C. D. Michel - SBN 144258
Clinton B. Monfort - SBN 255609
Sean A. Brady - SBN 262007
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Fax: (562) 216-4445
cmichel@michellawyers.com

Attorneys for Plaintiffs/Petitioners

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Petitioners, vs. THE STATE OF CALIFORNIA; JERRY BROWN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA; THE CALIFORNIA DEPARTMENT OF JUSTICE; and DOES 1-25, Defendants and Respondents.	CASE NO. 10CECG02116 **NOTICE OF LODGING FEDERAL AUTHORITIES IN SUPPORT OF PLAINTIFFS' REPLY TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION AND TRIAL** Date: January 18, 2011 Time: 8:30 a.m. Location: Dept. 402 Judge: Hon. Jeff Hamilton Date Action Filed: June 17, 2010

NOTICE IS HEREBY GIVEN that PLAINTIFFS are hereby lodging the following Federal Authorities in Support of Plaintiffs' Reply to Opposition to Motion for Summary Judgment or in the Alternative for Summary Adjudication and Trial:

1. *Andrews v. State*, (1871) 50 Tenn.165 ..... Exhibit 1
2. *Colautti v. Franklin*, (1979) 439 U.S. 379 ..... Exhibit 2
3. *Colton v. Kentucky*, (1972) 407 U.S. 104 ..... Exhibit 3
4. *District of Columbia v. Heller*, (2008) 128 S.Ct. 2783 ..... Exhibit 4
5. *Kolender v. Lawson*, (1983) 461 U.S. 352 ..... Exhibit 5
6. *Richmond Boro Gun Club, Inc. v. New York*, (1996) 97 F.3d 681 ..... Exhibit 6
7. *Roe v. Wade*, (1973) 410 U.S. 113 ..... Exhibit 7
8. *United States v. Chester*, 2010 U.S. App. LEXIS 26508 (4th Cir. W.Va., Dec. 30, 2010, No. 09-4084) ..... Exhibit 8
9. *United States v. Huet*, 2010 U.S. Dist. LEXIS 123597 (W.D. Pa., Nov. 22, 2010, No. 08-0215) ..... Exhibit 9
10. *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. Pa. 2010) ..... Exhibit 10
11. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, (1982) 454 U.S. 464 ..... Exhibit 11

Dated: January 7, 2011

Respectfully Submitted,
MICHEL & ASSOCIATES, P.C.

Clinton Monfort
Attorney for Plaintiffs

EXHIBIT 1

JAMES ANDREWS v. THE STATE, THE STATE v. FRANK O'TOOLE, AND THE STATE v. ELBERT CUSTER.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF TENNESSEE, JACKSON

50 Tenn. 165; 1871 Tenn. LEXIS 83; 3 Heisk. 165

June 7, 1871, Decided

PRIOR HISTORY: [**1] The case of The State v. Andrews, was tried in the Circuit Court of Gibson county, at February Term, 1871, before GID. B. BLACK, J., and upon a conviction, defendant appealed.

O'Toole was indicted in the Circuit Court of Carroll, where, at May Term, 1871, he moved to quash before JAMES D. PORTER, J., on the ground that the Act of 1870, c. 13, was unconstitutional, and because the indictment did not charge that the pistol was a belt pistol, or pocket pistol. The indictment being quashed on both grounds, the District Attorney, J. D. DUNLAP, appealed to this Court.

Custer was indicted in the Circuit Court for Henry county, at September Term, 1870; and at January Term, 1871, J. D. PORTER, J., presiding, defendant submitted, was fined, and ordered to be imprisoned. Thereupon, the District Attorney, DUNLAP, moved that he be required to give sureties to keep the peace, which being refused, he appealed for the State.

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: In three consolidated appeals from trial courts (Tennessee) the state and defendants sought adjudication of the constitutionality of Act of June 11, 1870 Tenn. Laws 13: to preserve the peace and prevent homicide.

OVERVIEW: The Act provided that it was unlawful for a person to publicly or privately carry a dirk, sword cane, Spanish stiletto, belt or pocket pistol or revolver. In consolidated appeals, defendants challenged the constitutionality of such provision as repugnant to U.S. Const. amend. II, while the state contended that Tenn. Const. art. I, § 26 (1870) conferred power on the legislature to prohibit absolutely the wearing of all and every kind of arms under all circumstances. The court held that the state legislature was not, then, limited in its powers on the right to bear arms by U.S. Const. amend. II because such provision was a limitation only on the power of the federal government. The court determined that it could not give its assent to the state's position because the power to regulate arms under Tenn. Const. art. I, § 26 (1870) necessarily involved the existence of the act to be regulated. The court found that only as to revolvers, the prohibition under the Act was too broad to be sustained because it amounted to a prohibition to keep and use such a weapon for any and all purposes in violation of the constitutional right under Tenn. Const. art. I, § 24 (1870), to bear arms.

OUTCOME: The court held that a state statute, which prohibited persons from publicly or privately carrying and keeping certain weapons, was too broad in its

application to revolvers because it amounted to a prohibition of the weapon for any and all purposes in contradiction to the constitutional right to bear arms.

COUNSEL: ALVIN HAWKINS, for Andrews and O'Toole, insisted that, by Article 2 of the amendments to the Constitution of the United States, the right to bear arms was protected. Also by Art. 1, s. 26, of the Constitution of 1834. He relied on Aymette [**2] v. The State, 2 Hum., 154; cited the Constitution of 1870, Art. 1, s. 26; insisted that the power to regulate did not involve the power to prohibit, and that this act was a prohibition. That in Aymette's case the arms carried were not arms of warfare, the wearing of which the Legislature had the power to prohibit; that this is the only point decided in that case--all else is dictum. He insisted that the words relied upon by Judge Green as restrictive, i. e., "for the common defense," could not be of any effect, as the right was guaranteed without any such restriction in the Constitution of the United States; that the necessity was not only to keep them at all times, but to be inured to their use by constantly bearing them about with them; that the power in the Constitution of 1870 to regulate the wearing of arms, implies a right to wear as well as to bear arms, and that this right was subject only to be regulated, not destroyed.

J. N. THOMASON, for Custer, insisted that the indictment was bad, for not showing what sort of pistol was carried. He insisted upon the protection of the Constitution of the United States, and of the State, and that the Legislature had no power over the [**3] arms of civilized warfare, but might prohibit the carrying of other arms.

Attorney General HEISKELL, for the State, insisted that Article 2, of the amendments to the Constitution of the United States had no application to States; that it was an imputation on the statesmanship of any convention to suppose that they meant to put a constitutional limitation on the power of the people to restrict the privilege (curse) of carrying deadly weapons. Aymett's case negatives this construction, and puts on it a meaning worthy of statesmen, protecting rights of freemen, not of ruffians and cut-throats. To attribute to the Convention of 1870, such an intention, in view of the state of things then existing, would be to impute to them utter incapacity. The Constitution of 1870 contains an express power to regulate the wearing of arms, not to regulate the mode, but the thing, the subject; equivalent to adopt rules concerning, to pass laws relative to. To regulate is not necessarily to permit. Regulations are simply rules. Rules concerning a thing may be mandatory, directory, restrictive or prohibitory--affecting the mode or going to the substance. If they can not prohibit carrying arms, they [**4] may, by regulation, determine what arms may be carried, what shall be proscribed; may declare where they may be carried, and when they may be carried, as well as declare the mode. If weapons of warfare are protected by the Constitution, still they are subject, by the exception, to regulation in respect to times, places and modes. In this act they restrict the time to journeys out of the county, but do not restrict the mode.

The legislative power is the power of the whole people, acting by their representatives. If they choose in that mode, to declare their willingness to part with a portion of their own liberty, in order that by the same law the evil minded may be restrained, who shall say nay? In the exercise of this great power by the people, they are not to be held to have tied their own hands, except where the Constitution makes it clear that they so intended.

The protection of minorities is one object of constitutional provisions. The protection of majorities is committed to the Legislature. They may protect themselves from the diabolical minorities by any act to which they are willing to submit themselves. The courts will not strain the Constitution to restrain legislation, [**5] but in a doubtful case will defer to the legislative judgment.

In the case of Aymette v. The State, Judge Green takes a proper view of the Constitution. In Alabama, about the same time, the same view was taken in the case of The State v. Reid, 1 Ala., 612. In each the Constitution is treated as an instrument worthy of statesmen, and construed in the light of History; but in both there are points which will not bear critical examination. These cases strike out the true principle that it is the bearing of arms, not for private broils and purposes of blood, but in defense of a common cause; as citizen soldiers bearing arms for their defense, in common with each other; not commonly; i. e., on ordinary occasions. They looked to history for the occasions when the people met, bearing arms for the common defense; when they extorted from King John the great charter; when they vanquished Charles I; when they dethroned James II. They refer to the laws to restrict carrying arms in certain places, and to

certain persons, which gave rise to no complaint, remonstrance or repeal; they refer to laws by which communities and classes were disarmed by discriminating regulations; and such laws were [**6] declared against, but in the very declaration, the right to legislate on the subject, is recognized. It was this great political right that our fathers aimed to protect; not the claims of the assassin and the cut-throat to carry the implements of his trade. They would as soon have protected the burglar's jimmy and skeleton key.

The keeping of arms is protected, but that right is not infringed by this law. The citizen may keep arms in his house, may carry them about his own premises, may buy and carry them home, may take them to have them repaired. This is not carrying them in the sense of the statute. Of a porter carrying a box of pistols in his wheelbarrow or on his shoulder, we would not say he carries arms; of a man carrying the separated parts of a pistol in a basket or bundle, we would not say he carries a pistol. The statute is to have a reasonable construction. "Carry arms" is a military command. To carry arms, or to bear arms, is something different from merely supporting the weight, or removing from place to place.

The clause in the Constitution of 1870 was introduced to avoid controversy over the adverse views in the cases of Simpson and of Aymette, not to imply [**7] anything.

JUDGES: FREEMAN, J., delivered the opinion of the Court, NELSON, J. NICHOLSON, C. J., and DEADERICK, J., concurring. SNEED, J., TURNEY, J., dissenting.

OPINION BY: FREEMAN; NELSON

OPINION

[*170] FREEMAN, J., delivered the opinion of the Court.

The questions presented for our decision in these cases, involve an adjudication of the constitutionality of [*171] the act of the Legislature of Tennessee, passed June 11, 1870, entitled "An act to preserve the peace and prevent homicide."

The first section provides, "that it shall not be lawful for any person to publicly or privately carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver. Any person guilty of a violation of this section shall be subject to presentment or indictment, and on conviction, shall pay a fine of not less than ten, nor more than fifty dollars, and be imprisoned at the discretion of the court, for a period of not less than thirty days, nor more than six months; and shall give bond in a sum not exceeding one thousand dollars, to keep the peace for the next six months after such conviction."

The second section imposes upon all the peace officers of the State the duty of seeing this act enforced. [**8] The third section makes certain exceptions in favor of officers and policemen, while *bona fide* engaged in their official duties in execution of process, or while searching for, or engaged in arrest of criminals, and in favor of persons *bona fide* assisting officers of the law, and persons on a journey out of their county or State.

These are the leading provisions of this statute, and present the points of attack made upon it in argument at the bar.

It is first insisted, that it is in violation of, and repugnant to the second article of the Amendments to the Constitution of the United States, which is, 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.

[*172] On the other hand, it is maintained by the Attorney General, that these amendments have no application to the States, and spend their force by limiting the powers of the Federal Government; and are, in their nature, simple restraints imposed by the States upon the government created by them, and therefore we can not look to this article in order to test the validity of the acts in question. Upon the face of [**9] this article, it might have been plausibly insisted that it would have been operative upon, and control the action of the State, as well as of the Federal Government; and this position would apparently be strengthened by the other provision of the Constitution of the United States, Art. 6, s. 2., that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding. It will be seen, however, that it is the "Constitution, and laws made in pursuance thereof," that are the supreme law of the land, so that we are to turn to that instrument, and ascertain what, by its fair construction and exposition, was intended to be allowed or prohibited, and to what

powers its limitations and restrictions were applicable.

With this view, we examine the question in reference to the proper application of the article of the amendment under consideration.

The case of *Barron* v. *The Mayor and City Council of the City of Baltimore*, 7 Pet. 465, Curtis' ed., presented the question of [**10] the taking of private property, by the corporation [*173] of the city, as it was assumed for public use. It was insisted, in favor of the jurisdiction of the Supreme Court of the United States, to review the decision of the State court, that the case was within and arose under the provision of the Constitutional amendments, Art. 5, prohibiting the taking of private property for public use, without just compensation. That this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. The question was discussed with his usual ability, by Chief Justice Marshall, and he lays down the proposition: "That the Constitution was ordained and established by the people of the United States, for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States formed such a government for the United States as they supposed best adapted to their [**11] situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think, necessarily applicable to the government created by the instrument. They are limitations of the power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes." The learned Judge, after arguing the question at some length, says: "If in every inhibition intended to act on State power, [*174] in the original Constitution, words are employed to express that intent; some strong reason must be shown for departing from this safe and judicious course in framing the amendments, before that departure can be assumed." He then goes on to demonstrate that no such reason existed. He says: "Had the people of the several States, or any of them, required changes in their constitutions; had they required additional safeguards from the apprehended encroachments of their particular governments, the remedy was in their own hands, and would have been applied by themselves. A convention would have been called by the [**12] discontented State, and the required improvements would have been made by itself. Had the framers of these amendments intended them to be limitations on the powers of the State governments, they would have imitated the framers of the original Constitution, and have expressed that intention."

The Court, therefore, held that the provision of the 5th amendment, declaring that private property shall not be taken for public use without just compensation, was intended solely as a limitation on the power of the Government of the United States, and was not applicable to legislation of the States. See, also, 5 Wall. 479-80, and numerous other cases decided by the Supreme Court of the United States, cited in note to case of *Barron* v. *City of Baltimore*, Curtis' ed., 468.

We need cite no authority to sustain the proposition that, upon a question involving the construction of the Constitution of the United States, or the just power of that government under said Constitution, the [*175] decisions of the United States are binding on this Court, as well as all other courts of the States.

The State Legislature is not, then, limited in its powers on this subject by this [**13] article of the Constitution of the United States; it is a limitation, whatever be its construction and meaning, upon the powers of the other government, ordained and established by the people of the States themselves, or their Conventions or Legislatures.

We come now to the Constitution of the State of Tennessee, and endeavor to see what restrictions or limitations the sovereign people of Tennessee have chosen to place upon themselves, in reference to this subject, for the general good.

First, it may be assumed as almost an axiom in our law, with reference to the Legislatures, or law-making body of the States, that there is no limitation upon their powers, except such as are found either in the Constitution of the United States, or of the State itself. Plenary power in the Legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power, is an exception: Cooley, Const. Lim., 88, 89; *People v. Draper*, 15 N.Y. 532.

We do not, however, hold the power of the

Legislature to be supreme for all purposes, when not in terms prohibited by one or the other of these Constitutions. We find limitations upon the powers of State Legislatures, [**14] as clearly defined by fair construction and implication, and as binding, as if expressed in so many words.

The division or separation of the powers of government in our States, between the three departments, [*176] legislative, judicial and executive, involves restraint upon the action of the Legislature, that is imperative, and may be fairly arrived at with sufficient certainty by the application of the principle that it is the Legislature that is the law-making power. The well-settled common law definition of a law is, a rule of *action* prescribed by the law-making power. It must, then, of necessity, (subject to possible exceptions,) be an enactment operative in the future, in so far as it is to be a rule of action prescribed for the people of the State. No enactment of a Legislature can, in the nature of things, reach back, and control or give direction to an act already accomplished. It was complete from the moment of its birth, so to speak, and can not be influenced or affected by another act, subsequent in time.

This view, however, is only incidentally mentioned, as presenting a ground of limitation on the powers of State Legislatures.

The Constitution of Tennessee, [**15] of 1834, Art. 1, s. 24, of the Bill of Rights, is: "That the sure and certain defense of a free people is a well-regulated militia; and as standing armies in time of peace are dangerous to freedom, they ought to be avoided, as far as the circumstances and safety of the community will admit; and that, in all cases, the military shall be kept in strict subordination to the civil authority." Section 25 exempts citizens, except such as are in the army of the United States, or militia in actual service, from punishment by martial law. Then follows section 26, which provides "that the free white men of this State have a right to *keep* and *bear* arms for their common defense."

[*177] Section 24, in the Constitution of 1870, is the same as in the Constitution of 1834.

Section 26 is: "That the *citizens* of this State have a *right* to *keep* and bear arms for *their* common defense. But the Legislature shall have power by law, to regulate the wearing of arms, with a view to *prevent* crime."

What is the fair and legitimate meaning of this clause of the Constitution, and what limitations does it impose on the power of the Legislature to regulate this right? is the question [**16] for our consideration.

What rights are guaranteed by the first clause of this Art. 26, "that the citizens have a right to keep and to bear arms for their common defense?" We may well look at any other clause of the same Constitution, or of the Constitution of the United States, that will serve to throw any light on the meaning of this clause. The first clause of section 24 says, "that the sure defense of a free people is a well-regulated militia." We then turn to Art. 2, of amendments to the Constitution of the United States, where we find the same principle laid down in this language: "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 abridged." We find that, necessarily, the same rights, and for similar reasons, were being provided for and protected in both the Federal and State Constitutions; in the one, as we have shown, against infringement by the Federal Legislature, and in the other, by the Legislature of the State. What was the object held to be so desirable as to require that its attainment should be guaranteed by being inserted in the fundamental law of [*178] the land? It was the efficiency [**17] of the people as soldiers, when called into actual service for the security of the State, as one end; and in order to this, they were to be allowed to *keep* arms. What, then, is involved in this right of keeping arms? It necessarily involves the right to purchase and use them in such a way as is usual, or to keep them for the ordinary purposes to which they are adapted; and as they are to be kept, evidently with a view that the citizens making up the yeomanry of the land, the body of the militia, shall become familiar with their use in times of peace, that they may the more efficiently use them in times of war; then the right to keep arms for this purpose involves the right to practice their use, in order to attain to this efficiency. The right and use are guaranteed to the citizen, to be exercised and enjoyed in time of peace, in subordination to the general ends of civil society; but, as a right, to be maintained in all its fullness.

The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man [**18] would have the right to carry them to and from his home, and no one could claim that

the Legislature had the right to punish him for it, without violating this clause of the Constitution.

But farther than this, it must be held, that the right to keep arms, involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in [*179] times of peace; that in such use, he shall not use them for violation of the rights of others, or the paramount rights of the community of which he makes a part.

Again, in order to arrive at what is meant by this clause of the State Constitution, we must look at the nature of the thing itself, the right to keep which is guaranteed. It is "arms;" that is, such weapons as are properly designated as such, as the term is understood in the popular language of the country, and such as are adapted to the ends indicated above; that is, the efficiency of the citizen as a soldier, when called on to make good "the defence of a free people;" and these arms he may use as a citizen, in all the usual modes to which they are adapted, [**19] and common to the country.

What, then, is he protected in the right to keep and thus use? Not every thing that may be useful for offense or defense; but what may properly be included or understood under the title of arms, taken in connection with the fact that the citizen is to keep them, as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we would hold, that the rifle of all descriptions, the shot gun, the musket, and repeater, are such arms; and that under the Constitution the right to *keep* such arms, can not be *infringed* or *forbidden* by the Legislature. Their *use*, however, to be subordinated to such regulations and limitations as are or may be authorized by the law [*180] of the land, passed to subserve the general good, so as not to infringe the right secured and the necessary incidents to the exercise of such right.

What limitations, then, may the Legislature impose [**20] on the use of such arms, under the second clause of the 26th section, providing: "But the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime?"

In the case of *Aymette* v. *The State*, 2 Hum. 159, Judge Greene said, that, "the convention, in securing the public political right in question, did not intend to take away from the Legislature all power of regulating the social relations of the citizen upon this subject. It is true, it is somewhat difficult to draw the precise line where legislation must cease, and where the political right begins, but it is *not* difficult to state a case where the right of the Legislature would exist." This was said in reference to the clause of the Constitution of 1834.

The Convention of 1870, knowing that there had been differences of opinion on this question, have conferred on the Legislature in this added clause, the right to regulate the wearing of arms, with a view to prevent crime.

It is insisted by the Attorney General, as we understand his argument, [1] that this clause confers power on the Legislature to prohibit absolutely the wearing of all and every kind of arms, under all [**21] circumstances. [*181] To this we can not give our assent. The power to regulate, does not fairly mean the power to prohibit; on the contrary, to regulate, necessarily involves the existence of the thing or act to be regulated. When applied to conduct or the doing of a thing, it must, of necessity, mean some check upon, or direction given to that conduct or course of action, implying the act being performed, but subject to certain limitations or restraints, either as to manner of doing it, or time, or circumstances under which it is or may be done. Adopt the view of the Attorney General, and the Legislature may, if it chooses, arbitrarily prohibit the carrying all manner of arms, and then, there would be no act of the citizen to regulate.

1 It will be seen, by reference to the argument, that the judge has not in this and the following paragraphs, caught its spirit with his wonted accuracy. And see p. 199 in note.

But the power is given to regulate, with a view to prevent crime. The enactment of the Legislature [**22] on this subject, must be guided by, and restrained to this end, and bear some well defined relation to the *prevention* of crime, or else it is unauthorized by this clause of the Constitution.

It is insisted, however, by the Attorney General, that, if we hold the Legislature has no power to prohibit the wearing of arms absolutely, and hold that the right secured by the Constitution is a private right, and not a

public political one, then the citizen may carry them at all times and under all circumstances. This does not follow by any means, as we think.

While the private right to keep and use such weapons as we have indicated as arms, is given as a private right, its exercise is limited by the duties and proprieties of social life, and such arms are to be used in the [*182] ordinary mode in which used in the country, and at the usual times and places. Such restrictions are implied upon their use as are thus indicated.

Therefore, a man may well be prohibited from carrying his arms to church, or other public assemblage, as the carrying them to such places is not an appropriate use of them, nor necessary in order to his familiarity with them, and his training and efficiency in [**23] their use. As to arms worn, or which are carried about the person, not being such arms as we have indicated as arms that may be kept and used, the wearing of such arms may be prohibited if the Legislature deems proper, absolutely, at all times, and under all circumstances.

It is insisted by the Attorney General, that the right to keep and bear arms is a political, not a civil right. In this we think he fails to distinguish between the nature of the right to keep, and its necessary incidents, and the right to bear arms for the common defense. Bearing arms for the common defense may well be held to be a political right, or for protection and maintenance of such rights, intended to be guaranteed; but the right to *keep* them, with all that is implied fairly as an incident to this right, is a private individual right, guaranteed to the citizen, not the soldier.

