

THE GUN CONTROL DEBATE AND THE POWER OF THE GEORGIA GENERAL ASSEMBLY: A HISTORICAL PERSPECTIVE

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I. INTRODUCTION

The debate over the Georgia General Assembly's power to regulate guns began almost 200 years ago¹ and continues to today.² While the national debate on gun control focuses on the meaning of the right "to keep and bear arms" as articulated in the Second Amendment to the United States Constitution,³ the debate in Georgia focuses on the Georgia General Assembly's expansion of the right to carry concealed weapons.⁴ The debate in Georgia is articulated in much the same language as the national debate. Individual rights proponents or pro-gun advocates argue the extreme that the Second Amendment prohibits the government from restricting, for any reason, an

1. See 1837 Ga. Acts, p. 90-91.

2. See H.R. 182, 150th Gen. Assem., Reg. Sess. (Ga. 2009) (preemption of local government regulation of the discharge of a firearm on property of five or more acres); S.B. 9, 150th Ga. Gen. Assem., Reg. Sess. (Ga. 2009) (repealing requirement of carrying concealed pistol in holder); and *GeorgiaCarry.org, Inc. v. City of Atlanta*, No. 08-15571, 2009 WL 614778 (N.D. Ga. Sept. 26, 2008).

3. U.S. CONST. amend. II ("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.").

4. Institute for Continuing Legal Education in Georgia, *Georgia and the Second Amendment: A State Primer on Guns and their Regulation Before and After Heller* (December 10, 2008) (086943) [hereinafter ICLE Georgia and the Second Amendment].

individual's right to carry a gun. And, gun control proponents argue that the Second Amendment is not a complete prohibition on the government's ability to regulate gun ownership and gun use. The debate on gun control in Georgia does, at times, focus on the tension between the various individual rights - in particular, the tension between one individual's right to bear arms and another individual's property rights, including the right to exclude an individual carrying a weapon from one's property.⁵ These debates, however, tend to focus on rights protected by the United States Constitution, not those protected by the Georgia Constitution.

Many had hoped that in *Heller v. District of Columbia*⁶, the United States Supreme Court would not only end the debate over whether the Second Amendment protected an individual as opposed to a collective right to bear arms, but would also provide some guidance as to the extent of the government's - both state and federal - power to regulate guns. Unfortunately, the Supreme Court raised more questions than it answered. Moreover, because the Supreme Court declined to address whether the Second Amendment applies to the states through the incorporation doctrine, state legislatures and citizens on both sides of the gun control issue are left to wonder what effect *Heller* has on the gun control debate in their state.

Although *Heller* provides some instruction on the outer limits of gun control regulation, *Heller* should have little effect on the gun debate in Georgia. The question of what power the Georgia General Assembly has to regulate guns can and should be answered by looking to the provisions of the Georgia State Constitution. As Harold Clarke, former Chief Justice of the Georgia Supreme Court, stated in 1994:

For too many years, we punted the important issues to the federal courts. If people's rights can be decided at the state level, we should handle it here.

I think there is a group on the court, of which I am one, that believes that the Georgia Supreme Court could interpret the state Constitution more expansively than the federal Constitution in several areas. That automatically means giving

5. *Id.*

6. 128 S. Ct. 2783 (2008).

more rights to the citizens of Georgia.⁷

The issue which needs to be addressed is did the framers of the Georgia State Constitution believe that there was an individual right to keep and bears arms and if so, what is the extent of the right to keep and bear arms, and how did the right to keep and bear arms relate to other rights protected by the Georgia Constitution, such as property rights. In order to answer these questions, one must delve into Georgia constitutional history.

Like the Founders, the framers of the various Georgia constitutions were influenced by the philosophy of John Locke who in his "Essay Concerning the True Original, Extent, and End of Civil Government"⁸ maintained that the the primary purpose of government is to protect life, liberty, and property. The individual had a right to keep and bear arms, a right which evolved over time. That right to keep and bear arms was never an unlimited right. From the inception of the colony, the Georgia legislative body retained and exercised the power to regulate that right. As many gun rights advocates have relied upon the Supreme Court of Georgia's opinion in *Nunn v. Georgia*,⁹ the opinion will be analyzed to determine its adherence to both the Georgia Constitution and to legislative perogatives. Finally, current gun control laws will be analyzed to determine whether the laws are consistent with all of the rights preserved by the Georgia Constitution.

II. HELLER V. DISTRICT OF COLUMBIA

In *Heller v. District of Columbia*,¹⁰ the United States Supreme Court was presented with the issue of whether the gun control regulations adopted by the District of Columbia violated the Second Amendment to the United States Constitution. Because the District of Columbia is under the direct control of the United

7. MELVIN B. HILL, JR., *THE GEORGIA STATE CONSTITUTION: A REFERENCE GUIDE* 29 (Greenwood Press 1994).

8. JOHN LOCKE, *Essey Concerning the True Original, Extent, and End of Civil Government*, in *TWO TREATISES OF GOVERNMENT* 265-428 (Peter Laslett ed., Cambridge University Press 2005) (1698).

9. 1 Ga. 243 (1846).

10. *Heller*, 128 S. Ct. 2783 (2008).

States Congress,¹¹ the Court could not avoid the constitutional question. Even though thirty-two states¹² filed an amicus curiae brief in support of the respondent, Mr. Heller, the Court declined to address the incorporation issue.¹³ Thus, the Court's holding, that the Second Amendment protects an individual right to keep and bear arms, is a restriction only on the powers of the federal government.

A. *The Facts of Heller v. District of Columbia*

Dick Heller, along with five other plaintiffs,¹⁴ challenged the District of Columbia's Firearms Control Regulations Act of 1975. With minor exceptions, the Firearms Control Regulations Act made it a crime to carry an unregistered firearm, prohibited the registration of firearms, prohibited the carrying of a handgun without a license, allowed the chief of police to issue licenses valid for one year, and required all lawfully owned guns, such as rifles, to be kept unloaded and locked.¹⁵

Heller was described by the Court as "a District of Columbia special police officer permitted to carry a handgun on duty as a guard at the Federal Judicial Center, [and who] wishes to possess one at his home."¹⁶ Heller had attempted to obtain a license for a handgun he had owned prior to moving to the

11. D.C. CODE ANN. § 601 (2001).

12. Thirty states (Alabama, Alaska, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, Washington, West Virginia, and Wyoming) joined Texas' Amicus Curiae Brief. Brief for Texas, *et al.*, *Heller v. District of Columbia*, 128 S. Ct. 2783 (2008) (No. 07-290). The State of Wisconsin filed its own brief. Motion for Leave to File Out of Time a Brief of the State of Wisconsin as Amicus Curiae in Support of Respondent and Brief of the State of Wisconsin as Amicus Curiae in Support of Respondent, *Heller v. District of Columbia*, 128 S. Ct. 1783 (2008) (No. 07-290).

13. *Heller*, 128 S. Ct. at 2813, n. 23 (incorporation is "a question not presented by this case").

14. The Court of Appeals found that Heller was the only plaintiff to have standing. *Parker v. District of Columbia*, 478 F.3d 370, 374-78 (2007).

15. See D.C. CODE ANN. §§7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4), 22-4504(a), 22-4506, 7-2507.02 (2001).

16. *Parker*, 478 F.3d at 373-74. See also *Heller*, 128 S. Ct. at 2788.

District of Columbia and had been denied a license.¹⁷

B. Finding an Individual Right

Both Justice Scalia in his majority opinion¹⁸ and Justice Stevens in his dissenting opinion¹⁹ agree that the Second Amendment codifies a pre-existing right.²⁰ Both state that the pre-existing right flows from the 1689 English Bill of Rights,²¹ which provides “[t]hat the subjects which are protestants may have arms for their defence, suitable to their conditions, and as allowed by law.”²² Justice Scalia claims that “[b]y the time of the founding, the right to have arms had become fundamental for English subjects,”²³ implying that the right was fundamental to the colonists. Relying on Blackstone’s Commentaries²⁴, Scalia states that the right considered fundamental was “the natural right of resistance and self-preservation.”²⁵ Without further exploration of the parameters of the natural right which existed prior to and was codified in the Second Amendment, Scalia states that “the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited . . .”,²⁶ but, at a minimum, included the right to have a gun to protect one’s home.²⁷ The majority came to this conclusion even though the English Bill of Rights had severely limited those who could exercise the rights (to protestants), the

17. *Heller*, 128 S. Ct. at 2788.

18. *Id.* at 2783 (Justice Scalia was joined by Chief Justice Roberts and Associate Justices Kennedy, Thomas, and Alito).

19. *Id.* at 2787 (Justice Stevens was joined by Associate Justices Ginsburg, Breyer and Souter).

20. *Compare Heller*, 128 S. Ct. at 2797 (The Second Amendment “codified a pre-existing right. The very text of the Second Amendment recognizes the pre-existence of the right and declares that it ‘shall not be infringed’.”) with 128 S. Ct. at 2831 (“the right to keep and bear arms for service in a state militia was also a pre-existing right”).

21. WALTER MCELREATH, A TREATISE ON THE CONSTITUTION OF GEORGIA 211 (The Harrison Company 1912).

22. *Id.*

23. *Heller*, 128 S. Ct. at 2798.

24. ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES 145-46 n. 42 (1803).

25. *Heller*, 128 S. Ct. at 2798.

26. *Id.* at 2799.

27. *Id.* at 2818.

arms which could be carried (suitable), and provided that the right could be regulated (as allowed by law).²⁸

In his dissent, Justice Stevens identifies the issue as the scope of the right protected by the Second Amendment,²⁹ but does not explore the origins of the right³⁰ or the parameters of the right to have arms that was preserved by the 1689 English Bill of Rights. Likewise, in his dissent, Justice Breyer does not explore the origins of the right to bear arms, but proposes a test for determining whether gun control legislation is constitutional and then applies the proposed test to the District of Columbia's regulation.³¹

All nine justices of the Supreme Court agree that the Second Amendment does not create the right which it protects.³² Although none of the three opinions articulate the scope of the preexisting right which is protected by the Second Amendment,³³ all agree that the Second Amendment does not define the scope of the right to bear arms. All nine justices also agree that the government can regulate the right to bear arms.³⁴ But, the extent of the government's ability to regulate guns is left unanswered, specifically reserved to future litigation.³⁵

C. The Questions Raised by Justice Scalia's Majority Opinion

A major portion of the opinion is devoted to interpreting the language of the Second Amendment and setting out secondary source material. In a 36 page opinion, Justice Scalia spends 5 paragraphs discussing the existence of the pre-existing individual right protected by the Second Amendment.³⁶ Scalia's interpretation of the language of the Second Amendment raises numerous questions which remain unanswered.

Justice Scalia starts his analysis of the Second Amendment

28. *Id.* at 2848 (Breyer, J., dissenting).

29. *Id.* at 2822 (Stevens, J., dissenting).

30. *Id.* at 2822-47 (Stevens, J., dissenting).

31. *Id.* at 2847-70 (Breyer, J., dissenting).

32. *Id.* at 2790, 2822 (Stevens, J., dissenting); *id.* at 2847 (Breyer, J., dissenting).

33. *Id.* at 2789-2811.

34. *Id.* at 2788, 2823 (Stevens, J., dissenting); *id.* at 2848 (Breyer, J., dissenting).

35. *Id.* at 2821.

36. *Id.* at 2790-2811.

by dividing the language of the Amendment into the prefatory clause and the operative clause.³⁷ Scalia states “[t]he former [meaning the prefatory clause] does not limit the latter grammatically, but rather announces a purpose.”³⁸ Scalia then states that the prefatory clause has no function other than to “clarify” an ambiguity.³⁹ Because the prefatory clause cannot be used to “limit or expand the scope of the operative clause,”⁴⁰ analysis must begin with the operative clause. In other words, according to Scalia, the phrase “[a] well regulated Militia, being necessary to the security of a free State”,⁴¹ provides an example of one of the reasons that the right to bears arms is protected by the Constitution. The phrase does not limit the right to bear arms to the militia, to use by those in the militia,⁴² or to military purposes.

In analyzing the operative clause, Scalia breaks the clause into two units: “right of the people”⁴³ and “keep and bear arms”.⁴⁴

“Right of the people” is interpreted to “unambiguously refer to individual rights, not ‘collective’ rights, or rights that may be exercised only through the participation in some corporate body.”⁴⁵ This interpretation of “the people” as identifying an individual right is deemed to be consistent with the use of “the people” as found in other provisions of the Constitution, including the Preamble, Article I §2, First Amendment, Fourth Amendment, Ninth Amendment, and Tenth Amendment.⁴⁶

37. *Id.* at 2789.

38. *Id.*

39. *Id.*

40. *Id.*

41. Similar language is found in the preamble of Georgia’s 1765 Militia Act, which states “[w]hereas, a well ordered and well disciplined militia is essentially necessary to the safety, peace and prosperity of this province . . .”. See Militia Act of 1765, p. 33, *microformed on* Georgia Colonial Laws and Georgia’ Laws, Drawer 288, Box 21 (Ga. Archives).

42. At the time of the adoption of the Second Amendment, Georgia required men between the ages of sixteen and sixty to keep and bear arms. Militia Act of 1773, p. 296, *microformed on* Georgia Laws 1764-1778, Drawer 54, Box 50 (Ga. Archives).

43. *Heller*, 128 S. Ct. at 2790-91.

44. *Id.* at 2791-97.

45. *Id.* at 2790.

46. *Id.*

“Keep and bear arms” means to possess and carry weapons which would have been in common use during the colonial period.⁴⁷ Scalia states that “the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”⁴⁸ Analogy is made to the 1st Amendment protection of speech on the internet and the 4th Amendment protection of telephone calls from search and seizure. Thus, modern weapons are protected under the Second Amendment. The only limitation from the text of the Second Amendment appears to be that the weapons “constitute bearable arms.”⁴⁹ Scalia, however, never defines “bearable”. In fact, he never uses the term again in the opinion. If two can carry it, but not one, is it still “bearable”? What if it can only be carried disassembled? Handguns are bearable, but what about rocket launchers? And, why should one’s right to keep and bear arms depend upon one’s personal strength?

