Written by **Bruce Walker** on March 17, 2010

# Bearing Arms: A Right ... and a Duty?

The Massachusetts Judicial Council ruled on March 10 that the Second Amendment of the U.S. Constitution does not apply to state governments and, consequently, the State of Massachusetts can regulate firearms in that state. The language of the Second Amendment states: “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.”

The Second Amendment is part of the Bill of Rights, which was added to the Constitution to guarantee that the federal government would not infringe upon basic rights and that those powers of government not specifically delegated to the federal government by the Constitution would be reserved to the states and the people. At the time (and up to the present day), each state had its own state constitution that defined and limited the powers of government.

For instance, Article XVII of the Massachusetts state Constitution guarantees: “The people have the right to keep and bear arms for the common defence.” This provision means, of course, that Massachusetts is violating its own state constitution by enacting restrictive gun laws infringing on the right to keep and bear arms, even if the Second Amendment, as the Massachusetts Judicial Council ruled, does not apply to the states.

Altogether, 44 states have state constitutional provisions guaranteeing the right to bear arms. In many instances, these state constitutional provisions are more potent than the language in the federal constitution. Many state constitutions, for example, provide explicitly that the right to bear arms *for purposes of self-defense* should not be infringed.

Other rights — such as freedom of press and of speech — are also protected by state constitutions.

Why, then, do people look to the federal government to protect any of their fundamental civil and political rights, including the right to bear arms?  The U.S. Supreme Court began in the early part of the last century through a process of judicial decisions called “incorporation” to apply selected parts of the Bill of Rights to state governments — in fact, to any governmental entity including even local school boards. This was done through a strained and peculiar interpretation of the Due Process Clause of the 14th Amendment. That brief amendment simply states that no state could deprive anyone within its borders of due process of law. For instance, the Court interpreted the Establishment Clause of the First Amdendment (“Congress shall make no law respecting the establishment of religion”) to apply to any governmental entity, not just the U.S. Congress, despite the clear language of the First Amendment. (The Court also interpreted the “establishment of religion” in such a broad way that it found public

school prayer to violate this clause.)

On the other hand, the Court has not applied its Incorporation Doctrine to the Second Amendment, even though the latter refers to the "right of the people" without mentioning Congress.

But constitutional lawyer Edwin Viera, who does not subscribe to the Incorporation Doctrine, argues that the Second Amendment applies to the states as well as to the federal government. In his *New American* article "The Second Amendment, The States, and the People," Viera points out that the Second Amendment explicitly states that the militia is *necessary* for the security of "a free State," and that "the Amendment's reference to 'a free State' cannot conceivably embrace only the General Government, and not as well the very States that comprise the federal system, and without which the General Government would never have been formed in the first place and could not continue to exist."

Viera has analyzed the purpose of colonial and early state laws regarding firearms and concludes that more than simply the right to bear arms is at play in the constitutional provisions regarding firearms. He notes that in colonial America the militia, a term used in the Second Amendment, was not simply a voluntary organization of men with muskets and rifles: The militia was, instead, a mandatory organization for all able bodied men who were not otherwise exempt for some special reason. The "right to bear arms" then, was complemented by the duty to bear arms.

He observes that in the Constitution there are only a very few specific entities that are recognized to have an independent existence. One of those few is the militia. The Founding Fathers presumed that the militia existed as a lawful and necessary organization in the several states even without the Constitution or the federal structure of government. Viera finds that the duty to serve in the militia, the duty to arm oneself for that duty, and the duty of the militia to exist and to act were fundamental duties (and rights) of citizens.

This line of thinking provides a different perspective from the viewpoint that the Second Amendment is intended to protect the right of hunting and target shooting. The language of the Second Amendment that refers to "A well regulated Militia being necessary to the security of a free State" is now largely overlooked. Yet this language is crucial. The reasons for a militia existing, under Viera's line of reasoning, has never ended and is fundamental to our system of government.

Certainly the duty to bear arms has historical precedent in earlier European history, when yeoman and knights had duties to serve for the common defense.  Some communities in America, looking back to that duty of citizenship, have passed ordinances that require gun ownership and also require that a gun be kept in each household. Such ordinances are based on the premise that citizens not only have the right to bear arms to defend themselves, but also have the duty to possess arms in order to provide for the common defense.

*Photo: Minuteman statue at Concord*