

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 8: The New Deal/Great Society Era – Individual Rights/Guns

Burton v. Sills, 53 N.J. 86 (1968)

L. Arthur Burton was a recreational hunter and gun rights advocate who objected to the Gun Control Act the New Jersey legislature passed in 1966. That measure required persons purchasing pistols or revolvers to obtain an identification card from the local police department, and mandated that the police department should not issue the card “to any person where the issuance would not be in the interest of the public health, safety or welfare.” Burton and other members of the Citizens Committee for Firearms Legislation asked a lower New Jersey court to issue an injunction to the state attorney general, Arthur Sills, prohibiting Sills from enforcing those provisions. The trial court refused to issue an injunction and that decision was affirmed by the appellant division. Burton appealed to the Supreme Court of New Jersey.

The Supreme Court of New Jersey unanimously sustained the state gun control law. Judge Jacobs declared that the licensing scheme was a legitimate means to promote the public safety. Burton was a typical state court decision on gun rights during the New Deal/Great Society Era. The Court emphasized both that the Second Amendment protects a collective right and that regulation in the public interest is not unconstitutional. Judge Jacobs insists that the case would be no different if New Jersey had a constitutional provision protecting the right to bear arms. Is he correct?

The Supreme Court of North Carolina reached a similar decision in State v. Dawson (1968).

At the time constitutional provisions guaranteeing to the people the right to bear arms were formulated, the weapons of the militia were largely the private arms of the individual members; so the right of the people to keep and bear arms was the right to maintain an effective militia. If a citizen could be disarmed, he could not function as a militiaman in the organized militia. Today, of course, the State militia (of which the National Guard is the backbone) is armed by the State government and privately owned weapons do not contribute to its effectiveness. While the purpose of the constitutional guaranty of the right to bear arms was to secure a well regulated militia and not an individual’s right to have a weapon in order to exercise his common-law right of self-defense, this latter right was assumed. . . . In any event, the guaranty made the militiaman’s arms available to him for that purpose. North Carolina decisions have interpreted our Constitution as guaranteeing the right to bear arms to the people in a collective sense – similar to the concept of a militia – and also to individuals. These decisions have, however, consistently pointed out that the right of individuals to bear arms is not absolute, but is subject to regulation.

JUDGE JACOBS

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The public purpose of the statute is entirely evident; it is designed to prevent criminals and other unfit elements from acquiring firearms. Towards that end the Legislature has set up permit and identification requirements and has provided for disqualifications along with suitable inquiry into qualifications and fitness. In setting its course, the Legislature was undoubtedly aware of the strongly expressed views of the many enforcement officials who have long favored state and federal regulation of the sale and possession of firearms, and of the many disastrous consequences which have resulted from the widespread absence heretofore of such regulation. Illustratively, the Director of the Federal Bureau of

Investigation, in supporting gun control laws, recently pointed out that in virtually every murder of a law enforcement officer, a firearm is the instrument of death; and while he acknowledged that hardened criminals would frequently obtain guns in disregard of control laws, he noted that their acquisition would be more difficult, and that, in any event, a large percentage of the murders in the United States occur 'within the family or among acquaintances' where the free availability of the lethal firearm is undoubtedly 'a major factor.' Wholly apart from the dangers which arise when firearms are in the hands of criminals, there is the undoubted danger when they are in the hands of the immature or the unfit such as the mentally deranged, the addicted and the alcoholic. Chapter 60 is explicitly designed to keep firearms from all such persons whose possession would pose a threat to the public health, safety or welfare. The homicides which occur within the family or among acquaintances, to which the Director referred, often involve highly emotional altercations which would not result in death if a firearm were not ready at hand; and surely the hurried purchase of a firearm following an altercation would be prevented with the ensuing cooling off period entailed by the processing necessities of the statute.

The plaintiffs do not question the legitimacy of the legislative objective but urge that it will not be attained by the Gun Control Law and that the arguments against the Law outweigh those advanced in its favor. They point out that rifles and shotguns, which represent their main concern, accounted for but a small percentage of past homicides, though these notably included political assassinations, killings of enforcement officers, and snipings during riots. And they urge that, as a practical matter, the Law will not prevent hardened criminals from obtaining firearms while it imposes restrictions on those engaged in lawful and favored pursuits including hunting, target shooting, civilian small arms marksmanship training under Army programs, etc. The restrictions referred to are not prohibitions but are regulatory requirements entailing minor inconveniences which members of our society must accept and bear in the public interest. . . . The fact that some criminals may, despite the Law, still be able to obtain firearms does not at all negate the validity of the conscientious legislative efforts aimed at keeping firearms out of the hands of all dangerously unfit persons, noncriminal as well as criminal. . . .