Scalia states that the weapons protected by the Second Amendment are only “those ‘in common use at the time’”, but not “dangerous and unusual weapons.”⁵⁰ Little guidance is given as to what period in time is the relevant one for determining common usage. If the Second Amendment protects weapons not in existence at the time of ratification, is the protection limited, as was stated by the Court of Appeals, to “lineal descendants” of those weapons?⁵¹ Or is the protection measured by the arms common at the time of the attempted regulation? From Scalia’s statement that banning the current “most preferred firearm in the nation” is unconstitutional,⁵² one could infer that protection is measured at the time of the constitutional challenge. No attempt is made to define what constitutes “dangerous or unusual” weapons.

After concluding that the Second Amendment protects the individual right to keep and bear arms, Scalia announces that the right is not absolute.⁵³ Scalia states that the Court is not

47. *Id.* at 2797.

48. *Id.* at 2791-92.

49. *Id.* at 2792.

50. *Id.* at 2817.

51. *Parker*, 478 F.3d at 398, 400.

52. *Heller*, 128 S. Ct. at 2818.

53. *Id.* at 2816.

providing an “exhaustive” analysis of the Second Amendment right, but that “prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms” are constitutional.⁵⁴ The government can continue to exclude weapons from the courthouse and schools and airports (considered sensitive after 9/11), but whether the government can exclude weapons from other locations such as grocery stores, taverns, parks, and playgrounds remains an open question.

Although Scalia likens the limits on the Second Amendment to those of the First and Fourth Amendments, Scalia fails to reconcile the limits on Second Amendment rights with the fact that even felons and the mentally ill have the right to exercise other constitutional rights to the same extent as non-felons and the sane.⁵⁵ The constitutional prohibition of Second Amendment rights to particular classes of people, places the Second Amendment in a separate and distinct category of constitutional rights. Scalia provides no rationale for this difference.⁵⁶ Nor does Scalia discuss what standards the government must use when establishing classes of people whose Second Amendment right can be extinguished or whether these individuals are entitled to have a hearing prior to the deprivation of this right to satisfy due process requirements.⁵⁷

Perhaps, this is why Scalia refuses to provide any standard of scrutiny by which to analyze regulations of Second Amendment

54. *Id.* at 2816-17.

55. *Id.* 2817 (Stevens, J., dissenting) (critique of Justice Scalia’s position that the Second Amendment can not be exercised by particular classes of people).

56. Early militia acts which required colonist to keep and bear arms did not contain exceptions of this obligation for the mentally ill or felons. The Militia Act for the Colony of Georgia required all men between the ages of sixteen to sixty to report for muster with arms and to keep and maintain arms for inspection at their home. Exemptions from muster, but not service existed for some public officials, judges and clergy. In addition, masters were required to provide arms not only for themselves but also for their indentured servants. See Militia Act of 1765, p. 33, *microformed on Georgia Colonial Laws and Georgia Laws*, Drawer 288, Box 21 (Ga. Archives).

57. *Heller*, 128 S. Ct. at 2783-2822.

rights.⁵⁸ Instead, Scalia states that “[u]nder any of the standards of scrutiny we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family’ would fail constitutional muster.”⁵⁹ Scalia rejects Justice Breyer’s suggestion of an “interest-balancing” approach,⁶⁰ stating that “[a] constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them,”⁶¹ which, of course, requires an answer to the question of what was the scope of the pre-existing right to keep and bear arms. Moreover, as the right to keep and bear arms is a pre-existing right, then when are the people deemed to have adopted the right? At the time the pre-existing right was first recognized? Or, at the time the pre-existing right was “enshrined” in a constitution? The court provides no answers to these questions.

One of the problems with Scalia’s analysis is that at the time the Second Amendment was ratified there were gun control laws in effect in the colonies.⁶² Moreover, the 1689 English Bill of Rights from which the individual right protected by the Second Amendment is presumed to have derived limited the right to a right to “have” arms to protestants,⁶³ “suitable to their condition”, and most importantly “as provided by law”.⁶⁴ If the right in existence at the time of the ratification of the Second

58. *Id.* at 2817-22. Scalia does reject Justice Breyer’s application of a rational basis standard. *Id.* at 2818 n. 27.

59. *Id.* at 2817-18.

60. *Id.* at 2821.

61. *Id.*

62. 1778 Mass. Session Laws, ch. 5, p. 193, 194; Act of Aug. 26, 1721, §4 in 3 Mitchell, Statutes at Large in Pennsylvania; 5 Colonial Laws of New York, ch. 1501, p. 244-46 (1894).

63. Under a literal reading of the 1689 English Bill of Rights, a majority of the current U.S. Supreme Court justices would not have a right to keep and bear arms; only two of the justices are protestants. See Religious Affiliation of the U.S. Supreme Court at http://www.adherents.com/adh_sc.htm (last visited on April 11, 2009).

64. A reading of the entire 1689 English Bill of Rights makes it clear that the Bill of Rights was meant to limit the power of the Crown with regard to Parliament.

Amendment was the same limited right as provided by the 1689 English Bill of Rights, then the scope of the right adopted would have included a limitation on the right as provided by law.

Does Scalia's reference to First and Fourth Amendment jurisprudence provide some guidance in ascertaining the Georgia General Assembly's power to regulate guns?

Before one looks to other areas of federal constitutional jurisprudence for answers, the next step is to determine what rights were included in the Georgia State Constitution and the scope of the rights as understood by the Georgians who adopted the provisions that protect the rights. The scope of the right protected by the Second Amendment is of less relevance in Georgia. Georgia did not ratify the Bill of Rights until 1939;⁶⁵ but adopted a provision protecting the right to keep and bear arms in the Georgia Constitution of 1861.⁶⁶

III. GEORGIA'S CONSTITUTIONAL AND LEGISLATIVE HISTORY

From the inception of self-governance in Georgia,⁶⁷ there was a concern for the protection of property rights.⁶⁸

65. HILL, *supra* note 7 at 4.

66. GA. CONST. art. I, sec. 6 (1861).

67. From June 9, 1732 to April 23, 1752, during the Trusteeship Period, the inhabitants of Georgia exercised almost no self-governance. Even the provincial parliament, created in 1750, was without power to create law. MCELREATH, *supra* note 21 at 12-15. The end of the Trusteeship did not improve matters. After the end of the Trusteeship Period, in order for a bill passed by both houses of the Georgia Assembly to become law, the bill if agreeable to the Royal Governor was sent to London to the king's attorney, who, if he had no objection, forwarded the bill to the Lords Commissioners of Trades and Plantations, who, if they approved, forwarded the bill to the king's council. If the king's council approved the bill, the King signed the bill in to law. The signed law was transmitted back to the Georgia Assembly through the same process in reverse. It usually took two years for a bill passed by the Georgia Assembly to become law, even when the bill pertained to the colony's internal/domestic affairs. *Id.* at 38-39.

68. The importance of property rights is well-articulated in the Annotated Georgia Constitution of 1877. MCELREATH, *supra* note 21 at 423-676. "The right of private property is sacred in the eyes of the law and stands upon the same foundation as the coordinate rights of personal liberty and personal security and yields only to the right of eminent domain, but all property is held subject to the police power of the State." *Id.* at 427. GA. CONST. art. I, sec.2, par. 2 (1877) ("Protection the Duty of Government. Protection to

It was not until the Constitution of 1861, the Confederate Constitution, that a “Declaration of Fundamental Principles” was included that specifically states that it is the duty of the government to protect “person and property”⁶⁹, provides that “[n]o person shall be deprived of life, liberty, or property, except by due process of law”⁷⁰, and lists the right “to keep and bear arms” as an enumerated individual right.⁷¹ The first three Georgia Constitutions, the Constitution of 1777, the Constitution of 1789, and the Constitution of 1798, all focused primarily on establishing the major branches of government and defining and limiting the powers of government.⁷²

This section will discuss each of the major constitutional time periods and whether the positions taken by Georgians with regard to “arms” during each time period were consistent with legislative prerogatives.

A. *The Colonial Period (1732-1776)*

The fact that the first three Georgia Constitutions did not specifically protect individual rights, does not mean that the delegates to the constitutional conventions or the people of Georgia believed that they had no such rights. The delegates to the constitutional conventions presumed that they had carried with them the rights they or their ancestors had held in England.⁷³

1. *The Trusteeship*

Georgian’s belief that they held the same rights as British citizens was premised upon the language of the Charter of the Province of Georgia.⁷⁴ The Charter of the Province of Georgia

Person and property is the paramount duty of government, and shall be impartial and complete.”).

69. GA. CONST. art. I, sec. 3 (1861).

70. GA. CONST. art. I, sec. 4 (1861).

71. GA. CONST. art. I, sec. 6 (1861).

72. See GA. CONST. (1777); GA. CONST. (1789); and GA. CONST. (1798).

73. See *Nunn v. Georgia*, 1 Ga. 243, 249 (1846) (Lumpkin J.) (“the rights and liberties of English subjects” were secured to them “whether living 3,000 or 300 miles from the royal palace”).

74. Charter of the Province of Georgia (1732), <http://georgiainfo.galileo.usg.edu/conn1776.htm> (last visited on February 6, 2009).

provided: “Also we do for ourselves and successors, declare by these presents, that all and every the said persons which shall happen to be born in the said province [Georgia], and every of their children and posterity, shall have and enjoy, all liberties, franchises, and immunities of free denizens and natural born subjects, within any of our dominions, to all intents and purposes, as if abiding and born within this, our kingdom of Great Britain, or any other dominion.”⁷⁵ The rights which would have been preserved to natural born British subjects would have included those rights identified in the Magna Carta,⁷⁶ the Petition of Right,⁷⁷ the Habeas Corpus Act,⁷⁸ and the 1689 Bill of Rights.⁷⁹

Being protestant,⁸⁰ Georgians would have believed that they had a right to bear arms for their self-defense as provided by the

75. MCELREATH, *supra* note 21 at 233.

76. A majority of the provisions of the Magna Carta protected property rights. *See id.* at 186-194.

77. The Petition of Right protects against taxation directly by the king and prohibits punishment for failure to pay taxes which are compelled without authority from parliament, including the taking of property, imprisonment, or death as punishment. *See id.* at 186-94.

78. Provides a mechanism to challenge the sovereign’s holding of an individual. *See id.* at 201.

79. The 1689 Bill of Rights is the first of the English documents which mentions a right to have arms. The right to have arms is seventh right listed, after suspension of parliament, the suspension of laws enacted by parliament, the creation of ecclesiastical courts, taxation without authority of parliament, the right to petition the king, and the raising and keeping of a standing army without the consent of parliament. *See id.* at 207-12. *See Reynolds v. State*, 3 Ga. 53, 59 (1848) (Lumpkin, J.) (common law of England was adopted at the law of Georgia on May 14, 1776). Judge Warner, one of the first three judges of the Georgia Supreme Court, stated “[i]t has doubtless been noticed by the [legal] profession that there were few dissenting opinions in [the early days of the court’s existence], and the reason is that each judge felt himself bound strictly to adhere to the fundamental principles of the law as it had existed from the time of Magna Charta and embraced in the written constitution of this State and the United States.” A HISTORY OF THE SUPREME COURT OF GEORGIA: A CENTENNIAL VOLUME 34 (John B. Harris ed., Georgia Bar Association 1948) (hereinafter GEORGIA SUPREME COURT HISTORY).

80. The first Catholic settlement in Georgia was established sometime between 1790-92, after the Constitution of 1777 guaranteed religious freedom. JOHN HANLEY, *The ARCHDIOCESE OF ATLANTA: A HISTORY* 8 (Editions du Signe 2006). *See also* Ga. Constit. art. LVI (1777).

1689 English Bill of Rights. The colonists were after all settling frontier area and were surrounded by enemies – the Spanish to the south and the Cherokees to the north and west. The Charter of Province provides that the Trustees may grant to those individuals willing to “inhabit and reside” in the colony the right to take with them into the colony “armour, weapons, powder, shot, ordinance, munition” for purposes of defense.⁸¹ The Charter of Province being the organic law which established the colony provided the “as by law” required by the 1689 English Bill of Rights. The list of the types of weapons and the purpose of defense against “the wild people” then residing in the colony established which arms were “suitable” to the “position” of one who was residing in the colony of Georgia. The defense for which the colonists were allowed to keep arms was the defense of themselves against the dangers of residing in the colony. This right to carry weapons for one’s personal self-defense is evidenced by the Charter of Province’s demarcation between granting permission to the colonist to have weapons and its grant to the corporation acting as Trustee the power to

train, and instruct, exercise and govern a militia, for the special defence and safety of our said colony, to assemble in martial array the inhabitants of the said colony, and to lead and conduct them, and with them to encounter, expulse, repel, resist and pursue by force of arms as well by sea as land, within or without the limits of our said colony, and also to kill, slay and destroy and conquer by all fighting ways, enterprises and means whatsoever, all and every such person or persons, as shall at any time hereafter, in any hostile manner, attempt or enterprise the destruction, invasion, detriment, or annoyance of our said colony; and to use and exercise the martial law in time of actual war and invasion or rebellion, in such cases where by law, the same may be used or exercised; and also from time to time to erect forts, and fortify any place or places within our said colony, and the same to furnish with all necessary ammunition, provisions, and stores of war, for offense and defence⁸²

During the period of the Trusteeship, the colonists’ right to carry arms arose from a specific contractual grant set forth in

81. Charter of the Province of Georgia (1732).

82. *Id.*

the Charter of the Province of Georgia. The Crown granted the Trustees the ability to grant to all who inhabited Georgia the privilege of carrying a weapon whether or not the same person would have had a right to carry a weapon in England. The right to carry a weapon was a contractual right. Moreover, King George limited the right to carry a weapon to personal self-defense. The right to use force to protect the colony was granted to the corporation as a whole; it was a collective right, not an individual right.⁸³

On April 23, 1752, the trustees surrendered the charter of the colony of Georgia to King George.⁸⁴ Captain John Reynolds was appointed Governor of Georgia⁸⁵ and arrived in Savannah

83. The right to use force to protect the colony was exercised through a series of acts with titles such as “An act of the better ordering the Militia of this Province” or “An Act for the better ordering of the Militia”. See Militia Act of 1764, p. 5, *microformed on* Georgia Colonial Laws and Georgia Laws, Drawer 288, Box 21 (Ga. Archives); Militia Act of 1765, p. 33, *microformed on* Georgia Colonial Laws and Georgia Laws, Drawer 288, Box 21 (Ga. Archives). The colonial militia law required all men between the ages of sixteen and sixty to keep arms in their home and to bring or bear these arms during musters or when called upon for militia duty. An individual who failed to comply with the duty to keep and bear arms was subject to a series of fines. The types of arms which an individual was required to keep included “one gun or musket fit for service, one cartridge-box with at least nine cartridges filled with good gunpowder, and ball that shall fit his piece, a horn or flask containing at least a quarter pound of gunpowder, and a shot pouch with half a pound of bullets, one girdle or belt, one worm or picker, four spare flints, a ball of bees-wax, and a cork that shall fit his piece, a bayonet, sword, or hatchet.” Militia Act of 1765, p. 33, 35, *microformed on* Georgia Colonial Laws and Georgia’ Laws, Drawer 288, Box 21 (Ga. Archives). Although the earliest published Militia Act for the colony of Georgia available in the Georgia Archives is dated 1764, the Act merely extends the law then in place. Militia Act of 1764, p. 5, *microformed on* Georgia Colonial Laws and Georgia’ Laws, Drawer 288, Box 21 (Ga. Archives). The preamble of the 1764 Act refers to the “law now in being for the regulation of the militia is near expired”. *Id.* In 1773, the Militia Act was reenacted under essentially the same terms as the Militia Act of 1765. See Militia Act of 1773, p. 294, *microformed on* Georgia Laws, Drawer 54, Box 50 (Ga. Archives). While it is currently not possible to know the exact obligations imposed by the Militia Acts in place prior to 1765, such an Act did exist and it can be assumed that the Act imposed a similar obligation upon all males inhabiting the colony of Georgia to keep and bear arms.

