IN THE SUPREME COURT OF THE STATE OF VERMONT
Supreme Court Docket Number: 2019-266

State of Vermont v. Max B. Misch

Appeal From
Vermont Superior Court - Criminal Division
Docket No. 173-2-19 Bncr

BRIEF OF AMICUS CURIAE DAVID J. HABER

IN SUPPORT OF APPELLANT THE STATE OF VERMONT

David Haber
Unaffiliated Private Citizen
70 S. Winooski Ave. #209
Burlington, VT 05401
dhaber@outlook.com
802-777-7580

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae is private citizen David Haber. I am not affiliated with any organization that supports or opposes the regulation of firearms, and I am not a lawyer. My interest in presenting this brief comes from over forty years of research into the political and ideological origins of the Second Amendment and America's gun culture. I received a Masters Degree in American history from Queens College in New York City in 1968. The subject of my Master's thesis was The Progressive Movement and the Selective Service Act of 1917. In 1972 I was awarded a teaching fellowship at Washington University in St. Louis. I received another Master's degree in American history, and continued on to pursue a doctorate, majoring in colonial American history with a not-so-minor in English political thought from 1600 to 1800. My dissertation topic was Republican Ideology and the Origins of the Second Amendment. I received a research grant from Washington University to study abroad at the British Museum in London, and another grant from the Newberry Library in Chicago.

I did not complete my dissertation and remain A.B.D. From 1979 to 2013 I had a number of jobs---community organizer, cabinetmaker, general manager/ foreman of a furniture factory in Northfield, Vt., computer tech, and finally systems engineer in the IT department at Fletcher Allen Health Care. In between work hours I continued researching my dissertation topic, and after I retired in 2013, I began working on it full time.

My interest in this case is twofold---a head and heart thing. I have an academic interest in the Second Amendment and gun culture. I am bothered by the misuse of history to prop up damaging public policies. I believe I have a unique historical analysis to offer the court that may inform the legal arguments you are about to consider. And, I am a citizen concerned about public safety. As I stated in my motion to file, I am the voice of one non gun-owner among many whose defense of our right to safety and security needs to be heard.

INTRODUCTION

> 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.
>
> Second Amendment to the U.S. Constitution

> That the people have a right to bear arms for the defence of themselves and the State; and, as standing armies, in the time of peace, are dangerous to liberty, ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.
>
> Ch.1, Article 16 of the Vermont Constitution

There are three contemporary schools of thought about the meaning of the second amendment, and by extension Article 16 of the Vermont Constitution. The so-called individualist or 'standard' model, emphasizes the second part of the amendment---"the right of the people to keep and bear arms, shall not be infringed". The adherents of this group present a wide range of views on how much infringement should be allowed. The more radical members say none, the more liberal say some.

Those who support an institutional explanation, the so-called 'collectivists', focus on the first part of the second amendment---"A well-regulated militia, being necessary to the security of a free state." They maintain that any restrictions on individual gun ownership are constitutional because only the ownership of firearms in a militia is covered by the Second Amendment. Until overtaken by the standard model in the late 20th and early 21st century, the 'collectivist' model prevailed as the generally accepted interpretation of the meaning of the Second Amendment.

The third, and smallest group, supports a civic rights model of interpretation. This group acknowledges both the existence of an individual right to bear arms but links it to service in the militia as a civic practice; an individual right exercised collectively, like the right to vote, the right of assembly, or the right to a jury trial. Proponents of this view consider the Second Amendment obsolete because the well-regulated militia is no longer necessary to a free state. This has important implications for challenges to legislation that under the standard model would violate constitutional protections, but under a civic rights model would be irrelevant.

One of the leading advocates of the civic duty theory has written that "the Second Amendment, with its express purpose dry, is silent on the question of free access to arms. The Constitution neither guarantees personal access for all purposes (it never did), nor does it restrict possession of arms to those destined for use for the common security."[1]

In the following pages I will argue that there is more evidence to support a civic rights interpretation of Article 16 of the Vermont Constitution than the currently accepted individualist model. That, in fact, there is virtually no historical evidence to support the latter, while there is compelling documentary, historical, linguistic and contextual evidence to support the former. Because of this there can be no constitutional prohibition against 13 V.S.A. § 4021.