The plaintiffs urge that the statute, insofar as it places regulatory restrictions on the ownership of firearms by sportsmen, tends to 'depress the economic, sociological, and political forces supporting the conservation and wise use of our national resources.' . . . Th[os]e arguments bear on the wisdom of the legislation rather than on its validity. Presumably they were all weighed by the Legislature when it concluded that the Law would further the public interest and should be adopted. We do not sit here as a superlegislature and we accept the legislative judgment as to the wisdom of the statute. . . . Similarly we honor the presumption of constitutionality which attends all legislation . . . and the doctrine that factual support for the legislative judgment will be presumed and, absent a sufficient showing to the contrary, it will be assumed that the statute rested 'upon some rational basis within the knowledge and experience of the Legislature.' . . . *United States v. Carolene Products Co.* (1938) . . .

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The common law did not recognize any absolute right to keep and bear arms. . . . And though the English Bill of Rights of 1689 was aimed at certain abuses which included the disarming of Protestants while others remained armed, its history and terms make it clear that its reference to the right of Protestants to have arms was 'a class right rather than an individual right' and that 'individual self-defense was not within its protective purpose.' . . . Indeed the right of Protestants to have arms was expressed to be 'as allowed by law' and current English statutes place very stringent controls on the availability of arms. . . .

During the American colonial days there was great fear of military rule; the colonists believed that standing armies were acceptable only in extraordinary circumstances and under control of civil authorities, and that the Militia was the proper organ for defense of the individual States. . . . With their historic distrust of standing armies and the desire that the Militia be protected from federal encroachment, the States quickly obtained the adoption of the second amendment. As the language of the amendment itself indicates it was not framed with individual rights in mind. Thus it refers to the collective right 'of the people' to keep and bear arms in connection with 'a well-regulated militia.' Most students of the subject would undoubtedly express agreement with the substance of the currently

expressed view that 'the term 'well-regulated militia' must be taken to mean the active, organized militia of each state, which today is characterized as the state National Guard.' . . .

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The plaintiffs venture the prediction that . . . the Supreme Court will hereafter 'extend the restrictions of the Second Amendment to all of the States' as it has done with some other amendments in the Bill of Rights. Enough has been said to differentiate the second amendment from those which protect individual rights and, as such, have been carried over into the fourteenth amendment. . . . However, the matter need not be pursued, for as the decisions indicate, regulation (such as New Jersey's Gun Control Law) which does not impair the maintenance of the State's active, organized militia is not at all in violation of either the terms or purposes of the second amendment. . . .

Long before the enactment of its recent Law . . . , New Jersey had many statutory provisions imposing restrictions not only on the carrying but also on the possession and sale of designated firearms. . . . To the extent they were challenged they were readily sustained. See, e.g., *State v. Angelo*, . . . (1925) where the court, in upholding a concealed weapon conviction, stated that, in the exercise of its police power the State could impose 'such conditions precedent to the right to carry concealed weapons as the safety and welfare of the people of the state in its judgment require.' There are comparable decisions in other jurisdictions which, like New Jersey, have no express state constitutional provisions dealing with the right to bear arms. . . . Even in those jurisdictions which have such express state constitutional provisions, the courts have found little difficulty in upholding varying and extensive statutory firearms regulations. See *State v. Dawson*, 272 N.C. 535 (1968); *State v. Robinson*, 217 Or. 612 (1959); *Mason v. State*, 267 Ala. 507 (1958). . . .

New Jersey's Gun Control Law is highly purposed and conscientiously designed toward preventing criminal and other unfit elements from acquiring firearms while enabling the fit elements of society to obtain them with minimal burdens and inconveniences. The plaintiffs themselves admit the need for some 'firearms legislation' and, in the concluding paragraph of their brief, they explicitly acknowledge their recognition of 'the problems created by the availability of handguns to juveniles, criminals, and irresponsible persons through mail order purchases.' It is indeed difficult to understand why their recognition does not quickly carry over into the equally serious and perhaps greater problems created through the free availability by direct purchase of pistols, rifles and other types of firearms. The plaintiffs predict that New Jersey's Law will not achieve its purpose but are unwilling to await the actual results of its operation over a reasonable period of time. . . .

All in all, the plaintiffs' presentation, while indicating some inconvenience and intrusion into the total privacy they seek to retain, has not established any constitutional infirmity or the deprivation of any basic right. Reasonable gun control legislation is clearly within the police power of the State and must be accepted by the individual though it may impose a restraint or burden on him. On balance, the interests of the State are manifestly paramount, and while New Jersey's comprehensive efforts may not prove to be wholly successful until suitably joined by other jurisdictions, they will undoubtedly have advanced the public welfare by having led the way. . . .