84. MCELREATH, *supra* note 21, at 15.

85. *Id.* at 18.

on October 29, 1754.⁸⁶ When the first General Assembly met on January 7, 1755,⁸⁷ some of the first business to which the General Assembly attended was enacting laws for the protection of the colony, one of which required white men from the age of sixteen years on to keep and carry firearms.⁸⁸ These laws were deemed “absolutely necessary for the security and defence of this province”.⁸⁹ The acts passed by the colonial General Assembly were approved by the Crown’s Council Chamber.⁹⁰ Thus, Georgians collectively through their elected representatives requested of the Crown the ability to keep and bear arms for the purposes of protecting the colony and each other. The Crown granted the right to keep and bear arms to the white male inhabitants of Georgia for the purpose of keeping the colony secure. The obligation to use the right to keep and bear arms for the purpose of the collective safety of the colony was imposed collectively through the same Georgia General Assembly. Of note, Savannah and other towns where the King’s troops were stationed were exempted from the obligation to carry fire arms,⁹¹ thus suggesting that the obligation to bear fire arms was perceived as a substitute for the military or a police force. The colonists requested the right to keep and bear arms for the purpose of more effectively protecting their property and life. They then imposed the duty to keep and bear arms on all men – again for the purpose of protecting the property and lives of the community.

86. *Id.* at 22.

87. *Id.* at 24.

88. Fire-arms to Publish Worship Act of 1757, p. 15, *microformed on Georgia Colonial Laws and Georgia Laws*, Drawer 288, Box 21 (Ga. Archives); Militia Act of 1764, p. 5, *microformed on Georgia Colonial Laws and Georgia Laws*, Drawer 288, Box 21 (Ga. Archives); Militia Act of 1765, p. 33, *microformed on Georgia Colonial Laws and Georgia Laws*, Drawer 288, Box 21 (Ga. Archives).

89. Fire-arms to Publish Worship Act of 1757, p. 15, *microformed on Georgia Colonial Laws and Georgia Laws*, Drawer 288, Box 21 (Ga. Archives) (act required all white men from sixteen years on to carry with them “on Sabbath-days, fasts, and festivals, and to such place of publick worship . . . one good gun, or a pair of pistols, with at least six charges of gun-powder and ball”).

90. *Id.*

91. Patrol Act of 1768, p. 4, 6, *microformed on Georgia Colonial Laws and Georgia Laws*, Drawer 288, Box 21 (Ga. Archives).

2. *The Move Toward Independence*

On July 4th, 1775, the Provincial Congress⁹² met in Savannah and adopted a series of resolutions which confirmed their belief in their natural rights as citizens of Georgia and rights as British subjects. Four of those resolutions were:

Resolved, That we were born free, have all the feelings of men, and are entitled to the natural rights of mankind.

Resolved, That by birth or incorporation we are all Britons, and whatever Britons may claim as their birthright is also ours.⁹³

* * *

Resolved, That by the law of nature and the British Constitution, no man can legally be deprived of his property without his consent given by himself or his representatives.

Resolved, That the acts of the British Parliament for raising a perpetual revenue on the Americans by laying a tax on them without their consent, and contrary to their protestations, are diametrically opposed to every idea of property, to the spirit of the constitution, and at one stroke deprive this vast continent of all liberty and property, and as such must be detested by every well wisher to Great Britain and America.⁹⁴

92. The Provincial Congress was created in January 1775 in response to receiving the Declaration of Colonial Rights issued by the first Continental Congress in September 1774. The Provincial Congress consisted of elected delegates from each of Georgia's twelve parishes. The Provincial Congress operated outside of the control of the Royal Governor and with the start of the Revolutionary war became the operating government of Georgia. MCELREATH, *supra* note 21, at 48-62. For a number of years the Provincial Congress and the General Assembly both met and claimed to be acting as the legitimate government of Georgia. The ability of each body to meet and take action depended upon the vicissitudes of war and who controlled Savannah and Augusta. *Id.*

93. As the natural rights of mankind and the birthrights of Britons are listed separately, and as all Britons are men and as such would also be entitled to the natural rights of mankind, the colonist must have believed that the birthrights of Britons include(d) something more than the natural rights of mankind.

94. MCELREATH, *supra* note 21, at 56-57.

In both the 1774 and 1775 Resolutions, Georgians focused on property rights. The complaint to the Crown and Parliament was that Parliament was violating both the English Constitution and natural law, upon which the English Constitution was based, by taxing the colony. Georgians claimed that such taxation violated the English Constitution and natural law for two reasons. First, the amount of the tax levied was so great that it subsumed the value of the property. The property the colonists were concerned about was both real and personal property and both tangible and intangible property.⁹⁵ Second, the tax was levied without due process of the law. Due process required an opportunity to participate in the law-making process by consenting to the authority of the legislative body.⁹⁶ Because the colonists were not represented in Parliament, they had not consented to the authority of Parliament and not had the opportunity to be heard. Through 1775 and until early 1776, there is little evidence that Georgians were focused on a right to bear arms.

In April of 1776, Georgia's Provincial Congress adopted the Rules and Regulations of the Colony of Georgia which served as a temporary constitution.⁹⁷ The Rules and Regulations establish the bare essentials of a functioning government and provide no mention of individual rights.⁹⁸ The Preamble to the Rules and Regulations, however, sets forth the belief that natural law includes the right to "bear arms" against an oppressive government and for self-protection.⁹⁹ The Preamble states:

Whereas, the unwise and iniquitous system of administration obstinately persisted in by the British Parliament and Ministry against the good people of America hath at length driven the latter to *take up arms as their last resource for the preservation of their rights and liberties which God and the Constitution gave them*; And whereas an armed force, with hostile intentions against the people of this province, having lately arrived at Cockspur,¹⁰⁰ his Excellency Sir James

95. LOCKE, *supra* note 8 at §§ 25-51.

96. *Id.* at § 138.

97. MCELREATH, *supra* note 21 at 60.

98. *Id.* at 60-62.

99. *Id.* at 60.

100. Cockspur island is located at the mouth of the Savannah River, north

Wright, Baronet, and King's Governor of Georgia, in aid of the views of the administration and with a design to add to those inconveniences which necessarily result from a state of confusion, suddenly and unexpectedly carried off the great seal of the Province with him;¹⁰¹

It should be noted that prior to the preparation for the use of force, Georgians had petitioned the Crown for redress of its complaints.¹⁰² The colonists believed that petitioning the government was an exercise of both British law and natural law as recognized by the 1774 resolution. Georgians did not resort to force (i.e. the use of arms) except as a "last resort",¹⁰³ and only then when they were threatened with the use of force, the landing of hostile forces,¹⁰⁴ at a location at the mouth of the Savannah River where the British troops could isolate Georgians both militarily and economically. Thus, Georgia's use of force to fight an oppressive government was use of force in a defensive mode. Such use of force to protect ones' self, family, and property, was an affirmative defense recognized at common law.¹⁰⁵ Moreover, this right to fight an oppressive government was exercised collectively, first by using the democratic process of Georgia's Provincial Congress to decide as a collective body to use force and then by using force through

of Tybee island. Due to its location, Cockspur was considered strategic for both military and economic reasons. Early in the colony's history, Cockspur was used for military purposes and was the site of Fort George. Although Fort George was destroyed by patriots at the beginning of the Revolutionary War, the British established a safe haven on the island for loyalists of King George. See http://www.visitgeorgiaonline.com/cockspur_island.htm (last visited on April 9, 2009). On January 12, 1776, two war ships arrived with royal troops. When Sir James Wright, the third Royal Governor of Georgia fled to Cockspur with the seal, Cockspur became the capital of the colony. MCELREATH, *supra* note 21 at 57.

101. MCELREATH, *supra* note 21 at 60 (emphasis added).

102. Georgia was not the only colony which took this course. In February 1768, Massachusetts sent a letter requesting that the other colonies join it in petitioning "parliament and the king for redress". *Id.* at 39. The Georgia Assembly requested that Benjamin Franklin, its agent, "join earnestly with the other colonies' agents in soliciting a repeal of those acts, [i.e. imposing of taxes and duties], and in remonstrating against any acts of like nature for the future." *Id.*

103. LOCKE, *supra* note 8 at §§ 220-26.

104. MCELREATH, *supra* note 21 at 60.

105. See 1802 Ga. Acts, p. 25.

the organized militia.

By recognizing that the power of government emanates from the people, the people of Georgia withdrew their power to govern from the crown and gave some of their power to govern to the representative government being created by the Constitution of 1777.¹⁰⁶ The recognition of natural law and sovereign power residing with the people left Georgians in the position of believing that they did not need to list all of the individual rights to which they were entitled under natural law. A reservation of rights was not included in the Constitution of 1777,¹⁰⁷ but Article VIII of the Constitution of 1789 specifically provided that “[a]ll powers not delegated by the constitution as amended, are retained by the people.”¹⁰⁸ The Constitution of 1789 was adopted after the ratification of the Constitution of the United States, a constitution which changed the relationship of the state with the federal government. Article VIII of the Constitution of 1789 can be seen as an explicit recognition by the people of Georgia that they had retained their natural rights and that by ratifying the U.S. Constitution, Georgians had not ceded their individual rights to either the U.S. or the state government.¹⁰⁹

Based on the statements made and the resolutions adopted leading up to the ratification of the Constitution of 1777, the concern with protecting private property from the government was an essential component to Georgia’s break from Britain. Nevertheless, the silence during this period on the “right” or the “ability” of Georgians to carry weapons is not real silence, as Georgians took up arms in 1776 to protect their property rights.¹¹⁰ Moreover, the Militia Act of 1773 was in effect and required all male inhabitants of the colony between the ages of

106. LOCKE, *supra* note 8 at §§ 220-26.

107. GA. CONST. (1777). Under the Articles of Confederation, each state maintained its own sovereignty. Thus, there would not have been the need to specifically reserve power to the state or to the people.

108. GA. CONST. art. VIII (1789).

109. *See* Nunn v. Georgia, 1 Ga. at 250 (Lumpkin, J.) (because people withheld power from Congress does not mean that the peoples conferred that power on state legislatures).

110. Rules and Regulations of the Colony of Georgia, Preamble (1776), <http://georgiainfo.galileo.usg.edu/con1776.htm> (last visited on Feb. 6, 2009).

sixteen and sixty to keep and bear arms.¹¹¹ Approximately one hundred years later, Georgians and Georgia repeat the same conversation and same process as events lead to the Civil War.

The demarcation of the right to use force between the individual and the community existed in Georgia from the creation of the colony. As set forth in the Charter of the Province of Georgia, individuals had the right to have weapons for self-defense and the Trustees, who were the government of the colony, had the responsibility to protect the community from outside forces.¹¹² Through the Militia Act and the Patrol Act, the government then requested that men between the ages of sixteen and sixty assist in the protection of the community by keeping and bearing arms.¹¹³ The community regulated the use of force by identifying who could exercise the force and the manner in which the force would be exercised.

With the recognition that sovereignty resides with the people and not the government, and that the people cede power to the government for the benefit and good of all, the concept of pre-existing rights takes on a new dimension. When the people of Georgia ceded sovereign power to the State of Georgia, did the people cede their right to keep and bear arms for all purposes? From the inception of the colony, the right to bear arms for personal self-defense was separate and distinct from the right to use force to defend the colony. Moreover, throughout the colonial period, when the people of the Georgia exercised the right to use force (or bear arms) against an oppressive government,¹¹⁴ this right was exercised as a last resort and was

111. The arms which were required to be kept included "one gun or musket fit for service, one cartridge . . . with at least nine cartridges filled with good gun powder and ball that shall fit his piece, a horn or flask containing at least one quarter pound of gun powder, a shot pouch with one half pound of bullets, flint, beeswax, a bayonet or hatchet. . ." Militia Act of 1765, p. 33, *microformed on* Georgia Colonial Laws and Georgia' Laws, Drawer 288, Box 21 (Ga. Archives).

112. *See supra* footnotes 81-83 and accompanying text.

113. Militia Act of 1765, p. 33, *microformed on* Georgia Colonial Laws and Georgia Laws, Drawer 288, Box 21 (Ga. Archives); Patrol Act of 1768, p. 4, 6, *microformed on* Georgia Colonial Laws and Georgia Laws, Drawer 288, Box 21 (Ga. Archives).

114. As established above, the British government was deemed oppressive because Parliament's acts were contrary to the colonists rights to property and liberty. *See supra* notes 94-101 and accompanying text.

exercised as a collective right. As of 1789, Georgians had exercised their right to use force to protect the fundamental rights to property and due process of the law, and the exercise of the right to use force was exercised collectively, leading one to conclude that the right to bear arms to protect against outside forces is a collective right of last resort.