[1] Uviller, H.R., and Merkel, W.G., *The Militia and the Right to Arms Or, How the Second Amendment Fell Silent*, (2002) p. 154

SUMMARY OF ARGUMENTS

1. 13 V.S.A. § 4021 is constitutional because Article 16 of the Vermont Constitution does not protect an individual right to own firearms for personal self-defense and therefore there is no constitutional prohibition to the statute in question.

    a. Vermont court cases, including the one before the Court now have relied on an unsupported, historically inaccurate description of the 18th century meaning of the terms “defence of themselves” and “to bear arms.”
    b. A civic rights theory of the meaning of the terms “defence of themselves” and “to bear arms” is more consistent with the language, political ideas and security needs of the people who authored Vermont’s Constitution and created the State. It describes “the right to bear arms” as an individual right exercised collectively, through military action, for the common good. It defines “defence of themselves” as referring to group defense, not individual self-defense.

2. The use of the term “defence of themselves” was ubiquitous in the second half of the 18th century and it almost always referred to an institution or a group of individuals, not the individuals acting separately.

    a. Article 16 is an exact copy of Pennsylvania’s Declaration of Rights in that state’s Constitution of 1776. There is clear evidence that “defence of

themselves" is applied to group military action and not individual self-defense

b. The same application of the term "defence of themselves" to refer to group actions can be found in Eastern New York and Western Pennsylvania at the time of the New York Land Riots (1750s and 1760s) and in the run-up to the American Revolution

c. Although the documentary evidence is sparse, 18th century Vermonters were clearly influenced by Pennsylvania's experience and the land rioters in Eastern New York and Western Massachusetts who migrated in large numbers to the New Hampshire Grants in the 1760s and 1770s.

3. Linguistic analysis of the term "bear arms" indicates that it was used to refer to the military, not private, non-military, use of arms in 18th century America.

4. The meaning of the "right to bear arms" clause of Article 16 of the Vermont Constitution is easily misinterpreted if it is read independently from the next two clauses of the Article and from the other pertinent provisions of the Vermont Constitution and other founding documents.

5. A provision of the Constitution originally included to protect the people's liberties and property, and to ensure their safety and security should not now be used to put those principles in jeopardy.

ARGUMENTS

Unlike the second amendment to the U. S. Constitution there is no disagreement or debate about the meaning of Chapter 1, Article 16 of the Vermont Constitution (Chapter 1, Article 15 of the 1777 Constitution). Both Mr. Bragdon, the defendant's attorney, and the State's attorney, Assistant Attorney General Battles, agree that Article 16 protects an individual's right to self-defense. Mr. Bragdon writes in his motion to dismiss the charges against Mr. Misch that Article 16 "is easy to understand and crystalline: the people have a right to bear arms for their defense and for the defense of the state. This is an individual right not a collective right."[2] And Mr. Battles in his reply to the defendant's motion to dismiss writes that the language of Article 16 "suggests the right exists for two purposes: self-defense ('defense of themselves") and militia service ("defense...of the State.")[3]

Judge Cohen's decision in the lower court to deny Mr. Misch's motion to dismiss also noted that Article 16 protected an individual right to bear arms for his or her personal security. As did Justice Watson in *State v. Rosenthal* and Justice Barney in *State v. Duranleau*.

Unfortunately, and with all due respect to the judge and the other justices, this individualist theory of the right to bear arms has little, if any, basis in fact. Swept up in the decades long debate over the Second Amendment to the U.S. Constitution and

[2] *State of Vermont vs. Max B. Misch*, No. 173-2-19 Bncr/Criminal, Motion to Dismiss, p. 5
[3] *State of Vermont vs. Max B. Misch,* No. 173-2-19 Bncr/Criminal, Motion to Deny, p. 8

nourished in a culture of radical individualism and social atomization unlike anything 18th century Vermonters would have understood, Article 16, like the Second Amendment itself, has had its history and meaning distorted by a coterie of conservative politicians, think-tank pundits, NRA propagandists, artful historians, Federalist Society judges, lawyers and legal scholars. Justice Antonin Scalia, one of the founders of the Federalist Society, gave this theory constitutional sanction in his 2008 decision in *District of Columbia v. Heller*.

Scalia wrote that in Article 13 of the Pennsylvania Declaration of Rights of 1776---the older twin of Vermont's Article 16---the terms "defense of themselves" meant individual self-defense, and "to bear arms" meant individual, non-military arms bearing. He used this example as part of his "proof" that the Second Amendment to the U.S. Constitution protected an individual's right to bear arms for self-defense unconnected to military service.

How, you might ask, do the proponents of this individualist interpretation of Article 16 defend their belief that "defence of themselves" refers to an individual right of unrestricted access to arms of any type, for any lawful purpose, especially self protection? They don't. They assume this is true; an article of faith accepted without question. They only disagree over the extent of allowable restrictions---none or some.

That this mistaken interpretation of the right to bear arms clause in the Vermont constitution became ubiquitous is unfortunate but not surprising given that there is no documentation of the events before, during or after Vermont's first constitutional

convention in July, 1777. Nothing like Madison's *Notes of Debates in the Federal Convention*, the *Federalist Papers* or Antifederalist criticism of the U.S. Constitution exists for the Vermont Constitution. There are no newspaper accounts of the convention's deliberations, or journals written by delegates to the convention; no memoirs, letters or volumes of papers authored by Vermonters. Justice John Dooley, in his decision in *Shields v. Gerhart*, summed up this state of affairs by lamenting that "Unfortunately, no record exists of any discussion or debate over the adoption of the Vermont Constitution."[4]

But what if the words of Article 16 could be explained in a manner more compatible with the experiences and traditions of 18th century Vermonters; more faithful to the evidence that does exist---as sparse and circumstantial as it may be---rather than the individualist model so widely accepted today? Could an understanding of 18th century intentions affect our 21st century assumptions about the meaning of the right to bear arms?

Such a theory does exist. The civic rights interpretation, usually applied to the Second Amendment, but applicable to Article 16 as well, describes the "right to bear arms" as an individual right exercised collectively in the militia for the common good. At its core, the civic rights theory, as applied to Vermont's Constitution, argues that Vermont's founders believed in a strong relationship between the responsibilities of citizenship and the right to bear arms in defense of themselves and their state; arms-

[4] *Ibid,* p. 9

bearing as an expression of civic virtue. The Green Mountain Boys embodied this notion of civic arms-bearing. These militiamen created the State of Vermont and formed it into a unified political society.

Furthermore the civic rights theory requires us to examine Article 16 in its 18th century context, examining the political events that motivated the authors of both the Pennsylvania Constitution of 1776 and the Vermont Constitution of 1777, looking holistically at Article 16, not just a single phrase ripped out of context.

Which theory of the people's right to bear arms should the Court use in the case of *The State of Vermont v. Max Misch*---the one that denies a connection between citizenship and bearing arms and sees guns only as a means of repelling assailants or fighting the government? Or the one that sees the right to bear arms as the proper means of defense of the community and as one of the civic practices that define citizenship in a republic?

This is not a trivial matter nor an academic exercise. If the Court continues to accept the individualist interpretation it has two options. It can rule that 13 V.S.A § 4021 is unconstitutional because it violates Mr. Misch's constitutional right to bear arms to defend himself. Or it can rule that the benefits of 13 V.S.A § 4021 to the community's safety far outweigh the insignificant burden to Mr. Misch's constitutional right to bear arms and the statute is therefore constitutional. In either case, an incorrect reading of Article 16 will continue to limit the community's ability to feel safe.

Nationally, Article 16 will still be used as evidence against any gun control legislation. Locally, given the increasing public support for stricter gun control laws, and the liberal/progressive political bent of Vermont's voters, we can expect to see more gun control laws passed in the state: red-flag laws, licensing of guns, mandatory buy-backs, the banning of assault-type weapons, expanded background checks, waiting periods, closing the gun show loophole, and licenses for concealed carry. Should the state electorate become more conservative in the future, expect to see laws reversing any of the above laws that have gone into effect, and more extreme laws such as one allowing teachers to carry guns in schools. There is a good chance that many of these will be challenged in court and make their way to your courtroom. Year after year this Court will be asked to decide whether the individual's right to bear arms for self-defense outweighs the public's right to safety.

But should the Court declare that 13 V.S.A § 4021 is not a constitutional matter because Article 16 is not about private gun ownership for personal self-defense but a legitimization of the right to bear arms as the Green Mountain Boys understood it, then the issue can be put to rest. Article 16 becomes irrelevant to the defendant's current appeal. The law limiting magazine size could not violate the defendant's right to own a firearm for personal, individual self-defense since no such right would exist. Article 16 would join the other obsolete, unused and irrelevant provisions of the Constitution, e.g., the prohibition of standing armies and Chapter II § 59, the militia clause. Legislation expanding or restricting gun ownership would then be decided democratically, by the

people's elected representatives in the legislature. If gun rights advocates wanted constitutional sanction for unrestricted, uninfringed, individual gun ownership, they could elect enough legislators supportive of their views to pass a new constitutional amendment that unequivocally grants them this right.

Overturning the traditional interpretation of Article 16 and accepting the civic rights model would be a very radical decision for sure. But Vermont is famous for radical constitutional action, from the first state to outlaw slavery, to the first state Supreme Court to affirm civil unions, leading the way towards same-sex marriage. Deciding that Article 16 does not sanction an individual right to bear arms, but does provide constitutional authority for a right to bear arms exercised as a civic duty, would be as bold a move as either of those measures.

Read the arguments to follow and consider the possibilities.

Argument #1: It Came From Pennsylvania

A. Pennsylvania

It is common knowledge that the text of Article 16 is a verbatim copy of Article 13 of the Pennsylvania Declaration of Rights in the Pennsylvania Constitution of 1776. And, as noted by Mr. Battles, if a constitutional provision is an exact copy of a provision in another jurisdiction, and no record exists of the debates or discussions of Vermont's adoption of that provision, then that article can "be analyzed in part by looking to the

historical record from" the other jurisdictions." So, we're off to 18th century Pennsylvania "to gain insight into the Article's [Article 16] scope."[5]

The right to bear arms provision of the Pennsylvania Declaration of Rights that Vermont copied came at the tail-end of a decades-long dispute between settlers on Pennsylvania's western frontiers and the Quaker dominated Assembly in Philadelphia. In their attempt to persuade the pacifist Assembly to create a state militia, or at least provide them with arms and ammunition to use against the frontier Indians they had provoked by encroaching on their land, the backcountry Whigs of western Pennsylvania, expressed in no uncertain terms their belief that "defence of themselves" meant that men had to join together in some form of military association---a state sponsored or extra-legal militia---in order to defend themselves as a community; that "defence of themselves" meant the community acting as one military unit to defend all of their lives, liberties and property. There is not a hint in all of their pamphlets, petitions, and newspaper accounts, of a concern for personal, individual safety as expressed by modern-day supporters of an individual right to bear arms.

The literature coming out of the Pennsylvania backcountry is filled with references to the need for communal defence. And, like the Green Mountain Boys two decades later, they formed quasi-legal, voluntary military associations, in lieu of support from the state. A few examples:

[5] *State of Vermont vs. Max B. Misch,* No. 173-2-19 Bncr/Criminal, Motion to Deny, p. 9

As early as 1747, Benjamin Franklin formed the first voluntary military association in Pennsylvania so that the people of the province could "undertake their own defence." [6] In 1754, during the French and Indian War, a group of Lancaster County settlers petitioned the Governor for protection against their adversaries, asking for the Governor to "put Us in a Condition that We may be able to defend Ourselves", promising to "join with all that We can do for the Safety of the Province."[7]. In 1755 the *New York Mercury* reported that "the people on the west side of the Susquahanna are gathering together to defend themselves."[8] Again in 1754, another writer argued that it was "high Time to look Around us, and unite as with one Voice to elect such Men as are able to defend themselves and Country from so violent an Enemy.[9] Finally, in 1776 the Philadelphia Committee of Observation declared, "in a State of Political Society and Government all Men are obligated to unite in defending themselves."[10]

