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The Fourteenth Amendment and the Right To Keep and Bear Arms: The Intent of the Framers

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> 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. —U.S. Const. amend. II.
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> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. —U.S. Const. amend. XIV, § 1.

If African Americans were citizens, observed Chief Justice Taney in *Dred Scott* v. *Sandford*,[1] "it would give to persons of the negro race . . . the full liberty of speech . . .; to hold public meetings upon political affairs, and to keep and carry arms wherever they went."[2] If this interpretation ignores that Articles I and II of the Bill of Rights designate the respective freedoms guaranteed therein to "the people" and not simply the citizens (much less a select group of orators or militia), contrariwise Dred Scott followed antebellum judicial thought in recognizing keeping and bearing arms as an individual right[3] protected from both federal and state infringement.[4] The exception to this interpretation were cases holding that the Second Amendment only protected citizens[5] from federal, not state,[6] infringement of the right to keep and bear arms, to provide judicial approval of laws disarming black freemen and slaves.

Since the Fourteenth Amendment was meant to overrule Dred Scott by extending individual constitutional rights to black Americans and by providing protection thereof against state infringement,[7] the question arises whether the framers of Amendment XIV and related enforcement legislation recognized keeping and bearing arms as individual right on which no state could infringe. The congressional intent in respect to the Fourteenth Amendment is revealed in the debates over both Amendments XIII and XIV as well as the Civil Rights Act of 1866, the Anti-KKK Act of 1871, and the Civil Rights Act of 1875. Given the unanimity of opinion concerning state regulation of privately held arms by the legislators who framed the Fourteenth Amendment and its enforcement legislation, it is surprising that judicial opinions and scholarly articles fail to analyze the Reconstruction debates.[8]

A. ARMS AND SLAVERY

Having won their national independence from England through armed struggle, post-Revolutionary War Americans were acutely

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aware that the sword and sovereignty go hand in hand, and that the firearms technology ushered in a new epoch in the human struggle for freedom. Furthermore, both proponents and opponents of slavery were cognizant that an armed black population meant the abolition of slavery, although plantation slaves were often trusted with arms for hunting.[9] This sociological fact explained not only the legal disarming of blacks but also the advocacy of a weapons culture by abolitionists. Having employed the instruments for self-defense against his pro-slavery attackers, abolitionist and Republican Party founder Cassius Marcellus Clay wrote that " 'the pistol and the Bowie knife' are to us as sacred as the gown and the pulpit."[10] And it was John Brown who argued that "the practice of carrying arms would be a good one for the colored people to adopt, as it would give them a sense of their manhood."[11]

The practical necessities of the long, bloody Civil War, demanding every human resource, led to the arming of blacks as soldiers. While originally they considered it a "white man's war," Northern authorities by 1863 were organizing black regiments on a wide scale. At the same time, black civilians were forced to arm themselves privately against mob violence. During the anti-draft riots in New York, according to a Negro newspaper of the time, "The colored men who had manhood in them armed themselves, and threw out their pickets every day and night, determined to die defending their homes. . . . Most of the colored men in Brooklyn who remained in the city were armed daily for self-defense."[12]

Toward the end of the war Southerners began to support the arming and freeing of slaves willing to fight the invaders, and the Virginia legislature, on passing a bill providing for the use of black soldiers, repealed its laws against the bearing of arms by blacks.[13] One opponent of these measures declared: "What would be the character of the returned negro soldiers, made familiar with the use of fire-arms, and taught by us, that freedom was worth fighting for?"[14] Being evident that slaves plus guns equaled abolition, the rebels were divided between those who valued nationhood to slavery and those who preferred a restored union which might not destroy the servile condition of black labor.

As the movement began before the end of the war for the complete abolition of slavery via the Thirteenth Amendment, members of the U.S. Congress recognized the key role that the bearing of arms was already playing in the freeing of the slaves. In debate over the proposed Amendment, Rep. George A. Yeaman (Unionist, Ky.) contended that whoever won the war, the abolition of slavery was inevitable due to the arming of blacks:

> Let proclamations be withdrawn, let statutes be repealed, let our armies be defeated, let the South achieve its independence, yet come out of the war . . . with an army of slaves made freemen for their service, who have been contracted with, been armed and drilled, and have seen the force of combination. Their personal status is enhanced. . . . They will not be returned to slavery.[15]

At the same time, members of the slavocracy were planning to disarm the freedmen. Arguing for speedy adoption of the Thirteenth Amendment, Rep. William D. Kelley (R., Penn.) expressed

shock at the words of an anti-secessionist planter in Mississippi who expected the union to restore slavery. Kelley cited a letter from a U.S. brigadier general who wrote: " 'What,' said I, 'these men who have had arms in their hands?' 'Yes,' he said, 'we should take the arms away from them, of course.' "[16]

The northern government won the war only because of the arming of the slaves, according to Sen. Charles Sumner (R., Mass.) who argued that necessity demanded "first, that the slaves should be declared free; and secondly, that muskets should be put into their hands for the common defense. . . . Without emancipation, followed by the arming of the slaves, rebel slavery would not have been overcome."[17]

B. THE CIVIL RIGHTS ACT OF 1866

After the war was concluded, the slave codes, which limited access of blacks to land, to arms, and to the courts, began to reappear in the form of the black codes,[18] and United States legislators turned their attention to the protection of the freedmen. In support of Senate Bill No. 9, which declared as void all laws in the rebel states which recognized inequality of rights based on race, Sen. Henry Wilson (R., Mass.) explained in part: "In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen disarming them, perpetrating murders and outrages on them. . . ."[19]

When Congress took up Senate Bill No. 61, which became the Civil Rights Act of 1866,[20] Sen. Lyman Trumbull (R., Ill.), Chairman of the Senate Judiciary Committee, indicated that the bill was intended to prohibit inequalities embodied in the black codes, including those provisions which "prohibit any negro or mulatto from having fire-arms."[21] In abolishing the badges of slavery, the bill would enforce fundamental rights against racial discrimination in respect to civil rights, the rights to contract, sue and engage in commerce, and equal criminal penalities. Sen. William Saulsbury (D., Del.) added: "In my State for many years, and I presume there are similar laws in most of the southern States, there has existed a law of the State based upon and founded in its police power, which declares that free negroes shall not have the possession of firearms or ammunition. This bill proposes to take away from the States this police power. . . ." The Delaware Democrat opposed the bill on this basis, anticipating a time when "a numerous body of dangerous persons belonging to any distinct race" endangered the state, for "the State shall not have the power to disarm them without disarming the whole population."[22] Thus, the bill would have prohibited legislative schemes which in effect disarmed blacks but not whites. Still, supporters of the bill were soon to contend that arms bearing was a basic right of citizenship or personhood.

In the meantime, the legislators turned their attention to the Freedmen's Bureau Bill. Rep. Thomas D. Eliot (R., Mass.) attacked an Opelousas, Louisiana ordinance which deprived blacks of various civil rights, including the following provision: "No freedman who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons, within the limits of the town of Opelousas without the special permission of his employer . . . and

approved by the mayor or president of the board of police."[23] And Rep. Josiah B. Grinnell (R., Iowa) complained: " A white man in Kentucky may keep a gun; if a black man buys a gun he forfeits it and pays a fine of five dollars, if presuming to keep in his possession a musket which he has carried through the war."[24] Yet the right of blacks to have arms existed partly as self-defense against the state militia itself, which implied that militia needs were not the only constitutional bases for the right to bear arms. Sen. Trumbull cited a report from Vicksburg, Mississippi which stated: "Nearly all the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of this militia."[25] Rather than restore order, the militia would typically "hang some freedman or search negro houses for arms."[26] As debate returned to the Civil Rights Bill, Rep. Henry J. Raymond (R., N.Y.) explained of the rights of citizenship: "Make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States under the laws and Constitution of the United States. . . . He has a defined status; he has a country and a home; a right to defend himself and his wife and children; a right to bear arms . . . ."[27] Rep. Roswell Hart (R., N.Y.) further states: "The Constitution clearly describes that to be a republican form of government for which it was expressly framed. A government . . . where 'no law shall be made prohibiting a free exercise of religion;' where 'the right of the people to keep and bear arms shall not be infringed;' . . . ."[28] He concluded that it was the duty of the United States to guarantee that the states have such a form of government.[29]

Rep. Sidney Clarke (R., Kansas) referred to an 1866 Alabama law providing: "That it shall not be lawful for any freedman, mulatto, or free person of color in this State, to own firearms, or carry about his person a pistol or other deadly weapon."[30] This same statute made it unlawful "to sell, give, or lend fire-arms to ammunition of any description whatever, to any freedman, free negro, or mulatto. . . ."[31] Clarke also attacked Mississippi, "whose rebel militia, upon the seizure of the arms of black Union Soldiers, appropriated the same to their own use."[32]

> Sir, I find in the Constitution of the United States an article which declares that "the right of the people to keep and bear arms shall not be infringed." For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws . . . .[33]

Emotionally referring to the disarming of black soldiers, Clarke added:

> Nearly every white man in that State that could bear arms was in the rebel ranks. Nearly all of their able-bodied colored men who could reach our lines enlisted under the old flag. Many of these brave defenders of the nation paid for the arms with which they went to battle. . . . The "reconstructed" State authorities of Mississippi were allowed to rob and disarm our veteran soldiers . . . .[34]

In sum, Clarke presupposed a constitutional right to keep privately held arms for protection against oppressive state militia.

C. THE FOURTEENTH AMENDMENT

The need for a more solid foundation for the protection of freedmen as well as white citizens was recognized, and the result was a significant new proposal—the Fourteenth Amendment. A chief exponent of the amendment, Sen. Jacob M. Howard (R., Mich.), referred to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press; . . . the right to keep and to bear arms. . . ."[35] Adoption of the Fourteenth Amendment was necessary because presently these rights were not guaranteed against state legislation. "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[36]

The Fourteenth Amendment was viewed as necessary to buttress the objectives of the Civil Rights Act of 1866. Rep. George W. Julian (R., Ind.) noted that the act

> Is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense by whipping and the pillory. South Carolina has the same enactments . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.[37]

It is hardly surprising that the arms question was viewed as part of a partisan struggle. "As you once needed the muskets of the colored persons, so now you need their votes," Sen. Sumner explained to his fellow Republicans in support of black suffrage in the District of Columbia.[38] At the opposite extreme, Rep. Michael C. Kerr (D., Ind.) an opponent of black suffrage and of the Fourteenth Amendment, attacked a military ordinance in Alabama that set up a volunteer militia of all males between ages 18 and 45 "without regard to race or color" on these grounds:

> Of whom will that militia consist? Mr. Speaker, it will consist only of the black men of Alabama. The white men will not degrade themselves by going into the ranks and becoming a part of the militia of the State with negroes. . . . Are the civil laws of Alabama to be enforced by this negro militia? Are white men to be disarmed by them?[39]

Kerr predicted that the disfranchisement of white voters and the above military measure would result in "a war of races."[40]

D. THE ANTI-KKK ACT

Although the Fourteenth Amendment became law in 1868, within three years the Congress was considering enforcement legislation to suppress the Ku Klux Klan. The famous report by Rep. Benjamin F. Butler (R., Mass.) on violence in the South assumed that the right to keep arms was necessary for protection against the militia but also against local law enforcement agencies. Noting

instances of "armed confederates" terrorizing the negro, the report stated that "in many counties they have preceded their outrages upon him by disarming him, in violation of his right as a citizen to 'keep and bear arms,' which the Constitution expressly says shall never be infringed."[41] The congressional power based on the Fourteenth Amendment to legislate to prevent states from depriving any U.S. citizen of life, liberty, or property justified the following provision of the committee's anti-KKK bill:

> That whoever shall, without due process of law, by violence, intimidation, or threats, take away or deprive any citizen of the United States of any arms or weapons he may have in his house or possession for the defense of his person, family, or property, shall be deemed guilty of a larceny thereof, and be punished as provided in this act for a felony.[42]

Rep. Butler explained the purpose of this provision in these words:

> Section eight is intended to enforce the well-known constitutional provision guaranteeing the right in the citizen to "keep and bear arms," and provides that whoever shall take away, by force or violence, or by threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed guilty of larceny of the same. This provision seemed to your committee to be necessary, because they had observed that, before these midnight marauders made attacks upon peaceful citizens, there were very many instances in the South where the sheriff of the county had preceded them and taken away the arms of their victims. This was specially noticeable in Union County, where all the negro population were disarmed by the sheriff only a few months ago under the order of the judge . . .; and then, the sheriff having disarmed the citizens, the five hundred masked men rode at night and murdered and otherwise maltreated the ten persons who were in jail in that county.[43]

The bill was referred to the Judiciary Committee, and when later reported as H.R. No. 320 the above section was deleted—probably because its proscription extended to simple individual larceny over which Congress had no constitutional authority, and because state or conspiratorial action involving the disarming of blacks would be covered by more general provisions of the bill. Supporters of the rewritten anti-KKK bill continued to show the same concern over the disarming of freedmen. Sen. John Sherman (R., Ohio) stated the Republican position: "Wherever the negro population preponderates, there they [the KKK] hold their sway, for a few determined men . . . can carry terror among ignorant negroes . . . without arms, equipment, or discipline."[44]

Further comments clarified that the right to arms was a necessary condition for the right of free speech. Sen. Adelbert Ames (R., Miss.) averred: "In some counties it was impossible to advocate Republican principles, those attempting it being hunted like wild beasts; in other, the speakers had to be armed and supported by

not a few friends."[45] Rep. William L. Stoughton (R., Mich.) exclaimed: "If political opponents can be marked for slaughter by secret bands of cowardly assassins who ride forth with impunity to execute the decrees upon the unarmed and defenseless, it will be fatal alike to the Republican party and civil liberty."[46]

Section 1 of the bill, which was taken partly from Section 2 of the Civil Rights Act of 1866 and survives today as 42 U.S.C. § 1983, was meant to enforce Section 1 of the Fourteenth Amendment by establishing a remedy for deprivation under color of state law of federal constitutional rights of all people, not only former slaves. This portion of the bill provided:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities to which . . . is entitled under the Constitution or laws of the United States, shall . . . be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .[47]

Rep. Washington C. Whitthorne (D. Tenn.), who complained that "in having organized a negro militia, in having disarmed the white man," the Republicans had "plundered and robbed" the whites of South Carolina through "unequal laws," objected to Section 1 of the anti-KKK bill on these grounds:

> It will be noted that by the first section suits may be instituted without regard to amount or character of claim by any person within the limits of the United States who conceives that he has been deprived of any right, privilege, or immunity secured him by the Constitution of the United States, under color of any law, statute, ordinance, regulation, custom, or usage of any State. This is to say, that if a police officer of the city of Richmond or New York should find a drunken negro or white man upon the streets with a loaded pistol flourishing it, &c., and by virtue of any ordinance, law, or usage, either of city or State, he takes it away, the officer may be sued, because the right to bear arms is secured by the Constitution, and such suit brought in distant and expensive tribunals.[48]

The Tennessee Democrat assumed that the right to bear arms was absolute, deprivation of which created a cause of action against state agents under Section 1 of the anti-KKK bill. In the minds of the bill's supporters, however, the Second Amendment as incorporated in the Fourteenth Amendment recognized a right to keep and bear arms safe from state infringement, not a right to commit assault or otherwise engage in criminal conduct with arms by pointing them at people or wantonly brandishing them about so as to endanger others. Contrary to the congressman's exaggerations, the proponents of the bill had the justified fear that the opposite development would occur, i.e., that a black or white man of the wrong political party would legitimately have or possess arms and a police officer of the city of Richmond or New York who was

drunken with racial prejudice or partisan politics would take it away, perhaps to ensure the success of an extremist group's attack. Significantly, none of the representative's colleagues disputed his assumption that state agents could be sued under the predecessor to § 1983 for deprivation of the right to keep arms.

Rep. William D. Kelly (R., Penn.), speaking after and in reply to Rep. Whitthorne, did not deny the argument that Section 1 allowed suit for deprivation of the right to possess arms, but emphasized the arming of the KKK. He referred to "great numbers of Winchester rifles, and a particular species of revolving pistol" coming into Charleston's ports. "Poor men, without visible means of support, whose clothes are ragged and whose lives are almost or absolutely those of vagrants, are thus armed with new and costly rifles, and wear in their belts a brace of expensive pistols."[49] These weapons were used against Southern Republicans, whose constitutional rights must thereby be guaranteed by law and arms.

However, like Congressman Whitthorne, Rep. Barbour Lewis (R., Tenn.) also decried the loss of state agent's immunity should the bill pass: "By the first section, in certain cases, the judge of a State court, though acting under oath of office, is made liable to a suit in the Federal Court and subject to damages for his decision against a suitor, however honest and conscientious that decision may be; and a ministerial officer is subject to the same pains and penalties. . . ."[50] Tennessee Republicans and Democrats alike thus agreed that what is today § 1983 provided an action for damages against state agents in general for deprivation of constitutional rights.

Debate over the anti-KKK bill naturally required exposition of Section 1 of the Fourteenth Amendment, and none was better qualified to explain that section than its draftsman, Rep. John A. Bingham (R., Ohio):

> Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of a State, are chiefly defined in the first eight amendments to the constitution of the United States. Those eight amendments are as follows:
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> ARTICLE I
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> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> ARTICLE II
>
> A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. . . . [Amendments III–VIII, also listed by Bingham, are here omitted.]

> These eight articles I have shown never were limitations upon the power of the States, until made so by the Fourteenth Amendment. The words of that amendment, "no State shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States," are an express prohibition upon every State of the Union. . . . [51]

This is a most explicit statement of the incorporation thesis by the architect of the Fourteenth Amendment. Although he based the incorporation on the privileges and immunities clause and not the due process clause as did subsequent courts of selective incorporation, Rep. Bingham could hardly have anticipated the judical metaphysics of the twentieth century in this respect. In any case, whether based on the due process clause or on the privileges and immunities clause, the legislative history supports the view that the incorporation of Amendments I-VIII was clear and unmistakable in the minds of the framers of Amendment XIV.

In contrast with the above legal analysis, some comments on the enforcement of the Fourteenth Amendment returned to discussion of power struggle between Republicans and unreconstructed Confederates. While Republicans deplored the armed condition of white Southerners and the unarmed state of black Southerners, Democrats argued that the South's whites were disarmed and endangered by armed carpetbaggers and negro militia. Thus, Rep. Ellis H. Roberts (R., N.Y.) lamented the partisan character of KKK violence: "The victims whose property is destroyed, whose persons are mutilated, whose lives are sacrificed, are always Republicans. They may be black or white. . . ." Of the still rebellious whites: "Their weapons are often new and of improved patterns; and however poor may be the individual member he never lacks for arms or ammunition. . . . In many respects the Ku Klux Klan is an army, organized and officered, and armed for deadly strife."[52]

Rep. Boyd Winchester (D., Ky.) set forth the contrary position, favorably citing a letter from an ex-governor of South Carolina to the reconstruction governor regretting the latter's "Winchester-rifle speech" which "fiendishly proclaimed that this instrument of death, in the hands of the negroes of South Carolina, was the most effective means of maintaining order and quiet in the State."[53] Calling on the governor to "disarm your militia," the letter referred to the disaster which resulted "when you organized colored troops throughout the State, and put arms into their hands, with powder and ball, and denied the same to the white people."[54] The letter proceeded to cite numerous instances where the "colored militia" murdered white people. According to Rep. Winchester, it was the arming of blacks and disarming of whites which resulted in white resistance. "It would seem that wherever military and carpetbagger domination in the South has been marked by the greatest contempt for law and right, and practiced the greatest cruelty toward the people, Ku Klux operations have multiplied."[55]

An instance of black Republican armed resistance to agents of the state who were in the Klan was recounted in a letter cited by Rep. Benjamin F. Butler:

> Then the Ku Klux fired on them through the window, one of the bullets striking a colored woman . . . and wounding her through the knee badly. The colored men then fired on the Ku Klux, and killed their leader or captain right there on the steps of the colored men's house. . . . There he remained until morning when he was identified, and proved to "Pat Inman," a constable and deputy sheriff. . . . [56]

By contrast, Rep. Samuel S. Cox (D., Ohio) assailed those who "arm negro militia and create a situation of terror," exclaimed that South Carolinians actually clamored for United States troops to save them from the rapacity and murder of the negro bands and their white allies," and saw the Klan as their only defense: "Is not repression the father of revolution?" The congressman compared the Klan with the French Jacobins, Italian Carbonari, and Irish Fenians.[57] Rep. John Coburn (R., Ind.) saw the situation in an opposite empirical light, deploring both state and private disarming of blacks. "How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men?"[58]

The next day Rep. Henry L. Dawes (R., Mass.) returned to a legal analysis which again asserted the incorporation thesis. Of the anti-Klan bill he argued:

> The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject-matter of this bill. . . .
>
> . . . In addition to the original rights secured to him in the first article of amendments he had secured the free exercise of his religious belief, and freedom of speech and of the press. Then again he has secured to him the right to keep and bear arms in his defense. [Dawes then summarizes the remainder of the first eight amendments.] . . .
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> . . . And still later, sir, after the bloody sacrifice of our four years' war, we gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens. . . .
>
> . . . [I]t is to protect and secure to him in these rights, privileges, and immunities this bill is before the House.[59]

Rep. Horatio C. Burchard (R., Ill.), while generally favoring the bill insofar as it provided against oppressive state action, rejected the interpretation by Dawes and Bingham regarding the definition of "privileges and immunities," which Burchard felt were contained only in Articles IV, V, and VI rather than I-VIII. However, Burchard still spoke in terms of "the application of their eight amendments to the States,"[60] and in any case Dawes had used the terms "*rights*, privileges and immunities." The anti-Klan bill finally was passed along partisan lines as An Act to Enforce the Provisions of the Fourteenth Amendment.[61]

E. THE CIVIL RIGHTS ACT OF 1875

After passage of the anti-Klan bill, discussion concerning arms persisted as interest developed toward what became the Civil

Rights Act of 1875, now 42 U.S.C. § 1984. A report on affairs in the South by Sen. John Scott (R., Penn.) indicated the need for further enforcement legislation: "negroes who were whipped testified that those who beat them told them they did so because they had voted the radical ticket, and in many cases made them promise that they would not do so again, and wherever they had guns took them from them."[62]

Following the introduction of the civil rights bill the debate over the meaning of the privileges and immunities clause returned. Sen. Matthew H. Carpenter (R., Wis.) cited *Cummings v. Missouri*,[63] a case contrasting the French legal system, which allowed deprivation of civil rights, "and among these of the right of voting, . . . of bearing arms," with the American legal system, averring that the Fourteenth Amendment prevented states from taking away the privileges of the American citizen.[64]

Sen. Allen G. Thurman (D., Ohio) argued that the "rights, privileges, and immunities of a citizen of the United States" were included in Amendments I-VIII. Reading and commenting on each of these amendments, he said of the Second: "Here is another right of a citizen of the United States, expressly declared to be his right—the right to bear arms; and this right, says the Constitution, shall not be infringed." After prodding from John A. Sherman (R., Ohio), Thurman added the Ninth Amendment to the list.[65]

The incorporationist thesis was stated succinctly by Senator Thomas M. Norwood (D., Ga.) in one of the final debates over the civil rights bill. Referring to a U.S. citizen residing in a Territory, Senator Norwood stated:

> His right to bear arms, to freedom of religious opinion, freedom of speech, and all others enumerated in the Constitution would still remain indefeasibly his, whether he remained in the Territory or removed to a State.
>
> And those and certain others are the privileges and immunities which belong to him in common with every citizen of the United States, and which no State can take away or abridge, and they are given and protected by the Constitution . . .
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> The following are most, if not all, the privileges and immunities of a citizen of the *United States:*
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> The right to the writ of *habeas corpus;* of peaceable assembly and of petition; . . . *to keep and bear arms* [emphasis added]; . . . from being deprived of the right to vote on account of race, color or previous condition of servitude.[66]

Arguing that the Fourteenth Amendment created no new rights but declared that "certain existing rights should not be abridged by States," the Georgia Democrat explained:

> Before its [Fourteenth Amendment] adoption any State might have established a particular religion, or restricted freedom of speech and of the press, or *the right to bear arms* [emphasis added] . . . A State could have deprived its citizens of any of the privileges and immunities contained in those eight articles, but the Federal Government could not. . .

> . . . And the instant the fourteenth amendment became a part of the Constitution, every State was at that moment disabled from making or enforcing any law which would deprive any citizen of a State of the benefits enjoyed by citizens of the United States under the first eight amendments to the Federal Constitution.[67]

In sum, in the understanding of Southern Democrats and Radical Republicans alike, the right to keep and bear arms, like other Bill of Rights freedoms, was made applicable to the states by the Fourteenth Amendment.

The framers of the Fourteenth Amendment and of the civil rights acts of Reconstruction, rather than predicating the right to keep and bear arms on the needs of an organized state militia, based it on the right of the people individually to possess arms for protection against any oppressive force—including racist or political violence by the militia itself or by other state agents such as sheriffs. At the same time, the militia was understood to be the whole body of the people, including blacks. In discussion concerning the Civil Rights Act of 1875, Sen. James A Alcorn (R., Miss.) defined the militia in these terms: "The citizens of the United States, the Posse comitatus, or the militia if you please, and the colored man composes part of these."[68] Every citizen, in short, was a militiaman. With the passage of the Fourteenth Amendment, the right and privilege individually to keep and bear arms was protected from both state and federal infringement.[69]

REFERENCES

1. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 15 L. Ed. 691 (1857).
2. 15 L. Ed. at 705 [emphasis added]. *And see id* at 719.
3. Protection of the "absolute rights of individuals" to personal security, liberty, and private property is secured in part by "the right of bearing arms—which with us is . . . practically enjoyed by every citizen, and is among his most valuable privileges, since it furnishes the means of resisting as a freeman ought, the inroads of usurpation." I Henry St. Geo. Tucker, Commentaries on the Laws of Virginia 43 (1831) (reference to U.S. Constitution). And see St. Geo. Tucker, 1 Blackstone, Commentaries *144 n. 40 (1st ed. 1803); W. Rawle, A View of the Constitution 125–26 (1829); 3 J. Story, Commentaries on the Constitution 746 (1833); Bliss vs. Commonwealth, 2 Litt. (Ky.) 90, 13 Am. Dec. 251 (1822); Simpson vs. State, 13 Tenn. Reports (5 Yerg.) 356 (1833); Nunn v. State, 1 Ga. 243 (1846). Cf. State v. Buzzard, 4 Ark. 18 (1843).
4. W. Rawle, supra note 3, at 125–26, stated: The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.

Similarly, it was stated in Nunn v. State, 1 Ga. 243, 250–51 (1846):

The language of the second amendment is broad enough to embrace both Federal and state governments—nor is there anything in its terms which restricts its meaning. . . . Is it not an unalienable right, which lies at the bottom of every free government?

And see cases cited at 68 C.J. Weapons §4 n 60 (1934).

According to II J. Bishop, Criminal Law §124 (3rd ed. 1865): "Though most of the amendments are restrictions on the general government alone, not on the States, this one seems to be of a nature to bind both the State and National legislatures." Approved in English v. State, 35 Tex. 473 (1872). For an analysis of U.S. Supreme Court cases related to whether the Second and/or Fourteenth Amendments prohibit state action which infringes on keeping and bearing arms, see S. Halbrook, The Jurisprudence of the Second and Fourteenth Amendments, IV George Mason L. Rev. (1981).

5. State v. Newson, 27 N.C. 203, 204 (1844); Cooper v. Savannah, 1 Ga. 72 (1848).

6. State v. Newson, 27 N.C. 203, 207 (1844). Cf. cases cited at 68 C.J. Weapons §5, n. 19, 21, 22; §8, n. 37, 40 (1934).

7. "What was the fourteenth article designed to secure? . . . That the privileges and immunities of citizens of the United States shall not be abridged or denied by the United States or by any State; defining also, what it was possible was open to some question after the Dred Scott decision, who were citizens of the United States." Sen. George F. Edmonds R., Vt., CONG. GLOBE, 40th Cong., 3rd. Sess., pt. 1, 1000 (Feb. 3, 1869).

8. While it "cannot turn the clock back to 1868 when the Amendment was adopted." *Brown v. Board of Education of Topeka*, 347 U.S. 483, 492 (1954), the Supreme Court is compelled to interpret Amendment XIV and Reconstruction legislation in accord with the Congressional intent. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 549 (1972); *Monell v. Dep't. of Social Services of City of New York*, 436 U.S. 658 (1978) ("fresh analysis of debate on the Civil Rights Act of 1871," *id.* 665, justified overruling *Monroe v. Pape*, 365 U.S. 167 (1961)). *Cf.* Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stanford L. Rev. 5, 44–45, 57–58, 119–20 (1949) (while contending that the Bill of Rights in general was not intended to apply to the states, cited references to the Second Amendment in congressional debates support incorporation).

Though beyond the scope of this study, the history of the prohibition of arms possession by native Americans or Indians or presents a parallel example of the use of gun control to suppress or exterminate non-white ethnic groups. While legal discrimination against blacks in respect to arms was abolished during Reconstruction, the sale of arms and ammunition to "hostile" Indians remained a prohibition. E.g., 17 stat. 457, 42nd Cong., 3rd Sess., ch. 138 (1873). *See also Sioux Nation of Indians v. United States*, 601 F. 2d 1571, 1166 (Ct. Cl. 1979): "Since the Army has taken from the Sioux their weapons and horses, the alternative to capitulation to the government's demands was starvation . . . ." The federal government's special restrictions on selling firearms to native Americans were abolished finally in 1979. Washington Post, Jan. 6, 1979, §A, at 11, col. 1.

9. See *State v. Hannibal*, 51N.C. 57 (1859); *State v. Harris*, 51 N.C. 448 (1859); D. Hundley, Social Relations in our Southern States 361 (1860). Blacks were experienced enough in the use of arms to pay a significant, though unofficial, role as Confederate soldiers, some even as sharpshooters. H. Blackerby, Blacks in Blue and Gray 1–40 (Tusculoosa, Ala. 1979); J. Obatala, Black Confederates, Players 13 ff. (April, 1979). In Louisiana, the only state in the Union to include blacks in the militia, substantial numbers of blacks joined the rebellion furnishing their own arms. M. Berry, *Negro Troops in Blue and Gray*, 8 Louisiana History 165–66 (1867).

10. The Writings of Cassius Marcellus Clay 257 (H. Greeley ed. 1848).

11. DuBois, John Brown 106 (1909).

12. J. McPherson, The Negro's Civil War 72–73 (1965). While all may be fair in love and war, experiences during the conflict suggest that deprivation of one right is coupled with deprivation of others. When the secession movement began, Lincoln suspended habeas corpus and enstated the disarming of citizens and military arrests in Maryland and Missouri. In the latter state, the death penalty was enstated by union officers for those caught with arms, and after an order was issued to arm the militia by random seizures of arms, these seizures provided the occasion for general looting. See 3 War of the Rebellion 466–67 (Series 1) and 13 id. at 506; R. Brownlee, