a right to bear arms for the defense of themselves and the state" (p. 30). While the case law in Vermont may hold this to give only a collective right,[16] Freedman makes no indication of such treatment, and its language certainly appears to allow individual firearm possession for self-defense.[17]

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The Privilege to Keep and Bear Arms has a chapter on theories of tort liability against gun manufacturers and distributors.[18] While

14. U.S. CONST. amend. II; *see also,* Beschle, *supra* note 8, at 101-02 (noting that the use of the term "unreasonable" in the fourth amendment implies a balancing test).

15. The only support Freedman uses to back up his assertion is a law review article which reads: "[T]he second amendment right of security is also an individual right, albeit one that requires collective action to protect it." Beschle, *supra* note 8, at 102. As noted above, this does not necessarily imply a balancing test, but rather argues that the individual right to bear arms can only be asserted if in conformity with collective (militia) activity. Also, it is interestingly in direct opposition to his claim that the second amendment grants a collective right.

16. *See* State v. Duranleau, 128 Vt. 206, 260 A.2d 383 (1969) (question of individual nature of the right remains ambiguous).

17. While it is perfectly possible that Mr. Freedman's assessment of these provisions is correct, his habit of omitting or glossing over seemingly important information gives even the sympathetic reader the impression that Freedman is trying to deceive. The most egregious example is where he claims the 1968 Supreme Court case of Duncan v. Louisiana, 391 U.S. 145 (1968), was "overruled in 1937 by Palko v. Connecticut," 302 U.S. 319 (1937). P. 61. While his argument did not depend on which overruled the other, it is a typical example of the kind of questionable use of authority which, when coupled with his flippant tone, tends to discredit his position.

18. The most notable among these are: the theory of negligent entrustment (holding manufacturers and dealers liable for reasonably foreseeable harm that will result from entrustment of certain firearms to certain people) (p. 94), a theory of strict liability for "ultrahazardous activities" (arguing that the risk of serious injury from handguns in particular warrants strict liability for all damages resulting from their use) (p. 101), and liability for "dispensing of firearms and guns to persons with criminal intent" (analogizing to dram shop acts imposing liability on servers of alcohol) (pp. 102-03).

these ideas are not completely new,[19] it is a fair sampling of some of the theories under which gun dealers may be held accountable, and victims of gun crimes may be compensated. The book concludes with a few words about what action should be taken to confront the problem of the proliferation of firearms. While Mr. Freedman's convictions are certainly sincere, and he does present many valid theories under which strict gun control laws are consistent with the second amendment, he nevertheless falls short of his stated goal of providing "the answers" to many of the serious claims advanced by the pro-gun lobby.

— *William A. Walker*

19. *See, e.g.*, Note, *Manufacturers' Strict Liability for Handgun Injuries: An Economic Analysis*, 73 GEO. L.J. 1437 (1985); Note, *Manufacturers' Liability to Victims of Handgun Crime: A Common Law Approach*, 51 FORDHAM L. REV. 771 (1983).