As the right to use force for self-defense was a right separate and distinct from the right to use force to protect the community from outside forces, it must be the individual right to use force for self-defense which is reserved to the people pursuant to Article VIII of the Georgia Constitution of 1789. The extent of the state's authority to regulate the individual's right to use force for self-defense remains to be answered.

B. The Constitutional Right to Bear Arms and the General Assembly

1. The 1861 Constitution

Leading Georgia politicians were instrumental in drafting the Confederate Constitution. Howell Cobb¹¹⁵ was the President of the Confederate Congress that drafted and unanimously approved the Confederate Constitution.¹¹⁶ Thomas R.R. Cobb,¹¹⁷ who, as chair of the Committee on the Constitution of the State and the Constitution and Laws of the United States, almost single-handedly drafted the Georgia Constitution of 1861, was a delegate to the Confederate Congress which drafted

115. Howell Cobb was Speaker of the U.S. House of Representatives from 1850 to 1851. In 1851, Howell Cobb was elected Governor of Georgia. Our Georgia History, http://ourgeorgiahistory.com/ogh/Howell_Cobb (last visited April 9, 2009).

116. Constitution of the Confederated States at http://avalon.law.yale.edu/19th_century/cas_cas.asp (last visited April 11, 2009). The Constitution of the Confederate States was unanimously adopted by the Congress of the Confederate States on March 11, 1861. JOURNAL OF THE CONSTITUTIONAL CONVENTIONAL 179-180 (1865), *microformed* on Georgia Laws, Drawer 54, Box 50 (Georgia Archives) (hereinafter JOURNAL OF 1861 CONVENTION).

117. Thomas R.R. Cobb served in the Confederate Congress as Chair of the Committee on Military Affairs. Cobb, a Brigadier General, died in the Battle of Fredricksburg on December 13, 1862. Thomas R.R. Cobb family letters, MSS 62f, Kenan Research Center, Atlanta History Center, available on line at <http://archivegrid.org> (last visited on April 11, 2009).

the Confederate Constitution.¹¹⁸

The Confederate Constitution provided that “[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”¹¹⁹, that “[n]o person shall be . . . deprived of life, liberty, or property without due process of law”¹²⁰, that “[t]he enumeration, in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people of the several States”¹²¹, and “[t]he powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people thereof.”¹²² The Confederate Constitution explicitly protected private property rights¹²³ and also the right to keep and bear arms.¹²⁴

On March 16, 1861, the Georgia Convention, which had reassembled in Savannah, unanimously adopted an ordinance ratifying the Constitution of the Confederate States of America.¹²⁵ On that same day, the Georgia convention assigned a committee to draft what became the Georgia Constitution of 1861.¹²⁶ Georgia’s 1861 Constitution¹²⁷ was adopted in convention on March 23, 1861 and ratified by people of the state.¹²⁸ When the 1861 Constitution was being drafted, the drafters believed that the federal government was impinging

118. The originals of both the Confederate Constitution and the Georgia Constitution of 1861 are in the same handwriting, that of Thomas R.R. Cobb. MCELREATH, *supra* note 21 at 129. The original handwritten Georgia Constitution of 1861 is in the Georgia Archives.

119. CONFEDERATE CONST. art. I, sec.9(13).

120. CONFEDERATE CONST. art. I, sec. 9(16).

121. CONFEDERATE CONST. art. VI, sec. 5.

122. CONFEDERATE CONST. art. VI, sec. 6.

123. *See* CONFEDERATE CONST. art. I, sec. 9(4) (protecting property rights in slaves).

124. CONFEDERATE CONST. art. I, sec. 9(16).

125. JOURNAL OF PUBLIC AND SECRET PROCEEDINGS OF THE CONVENTION OF THE PEOPLE OF GEORGIA 187-91 (1861).

126. *Id.*

127. The Georgia Constitution of 1861 has been called the most perfect constitution. *See* MCELREATH, TREATISE *supra* note 21 at 135.

128. GA. CONST. (1861). The Constitution of 1861 was the first Georgia constitution to be ratified by popular vote. MCELREATH, *supra* note 21 at 280, 297.

upon the state's rights and by doing so were impinging upon the rights of the citizens of that state. The drafters of the 1861 Constitution consciously drafted provisions to protect the rights which they believed the federal government was impinging upon. Thus, Article I of the Constitution of 1861, entitled "Declaration of Fundamental Principles",¹²⁹ provided in part:

1. The fundamental principles of Free Government cannot be too well understood, nor too often recurred.

* * * *

3. Protection to person and property is the duty of Government; and a Government which knowingly and persistently denies, or withholds from the governed such protection, when within its power, release [them] from the obligation of obedience.¹³⁰

4. No citizen shall be deprived of life, liberty or property, except by due process of law; and of life or liberty, only by the judgment of his peers.

* * * *

6. The right of the people to keep and bear arms shall not be infringed.¹³¹

129. Although the "Declaration of Fundamental Principles" like the rest of the 1861 Constitution was penned by Thomas R.R. Cobb and contained the essence of Cobb's political and religious philosophy, Cobb was not the only one who held these views. Compare "Declaration of Fundamental Principles" with Enunciation of Fundamental Principles" introduced by Mr. Fouche, a delegate to the Convention. *Id.* at 130-132.

130. Compare with Mr. Fouche: "Then in its relation to individuals, the protection of person, property and character, against violence, fraud, and defamation, is the sole legitimate object of all just government; and an imbecile government which cannot, or a corrupt government, which will not give it, ought to be reformed or overthrown." Enunciation of Fundamental Principles, Eleventh. *Id.* at 132.

131. The language of this provision is different than both the U.S. Constitution and the Confederate Constitution, both of which reference "militia". Compare U.S. CONST. amend. II with CONFEDERATE CONST. art. I, Sec. 9(13). As Thomas R. R. Cobb was involved with drafting both the Confederate and the Georgia Constitution in 1861, it can only be presumed that the difference in language was intentional. Also by the time that the 1861 Constitution had been drafted, the Georgia Supreme Court had issued

16.A faithful execution of the laws is essential to good order; and good order in society is essential to liberty.

27.The enumeration of rights herein contained shall not be construed to deny to the people any inherent rights which they have hitherto enjoyed.

28.This declaration is a part of this Constitution, and shall never be violated on any pretense whatever.¹³²

The Convention's adoption of language in the Georgia Constitution of 1861 protecting the right to keep and bear arms which did not reference the militia or protection of the state is consistent with maintaining the separation between the individual right to keep and bear arms for personal protection and the collective right to keep and bear arms for the protection of the state. By protecting the individual right to keep and bear arms in the Georgia Constitution, the Convention ratified the Supreme Court of Georgia's holding in *Nunn v. Georgia*¹³³ that the right to self defense stems from natural law and the state has limited power to regulate the right to bear arms for defense of

its opinion in *Nunn v. Georgia*, 1 Ga. 243 (1846), see *infra* at 24. Cobb would have been aware of the *Nunn* decision and the Georgia Supreme Court's rationale for two reasons. First, in 1949, Cobb, a lawyer admitted to practice before the Supreme Court of Georgia, was appointed clerk of the Supreme Court of Georgia. See Certificate appointing Cobb, The Georgia Archives at 4-2-46, DOC-2050, File 2 Names, Cobb, Thomas Reade Rootes. Second, Cobb was Judge Lumpkin's son-in-law; Lumpkin authored the *Nunn* opinion. Thomas R.R. Cobb family letters, MSS 62f, Kenan Research Center Atlanta History Center. Compare with Mr. Fouche: "That all citizens in a free State, may freely, and peaceably assemble to consider any matter interesting to them; *may keep, and bear arms*; may petition their government for anything within the sphere of its powers; may freely speak, write and publish their opinions upon any subject, standing to the penalty of law for any abuse of these privileges; may profess any religious creed, and practice any form of religious worship, without being subjected, on account thereof, to any political or legal disability, or entitled to any political or legal privileges of favor." Enunciation of Fundamental Principles, Thirteenth. MCELREATH, *supra* note 21 at 132.

132. GA. CONST. (1861).

133. 1 Ga. 243 (1946).

oneself and one's property. The individual right to bear arms was enshrined in a document which was the first Georgia constitution ratified by popular vote. Georgians no longer had to rely upon the reservation of rights found in the 1789 and 1798 constitutions to establish the existence of an individual right, but could now point to a positive right, a right enumerated in the Georgia Constitution of 1861.

The "right to keep and bear arms" was not absolute. The right to keep and bear arms enshrined in the 1861 Constitution was, at most, the right understood by Georgians at the time the 1861 Constitution was adopted.¹³⁴ In 1861, Georgians understood that the Georgia General Assembly could prohibit the carrying of concealed weapons¹³⁵ and could limit the use of weapons through the criminal code.¹³⁶ Moreover, the 1861 Constitution recognizes that "good order in society is essential to liberty"¹³⁷ and that it is the "duty" of government to provide "good order in society" by providing "protection to person and property".¹³⁸ The restrictions on the right to bear arms which were in effect in 1861 were restrictions which furthered the "good order in society" by protecting people and property from the unlawful use of force. The individual right to bear arms gave way to the greater good of having order in society which order was necessary for protecting the individual's greater right to life, liberty and property.

Georgians, however, reserved to the people the right "to keep and bear arms" for personal self-defense.¹³⁹ Again, just as with the colonial period, Georgia separated the right to keep and bear arms for personal protection, an individual right preserved in the Constitution of 1861, from the right to use force to protect the state and the right to use force to oppose an oppressive government, rights Georgians believed were collective rights exercised through the Convention of 1861 and preserved

134. *Heller*, 128 S. Ct. at 2821 (Scalia, J.) ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.").

135. *Nunn v. Georgia*, 1 Ga. at 243. See discussion, *infra* at notes 169—221 and accompanying text.

136. See 1817 Ga. Acts, p 92.

137. GA. CONST. art. I, sec. 16 (1861).

138. GA. CONST. art. I, sec. 3 (1861).

139. GA. CONST. art. I, sec. 6 (1861).

through Article I, Section 9(13) of the Confederate Constitution.¹⁴⁰

2. The Reconstruction Constitution

After the War, Georgia set about revising its constitution. The Constitution of 1865 provides that the primary “duty” of government is the “[p]rotection to person and property”¹⁴¹ and that “[n]o person shall be deprived of life, liberty, or the property, except by due process of law.”¹⁴² By listing the protection of property in the first two sections of the Constitution, Georgians were recognizing the primacy of the protection of property and the government’s affirmative duty to protect the community and its property.

Article I, Section 4 of the Constitution of 1865 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.”¹⁴³ The delegates to the convention believed that they were required to adopt the same language as that contained in the U.S. Constitution.

Article I of the Georgia Constitution of 1868 continued the obligation of the government to protect property.¹⁴⁴ In addition, Article I, Section 14 of the Georgia Constitution of 1868 provides: “A well-regulated militia being necessary to the security of a free people, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne.”¹⁴⁵ Section 14 contains the same language as the Second Amendment, but also clarifies that the legislature has the power to regulate arms in a manner akin to the time, place, and manner regulations of speech under the First Amendment to the U.S. Constitution.¹⁴⁶

140. CONFEDERATE CONST. art. I, sec. 9(13).

141. GA. CONST. art. I, sec. 1 (1865).

142. GA. CONST. art. I, sec. 2 (1865).

143. GA. CONST. art. I, sec. 4 (1865).

144. *See* GA. CONST. art. I, sec. 1 (1868) (“Protection to person and property is the paramount duty of government, and shall be impartial and complete.”) and GA. CONST. art. I, sec. 3 (1868) (“No person shall be deprived of life, liberty, or property, except by due process of law.”).

145. GA. CONST. art. I, sec. 14 (1868).

146. *Heller*, 128 S. Ct. at 2798.

During the Reconstruction time period, there was much public unrest. Due to the limits placed on voting rights, which excluded many well educated white men, Georgians did not view the Constitution of 1868 or the government installed under that Constitution as legitimate.¹⁴⁷ Those who had been disenfranchised and those who supported the disenfranchised had not consented to the new civil government and thus, they believed that the new civil government had no authority to rule.¹⁴⁸ The belief that the government was illegitimate led to lawlessness in some parts of the State. In response to the events of the day, the Georgia General Assembly passed the following resolution:

A Resolution requesting the Governor to prohibit armed and unlawful assemblages.

Whereas, It being the practice (sic) of a portion of the citizens of this State to assemble in large numbers, with arms, for the purpose of exercising in military tactics, and for other unlawful purposes, without authority of law, and to the terror of the good citizens thereof; therefore,

Resolved, by the Senate and House of Representatives, That his Excellency the Governor be and he is hereby respectfully requested to issue his proclamation prohibiting such armed and unlawful assemblages; but the right of the people to peaceably assemble for the consideration of any matter shall not be impaired by any proclamation of the Governor.¹⁴⁹

A resolution was passed because Georgia was under military rule and the power to prohibit armed gatherings lay with the military governor, not the Georgia General Assembly. Consistent with the principle set forth in Article I, Section 16 of the Constitution of 1868, the Georgia General Assembly sought to limit the right to bear arms to “further good order in society” and thus, protect life, liberty, and property.¹⁵⁰ Because the purpose of the prohibition was to prevent the terrorizing of citizens and because, at least some of the arms, were used in “exercising military tactics”, the arms at issue were arms worn

147. MCELREATH, *Supra* note 21, at 160.

148. See LOCKE, *supra* note 8 at § 87.

149. 1868 Ga. Acts, vol. 1, p. 183.

150. GA. CONST. art. I, sec. 16 (1868).

in the open. In 1868, the restriction prohibiting arms at public gatherings applied, not just to concealed weapons, but to all weapons. In imposing a limitation on the right to bear arms, the Georgia General Assembly was fulfilling its constitutional obligation to protect life and property.¹⁵¹

In 1870, the Georgia General Assembly passed “An Act to preserve the peace and harmony of the people of this State” which prohibited any person from carrying “any dirk, bowieknife, pistol or revolver, or any kind of deadly weapon, to any court of justice, or any election ground or precinct, or any place of public worship, or any other public gathering in this State, except militia muster-grounds.”¹⁵² The 1870 Act applied to all weapons, whether concealed or not. In enacting the 1870 Act, the Georgia General Assembly was again fulfilling its constitutional obligation to protect life and property.