It is said by the Attorney General, that the Legislature may prohibit the use of arms common in warfare, but not the use of them in warfare; but the idea of the Constitution is, the keeping and use of such arms as are useful either in warfare, or in preparing the citizen for their use in warfare, by training him as a citizen, [**24] to their use in times of peace. In reference to the second [*183] article of the Amendments to the Constitution of the United States, Mr. Story says, vol. 2, s. 1897: "The importance of this article will scarcely be doubted by any persons who have duly reflected upon the subject. The militia is the natural defense of a free country against sudden foreign invasion, domestic insurrection, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up a large military establishment and standing armies in times of peace, both from the enormous expense with which they are attended, and the facile means which they afford to ambitious rulers to subvert the government, or trample upon the rights of the people. The right of the citizen to keep and bear arms, has justly been considered as the palladium of the liberties of the republic, since it offers a strong moral check against usurpation and arbitrary power of rulers; and will in general, even if these are successful in the first instance, enable the people to resist and triumph over them."

We cite this passage as throwing light upon what was intended to be guaranteed to the people of the States, [**25] against the power of the Federal Legislature, and at the same time, as showing clearly what is the meaning of our own Constitution on this subject, as it is evident the State Constitution was intended to guard the same right, and with the same ends in view. So that, the meaning of the one, will give us an understanding of the purpose of the other.

The passage from Story, shows clearly that this right was intended, as we have maintained in this opinion, and was guaranteed to, and to be exercised and enjoyed [*184] by the citizen as such, and not by him as a soldier, or in defense solely of his political rights.

Mr. Story adds, in this section: "Yet though this truth would seem to be so clear, (the importance of a militia,) it can not be disguised that among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How is it practicable," he asks, "to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt, and thus gradually undermine all the [**26] protection intended by this clause of our national bill of rights."

We may for a moment, pause to reflect on the fact, that what was once deemed a stable and essential bulwark of freedom, "a well regulated militia," though the clause still remains in our Constitutions, both State and Federal, has, as an organization, passed away in almost every State of the Union, and only remains to us as a memory of the past, probably never to be revived.

As we understand the able opinion of Judge Green, in the case of *Aymette* v. *State*, 2 Hum. 158, he holds the same general views on this question, which are to be found in this opinion. He says: "As the object for which

the right to keep and bear arms is secured is of a general nature, to be exercised by the people in a body for their common defense, so the arms--the right to keep which is secured--are such as are usually employed in civilized warfare, and constitute the ordinary military equipment. If the citizens have these arms [*185] in their hands, they are prepared in the best possible manner, to repel any encroachments upon their rights by those in authority."

He says, on p. 159: "The Legislature, therefore, have [**27] a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are *not* usual in civilized warfare, or would not contribute to the common defense." And we add, that this right to keep arms, though one secured by the Constitution, with such incidents as we have indicated in this opinion, yet it is no more above regulation for the general good than any other right. The right to hold property is secured by the Constitution, and no man can be deprived of his property "but by the judgment of his peers, or the law of the land." If the citizen is possessed of a horse, under the Constitution it is protected and his right guaranteed, but he could not, by virtue of this guaranteed title, claim that he had the right to take his horse into a church to the disturbance of the people; nor into a public assemblage in the streets of a town or city, if the Legislature chose to prohibit the latter and make it a high misdemeanor.

The principle on which all right to regulate the use in public of these articles of property, is, that no man can so use his own as to violate the rights of others, or of the community of which he is a member.

So we may say, [**28] with reference to such arms, as we have held, he may keep and use in the ordinary mode known to the country, no law can punish [*186] him for so doing, while he uses such arms at home or on his own premises; he may do with his own as he will, while doing no wrong to others. Yet, when he carries his property abroad, goes among the people in public assemblages where others are to be affected by his conduct, then he brings himself within the pale of public regulation, and must submit to such restrictions on the mode of using or carrying his property as the people through their Legislature, shall see fit to impose for the general good.

We may here refer to the cases of *Bliss* v. *Commonwealth*, 2 Littell, Ky. 90; *State* v. *Reid*, Alabama R., 612, and case of *Nunn* v. *State of Georgia*, 1 Kelly 243, as containing much of interesting and able discussion of these questions; in the two last of which the general line of argument found in this opinion is maintained. The Kentucky opinion takes a different view, with which we can not agree. We have not followed precisely either of these cases, but have laid down our own views on the questions presented, aided, however, greatly [**29] by the reasoning of these enlightened courts.

We hold, then, that the Act of the Legislature in question, so far as it prohibits the citizen "either publicly or privately to carry a dirk, sword cane, Spanish stiletto, belt or pocket pistol," is constitutional. As to the pistol designated as a revolver, we hold this may or may not be such a weapon as is adapted to the usual equipment of the soldier, or the use of which may render him more efficient as such, and therefore hold this to be a matter to be settled by evidence as to what character of weapon [*187] is included in the designation "revolver." We know there is a pistol of that name which is not adapted to the equipment of the soldier, yet we also know that the pistol known as the repeater is a soldier's weapon--skill in the use of which will add to the efficiency of the soldier. If such is the character of the weapon here designated, then the prohibition of the statute is too broad to be allowed to stand, consistently with the views herein expressed. It will be seen the statute forbids by its terms, the carrying of the weapon publicly or privately, without regard to time or place, or circumstances, and in effect is an absolute [**30] prohibition against keeping such a weapon, and not a regulation of the use of it. Under this statute, if a man should carry such a weapon about his own home, or on his own premises, or should take it from his home to a gunsmith to be repaired, or return with it, should take it from his room into the street to shoot a rabid dog that threatened his child, he would be subjected to the severe penalties of fine and imprisonment prescribed in the statute. [2]

2 See *Page* v. *State. Post* 198, in note.

In a word, as we have said, the statute amounts to a prohibition to keep and use such weapon for any and all purposes. It therefore, in this respect, violates the constitutional right to keep arms, and the incidental right to use them in the ordinary mode of using such arms and is inoperative.

If the Legislature think proper, they may by a proper

law regulate the carrying of this weapon publicly, or [*188] abroad, in such a manner as may be deemed most conducive to the public peace, and the protection [**31] and safety of the community from lawless violence. We only hold that, as to this weapon, the prohibition is too broad to be sustained. [3]

3 See Act of 1871, c. 90.

The question as to whether a man can defend himself against an indictment for carrying arms forbidden to be carried by law, by showing that he carried them in self-defense, or in anticipation of an attack of a dangerous character upon his person, is one of some little difficulty. The real question in such case, however, is not the right of self-defense, as seems to be supposed, (for that is conceded by our law to its fullest extent,) but the right to use weapons, or select weapons for such defense, which the law forbids him to keep or carry about his person. If this plea could be allowed as to weapons thus forbidden, it would amount to a denial of the right of the Legislature to prohibit the keeping of such weapons; for, if he may lawfully use them in self-defense, he may certainly provide them, and keep them, for such purpose; and thus the plea of [**32] right of self-defense will draw with it, necessarily, the right to keep and use everything for such purpose, however pernicious to the general interest or peace or quiet of the community. Admitting the right of self-defense in its broadest sense, still on sound principle every good citizen is bound to yield his preference as to the means to be used, to the demands of the public good; and where certain weapons are forbidden to be kept or used by the law of the land, in order to the prevention [*189] of crime--a great public end--no man can be permitted to disregard this general end, and demand of the community the right, in order to gratify his whim or willful desire to use a particular weapon in his particular self-defense. The law allows ample means of self-defense, without the use of the weapons which we have held may be rightfully proscribed by this statute. The object being to banish these weapons from the community by an absolute prohibition for the prevention of crime, no man's particular safety, if such case could exist, ought to be allowed to defeat this end. Mutual sacrifice of individual rights is the bond of all social organizations, and prompt and willing obedience [**33] to all laws passed for the general good, is not only the duty, but the highest interest of every man in the land.

The principle we have laid down is sustained by a well established rule of the law of nations in the conduct of war. While the general rule is, that one belligerent may do his enemy all the injury he can, and for such purpose may lawfully kill him, yet the use of poisoned weapons is forbidden by the law of nations, on the ground that higher ends are thereby subserved, and the rights of sovereign belligerent nations even should be made subordinate to these ends: Vattel Law of Nations, top p. 361. So while the right of self-defense is one at all times to be maintained, yet as to the means used to attain this end, they must be subordinated to the higher claims of the general good of the community.

We admit extreme cases may be put, where the rule may work harshly, but this is the result of all general rules; that they may work harshly sometimes in individual [*190] cases. By our system, however, allowing the Attorney General to enter *nolle prosequi*, with the assent of the Court, there is but little danger of the law being enforced in any such cases to the detriment [**34] of any one; and if such case should occur, an application to Executive clemency may fairly be assumed as the remedy provided by the Constitution to meet all such exigencies.

In the case of *The State* v. *Andrews*, one of the cases now under investigation, it is stated in bill of exceptions, that a "plea of self-defense" was filed, demurred to, and demurrer overruled. We can not notice the action of the court on this question, as the plea is not set out so that we can see its allegations and judge of their merits

It was proposed, however, to prove, "that there was a set of men in the neighborhood of defendant during the time he had carried his pistol, and before, seeking the life of defendant." This testimony was objected to, and objection sustained by the court. We can not see from this statement that the court erred, as the character of the weapon is nowhere shown; and it may have been such a weapon, as we have held above, to have been properly forbidden to be carried at all. If so, then it was no defense to the indictment.

The proof, however, showed that he had been in the habit of carrying a pistol since the war. In such a case, he could not claim that he was really in peril [**35] of life or limb or great bodily harm, so imminent as to present any element of self-defense in justification of his carrying his pistol.

The law of the land gave him ample protection, if he

had chosen to seek its aid by authorizing, on proper application, [*191] the arrest of the parties, and sureties to keep the peace, or confinement in prison, to prevent the threatened injury. No court can assume that the law, in such case, would be powerless to give the needed protection. And we hold, that it is not only the highest duty of all, to submit to the law, and seek its protection, thus doing reverence to its mandates, but that this involves no humiliation, nor element of cowardice. On the contrary, it marks the highest moral courage to do right, notwithstanding passion and pride may urge us to the contrary course. He who subordinates his pride and his passions to the high behests of social duty, has shown himself as possessing the highest attribute of a noble manhood, sacrifice of self and pride, for the public good, in obedience to law.

In this view of the case, the question of what circumstances will justify a party in carrying arms, such as the Constitution permits him to keep, [**36] in legitimate self-defense, is hardly fairly before us. We may say, that the clause of the Constitution authorizing the Legislature to regulate the wearing of arms with a view to prevent crime, could scarcely be construed to authorize the Legislature to prohibit such wearing, where it was clearly shown they were worn *bona fide* to ward off or meet imminent and threatened danger to life or limb, or great bodily harm, circumstances essential to make out a case of self-defense. It might well be maintained they were not worn under such circumstances in order to crime, or that such purpose existed, or that the wearing under the circumstances indicated, of a weapon that might lawfully be kept, had any direct tendency to produce [*192] crime. On the contrary, the purpose would be to prevent the commission of crime on the part of another.

If the party is protected in the keeping and use of such arms as we have indicated, only to be restrained by such regulations as may be enacted by the Legislature, with a view to prevent crime, it would seem that the use of such a weapon for defense of the person when in actual peril, the end being a lawful one, ought not, upon any sound principle, [**37] to subject a party to punishment. However, when the Legislature shall enact a law regulating the wearing of weapons constitutionally allowed to be kept and used, as held in this opinion, the question may be presented fairly, and can be decided.

There was a motion to quash the indictment in each one of these cases, which was overruled. The indictment in each case only charges that the parties carried a pistol, without specifying the character of the weapon, whether belt or pocket pistol, or revolver. This was too indefinite a charge on such a statute, however literally it might be construed. There should be such specifications in the indictment as will enable the court to see that the weapon forbidden by the statute has been worn, and to inform the defendant of the character of weapon for the carrying of which he is to be held to answer.

For this error the cases will be reversed; the indictments quashed, and remanded to the Circuit Courts to be further proceeded in.

NICHOLSON, C. J., and DEADERICK, J., concurred in [*193] the general views of the opinion. SNEED, J., dissented from so much of the opinion as questioned the right of the Legislature to prohibit the wearing of arms [**38] of any description, or sought to limit the operation of the act of 1870.

NELSON, J., delivered the following opinion:

Concurring, as I do, in much of the reasoning of the majority of the Court, and believing that the object of the Legislature, in passing the act of 1870, was to promote the public peace, I am, nevertheless, constrained by a sense of duty to observe, that, in my opinion, that statute is in violation of one of the most sacred rights known to the Constitution. Ever since the opinions were promulgated, it has been my deliberate conviction that the exposition of the Constitution by Judge Robert Whyte, in *Simpson* v. *The State*, 5 Yerg. 360, was much more correct than that of Judge Green in *Aymette* v. *The State*, 2 Hum. 155. The expression in the case last named, that the citizens do not need, for the purpose of repelling encroachments upon their rights, "the use of those weapons which are usually employed in private broils, and are efficient only in the hands of the robber and assassin," is, in my view, an unwarrantable aspersion upon the conduct of many honorable men who were well justified in using them in self-defense. *Ibid* [**39] , 158. The provision contained in the declaration of rights in the Constitution of 1834, that "that the free white men of this State have a right to keep and bear arms for their common defense," is not restricted to *public* defense, as held in *Aymette* v. *The State*, 2 Hum. 158. [*194] Had such been the intention, the definite article "the," would have been employed, instead of the personal pronoun "their," which is used in a personal sense, and was

intended to convey the idea of a right belonging equally to more than one, general in its nature, and universally applicable to all the citizens. The word "bear" was not used alone in the military sense of carrying arms, but in the popular sense of wearing them in war or in peace. The word "arms," means "instruments or weapons of offense or defense," and is not restricted, by any means, to public warfare.

The declaration of rights, section 26, in the Constitution of 1870, omits the words "free white men," and contains an additional provision, which should be construed in connection with the previous decisions of this court, the conflict in which was well known to the framers of that instrument. After declaring [**40] "that the citizens of this State have a right to keep and to bear arms for their common defense," it is added: "But the Legislature shall have power, by law, to regulate the *wearing* of arms with a view to prevent crime." The word "bear" was manifestly employed in the Constitution of 1870, to convey the idea of carrying arms either for public or private defense; otherwise, it was unnecessary to add the provision that the Legislature shall have power "to regulate the *wearing* of arms with the view to prevent crime." The habit, or custom, intended to be regulated, was not that of bearing arms fit only to be used in war, and which, from the publicity with which such arms are carried, needed but little, if any, regulation. It was well known to the Convention, that [*195] a very large number of citizens had become accustomed, during the late civil war, to carry pistols and other weapons not ordinarily used in warfare, and had retained this habit after the close of the war, and that dangerous wounds, as well as frequent homicides, were the result of its universal prevalence; and the object of conferring express power to regulate the mode of wearing them, was not to destroy the [**41] right, but so to control it that the Legislature, by declaring that such arms should be worn publicly and not secretly upon the person, might prevent those crimes which are often committed by armed men in taking the lives of their unarmed adversaries. To "regulate" does not mean to destroy, but "to adjust by rule," "to put in good order," to produce uniformity of motion or of action; and, under this provision, there can be no question that, while the Legislature has no power to prohibit the wearing of arms, it has the right to declare that, if worn upon the person, they shall be worn in a public manner. The act of 1870, instead of regulating, *prohibits* the wearing of arms, and is, therefore, in my opinion, unconstitutional and void.

In *Bliss* v. *Commonwealth*, 2 Lit. 90, the statute to prevent persons wearing concealed arms; was held unconstitutional, as infringing the right of the people to bear arms in defense of themselves and the State. See Cooley Const. Lim., 350; *Cockrum v. The State*, 24 Tex. 394. The words "in defense of themselves and the State," are equivalent to the words "for their common defense," and but for the power to regulate, ingrafted [**42] upon the Constitution of 1870, should be interpreted here as they [*196] were in Kentucky: "The words '*rules and regulations*," in the Constitution of the United States, are usually employed in the Constitution in speaking of some particular specified power, which it means to confer on the government, and not, as we have seen, when granting general powers of legislation: as, to make rules for the government and regulation of the land and naval forces; to '*regulate*' commerce; to establish an uniform rule of naturalization; to coin money and '*regulate*' the value thereof. In all these, as in respect to the Territories, the words are used in a restricted sense:' Paschal's Anno. Const., 238; *Scott v. Sandford*, 19 How. 393; 2 Story's Const., 3d ed., 196, 213.

Neither the old nor the new Constitution confers the right to keep, or to bear, or to wear arms, for the purpose of aggression. The right exists only for the purpose of defense; and this is a right which no constitutional provision or legislative enactment can destroy. The right to the enjoyment of life is one of the "inalienable rights" with which the Declaration of Independence declares that all [**43] men are endowed by their Creator. And one of the most classical and elegant of all legal commentators declared, in regard to the great right of self-defense, that the law, in this case, respects the passions of the human mind, and (when external violence is offered to a man himself, or to those to whom he bears a near connection,) makes it lawful in him to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of the law is by no means an adequate remedy for injuries accompanied with [*197] force, since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man, immediately, to oppose one violence with another. Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be, in fact, taken away by the law of society:" 3 Black. Com., 34, m. In accordance with this view, I hold that when a man is really and truly endangered by a lawless assault, and the fierceness of the

attack is such as to require immediate resistance in order to save his own life, [**44] he may defend himself with *any weapon whatever*, whether seized in the heat of the conflict, or carried for the purpose of self-defense. He is not bound to humiliate or, perchance, to perjure himself, in the slow and often ineffectual process of "swearing the peace," or to encourage the onslaught of his adversary by an acknowledgment of timidity or cowardice. It is deeply to be regretted that any peaceful citizen should be placed in a condition making it necessary for him to carry arms for his own protection, and that a purpose, laudable and honorable in itself, is often perverted by "lewd fellows of the baser sort" to purposes of assassination or revenge. But some of the most important elements in nature, such, for example, as fire and water, may be so misused and perverted. Yet we do not prohibit or destroy their use. We endeavor only to regulate it.

In the purer and better days of the Republic, "a well-regulated militia was regarded as necessary to the security of a free state;" and it was declared in the first amendment to our National Constitution, that "the [*198] right of the people to keep and to bear arms should not be infringed."

So, "by the Anglo-Saxon laws, or [**45] rather by one of the primary and indispensable conditions of political society, every freeholder, if not every freeman, was bound to defend his country against hostile invasion;" and by the statute of Winchester, 13 Edw. I., every man between the ages of 15 and 60 was to be assessed and sworn to keep armor according to the value of his lands and goods: for 15 pounds and upward in rent, or 40 marks in goods, a hauberk, an iron breast-plate, a sword, a knife and a horse; for smaller property, less extensive [*199] arms. See Hallam's Cons. Hist., 311. These laws were subsequently repealed or modified in the interests of despotic power. And Mr. Tucker, in his notes to Blackstone, says that "whoever examines the forest and game laws in the British Code, will readily perceive that the right of keeping arms is taken away from the people of England." See 1 Sharsw. Black. 143. A jealous concern for public liberty and personal security animated our patriotic ancestors to encourage the use of arms. It was once the policy, too, of our State Government to foster a martial spirit among the people, and to train them to the use of arms, not only for the purpose of [*200] national defense, [**46] but also in cases of necessity, for the defense of their own persons. The tendency now appears to be the other way, and passive obedience and slavish submission to wrong and outrage would seem to be the growing spirit of the times. While "shooting matches" were once encouraged by the Legislature, as a proper method of accustoming the citizens to the use of arms, the timid course of existing legislation is to make the peace warrant the only potent weapon of defense, and to teach the people to "*have peace*" upon any terms, no matter how degrading. *

* NOTE. KNOXVILLE, Nov. 4, 1871.

THOMAS PAGE *v.* THE STATE.

CARRYING ARMS. *Act of* 1870 *construed.* It is not every removal of a pistol or other weapon from place to place, that constitutes a "carrying" within the meaning of the act of 1870, c. 13, which prohibits carrying arms. To constitute the offense, the weapons must be carried as "arms."

Criminal Court, May Term, 1871. M. L. HALL, J., presiding.

PROSSER, for the plaintiff in error, insisted, that under the Constitution the citizen was protected in an unlimited right to carry all kinds of arms without reference to size or quality, and had the right to keep and to bear arms at all times; the Legislature having the right to say how he shall wear them, but not to prohibit. The act of 1870 takes from the citizen the right to familiarize himself with the use of arms of the smaller class, and so infringes the Constitution.

Attorney General HEISKELL, for the State, insisted that carrying weapons carrying arms, means going armed. *To carry*, has many senses; to carry a scar; to carry a tune; to carry a loan. The word is not happily selected; but the objection is not, that it does not bear the exact meaning the Legislature intended to convey, but that it has other meanings, tending to confuse. A man may carry a wheelbarrow load of pistols to a shop; may carry them for repair, as merchandize; may carry in bundles, or boxes, or baskets; may carry pistols hunting, or to a gallery or tree to practice. In none of these cases would he be carrying them in the sense of the law. The law so construed, does not infringe the right to keep arms, or practice with them, or bear them for the common defense. Where a law admits of a construction

consistent with the Constitution, it must be so construed: *Bristoe* v. *Evans*, 2 Tenn. 341, 345; *Bank of State* v. *Cooper*, 2 Yer. 596, 623; *Townsend* v. *Shipp*, Cooke, 294, 301; *L. & N. Railroad Co.* v. *Davidson Co.*, 1 Sneed 637, 671; *Fisher* v. *Dabbs*, 6 Yer. 119, 135.

"Common defense," in the Constitution, has one of two senses. It can not have both. It either means defense as a community, or the individual defense of each man commonly, or on ordinary occasions. Now we know that it was intended to embrace the idea of general defense; it can not, therefore, mean the other, unless it be used in a double sense, in two opposite and distinct senses. The bearing of arms, then, is only protected on the occasions and when used in a manner appropriate to the public defense, as a citizen soldier. To keep for that purpose, necessarily includes the right to keep at all times and under all circumstances; but to bear for that use, means to bear on such occasions, at such times, and in such manner, as may be appropriate to that end. Not to *wear* weapons. It must mean after the fashion of a soldier, not after the manner of a cut-throat.

NICHOLSON, C. J., delivered the opinion of the Court.

