

**POSITION PAPER #4**  
**BALANCING THE SECOND AMENDMENT**  
**RIGHT TO KEEP AND BEAR ARMS**  
**WITH THE RIGHTS TO SAFETY**  
**AND SECURITY OF PERSON**

The majority opinion of the Court of Appeals panel in the Parker v District of Columbia case, later decided by the Supreme Court with an Antonin Scalia majority opinion, referenced the minority opinion of the Pennsylvania Constitutional ratification convention for historical context of the views of Quakers and other pacifist religious minorities. Footnote 10 of the majority decision stated:

To be sure, collective right theorists have correctly observed that the Pennsylvania dissenters were not speaking for anyone but themselves—that is, they lost in their attempt to defeat ratification of the Constitution, and lacked the clout to have their suggested amendments sent to the First Congress, unlike the Antifederalist delegates in other state conventions. See Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 *CHI.-KENT L. REV.* 103, 134-35 (2000). But that the dissenting delegates were political losers does not undercut their status as competent users of late eighteenth-century English.

The majority decision (pg. 26), went on to describe the recommended constitutional amendment of this minority as stating “That the people have a right to bear arms for the defence [sic] of themselves

and their own state, or the United States, or for the purpose of killing game . . . .”

However, and unfortunately, the explicit descriptions of rights believed to inherently exist regardless of the wording of the Constitution and of an amendment to the Constitution concerning gun ownership rights that were adopted by the majorities in other state constitutional conventions was omitted from the historical context of the decision. These depictions, by their very context as being the demands of those ratifying the constitution but concerned about its lack of explicit guarantees of rights, were quite obviously the textual source of the later amendments that came to be the Bill of Rights.

## I

### New Hampshire

#### Ratification: June 21, 1788

New Hampshire’s convention delegates set forth twelve (12) demands for amendments to the Constitution to insure that the rights of the people and of its state government were to be protected. The twelfth demand states that “Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion.” (Washington DC: *Documents Illustrative of the Formation of the Union of the American States*, House Document No. 398, 69<sup>th</sup> Congress, 1<sup>st</sup> Session; Government Printing Office, 1927; pp. 1024-1027).

## II

### Virginia

#### Ratification: June 26, 1788

The first right requested by Virginia’s ratification resolution stated as fundamental that the government could not “deprive or divest” rights including “...the enjoyment of life and liberty, with the means of

acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.” The seventeenth demand states in pertinent part “That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural, and safe defence [sic] of a free State.” (Washington DC: *Documents Illustrative of the Formation of the Union of the American States*, House Document No. 398, 69<sup>th</sup> Congress, 1<sup>st</sup> Session; Government Printing Office, 1927; pp. 1027-1034).

### III

#### New York

##### Ratification: July 26, 1788

The State of New York declared in its ratification resolution “That the People have a right to keep and bear Arms; that a well regulated Militia, including the body of the People *capable of bearing Arms*, is the proper, natural, and safe defence [sic] of a free State.” [*emphasis in original*] (Washington DC: *Documents Illustrative of the Formation of the Union of the American States*, House Document No. 398, 69<sup>th</sup> Congress, 1<sup>st</sup> Session; Government Printing Office, 1927; pp. 1034-1044).

### IV

#### North Carolina

##### Ratification: November 21, 1789

North Carolina echoed Virginia’s sentiment that natural rights included “...the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.” North Carolina also stated that it was a natural right “That the people have a right to keep and bear arms; that a well regulated militia composed of the body of the people, trained to arms, is the proper, natural and safe defence [sic] of a free state.” (Washington

DC: *Documents Illustrative of the Formation of the Union of the American States*, House Document No. 398, 69<sup>th</sup> Congress, 1<sup>st</sup> Session; Government Printing Office, 1927; pp. 1044-1051).