Through the Resolution of 1868 and the Act of 1870, the Georgia General Assembly exercised its power under the Constitution of 1868 to “prescribe by law the manner in which arms may be borne.”¹⁵³ The power was interpreted by the General Assembly to include the banning of all arms from public gatherings when the purpose of the ban was to protect the public. This interpretation of the General Assembly’s power to regulate guns is consistent with the natural law right of the individual to protect themselves and their property and is consistent with the constitutional obligation of the state to protect the community. One individual’s right to self-defense must be balanced against another individual’s right of self-defense. It is the government, through the legislature, which has the power to regulate property rights¹⁵⁴ among members of the community.¹⁵⁵ The 1870 ban applied to property where the need to balance individual rights was at its greatest - places of public gatherings or public worship or where the government was the property owner, courthouses and election sites. The 1870 ban applied to locations and events at which the need for

151. GA. CONST. art. I, sec. 1 (1868) (“Protection to person and property is the duty of government, and shall be impartial and complete.”).

152. 1870 Ga. Acts, vol. 1, p. 421.

153. GA. CONST. art. I, sec. 14 (1868).

154. Property is used to include life, liberty, and property. *See* LOCKE, *supra* note 8 at §§ 123, 139.

155. *Id.*

self-defense was lessened and the need to protect one's property was virtually non-existent, but the need to protect others the greatest.

C. The Modern Constitutions

1. Constitutional Provisions

The Constitution of 1877 restates the purpose of government. Article I, Paragraph I provides that all government is "instituted solely for the good of the whole."¹⁵⁶ Article I, Paragraph II provides: "Protection to person and property is the paramount duty of government, and shall be impartial and complete."¹⁵⁷ The government's duty to protect life and property must be done for the good of the whole community, thus protecting all life and all property regardless of the type of property or the identity of the owner.

Article I, Paragraph XXII of the Constitution of 1877 provides: "*Arms* – 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."¹⁵⁸ Paragraph XXII deletes the reference to the militia, clarifying that the right protected by the Georgia Constitution is an individual right. The power of the General Assembly to regulate the right to bear arms is retained.

Although the Georgia Constitution was amended in 1945, 1976, and 1983, there were no substantive changes to the provision on the protection of property or the provision on arms. Today, Article I, Paragraph II of the Georgia Constitution of 1983 provides:

Protection to person and property: equal protection.

Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.¹⁵⁹

And, Article I, Paragraph VIII of the Georgia Constitution of

156. GA. CONST. art. I, par. I (1877).

157. GA. CONST. art. I, par. II (1877).

158. GA. CONST. art. I, par. XXII (1877).

159. GA. CONST. art. I, par. II (1983). *See also* GA. CONST. art. I, par. I (1983) ("No person shall be deprived of life, liberty, or property except by due process of law.").

1983 provides:

Arms, right to keep and bear. 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.¹⁶⁰

2. The Constitutional Right to Keep and Bear Arms

Every Georgia constitution since 1861 has included a provision guaranteeing the citizens of Georgia the right to keep and bear arms, but the language and thus, the meaning of that right changed over time. Because the language of Article I, Paragraph VIII of the Georgia has been carried forward verbatim from the 1877 Georgia Constitution, the time of measuring the intent and meaning of the right to keep and bear arms is 1877.¹⁶¹

During Reconstruction, the Georgia General Assembly acted twice to restrict the carrying of weapons in public. Based on the preambles to the 1868 Resolution and the 1870 Act, both acts were taken in response to the use of force by individuals against other members of society. Both acts were taken to protect the lives and property of members of the community. The Georgia General Assembly was therefore fulfilling its constitutional obligation to protect and preserve property, which includes life, from the unlawful use of force by others.¹⁶² The Georgia General Assembly's Acts were taken by a vote of the majority of the representatives of the people and thus, the legislature was acting pursuant to the Georgia Constitution.¹⁶³ Because these

160. GA. CONST. art. I, par. VIII (1983).

161. *Heller*, 128 S. Ct. at 2821 (Scalia, J.) (the scope of a constitutional right is determined as of the time of its adoption).

162. *See* GA. CONST. art. I, sec. 1 (1865) ("Protection to person and property is the duty of government.") and GA. CONST. art. I, sec. 1 (1868) ("Protection to person and property is the paramount duty of government, and shall be impartial and complete.").

163. *See* GA. CONST. art. II, sec. V.1 (1865) ("The General Assembly shall have power to make all laws and ordinances consistent with this Constitution, and not repugnant to the Constitution of the United States, which they shall deem necessary and proper for the welfare of the State.") and GA. CONST. art. III, sec. 5.1 (1868) ("The General Assembly shall have power to make all laws and ordinances, consistent with this constitution, and not repugnant to the Constitution of the United States, which they shall deem

actions were taken prior to the ratification of the 1877 Constitution and because these actions are consistent with the State's obligations under the 1868 Constitution which was in effect at the time the General Assembly acted, these actions assist in defining the power of the Georgia General Assembly under Article I, Paragraph VIII of the current Georgia Constitution.

Because Article I, Paragraph VIII, specifically provides that the Georgia General Assembly may act to limit the individual right to "keep and bear arms", the Georgia General Assembly has the power to limit the right to keep and bear arms in the same manner as was done by the General Assembly prior to 1877. The power to regulate the right to keep and bear arms must be exercised in furtherance of the State's constitutional duty to protect and preserve life, liberty and property.

Today, the power of the Georgia General Assembly to regulate guns remains the same as it did when the Georgia General Assembly passed the 1870 Act to preserve peace and harmony. The Georgia General Assembly has the constitutional power to regulate where arms may be carried, what type of arms may be carried, and how they may be carried. The General Assembly's power includes the power to ban weapons when the ban is a limited ban which balances the various individuals' rights to self-defense and which bans only those weapons at those locations which if not banned would create a substantial risk of infringing upon another individual's right to defense of self or property. The General Assembly's power to regulate is not a power to destroy, but the duty to protect the community.

IV. THE SUPREME COURT OF GEORGIA AND GUN CONTROVERSY

A. *Nunn v. Georgia*

*Nunn v. Georgia*¹⁶⁴ has been cited by judges¹⁶⁵ and scholars¹⁶⁶ as evidence that at the time the Second Amendment was ratified it was understood to protect an individual right to bear arms.

necessary and proper for the welfare of the State.").

164. 1 Ga. 243 (1846).

165. See, e.g. *Heller*, 128 S. Ct. 2783 (2008).

166. See, e.g. Stephen P. Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bill of Rights*, 41 BAYLOR L. REV. 629 (1989).

Nunn, decided more than 50 years after the adoption of the Second Amendment, must be understood as a product of its time, pre-Civil War Georgia. Chief Judge Lumpkin's opinion uses rhetorical questions to raise several philosophical questions regarding the relationship between the right to bear arms to oppose an oppressive government and the power of government to regulate arms. Lumpkin does not answer the questions posed. Moreover, even if Lumpkin answered the questions posed in the affirmative, the philosophical discussion of the relationship between the individual's right to bear arms and the government's right to regulate weapons would not support the court's limited holding in the case. *Nunn* is not about what the Second Amendment meant at the time it was ratified, but a message to the Union that Georgia was armed and would use its arms to fight an oppressive government – the Union.

In *Nunn*, the Supreme Court of Georgia merely recognized the rights that the citizens of Georgia held as of 1846 and that had been retained by the people throughout the constitutional drafting period.¹⁶⁷ As *Nunn* predates the Constitution of 1861 by fifteen years, the holding is evidence of the intent and meaning of the right “to keep and bear arms” set forth in Article I, Section 6, of the Georgia Constitution of 1861.¹⁶⁸

1. The Facts

On December 25, 1837, the Georgia General Assembly had passed a law entitled “An Act to guard and protect the citizens of this State against the unwarrantable and too prevalent use of deadly weapons.”¹⁶⁹ Section 1 of the 1837 Act prohibited

any merchant or vendor of wares or merchandize in this State, or any other person or persons whatever, to sell, or to offer to sell, or to keep or to have about their persons or elsewhere, any of the herein-after-described weapons, to wit: Bowie or any other kinds of knives, manufactured and sold for the purpose of wearing or carrying the same as arms of offence or defence; pistols, dirks, sword-canes, spears &c., shall also be

167. See GA. CONST. art. VIII (1789) (“All powers not delegated by the constitution, as amended, are retained by the people.”).

168. Hiram Warner and Eugenius Nisbet, two of the first three judges of the Supreme Court of Georgia, were delegates to the 1861 Constitutional Convention. JOURNAL OF 1861 CONVENTION, *supra* note 116 at 1-7.

169. 1837 Ga. Acts, p. 90-91.

contemplated in this act, save such pistols as are known and used as horseman's pistols, &c.¹⁷⁰

Section 4 of the 1837 Act exempts "Sheriffs, Deputy Sheriffs, Marshalls, Constables, Overseers or Patrols" and states "that no person or persons shall be found guilty of violating the before-recited act, who shall openly wear, externally, Bowie Knives, Dirks, Tooth-Picks, Spears, and which shall be exposed plainly to view".¹⁷¹

Hawkins H. Nunn was indicted and convicted for "having and keeping about his person, and elsewhere, a pistol, the same not being such a pistol as is known and used as a horseman's pistol."¹⁷² There is no reference to any evidence before the court that Nunn was carrying a concealed weapon.¹⁷³ Nunn had moved in the trial court to quash the indictment on the grounds that the 1837 Act violated the Second Amendment of the U.S. Constitution, violated Article I, Section 17 of the Georgia Constitution of 1798,¹⁷⁴ that the 1837 Act was void for uncertainty and "absurdity", and that the indictment does not charge that he was carrying the weapon "secretly".¹⁷⁵

2. *The Opinion*

In 1846, when *Nunn* was decided, neither the Georgia Constitution then in effect nor any of the previous Georgia

170. *Id.*

171. *Id.*

172. 1 Ga. at 248. A horseman's pistol was one of the types of weapons which were used by the militia and which the State of Georgia purchased for its arsenal. 1799 Ga. Acts, p. 76-78 (authorizing the Governor to use state funds to purchase "five hundred pair of horseman's pistols" along with other weapons).

173. 1 Ga. at 248.

174. Article I, Section 17 of the Georgia Constitution of 1798 provides: "Every bill shall be read three times and on three separate days, in each branch of the General Assembly, before it shall pass, unless in cases of actual invasion or insurrection; nor shall any law or ordinance pass, containing any matter different from what is expressed in the title thereof; and all acts shall be signed by the president in the Senate, and the speaker in the house of representatives. No bill or ordinance which shall have been rejected by either house shall be brought in again during the session, under the same or any other title, without the consent of two-thirds of each branch."

175. 1 Ga. at 254.

Constitutions contained a provision akin to the Second Amendment to the United States Constitution.¹⁷⁶ Although the Supreme Court chastised the General Assembly for “the great vagueness in the wording of the statute”, the Court did not strike the statute down as void for vagueness. Nor did the Court rely upon any provision of the Georgia Constitution in declaring the Act unconstitutional.¹⁷⁷ The Court specifically declined to avoid the larger constitutional question.¹⁷⁸

In an opinion written by Chief Judge Joseph Lumpkin, the Supreme Court of Georgia framed the issue to be addressed as whether the Legislature can deny to one of its citizens the privilege of carrying a weapon openly.¹⁷⁹ The Court concluded that to the extent that the 1837 Act prohibits the carrying of concealed weapons, the Act is constitutional.¹⁸⁰ The Court also concluded that to the extent that the 1837 Act prohibits the “bearing of arms *openly*”, the Act “is in conflict with the Constitution,¹⁸¹ and *void. . .*”¹⁸²

In coming to these conclusions, the Court reviewed decisions from the courts of Kentucky, Alabama and Indiana.¹⁸³ In each of these states, the state legislature had enacted a statute prohibiting the wearing of concealed weapons; and each state had a provision in their state’s constitution which provided that “the people have a right to bear arms for the defence of

176. Compare GA. CONST. (1777); GA. CONST. (1789), and GA. CONST. (1798) with U.S. CONST. amend. II.

177. 1 Ga. 243.

178. 1 Ga. at 245-46.

179. 1 Ga. at 247.

180. 1 Ga. at 254.

181. The constitutional right to which the Court refers is the Second Amendment to the United States Constitution, an amendment which had not been ratified by the people of the State of Georgia at the time that the Court was interpreting it. HILL, *supra* note 7, at 4. Moreover, at the time the Court was interpreting the Second Amendment as applying to the States the U.S. Supreme Court had not yet developed the “incorporation doctrine” because the 14th Amendment had not been drafted or ratified. U.S. CONST. amend. XIV (1868). Most importantly, Georgia through its executive and legislative branches had been engaging in acts which evidence their resistance to the idea that the provisions of the U.S. Constitution restricted the Georgia General Assembly or Executive. MCELREATH, *supra* note 21 at 120-22.

182. 1 Ga. at 253.

183. 1 Ga. at 248-49.

themselves and the State.”¹⁸⁴ The Court stated that “[i]t is true, that these adjudications are all made on clauses in the State Constitutions; but these instruments confer no *new rights* on the people which did not belong to them before.”¹⁸⁵ In support of this statement, the Court relies upon the 1689 English Bill of Rights. The Court expanded the group to whom the right to bear arms was granted under the 1689 English Bill of Rights from the nobility to all freemen and stated that these rights were substituted by the provisions of “our own Constitution”.¹⁸⁶ In other words, the Constitution protected all freemen’s right to bear arms.