When these backcountry radicals, now joined by sympathetic eastern Pennsylvania elites who supported the Continental Congress, took control of the provincial government in 1776, they "played a major role in the Constitutional convention by drafting the Declaration of Rights."[11] And they incorporated their belief in a citizenship defined by the people's ability and willingness to defend their communities with arms, in Article 13 of that declaration: "That the people have a right to bear arms

[6] Kozuskanich, Nathan, "Defending Themselves: The Original Understanding of the Right to Bear Arms," Rutgers Law Journal, Summer, 2007 p.3, n35.
[7] *Ibid*, n39
[8] *Ibid,* n30
[9] *Ibid,* n32
[10] *Ibid*, p.9, n99
[11] *Ibid,* p. 9

for the defence of themselves and the state…." In other words, "They wrote the damned bill."[12]

As one historian of the period has noted, " Contemporary readers would not have been confused by the language of the Pennsylvania Constitution of 1776 or in its provisions for the common defense. The colonial experience had convinced many that men needed to unite together to defend themselves. In articulating these ideas, colonial essayists employed a language that focused on collective and not individual defense."[13] They would not have mistaken it for a statement about personal self-defense.

And they didn't. A direct line can be drawn from the sentiment of communal defense expressed in the Pennsylvania Declaration of Rights, through the mid-century land wars in New York, where poor farmers fought the quasi-feudal land policies of the New York grandees, through the events preceding Lexington and Concord, right up to the New Hampshire Grants and the Green Mountain Boys, the Vermont Constitution and the creation of the State of Vermont.

B. New England

Similar uses of the collective meaning of self-defense in the 18th century can be found in New York and Massachusetts. In 1757, during the French and Indian War, the *Boston Globe* warned its readers that divided republics remained vulnerable to attack. The newspaper called for unified colonial military action to defeat the French. "It is

[12] Bernie
[13] *Ibid*, p.11

madness ever to imagine, that a People however numerous or however naturally valiant, will ever be able to defend themselves, unless their Numbers and Force can be united and directed by proper Discipline."[14] The author then quotes Algernon Sydney, a seventeenth century radical Whig political theorist: "No Numbers of Men, tho' naturally valiant are able to defend themselves , unless they be well armed, disciplined and conducted."[15] Also in 1757 the *New York Mercury* reported that a group of people in Patunsec, New York "assembled together in three or four Houses to defend themselves against the barbarous enemies."[16]

Calls for collective defense became more urgent as the conflict with England edged closer to war. In 1773 the Boston Committee of Correspondence linked self-defense with collective defense. One member of the Committee said that "the Law of Nature with respect to communities, is the same as that it is with respect to individuals, it gives the collective body a right to preserve themselves…." He reminded his colleagues that "the power to defend themselves [was] the surest pledge of their safety…. Men enter into [civil] society for no other end than to defend themselves."[17]

In 1775 the *Boston Evening Post* published a letter from a Country Gentleman that warned of the dangers of standing armies and reminded his readers that the militia was America's alternative to that nefarious institution: "...the Colonies do not need or desire protection from these standing armies; but are able and willing to defend

[14] *Ibid,* p. 11, n127
[15] *Ibid*, n126
[16] *Ibid*, n130
[17] *Ibid*, n134

themselves…."[18] thereby linking the militia and self-defense and presenting it as an alternative to a standing army. These very sentiments are echoed in Article 16. In the same year, New York's delegates to the continental Congress recommended that New Yorkers "defend themselves and their property, and repel force by force."[19]

C. Vermont

The influence of the Pennsylvania Declaration of Rights on Vermont is obvious. The Vermont Constitution is, for the most part, its twin. Vermont's right to bear arms provision is an exact copy of Pennsylvania's. And for Vermonters there would be no mistaking the language of that provision for anything but a statement of the need for every man to contribute to the common defense and that "defence of themselves" meant that all male citizens of the new state would participate in that defense as a civic duty. Thomas Young, one of the authors of the Declaration of Rights mentored Ethan Allen, gave Vermont its name and urged Allen and his followers to adopt the Pennsylvania Constitution as their own.