## V

### Rhode Island

#### Ratification: May 29, 1790

Rhode Island echoed the sentiments of Virginia and North Carolina concerning the right to have the “means” of “protecting property....and safety.” Rhode Islanders then made the assertion “That the people have a right to keep and bear arms, that a well regulated militia, including the body of the people capable of bearing arms, is the proper, natural and safety defence [sic] of a free state...” (Washington DC: *Documents Illustrative of the Formation of the Union of the American States*, House Document No. 398, 69<sup>th</sup> Congress, 1<sup>st</sup> Session; Government Printing Office, 1927; pp. 1052-1059).

## VI

### THE ORDER OF RATIFICATIONS AND THE CHANGE IN CONTENT OF THE RATIFICATION RESOLUTIONS IS OF GREAT IMPORT TO UNDERSTANDING THE ORIGIN OF THE BILL OF RIGHTS

Prior to the Constitution taking effect, with the ratification by New Hampshire as the ninth ratifying state, not one single ratification resolution of the first five, all of which took place within slightly over a month, had called for amendments to the constitutional draft as it existed. The order of ratification for states not seeking amendments is as follows:

- **Delaware, December 7, 1787**

- **Pennsylvania, December 12, 1787**
- **New Jersey, December 18, 1787**
- **Georgia, January 2, 1788**
- **Connecticut, January 9, 1788**

Indeed, in a footnote to the United States Supreme Court’s seminal decision in *Faretta v California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) [Footnote 42], the court wrote that:

In ratifying the Constitution, three States urged that a right-to-counsel provision be added by way of amendment. Virginia and North Carolina proposed virtually identical packages of a defendant’s rights, each including the provision that an accused be “allowed” counsel. 2 Schwartz 841, 967. The package proposed by New York provided that the accused “ought to . . . have . . . the assistance of Council for his defense.” *Id.*, at 913. **The idea of proposing amendments upon ratification had begun with the Pennsylvania dissenters from ratification**, whose proposed package of a defendant’s rights provided for the accused’s “right . . . to be heard by himself and his counsel.” *Id.*, at 664-665. It can be seen that Madison’s precise formulation – “the right . . . to have the Assistance of Counsel for his defence” [sic] – varied in phrasing from each of the proposals. “The available debates on the various proposals throw no light on the significance or the interpretation which Congress attributed to the

right to counsel.” W. Beaney, *The Right to Counsel in American Courts* 23 (1955).

**[Emphasis added]**

That the states’ ratification resolutions for the Constitution and the debate in the ratification conventions is a source of interpretation for the intent of the Constitution is also recognized throughout *Welch v Texas Highways & Public Transp. Dept.*, 483 U.S. 468 (1987).

Massachusetts, which ratified on February 6, 1788, began the process of demanding amendments, opining that “And it is the opinion of this Convention that certain amendments & alterations in the said Constitution would remove the fears & quiet apprehensions of many of the good people of this Commonwealth & more effectually guard against an undue administration of the Federal Government...” (Washington DC: *Documents Illustrative of the Formation of the Union of the American States*, House Document No. 398, 69<sup>th</sup> Congress, 1<sup>st</sup> Session; Government Printing Office, 1927; pp. 1018-1020).

Maryland ratified April 28, 1788, but did not call for amendments. (Washington DC: *Documents Illustrative of the Formation of the Union of the American States*, House Document No. 398, 69<sup>th</sup> Congress, 1<sup>st</sup> Session; Government Printing Office, 1927; p. 1021)

The next month, South Carolina ratified on May 23, 1788 and sought amendments. (Washington DC: *Documents Illustrative of the Formation of the Union of the American States*, House Document No. 398, 69<sup>th</sup> Congress, 1<sup>st</sup> Session; Government Printing Office, 1927; pp. 1022-1023).

Beginning with the ratification of New Hampshire as noted above, every single ratifying state thereafter explicitly delineated gun rights within its declaration of natural rights and/or request for explicit

amendment of the Constitution.