Although the Court does not specify which of “our own” constitutions, Georgia or United States, it refers to, the lack of reference is irrelevant. Start with the premises found in the Resolutions adopted by the Provincial Congress of Georgia in 1775 that (1) sovereignty resides with the people; (2) all freemen are entitled to the natural rights of mankind, which include the right to use force to protect life, liberty, and property; and (3) that inhabitants of States of the United States, including Georgians, are entitled to the rights of Britons.¹⁸⁷ With these three premises a given, at the time that the colonists won the Revolutionary War, all sovereignty resided with the people. The people cede some of their sovereignty to the United States government and some of their sovereignty to their respective state governments. The rights not ceded remained with the individual people. As set forth above,¹⁸⁸ in Georgia, the right to resist an oppressive government was a collective right ceded to the State, or, at least, the decision to exercise the right was required to be decided by a collective body elected by the people. The right to use force to protect one’s own life and property was a right not ceded to either the state or the United States and thus, was retained by each individual. Nunn had an individual right to self-defense. All men between the ages eighteen and forty-five were required to keep and bear arms.¹⁸⁹ The most effective means to effectuate the right to self-defense

184. *Id.*

185. *Id.* (emphasis in original).

186. *Id.*

187. MCELREATH, *supra* note 21 at 48-62.

188. *See supra* notes 97-104 and accompanying text.

189. 1807 Ga. Acts, p. 105.

was through the use of arms, and most men had arms. The right to bear arms was a means by which to effectively exercise the right to self-defense and thus, included in the right to self-defense. The Supreme Court of Georgia could come to no other conclusion, but that the people had a right to bear arms to protect themselves.¹⁹⁰

Because the Georgia Constitution in effect at the time had no provision pertaining to the individual right to keep and bear arms and because there was a split among the courts in the states which did have such a provision in their state constitution, the Georgia Supreme Court relied upon the Second Amendment to the United States Constitution.¹⁹¹ The Court recognized that the Second Amendment was a restriction on federal power and had not been extended to the states.¹⁹² Nevertheless, the Court found that “[t]he language of the *second* amendment was broad enough to embrace both Federal and State governments” and that there was nothing in the language of the Second Amendment “which restricts its meaning” to the United States government.¹⁹³

The Court then concluded “[w]e do not believe that, because the people withheld this arbitrary power of disenfranchisement from Congress, they ever intended to confer it on the local legislatures. This right is far too dear to be confided to a republican legislature.”¹⁹⁴ It appears that the right the Court is referencing is not the individual right to bear arms, but a right to

190. Moreover, judges were not exempt from the 1837 Act. Thus, to find in favor of the State would mean that the judges would not be able to carry weapons to protect themselves as they rode the required 1,000 miles on the circuit each year. While the decision is consistent with the understanding of the framers of the early Georgia Constitutions, the decision also, in a real sense, protected the Judges at a time when there was no court security or personal body guards. See HISTORY OF GEORGIA SUPREME COURT, *supra* note 79.

191. 1 Ga. at 250.

192. *Id.*

193. *Id.* The Court relied on the reasoning in *People v. Goodwin*, 18 John. Rep. 200, that “[t]hese general and comprehensive expressions extend the provisions of the Constitution of the United States, to every article which is not confined by the subject matter to the national government, and is equally applicable to the States.” The *Goodwin* Court relied upon the Supremacy Clause. 1 Ga. at 150.

194. *Id.*

bear arms against an oppressive government.¹⁹⁵ Nunn did not claim that he was carrying his pistol to fight an oppressive government; Nunn was carrying a pistol for self-protection. As the Court's discussion of the right to bear arms to fight an oppressive government is not necessary to its holding, it is dicta. To the extent that the Court concludes that there is a right to use force against an oppressive government and that such a right is an individual right, the Court is wrong on both counts.

Throughout its history, both before and after the Court issued the opinion in *Nunn*, Georgians exercised their right to resist an oppressive government as a collective right, the resistance was voted on by the people through their elected representatives.¹⁹⁶ Moreover, the use of force to fight an oppressive government made sense in a monarchy where sovereignty resided in the Crown, which could impose its will on the people. The use of force to fight an oppressive government when the government is a democracy and sovereignty resides in the people is an oxymoron.¹⁹⁷ In a democracy, citizens do not use force, they use the political process; otherwise, they are fighting themselves – which is suicide.¹⁹⁸

The Court's rhetorical musings on whether the Georgia General Assembly would disarm its people is posturing. The Court asks, “[i]n solemnly affirming that a well-regulated militia is necessary to the *security* of a *free State*, and that, in order to train properly that militia, the unlimited right of the *people to keep and bear arms* shall not be impaired, are not the sovereign people of the State committed by this pledge to preserve this right inviolate?”¹⁹⁹ The right to bear arms, however, was never “unlimited”. From the early days of the

195. *Id.* at 249-50 (comparison of the purpose of the 1689 English Bill of Rights, to oppose the Crown's army, with the rationale of the Second Amendment and fear that the powers of the government were not sufficiently limited).

196. If there were any doubt that the right to use force against an oppressive government is not an individual right, one need only look at the Union's response to the Confederacy's use of force and the prosecution of Confederate leaders for treason. MCELREATH, *supra* note 21 at 136-40.

197. To the extent that there are groups of citizens who are not allowed to participate in the democratic political process, there is less of an oxymoron.

198. See LOCKE, *supra* note 8 at §§ 211-43.

199. 1 Ga. at 251.

colony, the right to bear arms was first a contractual right, and then a statutory obligation.²⁰⁰ Beginning as early as 1817, Georgia began to limit duels, first by prohibiting state officials from being involved in duels and penalizing law enforcement who failed to prevent duels and finally criminalizing the participation in duels and allowing prosecution for murder if one of the participants deceased as a result of the duel.²⁰¹ The anti-dueling statutes were not called into question by *Nunn*.²⁰²

In 1846, most men residing in Georgia were required to keep and bear arms.²⁰³ The State still had a Militia Law in effect, which required those who could to provide their own arms and munitions.²⁰⁴ But, the State had concluded in 1799 that it could not rely upon its citizens to have the arms necessary for the protection of the State.²⁰⁵ Thus, by 1846, the State had arsenals which held state owned arms and munitions which were inspected on a regular basis by the General Assembly.²⁰⁶ The State issued arms and munitions to those men who did not have their own.²⁰⁷ The State of Georgia was not threatening to disarm its citizens. The State of Georgia was in fact purchasing arms and munitions so that it could better arm and train its citizens for the protection of the State.²⁰⁸ The judges of the Supreme Court of Georgia would have been well aware of the proceedings of the Georgia General Assembly, all three had at one time served in that body.²⁰⁹ Moreover, all three of the judges, being white men between the ages of 16 and 45,²¹⁰ were

200. See *supra* notes 80-83 and accompanying text.

201. See, e.g. 1817 Ga. Acts, p. 92.

202. Approximately a decade before his election to the Supreme Court of Georgia, because of his expertise in criminal law, Lumpkin was one of three lawyers appointed to a commission to draft a revision of the Georgia Penal Code. The Commission's work was enacted into law in 1833. See PAUL DEFOREST HICKS, JOSEPH HENRY LUMPKIN: GEORGIA'S FIRST CHIEF JUSTICE 35 (University of Georgia Press 2002).

203. 1807 Ga. Acts, p. 105.

204. *Id.*

205. 1799 Ga. Acts, p. 76-78.

206. 1808 Ga. Acts, p. 11.

207. *Id.*

208. 1807 Ga. Acts., p. 16.

209. GEORGIA SUPREME COURT HISTORY, *supra* note 79, at 15-16.

210. In August 1846, Lumpkins was 45 years old; Hiram Warner was 43 years old; and Eugenius A. Nisbet was 42 years old. HICKS, *supra* note 202,

required to keep and bear arms as provided by the Militia Act.

The Court stated that the right to bear arms belongs to “the whole people, old and young, men, women, and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State.”²¹¹ The Court extended the right to bear arms to all free people residing within the State. The Court, however, failed to note that the training of the militia was then occurring in state sanctioned military academies, where the students were armed by the state, thus reducing the need for private individuals to keep arms within their homes.²¹² But, by extending the right to bear arms to more people and expanding the types of arms which may be kept, the Court ensured that when the militia was called up for duty, those left behind – women, boys, the elderly – could arm themselves for protection. Moreover, since the men called to militia duty would have been obliged to take with them the arms specified by the Militia Act or the equivalent type of arms,²¹³ once the call to militia duty came, the home would be stripped of the types of arms “used by the militia”. In order to effectuate the right to bear arms to women, boys, and those too old to serve in the militia, the type of weapon must also be expanded to include those weapons not used by the militia, i.e. those weapons left at home. The expansion of the right to include those not in the militia and to weapons not used by the militia in fact protects the individual right to bear arms to protect oneself and one’s property. Thus, while the militia is off exercising the collective right to bear arms to protect the state and resist the tyrannical Union government, the women, children, and the elderly left at home were able to exercise the individual right to bear arms to protect

at 5; GEORGIA SUPREME COURT HISTORY, *supra* note 79 at 15-16.

211. 1 Ga. at 251 (emphasis in original).

212. *Id.* See 1808 Ga. Acts, p. 11-13 (authorizes the establishment of military academies because the “present Militia system is inadequate to bring about the state of organization, order, and discipline” required of a well-organized militia and authorizes use of arms from “public arsenal” be used to train individuals at the military academies).

213. 1807 Ga. Acts, p. 105.

themselves and their property.²¹⁴ The Supreme Court of Georgia expanded the right to bear arms in order that the individual right to bear arms for self defense could be realistically exercised by all members of the community.

The Supreme Court of Georgia could have reached this conclusion without relying on the Second Amendment and without reference to the right to protect the state or the right to oppose a tyrannical government. The fact that the Court did rely on the Second Amendment and continually referenced the well-regulated, i.e. trained, militia, leads one to conclude that the Court's audience was not only the parties before it, but a much larger audience.²¹⁵ To have restricted the right to bear arms may have given the appearance of a weak state unable to defend itself. By 1846, Georgia was already in conflict with Congress regarding state's rights and the slavery question. The *Nunn* opinion with its expansion of the right to bear arms is the Supreme Court's contribution to the protection of the state, its people, and the coming war effort.²¹⁶

Although the Court had stated that the right to bear arms openly is unlimited, the Court held that the General Assembly can prohibit the carrying of concealed weapons.²¹⁷ The Court rationalized that the prohibition on carrying a concealed weapon "does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms."²¹⁸ The Court does not provide any authority for its position that a

214. In addition, by expanding the right to bear arms to women and boys and expanding the types of arms, Georgians would be able to protect themselves against rebellions such as Nate Turner's 1831 rebellion in Virginia, where more than eighty whites died. *See* HICKS, *supra* note 202 at 56.

215. *See* HICKS, *supra* note 202 at 51-62 (discussion of slavery and events leading to the Civil War).

216. In August 1846, less than one month after the Court heard and decided the *Nunn* case, the Wilmot proviso was adopted by the U.S. House of Representatives. The Wilmot proviso followed the attempt to prohibit slavery in the District of Columbia, the application of California for admission as a non-slave state, lead to the fear of a changing majority in Congress which would either forbid slavery or limit the ability of citizens of Georgia and other southern states to bring slaves into other territories of the United States. MCELREATH, *supra* note 21 at 122-23.

217. *Id.*

218. *Id.*

citizen of Georgia has a natural right to self-defense, not even to a statute providing an affirmative defense for the protection of self or others.²¹⁹ As evidenced by the Court's opinion, Georgians believed that citizens' natural rights were a given.²²⁰ Because the most effective way to exercise the right of self-defense was through the use of arms, the right to bear arms was seen as a part of the right to self-defense.²²¹

The Court's holding is consistent with its expansion of the right to bear arms. The Militia does not carry concealed weapons when they are acting to protect the state. When the Militia is called up for duty, those left at home do not need to carry a concealed weapon in order to exercise their right to protect themselves or their property. Since concealed weapons are not necessary for the exercise of the right to keep and bear arms, concealed weapons can be prohibited by the Georgia General Assembly.

The Supreme Court of Georgia's holding in *Nunn v. Georgia* that the individual had not ceded his natural right to use force for defense of himself was consistent with Georgia's historical demarcation between an individual right to self-defense and a collective right to protect the state. The holding that the individual right can be limited by the legislature was consistent with other restrictions on an individual's ability to use force against another - one can not exercise their right to use force to the detriment of others. If A carries a concealed weapon, then B does not have the knowledge needed in order to exercise his right to protect himself. Thus, the Legislature may regulate A's right to bear arms for the protection of B.

Much of the Court's dicta, however, has more to do with Georgia's pending dispute with the Union and ensuring protection of the State, through the Militia, and the protection of those left at home, than it does with providing insight into what the framers of the Second Amendment believed 50 years earlier. *Nunn* is a Civil War case, not a Revolutionary War case.

219. *Cf.* 1802 Ga. Acts, p. 25-26 (recognizing the affirmative defense of self-defense in murder cases).

220. 1 Ga. 243.

221. *Id.*

3. *Is Nunn Still Good Law?*

Sixteen years after the Supreme Court of Georgia's decision in *Nunn*, the individual right to bear arms was protected in Article I, Section 6 of the Georgia Constitution of 1861.²²² Article I, Section 6 does not affirmatively recognize or cede to the General Assembly the power to regulate arms.²²³ As there are no reported cases litigating the meaning of Article I, Section 6, the starting assumption should be that the Constitutional provision preserved the right articulated by the Supreme Court of Georgia in *Nunn*. This is so because Article I, Section 6 was drafted by Thomas R.R. Cobb, the Clerk of the Supreme Court of Georgia and son-in-law of Chief Judge Lumpkin, the author of *Nunn*,²²⁴ and because Hiram Warner and Eugenius Nisbet, the two Associate Judges of the Supreme Court of Georgia who heard the *Nunn* case and joined in the opinion²²⁵, were delegates to the 1861 Constitutional Convention.²²⁶ Moreover, in 1858, the work of the Supreme Court of Georgia was so highly valued that the General Assembly declared that an opinion of the Supreme Court of Georgia was the law of the Georgia,²²⁷ making the Court's holding in *Nunn* the law of Georgia.

The Civil War and Reconstruction, however, call *Nunn* into question. The Civil War negated the validity of the Court's dicta in *Nunn*. The right to use force to fight an oppressive government is not an individual right protected by the Second

222. GA.CONST. art. I, Sec. 6 (1861) ("The right of the people to keep and bear arms shall not be infringed.").

223. But Article I, Section 3, of the 1861 Constitution imposes on the government an affirmative duty to protect life and property, and Article I, Section 16, of the 1861 Constitution states that "good order is essential to liberty" and that the rule of law is "essential to good order." Thus, there is an argument that read together Sections 3 and 16 of Article I provide the General Assembly with the power to regulate arms to the extent that to do so is a protection of life and property.

224. For a discussion of the close relationship between Thomas R.R. Cobb and Lumpkin see HICKS, *supra* note 202 at 76.

225. 1 Ga. 243.

226. JOURNAL OF 1861 CONVENTION, *supra* note 116 at 1.

227. 1858 Ga. Acts, p. 74 ("A decision of the Supreme Court . . . made by a full court, and in which all three of the judges have or may concur . . . is hereby declared to be and shall be considered, regarded and observed by all courts of this state as the law of this state and to have the same effect, as if the same had been enacted in terms by the General Assembly.").

Amendment. Either the right to use force against an oppressive government had been ceded to the federal government at the time Georgia ratified the U.S. Constitution and was re-ceded in the 1865 Convention when Georgia repealed the ordinance of secession and ordinance joining the Confederate States,²²⁸ or in a democracy with periodic elections, there is no right to use force to resist government.²²⁹ At the time *Nunn* was decided, Georgians did not have an individual right to use force to fight an oppressive government or to protect the State – that right and power belonged to the federal government.

During Reconstruction, Georgians recognized the need for the General Assembly to have the power to regulate the individual right to bear arms for self-defense and so, included language in Article I, Section 14 of the Constitution of 1868, which specifically recognized the General Assembly's power to regulate arms. This power of the General Assembly to regulate weapons has been included in every Constitution since 1868.²³⁰ The General Assembly exercised its power to regulate arms in 1868 and 1870 – both times for the purpose of protecting the public. The Constitutional provision empowering the General Assembly to regulate arms overruled that portion of the *Nunn* decision which had limited the General Assembly's power to regulate weapons which were carried openly.

In 1886, the United States Supreme Court impliedly overruled a portion of *Nunn* when it held in *Presser v. Illinois*²³¹ that the Second Amendment does not apply to the States. The United States Supreme Court declined to address the incorporation issue in *Heller v. District of Columbia*.²³² As of today, the Second Amendment does not and has not applied to

228. Even if Georgia, by seceding from the Union, could have reacquired the right to fight an oppressive government that right was ceded to the Confederate States when Georgia ratified the Constitution of the Confederate States of America which contained a provision almost identical to Article V, Section 4 of the U.S. Constitution. MCELREATH, *supra* note 21 at 136-40.

229. See LOCKE, *supra* note 8 at §§ 211-43.

230. See GA. CONST. art. I, par. XXII (1877); GA. CONST. art. I, par. VIII (1983). See also HILL, *supra* note 41 (Article I, Paragraph VIII of the 1983 Constitution “came forward without change from the 1945 and 1976 Constitutions.”).

231. 116 U.S. 252 (1886).

232. 128 S. Ct. at 2813 n. 23.

the States. Thus, the legal authority upon which Judge Lumpkin relied in *Nunn* does not support the Supreme Court of Georgia's holding in the case. The legal authority for Georgians' individual right to bear arms must be found elsewhere.

The Second Amendment, however, was not essential to the Supreme Court of Georgia's holding that the General Assembly could ban the carrying of concealed weapons, but could not ban the carrying of weapons in the open.²³³ The Court had premised its holding on the individual's "natural right of self-defence".²³⁴ As natural law existed prior to the ratification of the Second Amendment, by locating the right to bear arms in natural law, the Supreme Court of Georgia has already satisfied the requirement of finding legal authority, other than the Second Amendment, for the right to keep and bear arms. In order to continue the protection of the right to bear arms in perpetuity, Georgia has included a specific provision in the Georgia Constitution.

Nunn remains central to an understanding of the right to self-defense in Georgia. The right to self-defense includes the right to effectively defend oneself and one's home. As the most effective method of self-defense is a firearm, firearms are part of the right to self-defense. This right is a state constitutional right. One individual's right to self-defense, however, can not eclipse or subsume another individual's right to self-defense. These conflicting rights must be balanced and regulated. The appropriate body to engage in the balancing of competing rights is the General Assembly, the democratically elected branch of government. Thus, the Georgia Constitution specifically recognizes the power of the Georgia General Assembly to "provide by law" a balancing of individual rights for the purpose of protecting the community.

V. GUNS AND THE GEORGIA GENERAL ASSEMBLY

A. *Framing the Debate*

Pursuant to its constitutional obligations, the Georgia General Assembly is required to protect all citizens of Georgia from the

233. 1 Ga. at 251.

234. *Id.*

unlawful use of force by another.²³⁵ No person and no type of property has any higher rank than others.²³⁶ The Georgia General Assembly is required to treat all citizens the same whether or not the citizen has exercised their state constitutional right to keep and bear arms.

The Georgia General Assembly may, by statute, provide more protection for property than that provided by the State Constitution. The problem arises when the reason articulated for providing a particular type of property more protection or providing the owners of particular types of property more privileges is non-existent. The current gun debate in Georgia has focused on the expansion of statutory rights for those individuals who have chosen to exercise their constitutional right to keep and bear arms by carrying concealed weapons. The problem with this debate is the language used to frame the debate. Proponents of more rights for gun owners speak in terms of an inalienable right to carry guns, even concealed weapons, anywhere and everywhere.²³⁷ Georgia legislators are also using that same language to frame the gun debate.²³⁸

The language chosen by the proponents of gun rights does not reflect the meaning of the Georgia Constitution as intended by the drafters of the Constitution. There has never been an unlimited right to carry a weapon in Georgia. The most expansive interpretation of right to carry arms in Georgia is the Supreme Court of Georgia's decision in *Nunn*,²³⁹ which specifically stated that the Georgia General Assembly had the power to completely ban the carrying of concealed weapons.²⁴⁰ Thus, there has never been an inalienable right to carry a concealed weapon in Georgia. In 1846, the Supreme Court of Georgia upheld the General Assembly's ban on the carrying of concealed weapons because the ban was consistent with the government's obligation to protect people and property.

Perhaps due to fear that the U.S. Supreme Court would limit the right to keep and bear arms in *Heller v. District of*

235. GA. CONST. art. I, para. II (1983).

236. LOCKE, *supra* note 8 at § 142.

237. See ICLE, *Georgia and the Second Amendment*.

238. *Id.*

239. *Supra*, note 164.

240. *Id.* at 252.

*Columbia*²⁴¹ or because of a 2005 courthouse shooting,²⁴² the current gun debate in Georgia has focused on increasing the statutory rights of gun owners to carry concealed weapons in public places. Gun proponents have framed the issue in terms of an individual having an inalienable right to carry a weapon, including a concealed weapon.²⁴³ Some legislators have used the same language and stated that the State must have a heightened interest before it can regulate guns.²⁴⁴ The language of this debate does not correctly reflect the Georgia Constitutional right to keep and bear arms and does not correctly reflect the power of the Georgia General Assembly to regulate guns.

The Georgia General Assembly has the power and a duty under the Georgia Constitution to regulate, including banning, the carrying of concealed weapons in public places when the regulation furthers the state's obligations under the Georgia Constitution to protect people and property. The question is whether the Georgia General Assembly has struck the correct balance between one individual's right to keep and bear arms and another individual's protection of their property interests.

B. Gun Regulation Prior to 2008

Prior to the 2008 legislative session, Georgia gun laws were a balance between the 1870 Act banning weapons at public gatherings²⁴⁵ and the Supreme Court of Georgia's holding in *Nunn*.²⁴⁶

In formulating its gun control laws, the State differentiated between types of weapons based upon the nature of the weapon and inherent dangerousness of the weapon. The State has banned the "possession [of] any sawed-off shotgun, sawed-off rifle, machine gun, dangerous weapon [and] silencer[s],"²⁴⁷ with

241. 128 S. Ct. 2783.

242. Brian Nichol's Trial, Timeline at http://www.11alive.com/news/local/nichols/incident_timeline.aspx (last visited on April 13, 2009).

243. ICLE, Georgia and the Second Amendment.

244. *Id.*

245. 1870 Ga. Acts, vol. I, p. 421.

246. *Supra* note 164.

247. O.C.G.A. § 16-11-122 (2007).

limited exceptions.²⁴⁸ The State has differentiated between pistols and revolvers²⁴⁹ and other weapons, requiring a license when the pistol or revolver is carried “outside of the home, motor vehicle, or place of business.”²⁵⁰ One may carry a “dangerous or deadly” weapon other than a pistol or revolver outside of the home or place of business only if the weapon is carried “in an open manner fully exposed to view.”²⁵¹ A person may carry a concealed weapon if they have on their person a “valid license” for the concealed weapon and are carrying the concealed weapon in a holster or similar device.²⁵² Carrying a concealed weapon without a license is a criminal offense.²⁵³

In addition to requiring a license to carry a concealed weapon, the State has limited where one can carry a concealed weapon and prohibited concealed weapons at public gatherings.²⁵⁴ Prior to 2008, a “public gathering” was defined as “athletic or sporting events, churches or church functions, political rallies or functions, publicly owned or operated buildings, or establishments at which alcoholic beverages are sold for consumption on the premises.”²⁵⁵ There were exceptions for “organized sport shooting events”²⁵⁶ and for law

248. The exceptions include law enforcement officers, members of the armed forces, security officers at federally licensed nuclear facilities. Exceptions also exist for items which have been made “inoperative” and where federal law would preempt the state statutory provision. O.C.G.A. § 16-11-124 (2007).

249. In addition to differentiating based on the type of weapon, the State has also differentiated based on age and status. With limited exceptions, individuals under the age of 18 may not “possess or have under their control a pistol or revolver”. O.C.G.A. § 16-11-132 (2007). A person who is on probation or who has been convicted of a felony is prohibited from carrying a firearm, which includes “any handgun, rifle, shotgun, or other weapon which will or can be converted to expel a projectile by the action of an explosive or electrical charge.” O.C.G.A. § 16-11-131 (2007).

250. O.C.G.A. § 16-11-128(a) (2007).

251. O.C.G.A. § 16-11-126(a) and (c) (2007).

252. *Id.*

253. O.C.G.A. § 16-11-126(b) (2007).

254. O.C.G.A. § 16-11-127 (2007).

255. O.C.G.A. § 16-11-127(b) (2007). Note the similarity with the 1870 Act which limited firearms at “any court of justice, or any election ground or precinct, or any place of public worship, or any other public gathering in this State”. 1870 Ga. Acts, vol. I, p. 421.

256. O.C.G.A. § 16-11-127(c) (2007).

enforcement officers carrying weapons into “publicly owned or operated buildings”.²⁵⁷ In addition, the State prohibited the possession of weapons²⁵⁸ in “School safety zones”,²⁵⁹ which were defined as 1,000 feet of any school.²⁶⁰

The State has declared that “the regulation of firearms is properly an issue of general, state-wide concern,”²⁶¹ that the “lawful design, marketing, manufacture, and sale of firearms and ammunition” is not a “nuisance per se”,²⁶² and thus, has preempted county and municipalities’ ability to regulate firearms.²⁶³ The State has permitted county and municipal

257. *Id.* The law enforcement exception applies to “[l]aw enforcement officers, peace officers retired from state or federal law enforcement agencies, judges, magistrates, solicitors-general, and district attorneys”. *Id.* See also O.C.G.A. § 16-11-130 (2007) (Exemptions for peace officers, wardens, employees of correctional institutions and jails, military personnel, government defense contractors, employees of district attorneys offices, parole officers, probation officers, the Attorney General and employees of the Attorney Generals office, public safety directors, judges, United States Attorneys and their Assistants, medical examiners, clerks of the superior court, and some retirees of these offices.).

258. Weapons are broadly defined to include “any pistol, revolver, or any weapon designed or intended to propel a missile of any kind, or any dirk, bowie knife, switchblade knife, ballistic knife, any other knife having a blade of two or more inches, straightedge razor, razor blade, spring stick, metal knucks, blackjack, any bat, club, or other bludgeon-type weapon . . . nun chahka . . . or fighting chain . . . any stun gun or taser . . .” O.C.G.A. § 16-11-127.1(a)(2) (2007). There are exceptions for sports equipment and ROTC equipment. O.C.G.A. § 16-11-127.1(c) (2007). There are also exceptions for law enforcement personnel and others similarly situated. O.C.G.A. § 16-11-127.1(c) (2007).

259. O.C.G.A. § 16-11-127.1(b) (2007).

260. O.C.G.A. § 16-11-127.1(a)(1) (2007). Schools include “any real property owned by or leased to any public or private elementary school, secondary school, school board and used for elementary or secondary education” and “the campus of any public or private technical school, vocational school, college, university, or institution of post-secondary education.” *Id.*

261. O.C.G.A. § 16-11-173(a)(1) (2007).

262. O.C.G.A. § 16-11-173(a)(2) (2007).

263. O.C.G.A. § 16-11-173(b)(1) (2007) (“No county or municipal corporation, by zoning or by ordinance, resolution, or other enactment, shall regulate in any manner gun shows; the possession, ownership, transport, carrying, transfer, sale, purchase, licensing, or registration of firearms or components of firearms; firearms dealers; or dealers in firearms

governments to regulate their own employees who carry weapons,²⁶⁴ to require “ownership of guns by heads of households within the political subdivision”,²⁶⁵ and to limit or prohibit “the discharge of firearms within [their] boundaries.”²⁶⁶

This scheme of gun control regulation balanced the interests of gun owners and non-gun owners. The pre-2008 statutory scheme recognized the individual’s natural right to use force to protect themselves and their property when the law enforcement delay would be most likely to cause irreparable harm. This scheme carved exceptions for the possession of weapons, including pistols and revolvers, in one’s home, car, and place of business. Also, consistent with Constitutional duty, the State recognized that it had a duty to protect the community and that one of the tools it could use to protect the community was to ban all concealed weapons at public gatherings and to ban the possession and carrying of unlicensed pistols or revolvers outside of the home, car, or place of business. The Georgia General Assembly exercised its power under the Georgia Constitution²⁶⁷ to regulate the carrying of weapons openly and limited the carrying of pistols and revolvers to those who were licensed and exercised its power to regulate the carrying of concealed weapons by banning them from public gatherings.

The Georgia General Assembly limited its gun control regulation to that which was necessary to protect the community. More individuals can be harmed by one weapon at a public gathering, than can be injured by possessing weapons in a home, car, or a place of business. And, A can not effectively exercise their right to use force for self-defense if A does not know that B, the aggressor, is carrying a concealed weapon. Without the knowledge that B is carrying a concealed weapon, A does not know that the delay in seeking law

components.”).

264. O.C.G.A. § 16-11-173(c) (2007).

265. O.C.G.A. § 16-11-173(d) (2007). Requiring an individual to exercise a constitutional right raises serious constitutional questions and if challenged, would likely be deemed unconstitutional. The constitutionality of Section 16-11-173(d) is outside the scope of this article.

266. O.C.G.A. § 16-11-173(e) (2007).

267. *See* GA. CONST. art. I, para. VIII (1983) (“the General Assembly shall have the power to prescribe the manner in which arms may be bourne”).

enforcement assistance may cause irreparable harm – injury or death. A does not have the knowledge needed to effectively exercise the right to self-defense. The General Assembly had stepped in and provided A with the knowledge that B’s threat of the use of force is not deadly, and thus, A should seek law enforcement assistance. By placing A in the position of seeking law enforcement assistance, the General Assembly had reduced the likelihood of the use of force at public gatherings, had solidified the rule of law, and had taken affirmative steps to protect the community and its property.

C. H.B. 89: The Business Security and Employee Privacy Act

In the 2008 Georgia General Assembly’s legislative session, House Bill 89 was introduced.²⁶⁸ When originally introduced, H.B. 89 would only have repealed a portion of Section 16-11-126 of the Georgia Code which pertained to the manner in which a loaded firearm was required to be transported in a privately owned passenger vehicle.²⁶⁹ When the H.B. 89 was first reported out of the Senate Rules Committee, the bill included two new provisions – (1) an amendment adding Section 16-11-135 to the Georgia Code, pertaining to guns in employees cars, and (2) an amendment to Section 51-1-29.2 of the Georgia Code, pertaining to liability of volunteer associations who assist the government during disasters.²⁷⁰ When the H.B. 89 was reported out of the Senate Rules Committee the second time, the bill included a provision amending Section 16-11-126(c) of the Georgia Code, which would allow a person with a license to carry a concealed weapon to carry the weapon “in all parks, historic sites, or recreational areas.”²⁷¹ Subsequently, Representative Bearden offered an amendment on the Floor of the House, which amendment included the ability to carry concealed weapons in “publicly owned buildings” located in parks, historic sites, and

268. H.B. 89, 149th Gen. Assem., Reg. Sess. (Ga. 2008). For the legislative history of H.B. 89 see http://www.legis.ga.gov/legis/2007_08/sum/hb89.htm (last visited on April 11, 2009).

269. H.B. 89 (as introduced).

270. H.B. 89 (as reported by S. Rules Comm. as 07 LC 28 3747S). The amendment to O.C.G.A. § 51-1-29.2 (2008) is not relevant to this article.

271. H.B. 89 (as reported by S. Rules Comm. as 08 LC 38 0516S).

recreational areas, “on public transportation”, and in establishments which serve more food than alcohol.²⁷² House Bill 89 passed with Senator Bearden’s amendment.²⁷³

H.B. 89 has substantially changed the gun control laws of the State in three ways. First, H.B. 89 allows individuals to carry concealed weapons onto private property where the occupant of the private property “derives less than 50 percent of their total annual gross food and beverage sales from the sale of prepared meals or food.”²⁷⁴ Second, H.B. 89 allows individuals to carry concealed weapons in public parks, historic sites, recreation areas, and on public transportation.²⁷⁵ Third, H.B. 89 changes the relationship between the employer and employee.²⁷⁶ The provisions of H.B. 89 pertaining to establishments serving food are the most troublesome as these provisions impinge upon property rights of the establishment’s owner, the property owner, and the other patrons. The provisions of H.B. 89 which allow the carrying of weapons in all parks, historic site, recreation areas, and on public transportation are troublesome because local government entities are preempted from protecting their property and their local community. The provision of H.B. 89 which regulate the relationship between the employer and employee are a proper balance between the interests of the employee and the interests of the employer and property owner.

1. Public Gatherings

The most troublesome change to the law is the amendment to Section 16-11-127(b) of the Georgia Code²⁷⁷ which changed the definition of “public gathering” from all establishments which serve alcoholic beverages to exclude those establishments which serve alcoholic beverages and “which derive less than 50 percent of their total annual gross food and beverage sales from the sale of prepared meals or food.”²⁷⁸ This change in definition

272. H.B. 89 (House Amend. as 08 AM 28 0852).

273. H.B. 89 (as passed April 14, 2008).

274. H.B. 89 at 3.

275. H.B. 89 at 4.

276. H.B. 89 at 6-8.

277. As H.B. 89 became effective on July 1, 2008, citation will be to the current section of the Official Georgia Code Annotated.

278. O.C.G.A. § 16-11-127(b) (2008).

means that establishments which were places of public gathering are no longer places of public gatherings within the meaning of the statutory language and thus, a person may carry a concealed weapon into these establishments. Moreover, unlike Section 16-11-135(e) of the Georgia Code, there is no provision in the statute which specifically states that the statutory definition does not restrict the private property owner's rights.²⁷⁹ Nor is there a provision in the statute which limits the establishment's or the property owner's liability if a patron uses a concealed weapon on the premise.²⁸⁰

The exclusion of establishments which sell more food than alcohol on an annual basis from the definition of "public gathering" is contrary to the General Assembly's obligations under the Georgia Constitution. The General Assembly's primary purpose is protecting property, which includes life, liberty, and property. Weapons are just one type of property, a type of property entitled to no greater rank of protection than any other type of legal property. When the government regulates property rights between private individuals,²⁸¹ the government must do so in an impartial manner²⁸² and in a manner which does not allow one person to harm the property of another.²⁸³ Because there is no provision specifically reserving the rights of property owners, either the owner of the business or the owner of the real property on which the business is located, and there is such a provision in Section 16-11-135(e), Section 16-11-127(b) can be interpreted as not providing such a reservation of property rights, thus calling into question whether the business or property owner can exclude weapons from the establishment. The lack of clarity in the ability to exclude coupled with the lack of statutory protection from tort liability if a customer were to use a concealed weapon on the premises is an invasion of the property rights of the business and the property owner. In addition, when a person carries a concealed weapon into a restaurant and the other patrons are not aware of the concealed weapons, the other patrons are not in a position to exercise their right to self-defense. The response then is for

279. See O.C.G.A. § 16-11-135(k) (2008).

280. See O.C.G.A. § 16-11-135(e)-(g) (2008).

281. LOCKE, *supra* note 8 at § 139.

282. *Id.* at § 142.

283. *Id.* at § 6.

everyone to carry a concealed weapon, which increases the likelihood that in the event of a dispute a person will be less likely to seek law enforcement assistance before engaging in the use of force. When individuals begin to act as the judge in determining when another's use of force was an illegitimate use of force and punish that use of force, civil society is destroyed. Section 16-11-127(b)'s exclusion of establishments which serve more food than alcohol from the definition of public gathering does not sufficiently protect the property interests of the establishment, the property owner, or the other patrons.

2. Parks and Public Transportation

Section 16-11-127(e) of the Georgia Code removed restrictions on the carrying of weapons in parks, historic sites, recreational areas, and on public transportation. Section 16-11-127(e) permits a person to who has a license to carry a pistol or a revolver to openly carry the pistol or revolver in all parks, historic sites, recreational areas, and on public transportation.²⁸⁴ Section 16-11-127(e) also permits a person who has a concealed weapon permit to carry a concealed weapon in all parks, historic sites, recreational areas, and on public transportation.²⁸⁵ All parks, historic sites, recreational areas, and public transportation include those owned by city, county, and other municipal governments. Because the State has preempted all local government entities from regulating the possession and carrying of weapons,²⁸⁶ with the expansion of the places where a weapon may be carried, local governments can not create gun free zones of local parks and recreational centers – the places where our children play. Local government entities can not exercise the rights of a property owner to exclude weapons from its property. Unlike the limitation of liability in Section 16-11-135(e) of the Georgia Code, the General Assembly has not limited the liability of the local government entity for gun incidents which occur on the local government's property. One using a park or recreational area does not know whether any of the other patrons are carrying concealed weapons and thus, does not have the information needed to make an appropriate

284. O.C.G.A. § 16-11-127(e) (2008).

285. *Id.*

286. O.C.G.A. § 16-11-173 (2007).

decision on the use of force. This lack of knowledge leaves the individual in the position of needing to carry a weapon in order to respond to any threat of force when using the park. Once individuals begin to assume that others are carrying weapons, it becomes more likely that an individual will respond to a threat of the use of force with force before appealing to law enforcement, which means that men will become their own judges – placing at risk the protection and preservation of property. The General Assembly has not balanced the property rights of the local government entity and the property rights of other members of the community against the property rights of the individual carrying the concealed weapon.

Because the State has prevented local government entities from regulating the possession or carrying of weapons within the municipal boundaries, local governments have no alternative avenues by which to protect their property or the local community. The lack of alternative avenues to protect property prevents the local governments from fulfilling their duty to protect the community. When the General Assembly enacts laws which do not preserve, but destroys property rights, the General Assembly has acted in violation of its duty under the Georgia Constitution to protect property.

3. The Employee Parking Lot Exception

Section 16-11-135 of the Georgia Code prohibits all employers from knowing whether an employee or business invitee has brought a weapon onto their premises. The prohibition applies to private and public employers, including state, county, and municipal governments.²⁸⁷ The Act prohibits any employer from “establishing, maintaining, or enforcing” any employment policy which allows the employer to search an employee’s car or the car of an invited guest when the car is on the employer’s parking lot.²⁸⁸ An employer can not include as a condition of employment that employees can not keep a weapon in their vehicle.²⁸⁹ There are limited exceptions to these restrictions on the employer.²⁹⁰ Section 16-11-135(e) attempts

287. O.C.G.A. § 16-11-135(a) (2008).

288. O.C.G.A. § 16-11-135(a) (2008).

289. O.C.G.A. § 16-11-135(b) (2008).

290. O.C.G.A. § 16-11-135(c) (2008).

to limit the employer and property owners from liability if a concealed weapon is used on the property, “unless such employer commits a criminal act involving the use of a firearm or unless the employer knew that the person using such firearm would commit such criminal act on the employer’s premises.”²⁹¹ Section 16-11-135(k) provides that it does not “restrict the rights of private property owners or person in legal control of the property through a lease, a rental agreement, a contract, or any other agreement to control access to such property.”²⁹²

While at first glance, Section 16-11-135 appears to violate the employer’s property rights, the balance struck by the legislature is consistent with the Georgia Constitution, if the “knowledge” requirement for the imposition of civil liability on the employer is narrowly construed. Sections (a) and (b) of Section 16-11-135 appear to interfere in two of the employer’s property rights - (1) the property being the labor the employer has purchased from the employee, and (2) the business premise. Because Sections (a) and (b) pertain only to guns locked in the employee’s vehicle and do not require the employer to allow the employee to bring the weapon into the workplace, there is no interference with the employer’s property interest in the employee’s labor. Because the law does not specifically prohibit the employer from prohibiting weapons from the workplace, the employer can exclude weapons from the actual workplace. By excluding weapons from the workplace, the employer would be taking action to affirmatively protect his property interests in the business premises and the work product of his other employees. The employer would also be acting to protect the property of the other employees.

The limitation of liability in Section (e), which limits the liability of the employer and the property owner resulting from

291. O.C.G.A. § 16-11-135(e) (2008). *See also* O.C.G.A. § 16-11-135(f) (2008) (employer or property owners compliance with other applicable law “shall be a complete defense”); O.C.G.A. § 16-11-135(g) (2008) (where civil action brought against the employer or property owner based on the criminal use of the firearm in the workplace is resolved in favor of the employer or property owner, plaintiff is liable for “all legal costs” of employer or property owner); and O.C.G.A. § 16-11-135(h) (2008) (no security measures required; remedial security measures not admissible to show negligence).

292. O.C.G.A. § 16-11-135(k) (2008).

the employee's exercise of his statutory rights under Sections (a) and (b), preserves the property of the employer and property owner by making their property unavailable to satisfy any remedy imposed for the employee's use of a weapon. The knowledge exception must be narrowly construed so that the exception does not swallow the rule. Knowledge should be limited to those incidents where the employee has brought the weapon into the workplace, the employee has threatened to use the weapon in the workplace, or where the employee has threatened the use of force against a specific person or group of persons in the workplace.

Moreover, because Section 16-11-135(k) specifically reserves the "rights of the private property owners or persons in legal control of property through a lease, rental agreement, contract, or any other agreement to control access to such property"²⁹³ the property owner can use the lease to exclude weapons from the property. If an employer does not want weapons in employee vehicles, than the employer can ask the property owner of the parking lot to exclude all weapons. If the employer is the property owner, the employer, acting as the property owner, can exclude weapons from cars. Because there is an alternative avenue by which the employer and property owner can protect their property interests, the General Assembly has struck an appropriate balance.

H.B. 89 contains several provisions that fail to provide adequate provision for the safety of the community. The failure of the General Assembly to act consistly with the principles of protecting property rights appears to stem from the manner in which the debate was framed. When the debate is framed in terms of protecting an inalienable right, the inclination is to remove obstacles to the exercise of the inalienable right. But, the ability to carry a concealed weapon is not an inalienable right; it never has been. When the debate was framed in terms of protecting the "inalienable right to carry a gun", the inclination of the General Assembly was to protect the inalienable right by removing obstacles to the exercise of the right. When H.B. 89 removed the obstacles to the exercise of a statutory right, the property rights of others were invaded. Guns are personal property and should be treated the same as all other

293. O.C.G.A. § 16-11-135(k) (2008).

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property; not given preferential treatment.

The gun control debate in Georgia needs to be rephrased into the correct terms. And, the balance of rights between all types of property and property owners needs to be restored.

VI. CONCLUSION

The “right to keep and bear arms” is a right protected by the Georgia Constitution. The General Assembly may not completely ban the possession of guns in Georgia. The General Assembly may, however, exercise its constitutional power to regulate arms to fulfill its duty to preserve property and to protect of the community. The Georgia General Assembly must take the lead in reorienting the gun control debate to insure that the property rights of all Georgians are protected.