Ethan Allen had the same expanded notion of self-preservation as the backcountry Pennsylvania Whigs. The law of self-preservation, as he called it, was more than individual survival, it included the family and other members of the community. In 1772 Allen wrote that "Self-preservation makes it necessary that the

[18] *Ibid*, p.12, n136
[19] *Ibid*, n137

said Inhabitants hold together, and defend themselves against this execrable Cunning of New York, or find themselves reduced to poverty and be by terms inslav'd."[20]
In their first act of resistance Allen and his supporters formed the extra-legal militia known as the Green Mountain Boys just as the anti-Quaker Pennsylvanians had formed voluntary military associations for their defense. This military organization would hold the inhabitants together, and be the vehicle for the "defence of themselves".

The settlers living in the New Hampshire Grants in the 1770s lived in a close approximation to a Lockean state of nature. Settlers with New York land titles fought settlers with land grants from New Hampshire, often for the same piece of land, with no effective civil authority to enforce either claim. No sustainable legal system or government structure existed; no police force, no army. Violence filled the void.

The 'Yorkers' had the New York militia, and in the early 1770s, the future Vermonters had the Green Mountain Boys, with Ethan Allen as their leader. They were less concerned with individual means of self-defense than protecting the lives and properties of the members of their settlements. They did not organize the Green Mountain Boys to protect themselves from the kinds of one-on-one crime and personal assaults that people fear today. They created a military force composed of a group of like-minded citizens with shared interests and, in many cases, familial ties, to protect their land titles, families and neighbors from what they perceived as the illegal and unjust attempts by New York's wealthy manor lords to steal their property. For the

[20] *Connecticut Courant*, 31 March 1772

Green Mountain Boys and many others, “defense of themselves” had a group meaning. It implied a political society that valued its members’ participation in the common defense. As Ethan Allen wrote, “To live in a state of anarchy, has been found to be inconsistent with the wisdom and practice of mankind in all ages and nations.... Indeed, the state and condition of men urgeth, nay, necessitates them to adopt some form of government for their *mutual protection and defence.*”[21](italics mine) This vision became codified in Article 16, “the people have a right to bear arms for the defence of themselves and the State.”

Argument #2: Bearing Arms[22]

In his decision in *District of Columbia v. Heller*, Scalia used an analysis of “written documents of the founding period that we have found” to come to the conclusion that the term “bear arms” referred to carrying a weapon for a particular purpose, not necessarily for military service. Justice Stevens, in his dissent used “dozens of contemporary texts” for his conclusion that the term was used most often to indicate

[21] Shapiro, Darline, “Ethan Allen: Philosopher-Theologian to a Generation of American Revolutionaries,” *William and Mary Quarterly*, Vol. 21, No. 2 (Apr., 1964) p.244, n26

[22] All of the linguistic research information in this section comes from these 3 articles:
https://blog.harvardlawreview.org/corpus-linguistics-and-the-second-amendment/

http://faculty.las.illinois.edu/debaron/essays/guns.pdf

https://www.dropbox.com/s/no1yhe60rwxywdb/Goldfarb,%20A%20(mostly%20corpus-based)%20reexamination%20of%20Heller%20and%20the%20Second%20Amendment.pdf?dl=0

bearing of arms in the militia. Both Scalia and Stevens used very small sample sizes, so their results should be considered inconclusive.

In 2018 Brigham Young University published a new database called the *Corpus of Founding Era American English* which contained information from almost 100,000 texts and over 140 million words from 1760 to 1799. It includes letters, newspapers, sermons, books and other material. Two scholars ran an analysis on this database and found that “the overwhelming majority of instances of ‘bear arms’ was in the military context.”The use of the term in a non-military context were “less common”

Another scholar, Professor Dennis Baron, ran an analysis on this information, as well as the *Corpus of Early Modern English* which contains over 1.3 billion words form over 40,000 texts from 1475-1800. Baron “found about 1,500 separate occurrences of “bear arms’ in the 17th and 18th centuries, and only a handful didn’t refer to war, soldiering or organized, armed action.” He concluded that “[t]hese databases confirm that the natural meaning of ‘bear arms’ in the framers’ was military.”

Two other professors used *Google Books* to search for the use of the term ‘bear arms’ from 1760-1795. “They found that in 67.4% of the sample size, ‘bear arms’ was used in its collective sense, whereas in 18.2% of the sample, the phrase was used in an individual sense.”