Page was indicted for carrying a belt pistol, a pocket and revolver. Upon his trial, on the plea of not guilty, he was convicted, fined and sentenced to imprisonment. He has appealed to this Court. It appears from the evidence in the bill of exceptions, that Page was seen coming from his home along the big road, about a mile distant from his house, carrying in his hand, swinging by his side, a pistol called a revolver, about eight inches long, but that it was not such weapon as is used as a weapon of war. He was not on a journey, nor was he a public officer. No other instance of his carrying a pistol is proven. He approached prosecutor, presented the pistol and threatened to shoot him. Was this such a carrying of a weapon as is prohibited by the act of 1870, c. 13? Shankland, 95. The evidence fully establishes the fact, that the pistol carried by Page was not an arm for war purposes; and therefore, under the ruling of this Court in the case of *Andrews* v. *The State*, decided at Jackson, it was a weapon, the carrying of which the Legislature could constitutionally prohibit. But the question here is, what is the meaning intended by the Legislature to be conveyed by the word "carry"? It will be observed, that the prohibitory clause of the Constitution uses the words, "keep and bear arms," &c. The Legislature has avoided using this language, but has used a word, which, as connected with weapons, conveys the idea of "wearing weapons," or "going armed." When we use the expression, "he carries arms," we mean "he goes armed," or "he wears arms." This is manifestly the sense in which the word was used by the Legislature, and we know of no other single word which could more clearly convey the meaning intended to be conveyed, than the word "carry." In this sense, Page was not only literally carrying a forbidden weapon, but he was "carrying" it, that is, "he was going armed," contrary to the true meaning of the statute.

It will be observed, that the interpretation which we give to the word "carry," meets and carries out the manifest purpose of the Legislature, which was, not only to make criminal the habitual carrying or wearing of dirks, sword-canes, Spanish stilettos, belt or pocket pistols, or revolvers, but, also, to make criminal a single act of wearing or carrying one of these weapons, when it is so worn, or carried, with the intent of thus going armed.

But we are far from understanding the Legislature as intending to make every act of carrying one of these weapons criminal. Under the constitution, every man has a right to own and keep these weapons, nor is this right interferred with by the prohibition against "carrying" them, in the sense in which the Legislature uses the word. To constitute the carrying criminal, the intent with which it is carried must be that of going armed, or being armed, or wearing it for the purpose of being armed. In the case before us, the intent with which Page was carrying his pistol was fully developed. He was carrying it that he might be armed, as was shown by his threatened assault upon the prosecutor. It would probably be difficult to enumerate all the instances in which one of these weapons could be carried innocently, and without criminality. It is sufficient here to

say, that, without the intent or purpose of being or going armed, the offense described in this statute can not be committed.

We think the facts proven, in the case before us, bring the plaintiff in error within the offense defined in the statute, and that his conviction was fully warranted by the evidence.

The judgment is affirmed.

[**47] [*201] Regretting, as I do, that the nobler objects of bearing and wearing arms are too often and too horribly perverted, I can not approve legislation which seems to foster and encourage a craven spirit on the part of those who are disposed to obey the laws, and leaves them to the tender mercies of those who set all law at defiance.

I concur in the foregoing dissenting opinion.

TURNEY, J.

EXHIBIT 2

COLAUTTI, SECRETARY OF WELFARE OF PENNSYLVANIA, ET AL. v. FRANKLIN ET AL.

No. 77-891

SUPREME COURT OF THE UNITED STATES

439 U.S. 379; 99 S. Ct. 675; 58 L. Ed. 2d 596; 1979 U.S. LEXIS 51

October 3, 1978, Argued
January 9, 1979, Decided

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: The United States District Court for the Eastern District of Pennsylvania entered judgment for plaintiff doctors and plaintiff nonprofit organization in their action alleging that § 5(a) (Pa. Const. Stat. Ann. tit. 35, § 6605(a)) of the Pennsylvania Abortion Control Act, Pa. Const. Stat. Ann. tit. 35, § 6601 et seq., was unconstitutionally vague. Defendant state officials appealed.

OVERVIEW: The doctors and nonprofit organization initiated a class action against state officials, alleging that § 5(a) of the Pennsylvania Abortion Control Act was unconstitutionally vague. The doctors and nonprofit organization contended that § 5(a) was vague because it failed to inform a doctor when his duty to the fetus arose, and it did not make the doctor's good-faith determination of viability conclusive. The state officials alleged that § 5(a) afforded the doctors the flexibility required for sound medical practice. The district court the held that § 5(a) was unconstitutional. On appeal, the court found that the viability-determination requirement of § 5(a) was ambiguous. Section 5(a) prescribed a certain standard of care when the fetus was viable or may be viable. The court reasoned that "viable" and "may be viable" referred to distinct conditions and that one of these conditions differed in some way from the definition of viability provided in the Act. The term "may be viable" could refer to viability as physicians understand it, or it may refer to some undetermined stage later in pregnancy.

OUTCOME: The court affirmed the decision because the provision of the Pennsylvania Abortion Control Act at issue was ambiguous regarding the standards used to determine the viability of a fetus.

SYLLABUS

Section 5 (a) of the Pennsylvania Abortion Control Act requires every person who performs an abortion to make a determination, "based on his experience, judgment or professional competence," that the fetus is not viable. If such person determines that the fetus "is viable," or "if there is sufficient reason to believe that the fetus may be viable," then he must exercise the same care to preserve the fetus' life and health as would be required in the case of a fetus intended to be born alive, and must use the abortion technique providing the best opportunity for the fetus to be aborted alive, so long as a different

technique is not necessary to preserve the mother's life or health. The Act, in § 5 (d), also imposes a penal sanction for a violation of § 5 (a). Appellees brought suit claiming, *inter alia*, that § 5 (a) is unconstitutionally vague, and a three-judge District Court upheld their claim. *Held*:

1. The viability-determination requirement of § 5 (a) is void for vagueness. Pp. 390-397.

(a) Though apparently the determination of whether the fetus "is viable" is to rest upon the basis of the attending physician's "experience, judgment or professional competence," it is ambiguous whether that subjective language applies to the second condition that activates the duty to the fetus, *viz.*, "sufficient reason to believe that the fetus may be viable." Pp. 391-392.

(b) The intended distinction between "is viable" and "may be viable" is elusive. Apparently those phrases refer to distinct conditions, one of which indeterminately differs from the definition of viability set forth in *Roe v. Wade*, 410 U.S. 113, and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52. Pp. 392-394.

(c) The vagueness of the viability-determination requirement is compounded by the fact that § 5 (d) subjects the physician to potential criminal liability without regard to fault. Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the Act is little more than "a trap for those who act in good faith," *United States v. Ragen*, 314 U.S. 513, 524, and the perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself. Pp. 394-397.

2. The standard-of-care provision is likewise impermissibly vague. It is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a "trade-off" between the patient's health and increased chances of fetal survival. Where conflicting duties of such magnitude are involved, there must be greater statutory precision before a physician may be subjected to possible criminal sanctions. Pp. 397-401.

COUNSEL: Carol Los Mansmann, Special Assistant Attorney General of Pennsylvania, argued the cause for appellants. With her on the brief was J. Jerome Mansmann, Special Assistant Attorney General.

Roland Morris argued the cause and filed a brief for appellees. *

* Burt Neuborne and Sylvia Law filed a brief for the American Public Health Assn. et al. as amici curiae urging affirmance.

Briefs of amici curiae were filed by George E. Reed and Patrick F. Geary for the United States Catholic Conference; and by Dennis J. Horan, John D. Gorby, Victor G. Rosenblum, and Dolores V. Horan for Americans United for Life, Inc.

JUDGES: BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, POWELL, and STEVENS, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, post, p. 401.

OPINION BY: BLACKMUN

OPINION

[*380] [***599] [**678] MR. JUSTICE BLACKMUN delivered the opinion of the Court.

[***LEdHR1A] [1A]At issue here is the constitutionality of subsection (a) of § 5 [1] of [***600] the Pennsylvania Abortion Control Act, 1974 Pa. Laws, [*381] Act No. 209, Pa. Stat. Ann., Tit. 35, § 6605 (a) (Purdon 1977). This statute subjects a physician who performs an abortion to potential criminal liability if he fails to utilize a statutorily prescribed technique when the fetus "is viable" or when there is "sufficient reason to believe that the fetus may be viable." A three-judge Federal District Court [2] declared § 5 (a) unconstitutionally vague and overbroad and enjoined its enforcement. App. 239a-244a. Pursuant to 28 U. S. C. § 1253, we noted probable jurisdiction *sub nom. Beal v. Franklin*, 435 U.S. 913 (1978).

1 Section 5 reads in pertinent part:

"(a) Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not

viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.

. . . .

"(d) Any person who fails to make the determination provided for in subsection (a) of this section, or who fails to exercise the degree of professional skill, care and diligence or to provide the abortion technique as provided for in subsection (a) of this section . . . shall be subject to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted."

2 The three-judge court was designated in September 1974 pursuant to 28 U. S. C. § 2281 (1970 ed.). This statute was repealed by Pub. L. 94-381, § 1, 90 Stat. 1119, but the repeal did not apply to any action commenced on or before August 12, 1976. § 7.

I

The Abortion Control Act was passed by the Pennsylvania Legislature, over the Governor's veto, in the year following this Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973). It was a comprehensive statute.

Section 1 gave the Act its title. Section 2 defined, among other terms, "informed consent" and "viable." The latter was specified to mean "the capability of a fetus to live outside the [*382] mother's womb albeit with artificial aid." See *Roe v. Wade*, 410 U.S., at 160.

Section 3 (a) proscribed the performance of an abortion "upon any person in the absence of informed consent thereto by such person." Section 3 (b)(i) prohibited the performance of an abortion in the absence of the written consent of the woman's spouse, provided that the spouse could be located and notified, and the abortion was not certified by a licensed physician "to be necessary in order to preserve the life or health of the mother." Section 3 (b)(ii), applicable [**679] if the woman was unmarried and under the age of 18, forbade the performance of an abortion in the absence of the written consent of "one parent or person in loco parentis" of the woman, unless the abortion was certified by a licensed physician "as necessary in order to preserve the life of the mother." Section 3 (e) provided that whoever performed an abortion without such consent was guilty of a misdemeanor of the first degree.

Section 4 provided that whoever, intentionally and willfully, took the life of a premature infant aborted alive, was guilty of murder of the [***601] second degree. Section 5 (a), set forth in n. 1, *supra*, provided that if the fetus was determined to be viable, or if there was sufficient reason to believe that the fetus might be viable, the person performing the abortion was required to exercise the same care to preserve the life and health of the fetus as would be required in the case of a fetus intended to be born alive, and was required to adopt the abortion technique providing the best opportunity for the fetus to be aborted alive, so long as a different technique was not necessary in order to preserve the life or health of the mother. Section 5 (d), also set forth in n. 1, imposed a penal sanction for a violation of § 5 (a).

Section 6 specified abortion controls. It prohibited abortion during the stage of pregnancy subsequent to viability, except where necessary, in the judgment of a licensed physician, to preserve the life or health of the mother. No abortion [*383] was to be performed except by a licensed physician and in an approved facility. It required that appropriate records be kept, and that quarterly reports be filed with the Commonwealth's Department of Health. And it prohibited solicitation or advertising with respect to abortions. A violation of § 6 was a misdemeanor of the first or third degrees, as specified.

Section 7 prohibited the use of public funds for an abortion in the absence of a certificate of a physician stating that the abortion was necessary in order to preserve the life or health of the mother. Finally, § 8 authorized the Department of Health to make rules and regulations with respect to performance of abortions and the facilities in which abortions were performed. See Pa. Stat. Ann., Tit. 35, §§ 6601-6608 (Purdon 1977).

[***LEdHR2A] [2A]Prior to the Act's effective date, October 10, 1974, the present suit was filed in the United States District Court for the Eastern District of Pennsylvania challenging, on federal constitutional grounds, nearly all of the Act's provisions. [3] [*384] The three-judge [**680] court on October 10 [***602] issued a preliminary injunction restraining the enforcement of a number of those provisions. [4] Each side sought a class-action determination; the plaintiffs', but not the defendants', motion to this effect was granted. [5]

3 The plaintiffs named in the complaint, as amended, were Planned Parenthood Association of Southeastern Pennsylvania, Inc., a nonprofit corporation; appellee John Franklin, M. D., a licensed and board-certified obstetrician and gynecologist and medical director of Planned Parenthood; Concern for Health Options: Information, Care and Education, Inc. (CHOICE), a nonprofit corporation; and Clergy Consultation Service of Northeastern Pennsylvania, a voluntary organization. Later, appellee Obstetrical Society of Philadelphia intervened as a party plaintiff. Named as original defendants were F. Emmett Fitzpatrick, Jr., District Attorney of Philadelphia County, and Helene Wohlgemuth, the then Secretary of Welfare of the Commonwealth of Pennsylvania. Subsequently, the Commonwealth's Attorney General and the Commonwealth itself intervened as parties defendant.

The District Court, in a ruling not under challenge here, eventually dismissed Planned Parenthood, CHOICE, and Clergy Consultation as plaintiffs. *Planned Parenthood Assn.* v. *Fitzpatrick*, 401 F.Supp. 554, 562, 593-594 (1975).

The present posture of the case, as a consequence, is a suit between Dr. Franklin and the Obstetrical Society, as plaintiffs-appellees, and Aldo Colautti, the present Secretary of Welfare, the Attorney General, the Commonwealth, and the District Attorney, as defendants-appellants.

[***LEdHR2B] [2B]We agree with the District Court's ruling in the cited 1975 opinion, 401 F.Supp., at 561-562, 594, that under *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973), the plaintiff physicians have standing to challenge § 5 (a), and that their claims present a justiciable controversy. See *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 62 (1976).

4 The court preliminarily enjoined the enforcement of the spousal- and parental-consent requirements, § 3 (b); the penal provisions of § 3 (e); the requirements of §§ 5 (a) and (d); the restriction on abortions subsequent to viability, § 6 (b); the facility-approval requirement, § 6 (c); the reporting provisions, § 6 (d); most of the penal provisions of § 6 (i); the restrictions on funding of abortions, § 7; and the definitions of "viable" and "informed consent" in § 2. Record, Doc. No. 16; see *Planned Parenthood Assn.* v. *Fitzpatrick*, 401 F.Supp., at 559.

5 The court ruled that "the present action is determined to be a class action on behalf of the class of Pennsylvania physicians who perform abortions and/or counsel their female patients with regard to family planning and pregnancy including the option of abortion, and the sub-class of members of the Obstetrical Society of Philadelphia who practice in Pennsylvania." Record, Doc. No. 57.

The case went to trial in January 1975. The court received extensive testimony from expert witnesses on all aspects of abortion procedures. The resulting judgment declared the Act to be severable, upheld certain of its provisions, and held other provisions unconstitutional. *Planned Parenthood Assn.* v. *Fitzpatrick*, 401 F.Supp. 554 (1975). [6] The court sustained the definition of "informed consent" in § 2; the facility-approval requirement and certain of the reporting requirements of § 6; § 8's authorization of rules and regulations; and, by a divided vote, the informed consent requirement of § 3 (a). It overturned § 3 (b)(i)'s spousal-consent requirement [*385] and, again by a divided vote, § 3 (b)(ii)'s parental-consent requirement; § 6's reporting requirements relating to spousal and parental consent; § 6's prohibition of advertising; and § 7's restriction on abortion funding. The definition of "viable" in § 2 was declared void for vagueness and, because of the incorporation of this definition, § 6's proscription of abortions after viability, except to preserve the life or health of the woman, was struck down. Finally, in part because of the incorporation of the definition of "viable," and in part because of the perceived overbreadth of the

phrase "may be viable," the court invalidated the viability-determination and standard-of-care provisions of § 5 (a). 401 F.Supp., at 594.

6 See also *Doe v. Zimmerman*, 405 F.Supp. 534 (MD Pa. 1975).

Both sides appealed to this Court. While the appeals were pending, the Court decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); and *Singleton v. Wulff*, 428 U.S. 106 (1976). *Virginia State Board* shed light on the prohibition of advertising for abortion services. *Planned Parenthood* had direct bearing on the patient-, spousal-, and parental-consent issues and was instructive on the definition-of-viability issue. *Singleton* concerned the issue of standing to challenge abortion regulations. Accordingly, that portion of the three-judge court's judgment which was the subject of the plaintiffs' appeal was summarily affirmed. *Franklin v. Fitzpatrick*, 428 U.S. 901 (1976). And that portion of the judgment which was the subject of the defendants' appeal [***603] was vacated and remanded for further consideration in the light of *Planned Parenthood, Singleton*, and *Virginia State Board*. *Beal v. Franklin*, 428 U.S. 901 (1976).

On remand, the parties entered into a stipulation which disposed of all issues except the constitutionality of §§ 5 (a) and 7. Relying on this Court's supervening decisions in *Beal v. Doe*, 432 U.S. 438 (1977), and *Maher v. Roe*, 432 U.S. 464 (1977), the District Court found, contrary to its original view, [*386] see 401 F.Supp., at 594, that § 7 did not violate either Tit. XIX of the Social Security Act, as added, 79 [**681] Stat. 343, and amended, 42 U. S. C. § 1396 *et seq.*, or the Equal Protection Clause of the Fourteenth Amendment. App. 241a. The court, however, declared: "After reconsideration of section 5 (a) in light of the most recent Supreme Court decisions, we adhere to our original view and decision that section 5 (a) is unconstitutional." *Id.*, at 240a-214a. Since the plaintiffs-appellees have not appealed from the ruling with respect to § 7, the only issue remaining in this protracted litigation is the validity of § 5 (a).

II

Three cases in the sensitive and earnestly contested abortion area provide essential background for the present controversy.

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court concluded that there is a right of privacy, implicit in the liberty secured by the Fourteenth Amendment, that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.*, at 153. This right, we said, although fundamental, is not absolute or unqualified, and must be considered against important state interests in the health of the pregnant woman and in the potential life of the fetus. "These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'" *Id.*, at 162-163. For both logical and biological reasons, we indicated that the State's interest in the potential life of the fetus reaches the compelling point at the stage of viability. Hence, prior to viability, the State may not seek to further this interest by directly restricting a woman's decision whether or not to terminate her pregnancy. [7] But after viability, the [*387] State, if it chooses, may regulate or even prohibit abortion except where necessary, in appropriate medical judgment, to preserve the life or health of the pregnant woman. *Id.*, at 163-164.

7 In *Maher v. Roe*, 432 U.S. 464, 471-477 (1977), the Court ruled that a State may withhold funding to indigent women even though such withholding influences the abortion decision prior to viability. The Court, however, reaffirmed that a State during this period may not impose direct obstacles -- such as criminal penalties -- to further its interest in the potential life of the fetus.

We did not undertake in *Roe* to examine the various factors that may enter into the determination of viability. We simply observed that, in the medical and scientific communities, a fetus is considered viable if [***604] it is "potentially able to live outside the mother's womb, albeit with artificial aid." *Id.*, at 160. We added that there must be a potentiality of "meaningful life," *id.*, at 163, not merely momentary survival. And we noted that viability "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Id.*, at 160. We thus left the point flexible for anticipated advancements in medical skill.

Roe stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out. We indicated that up to the points where important state interests

provide compelling justifications for intervention, "the abortion decision in all its aspects is inherently, and primarily, a medical decision," *id.*, at 166, and we added that if this privilege were abused, "the usual remedies, judicial and intra-professional, are available." *Ibid.*

Roe's companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), underscored the importance of affording the physician adequate discretion in the exercise of his medical judgment. After the Court there reiterated that "a pregnant woman does not have an absolute constitutional right to an abortion on her demand," *id.*, at 189, the Court discussed, in a vagueness-attack context, the Georgia statute's requirement that a physician's decision to perform an abortion must rest upon "his best clinical judgment." The Court found it critical that that [*388] judgment " [**682] may be exercised in the light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient." *Id.*, at 192.

The third case, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), stressed similar themes. There a Missouri statute that defined viability was challenged on the ground that it conflicted with the discussion of viability in *Roe* and that it was, in reality, an attempt to advance the point of viability to an earlier stage in gestation. The Court rejected that argument, repeated the *Roe* definition of viability, 428 U.S., at 63, and observed again that viability is "a matter of medical judgment, skill, and technical ability, and we preserved [in *Roe*] the flexibility of the term." *Id.*, at 64. The Court also rejected a contention that "a specified number of weeks in pregnancy must be fixed by statute as the point of viability." *Id.*, at 65. It said:

"In any event, we agree with the District Court that it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." [***605] *Id.*, at 64.

[***LEdHR3] [3]In these three cases, then, this Court has stressed viability, has declared its determination to be a matter for medical judgment, and has recognized that differing legal consequences ensue upon the near and far sides of that point in the human gestation period. We reaffirm these principles. Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support. Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering [*389] into the ascertainment of viability -- be it weeks of gestation or fetal weight or any other single factor -- as the determinant of when the State has a compelling interest in the life or health of the fetus. Viability is the critical point. And we have recognized no attempt to stretch the point of viability one way or the other.

With these principles in mind, we turn to the issues presented by the instant controversy.

III

[***LEdHR1B] [1B]The attack mounted by the plaintiffs-appellees upon § 5 (a) centers on both the viability-determination requirement and the stated standard of care. The former provision, requiring the physician to observe the care standard when he determines that the fetus is viable, or when "there is sufficient reason to believe that the fetus may be viable," is asserted to be unconstitutionally vague because it fails to inform the physician when his duty to the fetus arises, and because it does not make the physician's good-faith determination of viability conclusive. This provision is also said to be unconstitutionally overbroad, because it carves out a new time period prior to the stage of viability, and could have a restrictive effect on a couple who wants to abort a fetus determined by genetic testing to be defective. [8] The standard of care, and in particular the requirement that the physician employ the abortion technique "which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in [**683] order to preserve the life or health of the mother," is said to be void for vagueness and to be unconstitutionally restrictive in failing to afford [*390] the physician sufficient professional discretion in determining which abortion technique is appropriate.

8 The plaintiffs-appellees introduced evidence that modern medical technology makes it possible to detect whether a fetus is afflicted with such disorders as Tay-Sachs disease and Down's syndrome (mongolism). Such testing, however,

often cannot be completed until after 18-20 weeks' gestation. App. 53a-56a (testimony of Hope Punnett, Ph. D.).

The defendants-appellants, in opposition, assert that the Pennsylvania statute is concerned only with post-viability abortions and with prescribing a standard of care for those abortions. They assert that the terminology "may be viable" correctly describes the statistical probability of fetal survival associated with viability; that the viability-determination requirement is otherwise sufficiently definite to be interpreted by the medical community; and that it is for the legislature, not the judiciary, [***606] to determine whether a viable but genetically defective fetus has a right to life. They contend that the standard-of-care provision preserves the flexibility required for sound medical practice, and that it simply requires that when a physician has a choice of procedures of equal risk to the woman, he must select the procedure least likely to be fatal to the fetus.

IV

[***LEdHR1C] [1C]We agree with plaintiffs-appellees that the viability-determination requirement of § 5 (a) is ambiguous, and that its uncertainty is aggravated by the absence of a scienter requirement with respect to the finding of viability. Because we conclude that this portion of the statute is void for vagueness, we find it unnecessary to consider appellees' alternative arguments based on the alleged overbreadth of § 5 (a).