This timeline is all the more important to recognize for context when one considers the preamble of the “Resolution of the First Congress Submitting Twelve Amendments to the Constitution,” on March 4, 1789, which states that “THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government will best ensure the beneficent [sic] ends of its institution...”

**VII**  
**THE DECLARATION OF INDEPENDENCE**  
**PRECURSOR PROVIDES A VALUABLE**  
**COLONIAL EXPERIENCE FROM**  
**WHICH THE SECOND AMENDMENT**  
**IS DERIVED**

Approximately a year before the better known Declaration of Independence was adopted, Congress passed the “Declaration of the Causes and Necessity of Taking up Arms” on July 6, 1775. It recounts many experiences of the colonies to that time, including the following:

Hostilities, thus commenced by the British troops, have been since prosecuted by them without regard to faith or reputation.—The inhabitants of Boston being confined within that town by the general their governor, and having, in order to procure their dismissal, entered into a treaty with him, it was stipulated that the said inhabitants having deposited their arms with their own magistrates,

should have liberty to depart, taking with them their other effects. They accordingly delivered up their arms, but in open violation of honour, in defiance of the obligation of treaties, which even savage nations esteemed sacred, the governor ordered the arms deposited as aforesaid, that they might be preserved for their owners, to be seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire, to leave their most valuable effects behind.

## **VIII**

### **THE RIGHT TO KEEP AND BEAR ARMS HAS FOR CENTURIES BEEN RECOGNIZED AS A PEOPLE'S PROTECTION AGAINST OPPRESSION, WHETHER DOMESTIC OR FOREIGN**

The right to keep and bear arms at least goes back as far as the Biblical story recounted at Samuel I, 13:19:

Now, not a smith was to be found in all the land of Israel, for the Philistines said, "Lest the Hebrews make sword or spear." And all Israel went down to the (land of) the Philistines to sharpen each man his plowshare.....

Well before the English colonists had to defend their rights against the British forces, there were fights over the issue of who could bear arms. In America, perhaps the first fight over the right to keep and bear arms was born against the Dutch administration of then-New Amsterdam under Pieter Stuyvesant. Writes Arthur Hertzberg in *The Jews in America: Four*

Centuries of an Uneasy Encounter (New York : Simon and Schuster, 1989), ISBN 0-231-10841-9 (p. 21):

Two weeks after they landed, Stuyvesant heard the complaint from the local merchants and from the Church that 'the Jews who had arrived would nearly all like to remain here.' Stuyvesant decided to chase them out. Using the usual formulas of religious invective -- he called the Jews 'repugnant,' 'deceitful,' and 'enemies and blasphemers of Christ' - Stuyvesant recommended to his directors ... 'to require them in a friendly way to depart.'

One of the things that Stuyvesant did to the Jews of New Amsterdam in an effort to drive them out was to refuse them the right to stand watch as militia over the colony and attempted to force them to pay a tax in lieu of militia service. In 1655, under the law of New Amsterdam, Jews of military age were formally NOT allowed to serve in the militia. Asser Levy and another Jewish settler, Jacob Barsimon, petitioned the New Amsterdam council for the right to keep guard with the other burghers. In an act of ongoing civil disobedience, they appeared regularly with their guns for military training and stood guard on the city walls. The Dutch West India Company eventually forced Stuyvesant to relent under pressure from its Jewish investors. As Jerome Charyn wrote in the New York Times (*Officer Reilly He's Not*, September 19, 2004):

NEW AMSTERDAM, circa 1655. Asser Levy, a member of the first little colony of Jews that arrived from Brazil to escape religious persecution, petitions Peter Stuyvesant, the governor of the

colony, for the right to join the local militia. In what proved to be one of the first "official" acts of anti-Semitism in America, Stuyvesant refused. An autocratic man with a peg leg, he was determined to drive all Jews, Catholics and blacks out of New Amsterdam. When Levy refused to pay the tax in support of a militia he could not join, "Stuyvesant threatened to put him in jail and did put him in jail," said Rabbi Alvin Kass, chief chaplain of the New York Police Department.

Ultimately, Stuyvesant proved to be no match for Levy, who won the right to join the militia and went on to become the patron saint of Jewish police officers in America.

With an American history stretching back over a hundred years over fights to maintain the right to keep and bear arms by the time they were debating the Constitution of the United States, it is quite clear that these issues were high up on the minds of those who drafted and crafted the various ratification resolutions that immediately preceded the enactment of the Second Amendment. It quite clearly is an individual right as explicitly set forth in the ratification resolutions of the states who demanded the enactment of a Bill of Rights.

## **IX**

### **REGULATIONS THAT AFFECT THE RIGHT TO KEEP AND BEAR ARMS SHOULD BE SUBJECTED TO STRICT SCRUTINY**

There are perfectly reasonable restrictions that can and ought to be placed on gun ownership and usage, however statutes enacted by legislative bodies should be analyzed under the strict scrutiny doctrine to insure that they pass constitutional muster.

If the intent of a given law is to prevent crime and there is evidence in the legislative record that is reasonable and proper that the law may actually do what it purports to accomplish they may very well be facially constitutional. If in practice such laws do not perform as expected and have unintended consequences that restrict the otherwise lawful possession and use of firearms, they should be further subjected by the courts to strict scrutiny as to whether or not they are unconstitutional as applied and enforced.

In scrutinizing gun laws the courts should also balance the explicit constitutional right to keep and bear arms with the *inherent* federal constitutional right to *safety*.

As note above, the ratification resolutions of Virginia, North Carolina and Rhode Island all expressed their view that “safety” was a fundamental right. The rights which are explicit in the Constitution and especially its preamble are a further expression of the inherency of the right to safety:

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

If a right to safety is not a blessing of liberty and if “domestic

tranquility” does not include that right, the preamble itself would be irrational.

The International Covenant on Civil & Political Rights (ICCPR) elucidates, illuminates, and explains rights that are inherent in the United States Constitution. A key provision of this treaty, signed and ratified by the United States is Article 9, Section 1, which states that:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The right to “liberty and security of person” was taken from Article 3 of the Universal Declaration of Human Rights of the United Nations as adopted in 1948 and that right exists explicitly in the constitutions of Canada, South Africa, and was adopted by the statutory Canadian Bill of Rights in 1960.

Section 12 of the South African constitutional Bill of Rights includes a very important concept of security of person:

12. (1) Everyone has the right to freedom and security of the person, which includes the right -

.....

(c) to be free from all forms of violence from either public or *private sources*;

**[Emphasis added]**

To be free from all forms of violence from either public or *private* sources certainly implies an inherent right to self-defense. Without the right to effectively resist violence from a private source, the right is meaningless. To resist violence by one or more persons who are armed,

effective resistance in all but rare instances may require access to and the usage of arms by the person being attacked.

*To make this right effective as well inherently involves the necessity of the state having the instruments to preserve order and combat crime.*

In one of his infamous “Daleyisms,” the late Chicago Mayor Richard Daley (Sr) opined following the so-called Chicago “police riots” that “*The policeman isn’t there to create disorder, the policeman is there to preserve disorder.*” Daley obviously misspoke and meant to say that the policeman is there to preserve order as opposed to disorder. While some anarchists and social critics might make the argument that modern society and the state is in fact *disorder* and not natural or orderly, most people would reject that Rousseauian view from 17<sup>th</sup> Century philosophy and agree with that of Locke, that people give up their complete natural liberty for the *order* of the state to escape the inconvenience of a lack of government.

If we accept that premise, that the state exists to preserve order, including our rights to safety and security, it must have the tools to provide it, which includes the right to reasonable regulation of weapons. As distinct rights, the right to keep and bear arms must be balanced against and with the right to safety and security of person. Those rights go hand in hand, and together, form a significant basis of our liberties.