My non-professional search of the first four volumes of *The Records of the Council of Safety and the Governor and Council of Vermont*, which covers 1777 to the

early 1800s shows that the term was hardly used at all, three times, in fact, twice in relation to military matters and once in the copy of the Vermont Constitution.

Clearly 18th century Americans understood the term “to bear arms” primarily in a military context, and given their proclivity to use the phrase “defence of themselves” in a collective sense, the opening phrase of Article 16 takes on a different meaning than the one put forward by proponents of an individualist right to bear arms for personal self-defense. Even today, gun owners and ardent defenders of gun rights rarely use the term ‘to bear arms’ to refer to non-military uses of their weapons. Many, for example, support permissive concealed carry laws, not concealed “bearing” laws.

Argument #3: Context

The first part of Article 16---”That the people have a right to bear arms for the defence of themselves and the State” should not be considered in isolation. As is often the case with supporters of an individualist interpretation of the right to bear arms, context is often ignored, inconvenient quotes are omitted and troublesome phrases are snipped off. In the lobby of the headquarters of the National Rifle Association in Fairfax, Virginia, for example, a wall has a copy of the Second Amendment engraved on it in large, perfect script. But it is only the second half of the Second Amendment. The first part, i.e., “A well regulated militia, being necessary to the security of a free State….” is not mentioned.

To perform this kind of tomfoolery with Article 16 does a disservice to Vermont’s founding fathers and to all Vermonters today. The entire text had a special significance

at the time, and to ignore the second and third phrases because they are notions strange to our eyes, prevents a thorough understanding of what motivated the authors to replicate the words of the Pennsylvania Constitution. The full text is “That the people have a right to bear arms for the defence of themselves and the State; and, as standing armies, in the time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.” In its entirety it is a classic example of 18th century radical Whig anti-standing army, pro militia sentiment.

Today most Americans celebrate America’s professional, standing army. To the American revolutionaries of the 18th century it was their bete noire, the destroyer of republics.[23] The only proper system of defense for a republic was a militia composed of free, citizen-soldiers, fighting for their country, not for monetary reward. This prohibition of standing armies reinforces the assertion of the preceding phrase’s implied meaning that collective security could best be found in the militia**.** The right to bear arms was necessary for men to perform their civic duty of service in the militia. This is why the militia was considered necessary to a free state.

Even with a militia of citizen soldiers, the power of the sword was the power that would rule, so the last clause of Article 16 ensures that the military power would always be subordinate to civil authority. The threat to liberty from a “veteran army” Jefferson

[23] The best explanation of the impact of 18th and 17th and 18th opposition Whig ‘country’ ideology in general and anti-standing army sentiment can be found in Bailyn, Bernard, *The Ideological Origins of the American Revolution*, (1967); Wood, Gordon, *The Creation of the American Republic*, (1969); and Pocock, J.G.A., *The Machiavellian Moment* (1975)

wrote in 1774, was making “the civil subordinate to the military, instead of subjecting the military to civil power.”[24]

Article 16 had connections to other provisions of the Constitution, all reinforcing the notion of collective military duty. The preamble begins with the bold claim that “All government ought to be instituted and supported, for the security and protection of the community.....” ; Article 4 declares “That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same,” a sentiment noted earlier in Vermont’s Declaration of Independence; Article 6 states “That the government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community….” And Article 9 says “That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore, is bound to contribute his proportion towards the expense of that protection, and yield his personal service, when necessary, or an equivalent thereto….” And, in the same Article that no “man who is conscientiously scrupulous of bearing arms, be compelled thereto, if he will pay such equivalent.” The last statement is both an example of the term bearing arms used to connote military service and an affirmation that all members of society had a civic responsibility to contribute to its protection and security.

And finally Section 5 of the Plan or Frame of Government requires all the freemen of Vermont “and their sons” to be “trained and armed for its defence” in a

[24] Quoted in Bailyn, p.61

militia that retained the democratic tradition of the Green Mountain Boys in "choosing their colonels of the militia."

The selective reading of Article 16 as just a right to bear arms for individual self-defense clearly makes a shambles of the overall collective spirit that is woven into the constitution, and it divorces the community context from its intent. It ignores Vermont's history and the experience of Vermont's early settlers; a history and experience symbolized by the spirit---if not the actions---of those "fierce Republicans"[25] the Green Mountain Boys. Finally, it removes gun ownership from the very reason for the inclusion of the "right to bear arms" clause in the Vermont Constitution.

Conclusion

The individualist interpretation of the terms "defence of themselves" and "the right to bear arms" that now dominates the debate over gun control is a twentieth century construct. Over the past 225 years, unbridled, possessive individualism has replaced 18th century notions of civic virtue and the interconnectedness of individual rights and collective responsibilities.[26] In parallel fashion, the right to bear arms has lost its original, collective purpose and given way to an individualist one. What we are left with are 21st century notions of stand-your-ground self-defense and unrestricted gun ownership masquerading in the language of 18th century collective defense. A

[25] Quoted in Bellesiles, Michael, "*Revolutionary Outlaws: Ethan Allen and the Struggle for Independence on the Early American Frontier,* (1993)

[26] For a description of this process see,C.B McPherson, *The Political Theory of Possessive Individualism* (Oxford, 1962); and William Appelman Williams, *The Contours of American History* (1961)

constitutional provision designed to provide security, order and community safety, is now being used to produce its antithesis.

In the conclusion of his motion to dismiss the charges against his client Mr. Bragdon states that "the constitutional issue supporting this motion is far greater than Mr. Misch." Mr. Misch's views and past actions, he writes should be "subservient to the greater issues in this Motion." The constitutional issues raised "would be important *regardless* of the person asserting" them. And this is because "the constitution of our state protects *all* Vermont's citizens, even those who may be viewed as outliers in their political and social views."[27]

But this would not be the case if the "state of nature" that Mr. Bragdon praises as the foundation of Vermont's freedom still existed. The men who founded the State of Vermont were repulsed by living in a society in which men lived free of the " 'will of other men' including government" and "without leave or depending on the will of any other man"[28]; or as Locke described it, where each man served as judge, jury and executioner. As they explained in Vermont's Declaration of Independence, the inhabitants of the Grants "are, at present without law or government, and may be truly said to be in a state of nature." For this reason they have the right "to form a government best suited to secure their property, well being and happiness."[29] They wanted more government, not less.

---

[27] *State of Vermont vs. Max B. Misch*, No. 173-2-19 Bncr/Criminal, Motion to Dismiss, p. 28
[28] Ibid
[29] *Vermont Declaration of Independence,* March 17, 1777, in Conant and Stone, *The Geography, History, Constitution and Civil Government of Vermont*, 6th ed., 1`915 pp.192-193

With the introduction of the Constitution, Vermont left the state of nature and entered into a political society governed by laws and consensual government. They agreed that in return for security and safety, they would allow the unrestricted rights they had in a state of nature to be limited to the needs of the community and to serve the common good.

Allowing unrestricted access to firearms moves us away from the safety of political society and closer to the anarchy of a state of nature. It does nothing to increase the people's sense of safety; it only increases our fears. Whose rights are violated when people are afraid to send their kids to school, attend a concert or movie, or shop, or go to church, or sit in a college lecture hall; when fear becomes one of the few things that unites us? How does this compare to asking our gun-owning friends, not to give up the weapons they hold so dearly for self-protection, but to bear the inconvenience of having to make one extra reload?[30]

[30] See Addendum A

ADDENDUM A

Long Guns

THEN came, Oscar, the time of the guns.
And there was no land for a man, no land for a country,
Unless guns sprang up
And spoke their language.
The how of running the world was all in guns.

The law of a God keeping sea and land apart,
The law of a child sucking milk,
The law of stars held together,
They slept and worked in the heads of men
Making twenty mile guns, sixty mile guns,
Speaking their language
Of no land for a man, no land for a country
Unless... guns... unless... guns.

There was a child wanted the moon shot off the sky,
asking a long gun to get the moon,
to conquer the insults of the moon,
to conquer something, anything,
to put it over and win the day,

To show them the running of the world was all in guns.
There was a child wanted the moon shot off the sky.
They dreamed... in the time of the guns... of guns.

Carl Sandburg, 1920