A

[***LEdHR4] [4]It is settled that, as a matter of due process, a criminal statute that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States v. Harriss*, 347 U.S. 612, 617 (1954), or is so indefinite that "it encourages arbitrary and erratic arrests and convictions," *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972), is void for vagueness. See generally *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). [*391] This appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights. *Id.*, at 109; *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Keyishian v. Board of Regents*, 385 U.S. 589, 603-604 (1967).

Section 5 (a) requires every person who performs or induces an abortion to make a determination, "based on his experience, judgment or professional competence," that the fetus is not viable. If such person determines that the fetus is viable, or if "there is sufficient reason to believe that the fetus may be viable," then he must adhere to the prescribed standard of care. See n. 1, *supra*. This requirement contains a double ambiguity. First, it is unclear whether the statute imports a purely subjective standard, or whether it imposes a mixed subjective and objective standard. Second, it is uncertain whether the phrase "may be viable" simply refers to viability, as that term has been defined in *Roe* and in *Planned Parenthood*, or whether it refers to an undefined penumbral or "gray" area prior to the stage of viability.

The statute requires the physician to conform to the prescribed standard of care if one of two conditions is satisfied: if he determines that the fetus "is viable," or "if there is sufficient reason to believe that the fetus may be viable." Apparently, the determination of whether the fetus "is viable" is to be based on the attending physician's "experience, judgment or professional competence," a subjective point of reference. But it is unclear whether the same phrase applies to the second triggering condition, that is, to "sufficient reason to believe that the fetus may be viable." In other words, it is ambiguous [***607] whether there must be "sufficient reason" from the perspective of the judgment, skill, and training of the attending [**684] physician, or "sufficient reason" from the perspective of a cross section of the medical community or a panel of experts. The latter, obviously, portends not an inconsequential hazard for the typical private practitioner who may not [*392] have the skills and technology that are readily available at a teaching hospital or large medical center.

[***LEdHR5A] [5A]The intended distinction between the phrases "is viable" and "may be viable" is even more elusive. Appellants argue that no difference is intended, and that the use of the "may be viable" words "simply incorporates the acknowledged medical fact that a fetus is 'viable' if it has that statistical 'chance' of survival recognized by the medical community." Brief for Appellants 28. The statute, however, does not support the contention that "may be viable" is synonymous with, or merely intended to explicate the meaning of, "viable." [9]

9 [***LEdHR5B] [5B]Appellants do not argue that federal-court abstention is required on this

issue, nor is it appropriate, given the extent of the vagueness that afflicts § 5 (a), for this Court to abstain *sua sponte*. See *Bellotti v. Baird*, 428 U.S. 132, 143 n. 10 (1976).

[***LEdHR6] [6]Section 5 (a) requires the physician to observe the prescribed standard of care if he determines "that the fetus is viable *or* if there is sufficient reason to believe that the fetus may be viable" (emphasis supplied). The syntax clearly implies that there are two distinct conditions under which the physician must conform to the standard of care. Appellants' argument that "may be viable" is synonymous with "viable" would make either the first or the second condition redundant or largely superfluous, in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative. See *United States v. Menasche*, 348 U.S. 528, 538-539 (1955).

[***LEdHR7A] [7A]Furthermore, the suggestion that "may be viable" is an explication of the meaning of "viable" flies in the face of the fact that the statute, in § 2, already defines "viable." This, presumably, was intended to be the exclusive definition of "viable" throughout the Act. [10] In this respect, it is significant [*393] that § 6 (b) of the Act speaks only of the limited availability of abortion during the stage of a pregnancy "subsequent to viability." The concept of viability is just as important in § 6 (b) as it is in § 5 (a). Yet in § 6 (b) the legislature found it unnecessary to explain that a "viable" fetus includes one that "may be viable."

10 [***LEdHR7B] [7B]The statute says that viable "means," not "includes," the capability of a fetus "to live outside the mother's womb albeit with artificial aid." As a rule, "[a] definition which declares what a term 'means' . . . excludes any meaning that is not stated." 2A C. Sands, Statutes and Statutory Construction § 47.07 (4th ed. Supp. 1978).

Since we must reject appellants' theory that "may be viable" means "viable," a second serious ambiguity appears in the statute. On the one hand, as appellees urge and as the District Court found, see 401 F.Supp., at 572, it may be that "may be viable" carves out a new time period during pregnancy when there is a remote possibility of fetal survival outside the womb, but the fetus has not yet attained the reasonable likelihood [***608] of survival that physicians associate with viability. On the other hand, although appellants do not argue this, it may be that "may be viable" refers to viability as physicians understand it, and "viable" refers to some undetermined stage later in pregnancy. We need not resolve this question. The crucial point is that "viable" and "may be viable" apparently refer to distinct conditions, and that one of these conditions differs in some indeterminate way from the definition of viability as set forth in *Roe* and in *Planned Parenthood*. [11]

11 Since our ruling today is confined to the conclusion that the viability-determination requirement of § 5 (a) is impermissibly vague, there is no merit in the dissenting opinion's suggestion, *post*, at 406, that the Court has "tacitly [disowned]" the definition of viability as set forth in *Roe* and *Planned Parenthood*. On the contrary, as noted above, *supra*, at 388, we *reaffirm* what was said in those decisions about this critical concept.

[**685] Because of the double ambiguity in the viability-determination requirement, this portion of the Pennsylvania statute is readily distinguishable from the requirement that an abortion must be "necessary for the preservation of the mother's life or health," upheld against a vagueness challenge in *United* [*394] *States v. Vuitch*, 402 U.S. 62, 69-72 (1971), and the requirement that a physician determine, on the basis of his "best clinical judgment," that an abortion is "necessary," upheld against a vagueness attack in *Doe v. Bolton*, 410 U.S., at 191-192. The contested provisions in those cases had been interpreted to allow the physician to make his determination in the light of all attendant circumstances -- psychological and emotional as well as physical -- that might be relevant to the well-being of the patient. The present statute does not afford broad discretion to the physician. Instead, it conditions potential criminal liability on confusing and ambiguous criteria. It therefore presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights.

B

The vagueness of the viability-determination requirement of § 5 (a) is compounded by the fact that the Act subjects the physician to potential criminal liability without regard to fault. Under § 5 (d), see n. 1, *supra*, a

physician who fails to abide by the standard of care when there is sufficient reason to believe that the fetus "may be viable" is subject "to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted." To be sure, the Pennsylvania law of criminal homicide, made applicable to the physician by § 5 (d), conditions guilt upon a finding of scienter. See Pa. Stat. Ann., Tit. 18, §§ 2501-2504 (Purdon 1973 and Supp. 1978). The required mental state, however, is that of "intentionally, knowingly, recklessly or negligently [causing] the death of another human being." § 2501 (1973). Thus, the Pennsylvania law of criminal homicide requires scienter with respect to whether the physician's actions will result in the death of the fetus. But neither the Pennsylvania law of criminal homicide, nor the Abortion Control Act, requires that the [*395] physician be culpable in failing to find [***609] sufficient reason to believe that the fetus may be viable. [12]

12 Section 5 (a) does provide that the determination of viability is to be based on the physician's "experience, judgment or professional competence." A subjective standard keyed to the physician's individual skill and abilities, however, is different from a requirement that the physician be culpable or blameworthy for his performance under such a standard. Moreover, as noted above, it is ambiguous whether this subjective language applies to the second condition that activates the duty to the fetus, namely, "sufficient reason to believe that the fetus may be viable."

This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*. See, for example, *United States v. United States Gypsum Co.*, 438 U.S. 422, 434-446 (1978); *Papachristou v. Jacksonville*, 405 U.S., at 163; *Boyce Motor Lines v. United States*, 342 U.S. 337, 342 (1952). [13] Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than "a trap for those who act in good faith." *United States v. Ragen*, 314 U.S. 513, 524 [**686] (1942).

13 "[The] requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. . . . The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws v. United States*, 325 U.S. 91, 101-102 (1945) (plurality opinion).

The perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself. As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables: the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the [*396] quality of the available medical facilities; and other factors. [14] Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty. Moreover, the record indicates that even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all. [15] In the face of these uncertainties, it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to [***610] the stage of viability. The prospect of such disagreement, in conjunction with a statute imposing strict civil and criminal liability for an erroneous determination of viability, could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment.

14 See App. 5a-6a, 10a, 17a (testimony of Louis Gerstley III, M. D.); *id.*, at 77a-78a, 81a (testimony of Thomas W. Hilgers, M. D.); *id.*, at 93a-101a, 109a, 112a (testimony of William J. Keenan, M.D.).

15 See *id.*, at 8a (testimony of Dr. Gerstley) (viability means 5% chance of survival, "certainly at least two to three percent"); *id.*, at 104a (testimony of Dr. Keenan) (10% chance of survival would be viable); *id.*, at 144a (deposition of John Franklin, M. D.) (viability means "ten

percent or better" probability of survival); *id.*, at 132a (testimony of Arturo Hervada, M. D.) (it is misleading to be obsessed with a particular percentage figure).

[***LEdHR8] [8]Because we hold that the viability-determination provision of § 5 (a) is void on its face, we need not now decide whether, under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability. We reaffirm, however, that "the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." *Planned Parenthood of Central Missouri* v. [*397] *Danforth*, 428 U.S., at 64. State regulation that impinges upon this determination, if it is to be constitutional, must allow the attending physician "the room he needs to make his best medical judgment." *Doe* v. *Bolton*, 410 U.S., at 192.

V

[***LEdHR1D] [1D] [***LEdHR9A] [9A]We also conclude that the standard-of-care provision of § 5 (a) is impermissibly vague. [16] The standard-of-care provision, when it applies, requires the physician to

"exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so [**687] long as a different technique would not be necessary in order to preserve the life or health of the mother."

Plaintiffs-appellees focus their attack on the second part of the standard, requiring the physician to employ the abortion technique offering the greatest possibility of fetal survival, provided some other technique would not be necessary in order to preserve the life or health of the mother. [17]

16

[***LEdHR9B] [9B]The dissenting opinion questions whether the alleged vagueness of the standard-of-care provision is properly before us, since it is said that this issue was not reached by the District Court. That court, however, declared § 5 (a) unconstitutional in its entirety, including both the viability-determination requirement and the standard-of-care provision. App. 243a. Appellees, as the prevailing parties, may of course assert any ground in support of that judgment, "whether or not that ground was relied upon or even considered by the trial court." *Dandridge* v. *Williams*, 397 U.S. 471, 475 n. 6 (1970).

17 In *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 81-84 (1976), the Court struck down a provision similar to the first part of the standard-of-care provision of § 5 (a), on the ground that it applied at all stages of gestation and not just to the period subsequent to viability. Except to the extent that § 5 (a) is also alleged to apply prior to the point of viability, a contention we do not reach, see *supra*, at 390, appellees do not challenge the standard-of-care provision on overbreadth grounds.

[*398] The District Court took extensive testimony from various physicians about their understanding of this requirement. That testimony is illuminating. When asked what method of abortion they would prefer to use [***611] in the second trimester in the absence of § 5 (a), the plaintiffs' experts said that they thought saline amnio-infusion was the method of choice. [18] This was described as a method involving removal of amniotic fluid and injection of a saline or other solution into the amniotic sac. See *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S., at 75-79. All physicians agreed, however, that saline amnio-infusion nearly always is fatal to the fetus, [19] and it was commonly assumed that this method would be prohibited by the statute.

18 App. 11a (testimony of Dr. Gerstley); *id.*, at 28a (testimony of Dr. Franklin).

19 See, *e. g.*, *id.*, at 28a (testimony of Dr. Franklin); *id.*, at 36a (testimony of Fred Mecklenburg, M. D.).

When the plaintiffs' and defendants' physician-experts respectively were asked what would be the method of choice under § 5 (a), opinions differed

widely. Preferences ranged from no abortion, to prostaglandin infusion, to hysterotomy, to oxytocin induction. [20] Each method, it was generally conceded, involved disadvantages from the perspective of the woman. Hysterotomy, a type of Caesarean section procedure, generally was considered to have the highest incidence of fetal survival of any of the abortifacients. Hysterotomy, however, is associated with the risks attendant upon any operative procedure involving anesthesia and incision of [*399] tissue. [21] And all physicians agreed that future children born to a woman having a hysterotomy would have to be delivered by Caesarean section because of the likelihood of rupture of the scar. [22]

20 There was testimony that dilation and curettage and dilation and suction, two of the more common methods of abortion in the first trimester, normally are not used in the second trimster. *Id.*, at 39a-40a (testimony of Dr. Mecklenburg).

21 *Id.*, at 23a (testimony of Dr. Franklin); *id.*, at 43a (testimony of Dr. Mecklenburg); *id.*, at 73a (testimony of Dr. Hilgers).

22 See, *e. g., id.*, at 13a (testimony of Dr. Gerstley); *id.*, at 28a (testimony of Dr. Franklin).

Few of the testifying physicians had had any direct experience with prostaglandins, described as drugs that stimulate uterine contractibility, inducing premature expulsion of the fetus. See *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S., at 77-78. It was generally agreed that the incidence of fetal survival with prostaglandins would be significantly greater than with saline amnio-infusion. [23] Several physicians testified, however, that prostaglandins have undesirable side effects, such as nausea, vomiting, headache, and diarrhea, and indicated that they are unsafe with patients having a history of asthma, glaucoma, hypertension, cardiovascular disease, or epilepsy. [24] See [**688] *Wynn v. Scott*, 449 F.Supp. 1302, 1326 (ND Ill. 1978). One physician recommended oxytocin induction. He doubted, however, whether the procedure would be fully effective in all cases, and he indicated that the procedure was prolonged and expensive. [25]

23 See, *e. g., id.*, at 11a-12a (testimony of Dr. Gerstley); *id.*, at 28a (testimony of Dr. Franklin).

24 See *id.*, at 11a (testimony of Dr. Gerstley); *id.*, at 37a-38a (testimony of Dr. Mecklenburg); *id*., at 72a (testimony of Dr. Hilgers).

25 *Id.*, at 12a (testimony of Dr. Gerstley).

The parties acknowledge that [***612] there is disagreement among medical authorities about the relative merits and the safety of different abortion procedures that may be used during the second trimester. See Brief for Appellants 24. The appellants submit, however, that the only legally relevant considerations are that alternatives exist among abortifacients, [*400] "and that the physician, mindful of the state's interest in protecting viable life, must make a competent and good faith medical judgment on the feasibility of protecting the fetus' chance of survival in a manner consistent with the life and health of the pregnant woman." *Id.*, at 25. We read § 5 (a), however, to be much more problematical.

The statute does not clearly specify, as appellants imply, that the woman's life and health must always prevail over the fetus' life and health when they conflict. The woman's life and health are not mentioned in the first part of the stated standard of care, which sets forth the general duty to the viable fetus; they are mentioned only in the second part which deals with the choice of abortion procedures. Moreover, the second part of the standard directs the physician to employ the abortion technique best suited to fetal survival "so long as a different technique would not be *necessary* in order to preserve the life or health of the mother" (emphasis supplied). In this context, the word "necessary" suggests that a particular technique must be indispensable to the woman's life or health -- not merely desirable -- before it may be adopted. And "the life or health of the mother," as used in § 5 (a), has not been construed by the courts of the Commonwealth to mean, nor does it necessarily imply, that all factors relevant to the welfare of the woman may be taken into account by the physician in making his decision. Cf. *United States v. Vuitch*, 402 U.S., at 71-72; *Doe v. Bolton*, 410 U.S., at 191.

Consequently, it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a "trade-off" between the woman's health and additional percentage points of fetal survival. Serious ethical and constitutional difficulties, that we do not address, lurk behind this ambiguity. We hold only that where conflicting duties of this magnitude are involved, the [*401] State, at the least, must proceed with greater precision before it may subject a physician to

possible criminal sanctions.

Appellants' further suggestion that § 5 (a) requires only that the physician make a good-faith selection of the proper abortion procedure finds no support in either the language or an authoritative interpretation of the statute. 26 Certainly, there is nothing to suggest a *mens rea* requirement with respect to a decision whether a particular abortion method is necessary in order to preserve the life or health of the woman. The choice of an appropriate abortion technique, as the record in this case so amply demonstrates, is a complex medical judgment about which experts can -- and do -- disagree. [***613] The lack of any scienter requirement exacerbates the uncertainty of the statute. We conclude that the standard-of-care provision, like the viability-determination requirement, is void for vagueness.

26 Appellants, again, do not argue or suggest that we should abstain from passing on this issue. See n. 9, *supra*.

The judgment of the District Court is affirmed.

It is so ordered.

DISSENT BY: WHITE

DISSENT

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

Because the Court now withdraws from the States a substantial measure of the [**689] power to protect fetal life that was reserved to them in *Roe v. Wade*, 410 U.S. 113 (1973), and reaffirmed in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), I file this dissent.

I

In *Roe* v. *Wade*, the Court defined the term "viability" to signify the stage at which a fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." This is the point at which the State's interest in protecting fetal [*402] life becomes sufficiently strong to permit it to "go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." 410 U.S., at 163-164.

The Court obviously crafted its definition of viability with some care, and it chose to define that term not as that stage of development at which the fetus actually *is* able or actually *has* the ability to survive outside the mother's womb, with or without artificial aid, but as that point at which the fetus is *potentially* able to survive. In the ordinary usage of these words, being *able* and being *potentially able* do not mean the same thing. Potential ability is not actual ability. It is ability "[existing] in possibility, not in actuality." Webster's New International Dictionary (2d ed. 1958). The Court's definition of viability in *Roe* v. *Wade* reaches an earlier point in the development of the fetus than that stage at which a doctor could say with assurance that the fetus *would* survive outside the womb.

It was against this background that the Pennsylvania statute at issue here was adopted and the District Court's judgment was entered. Insofar as *Roe* v. *Wade* was concerned, Pennsylvania could have defined viability in the language of that case -- "potentially able to live outside the mother's womb" -- and could have forbidden all abortions after this stage of any pregnancy. The Pennsylvania Act, however, did not go so far. It forbade entirely only those abortions where the fetus had attained viability as defined in § 2 of the Act, that is, where the fetus had "the *capability* . . . to live outside the mother's womb albeit with artificial aid." Pa. Stat. Ann., Tit. 35, § 6602 (Purdon 1977) (emphasis added). But the State, understanding that it also had the power under *Roe* v. *Wade* to regulate where the fetus was only "potentially able" to exist outside the womb, also sought to regulate, but not forbid, abortions where there was sufficient reason to believe that the fetus "may be viable"; this language was reasonably [*403] believed by [***614] the State to be equivalent to what the Court meant in 1973 by the term "potentially able to live outside the mother's womb." Under § 5 (a), abortionists must not only determine whether the fetus is viable but also whether there is sufficient reason to believe that the fetus may be viable. If either condition exists, the method of abortion is regulated and a standard of care imposed. Under § 5 (d), breach of these regulations exposes the abortionist to the civil and criminal penalties that would be applicable if a live birth rather than an abortion had been intended.

In the original opinion and judgment of the

three-judge court, *Planned Parenthood Assn.* v. Fitzpatrick, 401 F.Supp. 554 (ED Pa. 1975), § 5 (a) was invalidated on two grounds: first, because it required a determination of viability and because that term, as defined in § 2, was held to be unenforceably vague; and second, because the section required a determination of when a fetus may be viable, it was thought to regulate a period of time prior to viability and was therefore considered to be invalid under this Court's cases. The District Court was not disturbed by the fact that its opinion declared the term "viability" as used in this Court's opinion in *Roe* v. *Wade* to be hopelessly vague since it understood that opinion also to have given specific content to that term and to have held that a State could not consider any fetus to be viable prior to the 24th week of pregnancy. This was concrete guidance to the States, and because the "may be viable" provision of § 5 (a) " [**690] [tended] to carve out a . . . period of time of potential viability [which might cover a period of] 20 to 26 weeks gestation," 401 F.Supp., at 572, the State was unlawfully regulating the second trimester. Because it sought to enforce § 5 (a), § 5 (d) was also invalidated. Section 6 (b), which forbade all abortions after viability, also fell to the challenge of vagueness.

The District Court's judgment was pending on appeal here when Planned Parenthood of Central Missouri v. Danforth, [*404] *supra*, was argued and decided. There, the state Act defined viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." 428 U.S., at 63. This definition was attacked as impermissibly expanding the *Roe* v. *Wade* definition of viability; the "mere possibility of momentary survival," it was argued, was not the proper standard under the Court's cases. 428 U.S., at 63. It was also argued in this Court that the "may be" language of the Missouri statute was vulnerable for the same reasons that the "may be" provision of the Pennsylvania statute had been invalidated by the District Court in the case now before us. Brief for Appellants, O. T. 1975, No. 74-1151, pp. 65-66, quoting *Planned Parenthood Assn.* v. Fitzpatrick, *supra*, at 571-572. This Court, however, rejected these arguments and sustained the Missouri definition as consistent with *Roe*, "even when read in conjunction with" another section of the Act that proscribed all abortions not necessary to preserve the life or health of the mother "unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable," that is, that it has not reached that stage at which it may exist indefinitely outside the mother's womb. 428 U.S., at 63-64. [***615] The Court noted that one of the appellant doctors "had no particular difficulty with the statutory definition" and added that the Missouri definition might well be considered more favorable to the complainants than the *Roe* definition since the "point when life can be 'continued indefinitely outside the womb' may well occur later in pregnancy than the point where the fetus is 'potentially able to live outside the mother's womb.'" 428 U.S., at 64. The Court went on to make clear that it was not the proper function of the legislature or of the courts to place viability at a specific point in the gestation period. The "flexibility of the term," which was essentially a medical concept, was to be preserved. *Ibid.* The Court plainly reaffirmed what it had held [*405] in *Roe* v. *Wade*: Viability refers not only to that stage of development when the fetus actually has the capability of existing outside the womb but also to that stage when the fetus *may have* the ability to do so. The Court also reaffirmed that at any time after viability, as so understood, the State has the power to prohibit abortions except when necessary to preserve the life or health of the mother.

In light of *Danforth*, several aspects of the District Court's judgment in the *Fitzpatrick* case were highly questionable, and that judgment was accordingly vacated and remanded to the District Court for reconsideration. Beal v. Franklin, 428 U.S. 901 (1976). A drastically modified judgment eventuated. The term "viability" could not be deemed vague in itself, and hence the definition of that term in § 2 and the proscription of § 6 (b) against post-viability abortions were sustained. The District Court, however, in a conclusory opinion adhered to its prior view that § 5 (a) was unconstitutional, as was § 5 (d) insofar as it related to § 5 (a).

Affirmance of the District Court's judgment is untenable. The District Court originally thought § 5 (a) was vague because the term "viability" was itself vague. The Court scotched that notion in *Danforth*, and the District Court then sustained the Pennsylvania definition of viability. In doing so, it necessarily nullified the major reason for its prior invalidation of § 5 (a), which was that it incorporated the supposedly vague standard of § 2. But the District Court had also said that the "may be viable" standard [**691] was invalid as an impermissible effort to regulate a period of "potential" viability. This was the sole remaining articulated ground for invalidating § 5 (a). But this is the very ground that was urged and rejected in

Danforth, where this Court sustained the Missouri provision defining viability as the stage at which the fetus "may" have the ability to survive outside the womb and reaffirmed the flexible concept of viability announced in *Roe*.

[*406] In affirming the District Court, the Court does not in so many words agree with the District Court but argues that it is too difficult to know whether the Pennsylvania Act simply intended, as the State urges, to go no further than *Roe* permitted in protecting a fetus that is potentially able to survive or whether it intended to carve out a protected period prior to viability as defined in *Roe*. The District Court, although otherwise seriously in error, had no such trouble with the Act. It understood the "may be viable" provision [***616] as an attempt to protect a period of potential life, precisely the kind of interest that *Roe* protected but which the District Court erroneously thought the State was not entitled to protect. 1 *Danforth*, as I have said, reaffirmed *Roe* in this respect. Only those with unalterable determination to invalidate the Pennsylvania Act can draw any measurable difference insofar as vagueness is concerned between "viability" defined as the ability to survive and "viability" defined as that stage at which the fetus may have the ability to survive. It seems to me that, in affirming, the Court is tacitly disowning the "may be" standard of the Missouri law as well as the "potential ability" [*407] component of viability as that concept was described in *Roe*. This is a further constitutionally unwarranted intrusion upon the police powers of the States.

1 The District Court observed:

> "*Roe* makes it abundantly clear that the compelling point at which a state in the interest of fetal life may regulate, or even prohibit, abortion is not before the 24th week of gestation of the fetus, at which point the Supreme Court recognized the fetus then presumably *has the capability* of meaningful life outside the mother's womb. Consequently, *Roe* recognizes only two periods concerning fetuses. The period prior to viability, when the state may not regulate in the interest of fetal life, and the period after viability, when it may prohibit altogether or regulate as it sees fit. The 'may be viable' provision of Section 5 (a) tends to carve out a third period of time of *potential* viability." *Planned Parenthood Assn.* v. *Fitzpatrick*, 401 F.Supp. 554, 572 (ED Pa. 1975) (emphasis added).

Thus, the court interpreted the term "viability" more restrictively than *Roe*, read in its entirety, permitted but coextensively with the definition in § 2. Based on its misapprehension of *Roe*, the court condemned § 5 (a) essentially for reaching the period when the fetus has the *potential* "capability of meaningful life outside the mother's womb." *Ibid.*

II

Apparently uneasy with its work, the Court has searched for and seized upon two additional reasons to support affirmance, neither of which was relied upon by the District Court. The Court first notes that under § 5 (d), failure to make the determinations required by § 5 (a), or otherwise to comply with its provisions, subjects the abortionist to criminal prosecution under those laws that "would pertain to him had the fetus been a child who was intended to be born and not aborted." Although concededly the Pennsylvania law of criminal homicide conditions guilt upon a finding that the defendant intentionally, knowingly, recklessly, or negligently caused the death of another human being, the Court nevertheless goes on to declare that the abortionist could be successfully prosecuted for criminal homicide without any such fault or omission in determining whether or not the fetus is viable or may be viable. This alleged lack of a scienter requirement, the Court says, fortifies its holding that § 5 (a) is void for vagueness.

This seems to me an incredible construction of the Pennsylvania statutes. The District Court suggested nothing of the sort, and appellees focus entirely on § 5 (a), ignoring the homicide statutes. The latter not only define the specified degrees of scienter [**692] that are required for the various homicides, but also provide that ignorance or mistake as to a matter of fact, for which there is a reasonable explanation, is a defense to a homicide charge if it negatives the mental state necessary for conviction. Pa. Stat. Ann., Tit. 18, § 304 [***617] (Purdon 1973). Given this background, I do not see how it can be seriously argued that a doctor who makes a good-faith mistake about whether a fetus is or is not viable could be successfully prosecuted [*408] for criminal homicide. This is the State's submission in this Court; the court below did not address the matter; and at the very least this is something the Court should not decide without hearing from the Pennsylvania courts.

Secondly, the Court proceeds to find the standard-of-care provision in § 5 (a) to be impermissibly vague, particularly because of an asserted lack of a *mens rea* requirement. I am unable to agree. In the first place, the District Court found fault with § 5 (a) only because of its viability and "may be viable" provisions. It neither considered nor invalidated the standard-of-care provision. Furthermore, the complaint did not expressly attack § 5 (a) on this ground, and plaintiffs' request for findings and conclusions challenged the section only on the grounds of the overbreadth and vagueness of the viability and the "may be viable" provisions. There was no request to invalidate the standard-of-care provision. Also, the plaintiffs' post-trial brief dealt with the matter in only the most tangential way. Appellees took no cross-appeal; and although they argue the matter in their brief on the merits in this Court, I question whether they are entitled to have still another provision of the Pennsylvania Act declared unconstitutional in this Court in the first instance, thereby and to that extent expanding the relief they obtained in the court below. [2] *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n. 8 (1977).

2 Unquestionably, rehabilitating § 5 (a) to satisfy this Court's opinion will be a far more extensive and more difficult task than that which the State faced under the District Court's ruling.

In any event, I cannot join the Court in its determined attack on the Pennsylvania statute. As in the case with a mistaken viability determination under § 5 (a), there is no basis for asserting the lack of a scienter requirement in a prosecution for violating the standard-of-care provision. I agree with the State that there is not the remotest chance that any abortionist will be prosecuted on the basis of a good-faith [*409] mistake regarding whether to abort, and if he does, with respect to which abortion technique is to be used. If there is substantial doubt about this, the Court should not complain of a lack of an authoritative state construction, as it does, but should direct abstention and permit the state courts to address the issues in the light of the Pennsylvania homicide laws with which those courts are so much more familiar than are we or any other federal court.

III

Although it seems to me that the Court has considerably narrowed the scope of the power to forbid and regulate abortions that the States could reasonably have expected to enjoy under *Roe* and *Danforth*, the Court has not yet invalidated a statute simply requiring abortionists to determine whether a fetus is viable and forbidding the abortion of a viable fetus except where necessary to save the life or health of the mother. [***618] Nor has it yet ruled that the abortionist's determination of viability under such a standard must be final and is immune to civil or criminal attack. Sections 2 and 6 (b) of the Pennsylvania law, for example, remain undisturbed by the District Court's judgment or by the judgment of this Court.

What the Court has done is to issue a warning to the States, in the name of vagueness, that they should not attempt to forbid or regulate abortions when there is a chance for the survival of the fetus, but it is not sufficiently large that the abortionist considers the fetus to be viable. This edict has no constitutional warrant, and I cannot join it.

REFERENCES

1 Am Jur 2d, Abortion 1.5

1 Am Jur Pl & Pr Forms (Rev), Abortion, Forms 1 et seq.

1 Am Jur Proof of Facts 15, Abortion and Miscarriage

US L Ed Digest, Abortion 1; Statutes 18

ALR Digests, Abortion 1; Statutes 29

L Ed Index to Annos, Abortion; Certainty and Definiteness

ALR Quick Index, Abortion; Certainty and Definiteness

Federal Quick Index, Abortion; Certainty and Definiteness

Annotation References:

Validity, under Federal Constitution, of abortion laws. 35 L Ed 2d 735.

Supreme Court's definition and application of doctrine of "abstention" where questions of state law are controlling in federal civil case. 20 L Ed 2d 1623.

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime. 96 L Ed 374, 16 L Ed 2d 1231.

Illustrations as to when statute defining criminal offense is subject to attack as vague, indefinite, or uncertain. 83 L Ed 893.

EXHIBIT 3

COLTEN v. KENTUCKY

No. 71-404

SUPREME COURT OF THE UNITED STATES

407 U.S. 104; 92 S. Ct. 1953; 32 L. Ed. 2d 584; 1972 U.S. LEXIS 43

April 17, 1972, Argued
June 12, 1972, Decided

PRIOR HISTORY: APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

DISPOSITION: 467 S. W. 2d 374, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant challenged the judgment of the Court of Appeals of Kentucky, which affirmed his conviction for disorderly conduct, in violation of Ky. Rev. Stat. § 437.016. Defendant claimed that his conviction and the state's statute were repugnant to U.S. Const. amend. I and U.S. Const. amend. XIV, and he challenged the constitutionality of the enhanced penalty he received under Kentucky's two-tier system for adjudicating certain criminal cases.

OVERVIEW: Defendant sought review when the state's appellate court rejected his constitutional challenges to Kentucky's disorderly conduct statute, Ky. Rev. Stat. § 437.016, and his claim that the punishment imposed was impermissible. The Court affirmed the judgment of the state court. The Court held that the state court properly determined that when defendant was arrested, that he was not engaged in activity protected by U.S. Const. amend. I, and that the police officers' order to disperse was suited to the occasion. The Court held that the state had a legitimate interest in enforcing its traffic laws and its officers were entitled to enforce them free from possible interference or interruption from bystanders, even those claiming a third-party interest in the transaction. The order to disperse was suited to the occasion. The Court held there was nothing unconstitutional in the manner in which the statute was applied and that the statute was neither impermissibly vague nor broad. The Court also ruled that Kentucky's two-tiered court system did not violate Due Process Clause or the Double Jeopardy Clause of U.S. Const. amend. V.

OUTCOME: The Court held that Kentucky's disorderly conduct statute did not violate the First or Fourteenth Amendments and that the state's two-tiered court system did not violate Double Jeopardy or the Due Process Clause. The Court affirmed the order of the state court that affirmed defendant's conviction for disorderly conduct.

SYLLABUS

Appellant, arrested for disorderly conduct when he failed, notwithstanding several requests by an officer, to leave a congested roadside where a friend in another car was being ticketed for a traffic offense, was tried and convicted in an inferior court and fined $ 10. Kentucky has a two-tier system for adjudicating certain criminal cases, under which a person charged with a misdemeanor may be tried first in an inferior court and, if dissatisfied with the outcome, may have a trial *de novo* in a court of

general criminal jurisdiction but must risk a greater punishment if convicted. Exercising his right to a trial *de novo*, appellant was tried for disorderly conduct in the circuit court, convicted, and fined $ 50. The state appellate court affirmed, rejecting appellant's contention that the disorderly conduct statute is unconstitutional under the First and Fourteenth Amendments and that the greater punishment contravened the due process requirements of *North Carolina v. Pearce*, 395 U.S. 711, and violated the Fifth Amendment's Double Jeopardy Clause. The disorderly conduct statute makes it an offense for a person with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, to congregate with others in a public place and refuse to comply with a lawful police dispersal order. As construed by the Kentucky Court of Appeals, a violation occurs only where there is no bona fide intention to exercise a constitutional right or where the interest to be advanced by the individual's exercise of the right is insignificant in comparison to the inconvenience, annoyance, or alarm caused by his action. *Held*:

1. The disorderly conduct statute was not unconstitutionally applied, there having been ample evidence that the action of appellant, who had no constitutional right to observe the ticketing process or engage the issuing officer in conversation, was interfering with enforcement of traffic laws. Pp. 108-110.

2. The statute is not impermissibly vague or broad as "citizens who desire to obey [it] will have no difficulty in understanding it," and, as construed by the Kentucky court, individuals may not be convicted thereunder merely for expressing unpopular ideas. Pp. 110-111.

3. Kentucky's two-tier system does not violate the Due Process Clause, as it imposes no penalty on those who seek a trial *de novo* after having been convicted in the inferior court. The Kentucky procedure involves a completely fresh determination of guilt or innocence by the superior court which is not the court that acted on the case before and has no motive to deal more strictly with a *de novo* defendant than it would with any other. *North Carolina v. Pearce, supra*, distinguished. Pp. 112-119.

4. The Double Jeopardy Clause does not prohibit an enhanced sentence on reconviction. *North Carolina v. Pearce, supra*, at 719-720. Pp. 119-120.

COUNSEL: Alvin L. Goldman argued the cause for appellant. With him on the brief were Melvin L. Wulf and Sanford Jay Rosen.

Robert W. Willmott, Jr., Assistant Attorney General of Kentucky, argued the cause for appellee pro hac vice. With him on the brief was Ed W. Hancock, Attorney General.

JUDGES: White, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Stewart, Blackmun, Powell, and Rehnquist, JJ., joined. Douglas, J., post, p. 120, and Marshall, J., post, p. 122, filed dissenting opinions.

OPINION BY: WHITE

OPINION

[*105] [***587] [**1954] MR. JUSTICE WHITE delivered the opinion of the Court.

[**1955] This case presents two unrelated questions. Appellant challenges his Kentucky conviction for disorderly conduct on the ground that the conviction and the State's statute are repugnant to the First and Fourteenth Amendments. He also challenges the constitutionality of the enhanced penalty he received under Kentucky's two-tier system for adjudicating certain criminal cases, whereby a person charged with a misdemeanor may be tried first in an inferior court and, if dissatisfied with the outcome, may have a trial *de novo* in a court of general [*106] criminal jurisdiction but must run the risk, if convicted, of receiving a greater punishment.

Appellant Colten and 15 to 20 other college students gathered at the Blue Grass Airport outside Lexington, Kentucky, to show their support for a state gubernatorial candidate and to demonstrate their lack of regard for Mrs. Richard Nixon, then about to leave Lexington from the airport after a public appearance in the city. When the demonstration had ended, the students got into their automobiles and formed a procession of six to 10 cars along the airport access road to the main highway. A state policeman, observing that one of the first cars in the entourage carried an expired Louisiana license plate, directed the driver, one Mendez, to pull off the road. He complied. Appellant Colten, followed by other motorists in the procession, also pulled off the highway, and Colten approached the officer to find out what was the matter. The policeman explained that the Mendez car bore an

expired plate and that a traffic summons would be issued. Colten made some effort to enter into a conversation about the summons. His theory was that Mendez may have received an extension of time in which to obtain new plates. In order to avoid Colten and to complete the issuance of the summons, the policeman took Mendez to the patrol car. Meanwhile, other students had left their cars and additional [***588] policemen, having completed their duties at the airport and having noticed the roadside scene, stopped their cars in the traffic lane abreast of the students' vehicles. At least one officer took responsibility for directing traffic, although testimony differed as to the need for doing so. Testimony also differed as to the number of policemen and students present, how many students left their cars and how many were at one time or another standing in the roadway. A state police captain asked on four or five occasions that the group disperse. At least five times [*107] police asked Colten to leave. [1] A state trooper made two requests, remarking at least once: "Now, this is none of your affair . . . get back in your car and please move on and clear the road." In response to at least one of these requests Colten replied that he wished to make a transportation arrangement for his friend Mendez and the occupants of the Mendez car, which he understood was to be towed away. Another officer asked three times that Colten depart and when Colten failed to move away he was arrested for violating Kentucky's disorderly conduct statute, Ky. Rev. Stat. § 437.016 (Supp. 1968). The arresting officer testified that Colten's response to the order had been to say that he intended to stay and see what might happen. Colten disputed this. He testified that he expressed a willingness to leave but wanted [**1956] first to make a transportation arrangement. At trial he added that he feared violence on the part of the police . [2]

1 This version of the facts is taken largely from the opinion of the Kentucky Court of Appeals. *Colten v. Commonwealth*, 467 S. W. 2d 374, 375-376 (Ky. 1971). Colten testified that only the arresting officer ordered him to leave and that the three orders were uttered in such rapid succession that he had little opportunity to comply. App. 49-51. This was disputed by a policeman who testified that earlier he twice asked appellant to leave and gave the admonition quoted in the text. *Id.*, at 23-24. Our own examination of the record indicates that the Kentucky courts' resolution of this factual dispute was a fair one. Cf. *Cox v. Louisiana*, 379 U.S. 536, 545 n. 8 (1965).

2 In his brief appellant makes a passing reference to the possibility of violence on the part of police and suggests that he remained on the scene to avert misdeeds or to be a potential witness to them. Yet he builds no factual basis for a reasonable apprehension of violence and seemingly dispels whatever force such a contention might have when he states in his brief: "In the overwhelming majority of cases, that suspicion [of police brutality] is undoubtedly wrong, but it is there." Brief for Appellant 36.

The complaint and warrant charging disorderly conduct, which carries a maximum penalty of six months in jail and a fine of $ 500, were addressed to the Quarterly [*108] Court of Fayette County, where Colten was tried, convicted, and fined $ 10. Exercising his right to a trial *de novo* in a court of general jurisdiction, Colten "appealed," as the Kentucky rules style this recourse, Ky. Rule Crim. Proc. 12.02, to the Criminal Division of the Fayette Circuit Court. By consent, trial was to the court and Colten was convicted of disorderly conduct and this time fined $ 50. The Kentucky Court of Appeals affirmed. *Colten v. Commonwealth*, 467 S. W. 2d 374 (1971). It rejected Colten's constitutional challenges to the statute and his claim that the punishment imposed was impermissible, under *North Carolina v. Pearce*, 395 U.S. 711 (1969). We noted probable jurisdiction. 404 U.S. 1014 (1972).

[***589] I

Colten was convicted of violating Ky. Rev. Stat. § 437.016 (1)(f) (Supp. 1968), which states:

"(1) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

. . . .

"(f) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse . . . ."

The Kentucky Court of Appeals interpreted the statute in the following way:

"As reasonably construed, the statute does not prohibit the lawful exercise of any constitutional right.

We think that the plain meaning of the statute, in requiring that the proscribed conduct be done 'with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof,' is that the specified intent must be the *predominant* intent. Predominance can be determined either (1) from the fact that no bona fide intent to exercise a constitutional [*109] right appears to have existed or (2) from the fact that the interest to be advanced by the particular exercise of a constitutional right is insignificant in comparison with the inconvenience, annoyance or alarm caused by the exercise." 467 S. W. 2d, at 377.

The evidence warranted a finding, the Kentucky court concluded, that at the time of his arrest, "Colten was not undertaking to exercise any constitutionally protected freedom." Rather, he "appears to have had no purpose other than to cause inconvenience and annoyance. So the statute as applied here did not chill or stifle the exercise of any constitutional right." *Id.*, at 378.

[***LEdHR1] [1]Based on our own examination of the record, we perceive no justification for setting aside the conclusion of the state court that when arrested appellant was not engaged in activity protected by the First Amendment. Colten insists that in seeking to arrange transportation for Mendez and in observing the issuance of a traffic citation he was disseminating and receiving information. But this is a strained, near-frivolous contention and we have [**1957] little doubt that Colten's conduct in refusing to move on after being directed to do so was not, without more, protected by the First Amendment. Nor can we believe that Colten, although he was not trespassing or disobeying any traffic regulation himself, could not be required to move on. He had no constitutional right to observe the issuance of a traffic ticket or to engage the issuing officer in conversation at that time. The State has a legitimate interest in enforcing its traffic laws and its officers were entitled to enforce them free from possible interference or interruption from bystanders, even those claiming a third-party interest in the transaction. Here the police had cause for apprehension that a roadside strip, crowded with persons and automobiles, might expose the entourage, passing motorists, and police to the risk of accident. We cannot disagree with the finding [*110] below that the order to disperse was suited to the occasion. We thus see nothing unconstitutional in the manner in which the statute was applied.

II

[***LEdHR2] [2] [***LEdHR3] [3]Neither are we convinced that the statute is either impermissibly vague or broad. We perceive [***590] no violation of "the underlying principle . . . that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U.S. 612, 617 (1954); cf. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Here the statute authorized conviction for refusing to disperse with the intent of causing inconvenience, annoyance, or alarm. Any person who stands in a group of persons along a highway where the police are investigating a traffic violation and seeks to engage the attention of an officer issuing a summons should understand that he could be convicted under subdivision (f) of Kentucky's statute if he fails to obey an order to move on. The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. We agree with the Kentucky court when it said: "We believe that citizens who desire to obey the statute will have no difficulty in understanding it . . . ." *Colten v. Commonwealth*, 467 S. W. 2d, at 378.

Colten also argues that the Kentucky statute is overbroad. He relies on *Cox v. Louisiana*, 379 U.S. 536 (1965), where the Court held unconstitutional a breach-of-peace statute construed to forbid causing agitation or [*111] disquiet coupled with refusing to move on when ordered to do so. The Court invalidated the statute on the ground that it permitted conviction where the mere expression of unpopular views prompted the order that is disobeyed. Colten argues that the Kentucky statute must be stricken down for the same reason.

[***LEdHR4] [4]As the Kentucky statute was construed by the state court, however, a crime is committed only where there is no bona fide intention to exercise a constitutional right -- in which event, by definition, the statute infringes no protected speech or conduct -- or where the interest so clearly outweighs the collective interest sought to be asserted that the latter must be deemed insubstantial. The court hypothesized, for

example, that one could be convicted for disorderly conduct if at a symphony concert he arose and began lecturing to the audience on leghorn chickens. 467 S. W. 2d, at 377. In so confining the reach of its statute, the Kentucky court avoided the shortcomings of the statute invalidated in the *Cox* case. Individuals may not be convicted under the Kentucky statute merely for expressing unpopular [**1958] or annoying ideas. The statute comes into operation only when the individual's interest in expression, judged in the light of all relevant factors, is "minuscule" compared to a particular public interest in preventing that expression or conduct at that time and place. As we understand this case, appellant's own conduct was not immune under the First Amendment and neither is his conviction vulnerable on the ground that the statute threatens constitutionally protected conduct of others. [3]

3 Appellant attacks on overbreadth grounds other subsections of the disorderly conduct statute, such as those that prohibit the making of an "unreasonable noise" and the use of "abusive or obscene language." Ky. Rev. Stat. §§ 437.016 (b), (c) (Supp. 1968). But Colten was not convicted of violating these subsections and they are not properly before us in this case.

[*112] III

[***591] Kentucky, like many other States, [4] has a two-tier system for adjudicating less serious criminal cases. In Kentucky, at the option of the arresting officer, those crimes classified under state law as misdemeanors [5] may be charged and tried in a so-called inferior court, [6] where, as in the normal trial setting, a defendant may choose to have a trial or to plead guilty. If convicted after trial or on a guilty plea, however, he has a right to a trial *de novo* in a court of general criminal jurisdiction, *Brown v. Hoblitzell*, 307 S. W. 2d 739 (Ky. 1957), so [*113] long as he applies within the statutory time. [7] The right to a new trial is absolute. A defendant need not allege error in the inferior court proceeding. If he seeks a new trial, the Kentucky statutory scheme contemplates that the slate be wiped clean. Ky. Rule Crim. Proc. 12.06. Prosecution and defense begin anew. By the same token neither the judge nor jury that determines guilt or fixes a penalty in the trial *de novo* is in any way bound by the inferior court's findings or judgment. The case is to be regarded exactly as if it had been brought there in the first instance. A convicted defendant may seek review in the state appellate courts in the same manner as a person tried initially in the general criminal court. Ky. Rev. Stat. § 23.032 (Supp. 1968). However, a defendant convicted after a trial or plea in an inferior court may not seek ordinary appellate review of the inferior court's ruling. His recourse is the trial *de novo*.

4 *E. g.*, Ariz. Rev. Stat. Ann. § 22-371 *et seq.* (1956 and Supp. 1971-1972); Ark. Stat. Ann. § 44-501 *et seq.* (1964); Colo. Rule Crim. Proc. 37 (f); Fla. Stat. Ann. § 924.41 *et seq.* (Supp. 1972-1973); Ind. Ann. Stat. § 9-713 *et seq.* (1956 and Supp. 1971); Kan. Stat. Ann. § 22-3610 *et seq.* (Supp. 1971); Me. Dist. Ct. Crim. Rule 37 *et seq.*; Md. Ann. Code, Art. 5, § 43 (1968); Mich. Stat. Ann. § 28.1226 (Supp. 1972); Minn. Stat. §§ 488.20, 633.20 *et seq.* (1969); Miss. Code Ann. §§ 1201, 1202 (Supp. 1971); Mo. Sup. Ct. Rule 22; Mont. Rev. Codes Ann. § 95-2001 *et seq.* (1947); Neb. Rev. Stat. § 29-601 *et seq.* (1964); Nev. Rev. Stat. § 189.010 *et seq.* (1969); N. H. Rev. Stat. Ann. §§ 502:18, 502-A:11-12 (1968); N. M. Stat. Ann. § 36-15-1 *et seq.* (Supp. 1971); N. C. Gen. Stat. §§ 15-177 *et seq.*, 20-138 (1965 and Supp. 1971); N. D. Cent. Code § 33-12-40 *et seq.* (1960); Pa. Stat. Ann., Tit. 42, § 3001 *et seq.* (Supp. 1972-1973); Pa. Const., Sched. Art. 5, § 16 (r)(iii) (Philadelphia); Tex. Code Crim. Proc., Arts. 44.17, 45.10 (1966); Va. Code Ann. § 16.1-129 *et seq.* (1950); Wash. Rev. Code § 3.50.380 *et seq.* (Supp. 1971); W. Va. Code Ann. § 50-18-1 *et seq.* (1966 and Supp. 1971).

5 Misdemeanors are defined as those crimes punishable by a maximum of one year in jail and a $ 500 fine. Ky. Rev. Stat. §§ 25.010, 26.010 (1962 and Supp. 1968).

6 What the Kentucky Court of Appeals calls inferior courts include county, quarterly, justice's and police courts. In all cases in which the punishment is limited to a fine of $ 20, the inferior courts have original jurisdiction. Ky. Rev. Stat. § 25.010 (1962). In all other misdemeanor cases their jurisdiction is concurrent with that of the circuit courts.

7 Ky. Rev. Stat. § 23.032 (Supp. 1968). Kentucky denominates an application for a trial *de novo* an "appeal." However, the right to a new trial is unconditional and exists even when a defendant seeks redetermination of questions of law. Ky. Rules Crim. Proc. 12.02, 12.06.

[**1959] While by definition two-tier systems throughout the States have in common the trial *de novo* feature, [8] there are differences in the kind of trial available in the inferior courts of first instance, whether known as county, municipal, police, or justice [***592] of the peace courts, or are otherwise referred to. Depending upon the jurisdiction and offense charged, many such systems provide as complete protection for a criminal defendant's constitutional rights as do courts empowered to try more serious crimes. Others, however, lack some of the safeguards provided in more serious criminal cases. Although appellant here was entitled to a six-man jury, cf. Williams v. Florida, 399 U.S. 78 (1970), which he waived, some [*114] States do not provide for trial by jury, [9] even in instances where the authorized punishment would entitle the accused to such tribunal. Cf. Duncan v. Louisiana, 391 U.S. 145 (1968). Some, including Kentucky, do not record proceedings [10] and the judges may not be trained for their positions either by experience or schooling. [11]

8 A general discussion of how these courts operate may be found in 47 Am. Jur. 2d, Justices of the Peace §§ 49-120.

9 *E. g.*, Massachusetts, North Carolina, Pennsylvania. *Mann v. Commonwealth*, Mass. , 271 N. E. 2d 331 (1971); *State v. Spencer*, 276 N. C. 535, 173 S. E. 2d 765 (1970); Pa. Stat. Ann., Tit. 42, § 3001 *et seq.* (Supp. 1972-1973); Pa. Const., Sched. Art. 5, § 16 (r)(iii) (Philadelphia).

10 *E. g.*, North Carolina, Virginia. *State v. Sparrow*, 276 N. C. 499, 173 S. E. 2d 897 (1970); *Evans v. City of Richmond*, 210 Va. 403, 171 S. E. 2d 247 (1969).

11 See, *e. g.*, *People v. Olary*, 382 Mich. 559, 170 N. W. 2d 842 (1969); *State v. DeBonis*, 58 N. J. 182, 276 A. 2d 137 (1971). However, the trial judge in the Fayette Quarterly Court, where Colten was tried, is a professional.

Two justifications are asserted for such tribunals: first, in this day of increasing burdens on state judiciaries, these courts are designed, in the interest of both the defendant and the State, to provide speedier and less costly adjudications than may be possible in the criminal courts of general jurisdiction where the full range of constitutional guarantees is available; second, if the defendant is not satisfied with the results of his first trial he has the unconditional right to a new trial in a superior court, unprejudiced by the proceedings or the outcome in the inferior courts. Colten, however, considers the Kentucky system to be infirm because the judge in a trial *de novo* is empowered to sentence anew and is not bound to stay within the limits of the sentence imposed by the inferior court. He bases his attack both on the Due Process Clause, as interpreted in *North Carolina v. Pearce*, 395 U.S. 711 (1969), and on the Fifth Amendment's Double Jeopardy Clause. The [*115] issues appellant raises have produced a division among the state courts that have considered them [12] as well as a conflict among the federal circuits. [13]

12 *North Carolina v. Pearce*, 395 U.S. 711 (1969), applies: *Bronstein v. Superior Court*, 106 Ariz. 251, 475 P. 2d 235 (1970); *State v. Shak*, 51 Haw. 626, 466 P. 2d 420 (1970); *Eldridge v. State*, 256 Ind. 113, 267 N. E. 2d 48 (1971); *Cherry v. State*, 9 Md. App. 416, 264 A. 2d 887 (1970); *Commonwealth v. Harper*, 219 Pa. Super. 100, 280 A. 2d 637 (1971).

Contra: *Mann v. Commonwealth*, Mass. , 271 N. E. 2d 331 (1971); *People v. Olary*, 382 Mich. 559, 170 N. W. 2d 842 (1969); *State v. Stanosheck*, 186 Neb. 17, 180 N. W. 2d 226 (1970); *State v. Sparrow*, 276 N. C. 499, 173 S. E. 2d 897 (1970); *Evans v. City of Richmond*, 210 Va. 403, 171 S. E. 2d 247 (1969).

New Mexico prohibits enhanced sentencing altogether. N. M. Stat. Ann. § 36-15-3 (Supp. 1971).

13 *Pearce* applies: *Rice v. North Carolina*, 434 F.2d 297 (CA4 1970), vacated and remanded on ground of possible mootness, 404 U.S. 244 (1971); *contra:* *Lemieux v. Robbins*, 414 F.2d 353 (CA1 1969), cert. denied, 397 U.S. 1017 (1970). See also *Manns v. Allman*, 324 F.Supp. 1149 (WD Va. 1971), holding that *Pearce* does not apply where an enhanced penalty is imposed by a jury rather than a judge.

[***LEdHR5] [5]Colten rightly reads *Pearce* to forbid, following a successful appeal [***593] and reconviction, [**1960] the imposition of a greater punishment than was imposed after the first trial, absent specified findings that have not been made here. He insists that the *Pearce* rule is applicable here and that there is no relevant difference between the *Pearce* model and the Kentucky two-tier trial *de novo* system. Both, he

asserts, involve reconviction and resentencing, both provide the convicted defendant with the right to "appeal" and in both -- even though under the Kentucky scheme the "appeal" is in reality a trial *de novo* -- a penalty for the same crime is fixed twice, with the same potential for an increased penalty upon a successful "appeal."

[*116] But *Pearce* did not turn simply on the fact of conviction, appeal, reversal, reconviction, and a greater sentence. The court was there concerned with two defendants who, after their convictions had been set aside on appeal, were reconvicted for the same offenses and sentenced to longer prison terms. In one case the term was increased from 10 to 25 years. Positing that a more severe penalty after reconviction would violate due process of law if imposed as purposeful punishment for having successfully appealed, the court concluded that such untoward sentences occurred with sufficient frequency to warrant the imposition of a prophylactic rule to ensure "that vindictiveness against a defendant for having successfully attacked his first conviction . . . [would] play no part in the sentence he receives after a new trial . . ." and to ensure that the apprehension of such vindictiveness does not "deter a defendant's exercise of the right to appeal or collaterally attack his first conviction . . . ." 395 U.S., at 725.

Our view of the Kentucky two-tier system of administering criminal justice, however, does not lead us to believe, and there is nothing in the record or presented in the briefs to show, that the hazard of being penalized for seeking a new trial, which underlay the holding of *Pearce*, also inheres in the *de novo* trial arrangement. Nor are we convinced that defendants convicted in Kentucky's inferior courts would be deterred from seeking a second trial out of fear of judicial vindictiveness. The possibility of vindictiveness, found to exist in *Pearce*, is not inherent in the Kentucky two-tier system.

We note first the obvious: that the court which conducted Colten's trial and imposed the final sentence was not the court with whose work Colten was sufficiently dissatisfied to seek a different result on appeal; and it [*117] is not the court that is asked to do over what it thought it had already done correctly. Nor is the *de novo* court even asked to find error in another court's work. Rather, the Kentucky court in which Colten had the unrestricted right to have a new trial was merely asked to accord the same trial, under the same rules and procedures, available to defendants whose cases are begun in that court in the first instance. It would also appear that, however understandably a court of general jurisdiction might feel that the defendant who has had a due process trial ought to be satisfied with it, the *de novo* court in the two-tier system is much more likely to reflect the attitude of the Kentucky Court of Appeals in this case when it stated that "the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts [***594] of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses." *Colten v. Commonwealth*, 467 S. W. 2d, at 379. We see no reason, and none is offered, to assume that the *de novo* court will deal any more strictly with those who insist on a trial in the superior court after conviction in the Quarterly Court than it would with those defendants whose cases are filed originally in the superior court and who choose to put the State to its proof in a trial subject to constitutional guarantees.

It may often be that the superior court will impose a punishment more severe than that received from the inferior court. But it no more follows that such [**1961] a sentence is a vindictive penalty for seeking a superior court trial than that the inferior court imposed a lenient penalty. The trial *de novo* represents a completely fresh determination of guilt or innocence. It is not an appeal on the record. As far as we know, the record from the lower court is not before the superior court and is irrelevant [*118] to its proceedings. In all likelihood, the trial *de novo* court is not even informed of the sentence imposed in the inferior court and can hardly be said to have "enhanced" the sentence. [14] In Kentucky, disorderly conduct is punishable by six months in jail and a fine of $ 500. The inferior court fined Colten $ 10, the trial *de novo* court $ 50. We have no basis for concluding that the latter court did anything other than invoke the normal processes of a criminal trial and then sentence in accordance with the normal standards applied in that court to cases tried there in the first instance. We cannot conclude, on the basis of the present record or our understanding, that the prophylactic rule announced in *Pearce* is appropriate in the context of the system by which Kentucky administers criminal justice in the less serious criminal cases.

14 In Colten's case the superior court judge did know about the $ 10 fine. Colten's counsel in closing argument stated what the penalty had

been, App. 93, although clearly he need not have done so.

[***LEdHR6] [6]It is suggested, however, that the sentencing strictures imposed by *Pearce* are essential in order to minimize an asserted unfairness to criminal defendants who must endure a trial in an inferior court with less-than-adequate protections in order to secure a trial comporting completely with constitutional guarantees. We are not persuaded, however, that the Kentucky arrangement for dealing with the less serious offenses disadvantages defendants any more or any less than trials conducted in a court of general jurisdiction in the first instance, as long as the latter are always available. Proceedings in the inferior courts are simple and speedy, and, if the results in Colten's case are any evidence, the penalty is not characteristically severe. Such proceedings offer a defendant the opportunity to learn about the prosecution's case and, if he chooses, he need not reveal his own. He may [*119] also plead guilty without a trial and promptly secure a *de novo* trial in a court of general criminal jurisdiction. He cannot, and will not, face the realistic threat of a prison sentence in the inferior court without having the help of counsel, whose advice will also be available in determining whether to seek a new trial, with the slate wiped clean, or to accept the penalty imposed by the inferior [***595] court. The State has no such options. Should it not prevail in the lower court, the case is terminated, whereas the defendant has the choice of beginning anew. In reality his choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of judge or jury in the superior court, with sentence to be determined by the full record made in that court. We cannot say that the Kentucky trial *de novo* system, as such, is unconstitutional or that it presents hazards warranting the restraints called for in *North Carolina* v. *Pearce*, particularly since such restraints might, to the detriment of both defendant and State, diminish the likelihood that inferior courts would impose lenient sentences whose effect would be to limit the discretion of a superior court judge or jury if the defendant is retried and found guilty.

[***LEdHR7] [7]Colten's alternative contention is that the Double Jeopardy Clause prohibits the imposition of an enhanced penalty upon reconviction. The *Pearce* Court rejected the same contention in the context of that case, 395 U.S., at 719-720.Colten urges that his claim is stronger because the Kentucky system forces a defendant to expose himself to jeopardy as a price for securing a trial that comports with the Constitution. That was, of course, the [**1962] situation in *Pearce*, where reversal of the first conviction was for constitutional error. The contention also ignores that a defendant can bypass the inferior court simply by pleading guilty and erasing immediately [*120] thereafter any consequence that would otherwise follow from tendering the plea.

The judgment of the Kentucky Court of Appeals is

Affirmed.

DISSENT BY: DOUGLAS; MARSHALL

DISSENT

MR. JUSTICE DOUGLAS, dissenting.

This case arose in the aftermath of a visit of the President's wife to Lexington, Kentucky, where nothing untoward happened. After her plane had left, appellant and a group of his friends got into "some six to ten cars" and started down the access road leading from the airport to the main highway. The lead car was stopped by the police because of an expired license plate and at the officer's request, pulled onto the shoulder of the access road. Appellant, who followed, also pulled onto the shoulder as did the other cars in the group. So there were no cars belonging to appellant's group blocking traffic.

The people in the cars, however, walked around, some talking with the police, and appellant talking mostly with the driver of the lead car. Appellant claimed that he only wanted to advise the man who was getting the citation of his rights, and to help arrange for the driver and passengers in the lead car to get to Lexington. The Court of Appeals of Kentucky, however, said that "Colten's real intent was simply to aggravate, harass, annoy and inconvenience the police, for no purpose other than the pleasure of aggravation, harassment, annoyance and inconvenience." 467 S. W. 2d 374, 376.

The statute under which petitioner was convicted read in relevant part as follows: [1]

" [***596] (1) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof,

he:

. . . .

"(f) Congregates with other persons in a public [*121] place and refuses to comply with a lawful order of the police to disperse . . . ."

1 Ky. Rev. Stat. § 437.016 (Supp. 1968).

The Court of Appeals sustained the statute as applied because the inconvenience [2] and annoyance to the police far outweighed appellant's speech which fell "far below the level of minimum social value." 467 S. W. 2d, at 377. That court, citing our obscenity cases, said if "the lack of redeeming social value is a basis upon which the right of freedom of speech may be required to yield to the protection of contemporary standards of morality . . . it would seem that the public's interest in being protected from inconvenience, annoyance or alarm should prevail over any claimed right to utter speech that has no social value." *Ibid.*

2 Neither appellant nor any in his group blocked traffic, their cars being parked on the shoulder of the road. Any blocking of traffic was caused by police who pulled up to see what was going on, leaving their patrol cars in the access road. See 467 S. W. 2d 374, 376.

But the speech involved here was nonerotic, having no suggestion or flavor of the pornographic.

The speech here was quiet, not boisterous, and it was devoid of "fighting words."

Moreover, this was not a case where speech had moved into action, involving overt acts. There were no fisticuffs, no disorderly conduct in the normal meaning of the words.

The Court of Appeals said "Colten was not seeking to express a thought to any listener or to disseminate any idea." 467 S. W. 2d, at 378. Nor was he, it said, "exercising the right of peaceable assembly." *Ibid.*

He was, however, speaking to a representative of government, the police. And it is to government that one goes "for a redress of grievances," to use an almost forgotten phrase of the First Amendment. But it is said that the purpose [**1963] was "to cause inconvenience and annoyance." [*122] Since when have we Americans been expected to bow submissively to authority and speak with awe and reverence to those who represent us? The constitutional theory is that we the people are the sovereigns, the state and federal officials only our agents. We who have the final word can speak softly or angrily. We can seek to challenge and annoy, as we need not stay docile and quiet. The situation might have indicated that Colten's techniques were ill-suited to the mission he was on, that diplomacy would have been more effective. But at the constitutional level speech need not be a sedative; it can be disruptive. As we said in *Terminiello v. Chicago*, 337 U.S. 1, 4:

"[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects [***597] as it presses for acceptance of an idea."

Under that test this conviction should be set aside.

MR. JUSTICE MARSHALL, dissenting.

In my view, *North Carolina v. Pearce*, 395 U.S. 711 (1969), requires a reversal of this case.

In this case the Court correctly evaluates Kentucky's procedure: "[A] defendant convicted after a trial or plea in an inferior court may not seek ordinary appellate review of the inferior court's ruling. His recourse is the trial *de novo*." From this the conclusion is reached that the "trial *de novo*" is not an appeal. What, then, is it?

[*123] The pertinent Kentucky Rules provide:

12.02 *Manner of Taking*

"(1) An appeal to the circuit court is taken by filing with the clerk thereof a certified copy of the judgment and the amount of costs, and causing to be executed before the clerk a bond to the effect that the defendant will pay the costs of the appeal and perform the judgment which may be rendered against him on the appeal; whereupon, the clerk shall issue an order to the judge or the justice rendering the judgment, to stay proceedings thereon, and to transmit to the office of said clerk all the original papers in the prosecution.

"(2) The applicable provisions governing bail shall

apply to the bond provided for in subsection (1).

"(3) After the service of the order to stay proceedings, no execution shall be issued from the inferior court, and any officer on whom the order is served shall return the execution in his hands as suspended by appeal."

12.06 *Schedule and Manner of Trial; Judgment*

"Appeals taken to the circuit court shall be docketed by the clerk thereof as a regular criminal prosecution and shall be tried anew, as if no judgment had been rendered, and the judgment shall be considered as affirmed to the extent of the punishment, if any, adjudged against the defendant in the circuit court, and thereupon he shall be adjudged to pay the costs of the appeal. If an appeal taken to the circuit court be dismissed, the judgment of the court from which it was taken shall stand affirmed and the costs of the appeal shall be paid by the party whose appeal is dismissed."

[*124] In *Pearce* this Court reaffirmed the restrictions upon heavier sentences after appeal:

"It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence [**1964] upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. Where, as in each of the cases before us, the original conviction has been set aside because of a constitutional error, the imposition of such a punishment, 'penalizing those who choose to exercise' constitutional rights, 'would be patently unconstitutional.' *United States v. Jackson*, 390 U.S. 570, 581. And the very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to 'chill the exercise of basic [***598] constitutional rights.' *Id.*, at 582. See also *Griffin v. California*, 380 U.S. 609; cf. *Johnson v. Avery*, 393 U.S. 483. But even if the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law. 'A new sentence, with enhanced punishment, based upon such a reason, would be a flagrant violation of the rights of the defendant.' *Nichols v. United States*, 106 F. 672, 679. A court is 'without right to . . . put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered. . . . It is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice.' *Worcester v. Commissioner*, 370 F.2d 713, 718. See *Short v. United States*, 120 U. S. App. D. C. 165, 167, [*125] 344 F.2d 550, 552. 'This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin v. Illinois*, 351 U.S. 12; *Douglas v. California*, 372 U.S. 353; *Lane v. Brown*, 372 U.S. 477; *Draper v. Washington*, 372 U.S. 487.' *Rinaldi v. Yeager*, 384 U.S. 305, 310-311." 395 U.S., at 723-725.

This Court today seeks to escape this determination by such conclusions as:

"Our view of the Kentucky two-tier system of administering criminal justice, however, does not lead us to believe, and there is nothing in the record or presented in the briefs to show, that the hazard of being penalized for seeking a new trial, which underlay the holding of *Pearce*, also inheres in the *de novo* trial arrangement. Nor are we convinced that defendants convicted in Kentucky's inferior courts would be deterred from seeking a second trial out of fear of judicial vindictiveness. The possibility of vindictiveness, found to exist in *Pearce*, is not inherent in the Kentucky two-tier system."

To the contrary, appellant's Jurisdictional Statement cites us to an order of the same judge who tried this case "*de novo*" in which he accepted a motion to dismiss an appeal in a similar case with the following statement:

"The Commonwealth Attorney has advised the Court that he does not wish to oppose the defendant's motion to dismiss.

"While the defendant may be correct in his assumption that the citizens of this community have a hostile attitude toward students who would attempt [*126] to disrupt the university, it may be that this hostility has been earned, and it is conceivable that a jury composed of citizens of this community might impose a more severe sentence than that imposed in the court below. Nonetheless, the Court after having reviewed the law submitted by the defendant [**1965] and having conducted its own research of the law is of the opinion

that the defendant [***599] has a right to dismiss his appeal and that he cannot be forced into a new trial if he does not desire to continue his appeal. For that reason the defendant's motion to have his appeal dismissed be and the same is hereby granted."

The record in this case also shows that the trial judge was informed of the lower $ 10 fine in the original trial and consequently knowingly increased it to $ 50. Finally, it should not be forgotten that under this Court's ruling today he could have increased it to $ 500 plus six months in jail.

The Court suggests that for some reason there is less danger of vindictive sentencing on the second trial in this context than after an ordinary appeal. Specifically, the Court faults the appellant for failing to present evidence that the danger of vindictiveness is as great here as in the precise context presented in *Pearce*. But *Pearce* did not rest on evidence that most trial judges are hostile to defendants who obtain a new trial after appeal. *Pearce* was based, rather, on the recognition that whenever a defendant is tried twice for the same offense, there is inherent in the situation the danger of vindictive sentencing the second time around, and that this danger will deter some defendants from seeking a second trial. This danger, with its deterrent effect, is exactly the same even though the second trial takes place in a different court from the first. Certainly a defendant has good reason to fear that his case will [*127] not be well received by a second court after he rejects a disposition as favorable as the sentence originally imposed in this case.

Pearce was directed toward a new trial after an appellate reversal. This case involves a new trial without an appellate reversal. The core problem is the second trial. In both cases we have a second full and complete trial. *Pearce* should control.

REFERENCES

21 Am Jur 2d, Criminal Law 16, 17, 581

US L Ed Digest, Constitutional Law 848, 925.8; Statutes 18

ALR Digests, Constitutional Law 680, 791; Statutes 29

L Ed Index to Anno, Constitutional Law; Statutes

ALR Quick Index, Certainty and Definiteness; Due Process of Law

Federal Quick Index, Certainty and Definiteness; Due Process of Law

Annotation References:

Limitations under double jeopardy clause of Fifth Amendment upon state criminal prosecutions. 25 L Ed 2d 968.

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime. 16 L Ed 2d 1231.

The Supreme Court and the right of free speech and press. 93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.

Vagueness as invalidating statutes or ordinances dealing with disorderly persons or conduct. 12 ALR3d 1448.

Propriety of increased punishment on new trial for same offense. 12 ALR3d 978.

Failure or refusal to obey police officer's order to move on, on street, as disorderly conduct. 65 ALR2d 1152.

EXHIBIT 4

LEXSEE

Caution
As of: Jan 07, 2011

DISTRICT OF COLUMBIA, et al., Petitioners v. DICK ANTHONY HELLER

No. 07-290

SUPREME COURT OF THE UNITED STATES

554 U.S. 570; 128 S. Ct. 2783; 171 L. Ed. 2d 637; 2008 U.S. LEXIS 5268; 76 U.S.L.W. 4631; 21 Fla. L. Weekly Fed. S 497

March 18, 2008, Argued
June 26, 2008, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

SUBSEQUENT HISTORY: Related proceeding at Heller v. District of Columbia, 698 F. Supp. 2d 179, 2010 U.S. Dist. LEXIS 29063 (D.D.C., Mar. 26, 2010)

PRIOR HISTORY:

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Parker v. District of Columbia, 478 F.3d 370, 375 U.S. App. D.C. 140, 2007 U.S. App. LEXIS 5519 (2007)

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner District of Columbia sought certiorari review of a judgment from the United States Court of Appeals for the District of Columbia Circuit which held that the Second Amendment protected an individual's right to possess firearms and that the total ban on handguns under D.C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4), as well as the requirement under D.C. Code § 7-2507.02 that firearms be kept nonfunctional, violated that right.

OVERVIEW: Respondent, a special policeman, filed the instant action after the District refused his application to register a handgun. The Court held that the District's ban on handgun possession in the home and its prohibition against rendering any lawful firearm in the home operable for the purposes of immediate self-defense violated the Second Amendment. The Court held that the Second Amendment protected an individual right to possess a firearm unconnected with service in a militia and to use that firearm for traditionally lawful purposes, such as self-defense within the home. The Court determined that the Second Amendment's prefatory clause announced a purpose but did not limit or expand the scope of the operative clause. The operative clause's text and history demonstrated that it connoted an individual right to keep and bear arms, and the Court's reading of the operative clause was consistent with the announced purpose of the prefatory clause. None of the Court's precedents foreclosed its conclusions. The Court held that the Second Amendment right was not unlimited, and it noted that its opinion should not be taken to cast doubt on certain long-standing prohibitions related to firearms.

OUTCOME: The Court affirmed the judgment of the Court of Appeals. Assuming respondent was not disqualified from exercising Second Amendment rights, the Court held that the District must permit respondent to register his handgun and must issue him a license to carry

it in his home. 5-4 Decision; 2 Dissents.

SYLLABUS

District of Columbia law bans handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns; provides separately that no person may carry an unlicensed handgun, but authorizes the police chief to issue 1-year licenses; and requires residents to keep lawfully owned firearms unloaded and dissembled or bound by a trigger lock or similar device. Respondent Heller, a D. C. special policeman, applied to register a handgun he wished to keep at home, but the District refused. He filed this suit seeking, on Second Amendment [***646] grounds, to enjoin the city from enforcing the bar on handgun registration, the licensing requirement insofar as it prohibits carrying an unlicensed firearm in the home, and the trigger-lock requirement insofar as it prohibits the use of functional firearms in the home. The District Court dismissed the suit, but the D. C. Circuit reversed, holding that the Second Amendment protects an individual's right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right.

Held:

1. The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. Pp. 576-626.

(a) The Amendment's prefatory clause announces a purpose, but does not limit or expand the scope of the second part, the operative clause. The operative clause's text and history demonstrate that it connotes an individual right to keep and bear arms. Pp. 567-595.

(b) The prefatory clause comports with the Court's interpretation of the operative clause. The "militia" comprised all males physically capable of acting in concert for the common defense. The Antifederalists feared that the Federal Government would disarm the people in order to disable this citizens' militia, enabling a politicized standing army or a select militia to rule. The response was to deny Congress power to abridge the ancient right of individuals to keep and bear arms, so that the ideal of a citizens' militia would be preserved. Pp. 595-600.

(c) The Court's interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed the Second Amendment. Pp. 600-603.

(d) The Second Amendment's drafting history, while of dubious interpretive worth, reveals three state Second Amendment proposals that unequivocally referred to an individual right to bear arms. Pp. 603-605.

(e) Interpretation of the Second Amendment by scholars, courts, and legislators, from immediately after its ratification through the late 19th century, also supports the Court's conclusion. Pp. 605-619.

(f) None of the Court's precedents forecloses the Court's interpretation. Neither *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L. Ed. 588, nor *Presser v. Illinois*, 116 U.S. 252, 264-265, 6 S. Ct. 580, 29 L. Ed. 615, refutes the individual-rights interpretation. *United States v. Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373, does not limit the right to keep and bear arms to militia purposes, but rather limits the type of weapon to which the right applies to those used by the militia, *i.e.*, those in common use for lawful purposes. Pp. 619-626.

2. Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose: For example, concealed weapons prohibitions have been upheld under the Amendment or state analogues. The Court's opinion should not be taken to cast doubt on longstanding 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. *Miller*'s holding that the sorts [***647] of weapons protected are those "in common use at the time" finds support in the historical tradition of prohibiting the carrying of dangerous and unusual weapons. Pp. 626-628.

3. The handgun ban and the trigger-lock requirement (as applied to self-defense) violate the Second Amendment. The District's total ban on handgun possession in the home amounts to a prohibition on an

entire class of "arms" that Americans overwhelmingly choose for the lawful purpose of self-defense. Under any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition--in the place where the importance of the lawful defense of self, family, and property is most acute--would fail constitutional muster. Similarly, the requirement that any lawful firearm in the home be disassembled or bound by a trigger lock makes it impossible for citizens to use arms for the core lawful purpose of self-defense and is hence unconstitutional. Because Heller conceded at oral argument that the D. C. licensing law is permissible if it is not enforced arbitrarily and capriciously, the Court assumes that a license will satisfy his prayer for relief and does not address the licensing requirement. Assuming he is not disqualified from exercising Second Amendment rights, the District must permit Heller to register his handgun and must issue him a license to carry it in the home. Pp. 628-636.

375 U.S. App. D.C. 140, 478 F.3d 370, affirmed.

COUNSEL: Walter Dellinger argued the cause for petitioners.

Paul D. Clement argued the cause for the United States, as amicus curiae, by special leave of the court.

Alan Gura argued the cause for respondent

JUDGES: Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, and Alito, JJ., joined. Stevens, J., filed a dissenting opinion, in which Souter, Ginsburg, and Breyer, JJ., joined, *post*, p. 636. Breyer, J., filed a dissenting opinion, in which Stevens, Souter, and Ginsburg, JJ., joined, *post*, p. 681.

OPINION BY: SCALIA

OPINION

[*573] [**2787] Justice **Scalia** delivered the opinion of the Court.

We consider whether a District of Columbia prohibition on the possession of [**2788] usable handguns in the home violates the Second Amendment to the Constitution.

[*574] I

The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered [*575] firearm, and the registration of handguns is prohibited. See D. C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001). Wholly apart from that prohibition, no person may carry a handgun without a license, but the chief of police may issue licenses for 1-year periods. See §§ 22-4504(a), 22-4506. District of Columbia law also requires residents to keep their lawfully owned firearms, such as registered long guns, "unloaded and dissembled or bound by a trigger lock or similar device" unless they are located in a place of business or are being used for lawful recreational activities. See § 7-2507.02.[1]

1 There are minor exceptions to all of these prohibitions, none of which is relevant here.

Respondent Dick Heller is a D. C. special police officer authorized to carry a handgun while on duty at the Federal Judicial Center. He applied for a registration certificate for a handgun that he wished to keep at home, but the District refused. He thereafter filed a lawsuit in the Federal District Court for the District of [***648] Columbia seeking, [*576] on Second Amendment grounds, to enjoin the city from enforcing the bar on the registration of handguns, the licensing requirement insofar as it prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibits the use of "functional firearms within the home." App. 59a. The District Court dismissed respondent's complaint, see *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 109 (2004). The Court of Appeals for the District of Columbia Circuit, construing his complaint as seeking the right to render a firearm operable and carry it about his home in that condition only when necessary for self-defense,[2] reversed, see *Parker v. District of Columbia*, 375 U.S. App. D.C. 140, 478 F.3d 370, 401 (2007). It held that the Second Amendment protects an individual right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right. See *id.*, at 395, 399-401. The Court of Appeals directed the District Court to enter summary judgment for respondent.

2 That construction has not been challenged here.

We granted certiorari. 552 U.S. 1035, 128 S. Ct. 645,

169 L. Ed. 2d 417 (2007).

II

We turn first to the meaning of the Second Amendment.

A

[***LEdHR1] [1] The Second Amendment 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." In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States* v. *Sprague*, 282 U.S. 716, 731, 51 S. Ct. 220, 75 L. Ed. 640 (1931); see also *Gibbons* v. *Ogden*, 22 U.S. 1, 9 Wheat. 1, 188, 6 L. Ed. 23 (1824). Normal meaning may of [*577] course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

[**2789] The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today's dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. See Brief for Petitioners 11-12; *post*, at 636-637, 171 L. Ed. 2d, at 684 (Stevens, J., dissenting). Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. See Brief for Respondent 2-4.

[***LEdHR2] [2] The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." See J. Tiffany, A Treatise on Government and Constitutional Law § 585, p 394 (1867); Brief for Professors of Linguistics and English as *Amici Curiae* 3 (hereinafter Linguists' [***649] Brief). Although this structure of the Second Amendment is unique in our Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose. See generally Volokh, The Commonplace Second Amendment, 73 N. Y. U. L. Rev. 793, 814-821 (1998).

Logic demands that there be a link between the stated purpose and the command. The Second Amendment would be nonsensical if it read, "A well regulated Militia, being necessary to the security of a free State, the right of the people to petition for redress of grievances shall not be infringed." That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause ("The [*578] separation of church and state being an important objective, the teachings of canons shall have no place in our jurisprudence." The preface makes clear that the operative clause refers not to canons of interpretation but to clergymen.) But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. See F. Dwarris, A General Treatise on Statutes 268-269 (P. Potter ed. 1871); T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 42-45 (2d ed. 1874).[3] "'It is nothing unusual in acts . . . for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.'" J. Bishop, Commentaries on Written Laws and Their Interpretation § 51, p 49 (1882) (quoting *Rex* v. *Marks*, 3 East 157, 165, 102 Eng. Rep. 557, 560 (K. B. 1802)). Therefore, while we will begin [**2790] our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.[4]

3 As Sutherland explains, the key 18th-century English case on the effect of preambles, *Copeman* v. *Gallant*, 1 P. Wms. 314, 24 Eng. Rep. 404 (1716), stated that "the preamble could not be used to restrict the effect of the words of the purview." 2A N. Singer, Sutherland on Statutory Construction §47.04, pp. 145-146 rev. (5th ed. 1992). This rule was modified in England in an 1826 case to give more importance to the preamble, but [***LEdHR3] [3] in America "the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms." *Id.*, at 146.

Justice Stevens says that we violate the general rule that every clause in a statute must have effect. *Post*, at 643, 171 L. Ed. 2d, at 688. But where the text of a clause itself indicates that it does not have operative effect, such as "whereas" clauses in federal legislation or the Constitution's preamble, a court has no license to make it do what it was not designed to do. Or to put the point differently, operative provisions should be given effect as operative provisions, and prologues as prologues.

4 Justice Stevens criticizes us for discussing the prologue last. *Ibid.* But if a prologue can be used only to clarify an ambiguous operative provision, surely the first step must be to determine whether the operative provision is ambiguous. It might be argued, we suppose, that the prologue itself should be one of the factors that go into the determination of whether the operative provision is ambiguous--but that would cause the prologue to be used to produce ambiguity rather than just to resolve it. In any event, even if we considered the prologue *along with* the operative provision we would reach the same result we do today, since (as we explain) our interpretation of "the right of the people to keep and bear arms" furthers the purpose of an effective militia no less than (indeed, more than) the dissent's interpretation. See *infra*, at 599-600, 171 L. Ed. 2d, at 662.

[*579] **1. Operative Clause.**

a. "Right of the People." The first salient feature of the operative clause is that it codifies a "right of the [***650] people." The unamended Constitution and the Bill of Rights use the phrase "right of the people" two other times, in the First Amendment's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"). All three of these instances unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body.[5]

5 Justice Stevens is of course correct, *post*, at 645, 171 L. Ed. 2d, at 689, that the right to assemble cannot be exercised alone, but it is still an individual right, and not one conditioned upon membership in some defined "assembly," as he contends the right to bear arms is conditioned upon membership in a defined militia. And Justice Stevens is dead wrong to think that the right to petition is "primarily collective in nature." *Ibid.* See *McDonald v. Smith*, 472 U.S. 479, 482-484, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985) (describing historical origins of right to petition).

Three provisions of the Constitution refer to "the people" in a context other than "rights"--the famous preamble ("We the people"), § 2 of Article I (providing that "the people" will choose members of the House), and the Tenth Amendment (providing that those powers not given the Federal Government remain with "the States" or "the people"). Those provisions arguably refer to "the people" acting collectively--but [*580] they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a "right" attributed to "the people" refer to anything other than an individual right.[6]

6 If we look to other founding-era documents, we find that some state constitutions used the term "the people" to refer to the people collectively, in contrast to "citizen," which was used to invoke individual rights. See Heyman, Natural Rights and the Second Amendment, in The Second Amendment in Law and History 179, 193-195 (C. Bogus ed. 2000) (hereinafter Bogus). But that usage was not remotely uniform. See, *e.g.*, N. C. Declaration of Rights § XIV (1776), in 5 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 2787, 2788 (F. Thorpe ed. 1909) (hereinafter Thorpe) (jury trial); Md. Declaration of Rights § XVIII (1776), in 3 *id.*, at 1686, 1688 (vicinage requirement); Vt. Declaration of Rights, ch. 1, § XI (1777), in 6 *id.*, at 3737, 3741 (searches and seizures); Pa. Declaration of Rights § XII (1776), in 5 *id.*, at 3082, 3083 (free speech). And, most importantly, it was clearly not the terminology used in the Federal Constitution, given the First, Fourth, and Ninth Amendments.

What is more, in all six other provisions of the Constitution that mention "the people," the term unambiguously refers to all members of the political

community, not [**2791] an unspecified subset. As we said in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990):

> [***LEdHR4] [4] "'[T]he people' seems to have been a term of art employed in select parts of the Constitution. . . . [Its uses] sugges[t] that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

This contrasts markedly with the phrase "the militia" in the prefatory clause. As we will describe below, the "militia" in colonial America consisted of a subset of "the people"--those who were male, able bodied, and within a [***651] certain age range. Reading the Second Amendment as protecting only the right [*581] to "keep and bear Arms" in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as "the people."

We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.

b. "Keep and Bear Arms." We move now from the holder of the right--"the people"--to the substance of the right: "to keep and bear Arms."

Before addressing the verbs "keep" and "bear," we interpret their object: "Arms." [***LEdHR5] [5] The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined "arms" as "[w]eapons of offence, or armour of defence." 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978) (hereinafter Johnson). Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 1 A New and Complete Law Dictionary; see also N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster) (similar).

The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity. For instance, Cunningham's legal dictionary gave as an example of usage: "Servants and labourers shall use bows and arrows on *Sundays*, &c. and not bear other arms." See also, *e.g.*, An Act for the trial of Negroes, 1797 Del. Laws ch. XLIII, § 6, in 1 First Laws of the State of Delaware 102, 104 (J. Cushing ed. 1981 (pt. 1)); see generally *State v. Duke*, 42 Tex. 455, 458 (1874) (citing decisions of state courts construing "arms"). Although one founding-era thesaurus limited "arms" (as opposed to "weapons") to "instruments of offence *generally* made use of in war," even that source stated that all firearms constituted "arms." 1 J. Trusler, The Distinction Between Words Esteemed [*582] Synonymous in the English Language 37 (3d ed. 1794) (emphasis added).

Some have made the argument, bordering on the frivolous, [***LEdHR6] [6] that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, *e.g.*, *Reno v. ACLU*, 521 U.S. 844, 849, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997), and the Fourth Amendment applies to modern forms of search, *e.g.*, *Kyllo v. United States*, 533 U.S. 27, 35-36, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001), the Second Amendment extends, [**2792] prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

We turn to the phrases "keep arms" and "bear arms." Johnson defined "keep" as, most relevantly, "[t]o retain; not to lose," and "[t]o have in custody." Johnson 1095. Webster defined it as "[t]o hold; to retain in one's power or possession." No party has apprised us of an idiomatic meaning of "keep Arms." Thus, [***LEdHR7] [7] the most natural reading of "keep Arms" in the Second Amendment is to "have weapons."

The phrase "keep arms" was not prevalent in the written documents of [***652] the founding period that we have found, but there are a few examples, all of which favor viewing the right to "keep Arms" as an individual right unconnected with militia service. William Blackstone, for example, wrote that Catholics convicted of not attending service in the Church of England suffered certain penalties, one of which was that they were not permitted to "keep arms in their houses." 4

Commentaries on the Laws of England 55 (1769) (hereinafter Blackstone); see also 1 W. & M., ch. 15, § 4, in 3 Eng. Stat. at Large 422 (1689) ("[N]o Papist . . . shall or may have or keep in his House . . . any Arms . . ."); 1 W. Hawkins, Treatise on the Pleas of the Crown 26 (1771) (similar). Petitioners point to militia laws of the founding period that required militia members to "keep" arms in connection with [*583] militia service, and they conclude from this that the phrase "keep Arms" has a militia-related connotation. See Brief for Petitioners 16-17 (citing laws of Delaware, New Jersey, and Virginia). This is rather like saying that, since there are many statutes that authorize aggrieved employees to "file complaints" with federal agencies, the phrase "file complaints" has an employment-related connotation. "Keep arms" was simply a common way of referring to possessing arms, for militiamen *and everyone else.*[7]

7 See, *e.g.*, 3 A Compleat Collection of State-Tryals 185 (1719) ("Hath not every Subject power to keep Arms, as well as Servants in his House for defence of his Person?"); T. Wood, A New Institute of the Imperial or Civil Law 282 (4th ed. corrected 1730) ("Those are guilty of *publick* Force, who keep Arms in their Houses, and make use of them otherwise than upon Journeys or Hunting, or for Sale . . ."); A Collection of All the Acts of Assembly, Now in Force, in the Colony of Virginia 596 (1733) ("Free Negros, Mulattos, or Indians, and Owners of Slaves, seated at Frontier Plantations, may obtain Licence from a Justice of Peace, for keeping Arms, &c."); J. Ayliffe, A New Pandect of *Roman* Civil Law 195 (1734) ("Yet a Person might keep Arms in his House, or on his Estate, on the Account of Hunting, Navigation, Travelling, and on the Score of Selling them in the way of Trade or Commerce, or such Arms as accrued to him by way of Inheritance"); J. Trusler, A Concise View of the Common Law and Statute Law of England 270 (1781) ("[I]f [papists] keep arms in their houses, such arms may be seized by a justice of the peace"); Some Considerations on the Game Laws 54 (1796) ("Who has been deprived by [the law] of keeping arms for his own defence? What law forbids the veriest pauper, if he can raise a sum sufficient for the purchase of it, from mounting his Gun on his Chimney Piece . . .?"); 3 B. Wilson, The Works of the Honourable James Wilson 84 (1804) (with reference to state constitutional right: "This is one of our many renewals of the Saxon regulations. 'They were bound,' says Mr. Selden, 'to keep arms for the preservation of the kingdom, and of their own persons'"); W. Duer, Outlines of the Constitutional Jurisprudence of the United States 31-32 (1833) (with reference to colonists' English rights: "The right of every individual to keep arms for his defence, suitable to his condition and degree; which was the public allowance, under due restrictions of the natural right of resistance and self-preservation"); 3 R. Burn, Justice of the Peace and Parish Officer 88 (29th ed. 1845) ("It is, however, laid down by Serjeant *Hawkins*, . . . that if a lessee, after the end of the term, keep arms in his house to oppose the entry of the lessor, . . ."); State v. Dempsey, 31 N. C. 384, 385 (1849) (citing 1840 state law making it a misdemeanor for a member of certain racial groups "to carry about his person or keep in his house any shot gun or other arms").

[*584] [***LEdHR8] [8] [**2793] At the time of the founding, as now, to "bear" meant to "carry." See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed. 1989) (hereinafter Oxford). When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose--confrontation. In Muscarello v. United States, 524 U.S. 125, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (1998), in the course of analyzing the meaning of "carries a firearm" in a federal criminal statute, Justice Ginsburg [***653] wrote that "[s]urely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'" *Id.*, at 143, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (dissenting opinion) (quoting Black's Law Dictionary 214 (6th ed. 1990)). We think that Justice Ginsburg accurately captured the natural meaning of "bear arms." Although the phrase implies that the carrying of the weapon is for the purpose of "offensive or defensive action," it in no way connotes participation in a structured military organization.

From our review of founding-era sources, we conclude that this natural meaning was also the meaning that "bear arms" had in the 18th century. In numerous

instances, "bear arms" was unambiguously used to refer to the carrying of weapons outside of an organized militia. The most prominent examples are those most relevant to the Second Amendment: Nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to "bear arms in defense of themselves and the state" or "bear arms in defense of himself and [*585] the state."[8] It is clear from those formulations that "bear arms" did not refer only to carrying a weapon in an organized military unit. Justice James Wilson interpreted the Pennsylvania Constitution's arms-bearing right, for example, as a recognition of the natural right of defense "of one's person or house"--what he called the law of "self preservation." 2 Collected Works of James Wilson 1142, and n x (K. Hall & M. Hall eds. 2007) (citing Pa. Const., Art. IX, § 21 (1790)); see also T. Walker, Introduction to American Law 198 (1837) [**2794] ("Thus the right of self-defence [is] guaranteed by the [Ohio] constitution"); see also *id.*, at 157 (equating Second Amendment with that provision of the Ohio Constitution). That was also the interpretation of those state constitutional provisions adopted by pre-Civil War state courts.[9] These provisions [*586] demonstrate--again, in the most analogous linguistic context--that "bear arms" [***654] was not limited to the carrying of arms in a militia.

8 See Pa. Declaration of Rights § XIII, in 5 Thorpe 3083 ("That the people have a right to bear arms for the defence of themselves and the state . . ."); Vt. Declaration of Rights, Ch. 1, § XV, in 6 *id.*, at 3741 ("That the people have a right to bear arms for the defence of themselves and the State . . ."); Ky. Const., Art. XII, § 23 (1792), in 3 *id.*, at 1264, 1275 ("That the right of the citizens to bear arms in defence of themselves and the State shall not be questioned"); Ohio Const., Art. VIII, § 20 (1802), in 5 *id.*, at 2901, 2911 ("That the people have a right to bear arms for the defence of themselves and the State . . ."); Ind. Const., Art. I, § 20 (1816), in 2 *id.*, at 1057, 1059 ("That the people have a right to bear arms for the defense of themselves and the State . . ."); Miss. Const., Art. I, § 23 (1817), in 4 *id.*, at 2032, 2034 ("Every citizen has a right to bear arms, in defence of himself and the State"); Conn. Const., Art. First, § 17 (1818), in 1 *id.*, at 536, 538 ("Every citizen has a right to bear arms in defense of himself and the state"); Ala. Const., Art. I, § 23 (1819), in *id.*, at 96, 98 ("Every citizen has a right to bear arms in defence of himself and the State"); Mo. Const., Art. XIII, § 3 (1820), in 4 *id.*, at 2150, 2163 ("[T]hat their right to bear arms in defence of themselves and of the State cannot be questioned"). See generally Volokh, State Constitutional Rights to Keep and Bear Arms, 11 Tex. Rev. L. & Politics 191 (2006).

9 See *Bliss v. Commonwealth*, 12 Ky. 90, 2 Litt. 90, 91-92 (Ky. 1822); *State v. Reid*, 1 Ala. 612, 616-617 (1840); *State v. Schoultz*, 25 Mo. 128, 155 (1857); see also *Simpson v. State*, 13 Tenn. 356, 5 Yer. 356, 360 (Tenn. 1833) (interpreting similar provision with "'common defence'" purpose); *State v. Huntly*, 25 N. C. 418, 422-423 (1843) (same); cf. *Nunn v. State*, 1 Ga. 243, 250-251 (1846) (construing Second Amendment); *State v. Chandler*, 5 La. Ann. 489, 489-490 (1850) (same).

[***LEdHR9] [9] The phrase "bear Arms" also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: "to serve as a soldier, do military service, fight" or "to wage war." See Linguists' Brief 18; *post*, at 646, 171 L. Ed. 2d, at 690 (Stevens, J., dissenting). But it *unequivocally* bore that idiomatic meaning only when followed by the preposition "against," which was in turn followed by the target of the hostilities. See 2 Oxford 21. (That is how, for example, our Declaration of Independence P 28 used the phrase: "He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country . . . .") Every example given by petitioners' *amici* for the idiomatic meaning of "bear arms" from the founding period either includes the preposition "against" or is not clearly idiomatic. See Linguists' Brief 18-23. Without the preposition, "bear arms" normally meant (as it continues to mean today) what Justice Ginsburg's opinion in *Muscarello* said.

In any event, the meaning of "bear arms" that petitioners and Justice Stevens propose is *not even* the (sometimes) idiomatic meaning. Rather, they manufacture a hybrid definition, whereby "bear arms" connotes the actual carrying of arms (and therefore is not really an idiom) but only in the service of an organized militia. No dictionary has ever adopted that definition, and we have been apprised of no source that indicates that it carried that meaning at the time of the founding. But it is easy to see why petitioners and the dissent are

driven to the hybrid definition. Giving "bear Arms" its idiomatic meaning would cause the protected right to consist of the right to be a soldier or to wage war--an absurdity that no commentator has ever endorsed. See L. Levy, Origins of the Bill of Rights 135 (1999). Worse still, [*587] the phrase "keep and bear Arms" would be incoherent. The word "Arms" would have two different meanings at once: "weapons" (as the object of "keep") and (as the object of "bear") one-half of an idiom. It would be rather like saying "He filled and kicked the bucket" to mean "He filled the bucket and died." Grotesque.

Petitioners justify their limitation of "bear arms" to the military context by pointing out the unremarkable fact that it was often used in that context--the same mistake they made with respect to "keep arms." It is especially unremarkable that the phrase was often used in a military context in the federal legal sources (such as records of congressional debate) that have been the focus of petitioners' inquiry. Those sources would have had little occasion to use it *except* in discussions about the standing army and the militia. And the phrases used primarily in those military discussions include not only "bear arms" but also "carry arms," "possess arms," and "have arms"--though no one [**2795] thinks that those *other* phrases also had special military meanings. See Barnett, Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia? 83 Texas L. Rev. 237, 261 (2004). The common references to those "fit to bear arms" in congressional discussions about the militia are matched by use of the same phrase in the few nonmilitary federal contexts where the concept would be relevant. See, *e.g.*, 30 Journals of Continental Congress 349-351 (J. Fitzpatrick [***655] ed. 1934). Other legal sources frequently used "bear arms" in nonmilitary contexts.[10] Cunningham's legal dictionary, cited [*588] above, gave as an example of its usage a sentence unrelated to military affairs ("Servants and labourers shall use bows and arrows on *Sundays*, &c. and not bear other arms"). And if one looks beyond legal sources, "bear arms" was frequently used in nonmilitary contexts. See Cramer & Olson, What Did "Bear Arms" Mean in the Second Amendment? 6 Georgetown J. L. & Pub. Pol'y 511 (2008) (identifying numerous nonmilitary uses of "bear arms" from the founding period).

10 See J. Brydall, Privilegia Magnatud apud Anglos 14 (1704) (Privilege XXXIII) ("In the 21st Year of King Edward the Third, a Proclamation Issued, that no Person should bear any Arms within London, and the Suburbs"); J. Bond, A Compleat Guide to Justices of the Peace 43 (3d ed. 1707) ("Sheriffs, and all other Officers in executing their Offices, and all other persons pursuing Hu[e] and Cry may lawfully bear Arms"); 1 An Abridgment of the Public Statutes in Force and Use Relative to Scotland (1755) (entry for "Arms": "And if any person above described shall have in his custody, use, or bear arms, being thereof convicted before one justice of peace, or other judge competent, summarily, he shall for the first offense forfeit all such arms" (citing 1 Geo., ch. 54, § 1, in 5 Eng. Stat. at Large 90 (1668))); Statute Law of Scotland Abridged 132-133 (2d ed. 1769) ("Acts for disarming the highlands" but "exempting those who have particular licenses to bear arms"); E. de Vattel, The Law of Nations, or, Principles of the Law of Nature 144 (1792) ("Since custom has allowed persons of rank and gentlemen of the army to bear arms in time of peace, strict care should be taken that none but these should be allowed to wear swords"); E. Roche, Proceedings of a Court-Martial, Held at the Council-Chamber, in the City of Cork 3 (1798) (charge VI: "With having held traitorous conferences, and with having conspired, with the like intent, for the purpose of attacking and despoiling of the arms of several of the King's subjects, qualified by law to bear arms"); C. Humphreys, A Compendium of the Common Law in Force in Kentucky 482 (1822) ("[I]n this country the constitution guaranties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify people unnecessarily").

Justice Stevens points to a study by *amici* supposedly showing that the phrase "bear arms" was most frequently used in the military context. See *post*, at 647-648, n 9, 171 L. Ed. 2d, at 691; Linguists' Brief 24. Of course, as we have said, the fact that the phrase was commonly used in a particular context does not show that it is limited to that context, and, in any event, we have given many sources where the phrase was used in nonmilitary contexts. Moreover, the study's collection appears to include (who knows how many times) the idiomatic phrase "bear arms against," which is irrelevant. The *amici* also dismiss examples such as "'bear arms . . . for

the purpose of killing game'" because those uses are "expressly [*589] qualified." Linguists' Brief 24. (Justice Stevens uses the same excuse for dismissing the state constitutional provisions analogous to the Second Amendment that identify private-use purposes for which the individual right can be asserted. See *post*, at 647, 171 L. Ed. 2d, at 690-691.) That analysis is faulty. A purposive qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass [**2796] (except, apparently, in some courses on linguistics). If "bear arms" means, as we think, simply the carrying of arms, a modifier can limit the purpose of the carriage ("for the purpose of self-defense" or "to make war against the King"). But if "bear arms" means, as the petitioners and the dissent think, the carrying of arms only for military purposes, one simply cannot add "for [***656] the purpose of killing game." The right "to carry arms in the militia for the purpose of killing game" is worthy of the Mad Hatter. Thus, these purposive qualifying phrases positively establish that "to bear arms" is not limited to military use.[11]

11 Justice Stevens contends, *post*, at 650, 171 L. Ed. 2d, at 692, that since we assert that adding "against" to "bear arms" gives it a military meaning we must concede that adding a purposive qualifying phrase to "bear arms" can alter its meaning. But the difference is that we do not maintain that "against" *alters* the meaning of "bear arms" but merely that it *clarifies* which of various meanings (one of which is military) is intended. Justice Stevens, however, argues that "[t]he term 'bear arms' is a familiar idiom; when used unadorned by any additional words, its meaning is 'to serve as a soldier, do military service, fight.'" *Post*, at 646, 171 L. Ed. 2d, at 690. He therefore must establish that adding a contradictory purposive phrase can *alter* a word's meaning.

Justice Stevens places great weight on James Madison's inclusion of a conscientious-objector clause in his original draft of the Second Amendment: "but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." Creating the Bill of Rights 12 (H. Veit, K. Bowling, & C. Bickford eds. 1991) (hereinafter Veit). He argues that this clause establishes that the drafters of the Second Amendment intended "bear Arms" to refer only [*590] to military service. See *post*, at 660-661, 171 L. Ed. 2d, at 698. It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process.[12] In any case, what Justice Stevens would conclude from the deleted provision does not follow. It was not meant to exempt from military service those who objected to going to war but had no scruples about personal gunfights. Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever--so much so that Quaker frontiersmen were forbidden to use arms to defend their families, even though "[i]n such circumstances the temptation to seize a hunting rifle or knife in self-defense . . . must sometimes have been almost overwhelming." P. Brock, Pacifism in the United States 359 (1968); see M. Hirst, The Quakers in Peace and War 336-339 (1923); 3 T. Clarkson, Portraiture of Quakerism 103-104 (3d ed. 1807). The Pennsylvania Militia Act of 1757 exempted from service those *"scrupling the use of arms"*--a phrase that no one contends had an idiomatic meaning. See 5 Stat. at Large of Pa. 613 (J. Mitchell & H. Flanders Comm'r. 1898) (emphasis in original). Thus, the most natural interpretation of Madison's deleted text is that those opposed to carrying weapons for potential violent confrontation would not be "compelled to render military service," in which such carrying would be required. [13]

12 Justice Stevens finds support for his legislative history inference from the recorded views of one Antifederalist member of the House. *Post*, at 660, n. 25, 171 L. Ed. 2d, at 698. "The claim that the best or most representative reading of the [language of the] amendments would conform to the understanding and concerns of [the Antifederalists] is . . . highly problematic." Rakove, The Second Amendment: The Highest Stage of Originalism, in Bogus 74, 81.

13 The same applies to the conscientious-objector amendments proposed by Virginia and North Carolina, which said: "That any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead." See Veit 19; 4 J. Eliot, The Debates in the Several State Constitutions on the Adoption of the Federal Constitution 243, 244 (2d ed. 1836) (reprinted 1941). Certainly their second use of the phrase ("bear arms in his stead") refers, by reason of context, to compulsory bearing of arms for military duty. But their first use of the phrase ("any person religiously scrupulous of bearing

arms") assuredly did not refer to people whose God allowed them to bear arms for defense of themselves but not for defense of their country.

[*591] [***657] [**2797] Finally, Justice Stevens suggests that "keep and bear Arms" was some sort of term of art, presumably akin to "hue and cry" or "cease and desist." (This suggestion usefully evades the problem that there is no evidence whatsoever to support a military reading of "keep arms.") Justice Stevens believes that the unitary meaning of "keep and bear Arms" is established by the Second Amendment's calling it a "right" (singular) rather than "rights" (plural). See *post*, at 651, 171 L. Ed. 2d, at 692-693. There is nothing to this. State constitutions of the founding period routinely grouped multiple (related) guarantees under a singular "right," and the First Amendment protects the "right [singular] of the people peaceably to assemble, and to petition the Government for a redress of grievances." See, *e.g.*, Pa. Declaration of Rights §§ IX, XII, XVI, in 5 Thorpe 3083-3084; Ohio Const., Art. VIII, §§ 11, 19 (1802), in *id.*, at 2910-2911.[14] And even if "keep and bear Arms" were a unitary phrase, we find no evidence that it bore a military meaning. Although the phrase was not at all common (which would be unusual for a term of art), we have found instances of its use with a clearly nonmilitary connotation. In a 1780 debate in the House of Lords, for example, Lord Richmond described an order to disarm private [*592] citizens (not militia members) as "a violation of the constitutional right of Protestant subjects to keep and bear arms for their own defence." 49 The London Magazine or Gentleman's Monthly Intelligencer 467 (1780). In response, another member of Parliament referred to "the right of bearing arms for personal defence," making clear that no special military meaning for "keep and bear arms" was intended in the discussion. *Id.*, at 467-468.[15]

14 Faced with this clear historical usage, Justice Stevens resorts to the bizarre argument that because the word "to" is not included before "bear" (whereas it is included before "petition" in the First Amendment), the unitary meaning of "'to keep and bear'" is established. *Post*, at 651, n 13, 171 L. Ed. 2d, at 693. We have never heard of the proposition that omitting repetition of the "to" causes two verbs with different meanings to become one. A promise "to support and to defend the Constitution of the United States" is not a whit different from a promise "to support and defend the Constitution of the United States."

15 Cf. 21 Geo. II, ch. 34, § 3, in 7 Eng. Stat. at Large 126 (1748) ("That the Prohibition contained . . . in this Act, of having, keeping, bearing, or wearing any Arms or Warlike Weapons . . . shall not extend . . . to any Officers or their Assistants, employed in the Execution of Justice . . .").

c. Meaning of the Operative Clause. Putting all of these textual elements together, [***LEdHR10] [10] we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we said in *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L. Ed. 588 (1876), "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The [**2798] second amendment declares [***658] that it shall not be infringed . . . ."[16]

16 Contrary to Justice Stevens' wholly unsupported assertion, *post*, at 636, 652, 171 L. Ed. 2d, at 684, 693, there was no pre-existing right in English law "to use weapons for certain military purposes" or to use arms in an organized militia.

Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents. See J. Malcolm, To Keep and Bear Arms 31-53 (1994) (hereinafter Malcolm); L. Schwoerer, The Declaration of Rights, 1689, p 76 (1981). [*593] Under the auspices of the 1671 Game Act, for example, the Catholic Charles II had ordered general disarmaments of regions home to his Protestant enemies. See Malcolm 103-106. These experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms. They accordingly obtained an assurance from William and Mary, in the Declaration of Right (which was codified as the English Bill of Rights), that Protestants would never be disarmed: "That the subjects which are Protestants may have arms

for their defence suitable to their Conditions, and as allowed by Law." 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441. This right has long been understood to be the predecessor to our Second Amendment. See E. Dumbauld, The Bill of Rights and What It Means Today 51 (1957); W. Rawle, A View of the Constitution of the United States of America 122 (1825) (hereinafter Rawle). It was clearly an individual right, having nothing whatever to do with service in a militia. To be sure, it was an individual right not available to the whole population, given that it was restricted to Protestants, and like all written English rights it was held only against the Crown, not Parliament. See Schwoerer, To Hold and Bear Arms: The English Perspective, in Bogus 207, 218; but see 3 J. Story, Commentaries on the Constitution of the United States § 1858 (1833) (hereinafter Story) (contending that the "right to bear arms" is a "limitatio[n] upon the power of parliament" as well). But it was secured to them as individuals, according to "libertarian political principles," not as members of a fighting force. Schwoerer, Declaration of Rights, at 283; see also *id.*, at 78; G. Jellinek, The Declaration of the Rights of Man and of Citizens 49, and n 7 (1901) (reprinted 1979).

By the time of the founding, the right to have arms had become fundamental for English subjects. See Malcolm 122-134. Blackstone, whose works, we have said, "constituted the preeminent authority on English law for the founding [*594] generation," *Alden v. Maine*, 527 U.S. 706, 715, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999), cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen. See 1 Blackstone 136, 139-140 (1765). His description of it cannot possibly be thought to tie it to militia or military service. It was, he said, "the natural right of resistance and self-preservation," *id.*, at 139, and "the right of having and using arms for self-preservation and defence," *id.*, at 140; see also 3 *id.*, at 2-4 (1768). Other contemporary authorities concurred. See G. Sharp, Tracts, Concerning the Ancient and Only True Legal Means of National Defence, by a Free Militia 17-18, 27 (3d ed. 1782); 2 J. de Lolme, The Rise and Progress of the English Constitution 886-887 (1784) (A. [***659] Stephens ed. 1838); W. Blizard, Desultory Reflections on Police 59-60 (1785). Thus, the right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual [**2799] right protecting against both public and private violence.

And, of course, what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists. In the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms. A New York article of April 1769 said that "[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence." A Journal of the Times: Mar. 17, New York Journal, Supp. 1, Apr. 13, 1769, in Boston Under Military Rule 79 (O. Dickerson ed. 1936) (reprinted 1970); see also, *e.g.*, Shippen, Boston Gazette, Jan. 30, 1769, in 1 The Writings of Samuel Adams 299 (H. Cushing ed. 1904) (reprinted 1968). They understood the right to enable individuals to defend themselves. As the most important early American edition of Blackstone's Commentaries (by the law professor and former Antifederalist St. George Tucker) made clear in the notes to the [*595] description of the arms right, Americans understood the "right of self-preservation" as permitting a citizen to "repe[l] force by force" when "the intervention of society in his behalf, may be too late to prevent an injury." 1 Blackstone's Commentaries 145-146, n 42 (1803) (hereinafter Tucker's Blackstone). See also W. Duer, Outlines of the Constitutional Jurisprudence of the United States 31-32 (1833).

[***LEdHR11] [11] There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not, see, *e.g.*, *United States v. Williams*, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*. Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause.

2. Prefatory Clause.

The prefatory clause reads: "A well regulated Militia, being necessary to the security of a free State . . . ."

a. "Well-Regulated Militia." [***LEdHR12] [12] In *United States v. Miller*, 307 U.S. 174, 179, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939), we

explained that "the Militia comprised all males physically capable of acting in concert for the common defense." That definition comports with founding-era sources. See, *e.g.*, Webster ("The militia of a country are the able bodied men organized into companies, regiments and brigades . . . and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations"); The Federalist No. 46, pp 329, 334 (B. Wright ed. 1961) (J. Madison) ("near half a million of citizens with arms in their hands"); Letter to Destutt de Tracy (Jan. 26, 1811), in The Portable Thomas [*596] Jefferson 520, 524 (M. Peterson ed. 1975) ("the militia of the [***660] State, that is to say, of every man in it able to bear arms").

Petitioners take a seemingly narrower view of the militia, stating that "[m]ilitias are the state- and congressionally-regulated military forces described in the Militia Clauses (art. I, § 8, cls. 15-16)." Brief for Petitioners 12. Although we agree with petitioners' interpretive assumption that "militia" means the same thing in Article I [**2800] and the Second Amendment, we believe that petitioners identify the wrong thing, namely, the organized militia. [***LEdHR13] [13] Unlike armies and navies, which Congress is given the power to create ("to raise . . . Armies"; "to provide . . . a Navy," Art. I, § 8, cls. 12-13), the militia is assumed by Article I already to be *in existence*. Congress is given the power to "provide for calling forth the Militia," § 8, cl. 15; and the power not to create, but to "organiz[e]" it--and not to organize "a" militia, which is what one would expect if the militia were to be a federal creation, but to organize "the" militia, connoting a body already in existence, *ibid.*, cl. 16. This is fully consistent with the ordinary definition of the militia as all able-bodied men. From that pool, Congress has plenary power to organize the units that will make up an effective fighting force. That is what Congress did in the first militia Act, which specified that "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia." Act of May 8, 1792, 1 Stat. 271. To be sure, Congress need not conscript every able-bodied man into the militia, because nothing in Article I suggests that in exercising its power to organize, discipline, and arm the militia, Congress must focus upon the entire body. Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them.

[*597] Finally, [***LEdHR14] [14] the adjective "well-regulated" implies nothing more than the imposition of proper discipline and training. See Johnson 1619 ("Regulate": "To adjust by rule or method"); Rawle 121-122; cf. Va. Declaration of Rights § 13 (1776), in 7 Thorpe 3812, 3814 (referring to "a well-regulated militia, composed of the body of the people, trained to arms").

b. "Security of a Free State." [***LEdHR15] [15] The phrase "security of a free State" meant "security of a free polity," not security of each of the several States as the dissent below argued, see 478 F.3d at 405, and n 10. Joseph Story wrote in his treatise on the Constitution that "the word 'state' is used in various senses [and in] its most enlarged sense it means the people composing a particular nation or community." 1 Story § 208; see also 3 *id.*, § 1890 (in reference to the Second Amendment's prefatory clause: "The militia is the natural defence of a free country"). It is true that the term "State" elsewhere in the Constitution refers to individual States, but the phrase "security of a free State" and close variations seem to have been terms of art in 18th-century political discourse, meaning a "'free country'" or free polity. See Volokh, "Necessary to the Security of a Free State," 83 Notre Dame L. Rev. 1, 5 (2007); see, *e.g.*, 4 Blackstone 151 (1769); Brutus Essay III (Nov. 15, 1787), in The Essential Antifederalist 251, 253 (W. Allen & G. Lloyd eds., 2d ed. 2002). Moreover, the other instances of [***661] "state" in the Constitution are typically accompanied by modifiers making clear that the reference is to the several States--"each state," "several states," "any state," "that state," "particular states," "one state," "no state." And the presence of the term "foreign state" in Article I and Article III shows that the word "state" did not have a single meaning in the Constitution.

There are many reasons why the militia was thought to be "necessary to the security of a free State." See 3 Story § 1890. First, of course, it is useful in repelling invasions and suppressing insurrections. Second, it renders large [*598] standing armies unnecessary--an argument that Alexander Hamilton made in favor of federal control [**2801] over the militia. The Federalist No. 29, pp 226, 227 (B. Wright ed. 1961) (A. Hamilton). Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.

3. Relationship Between Prefatory Clause and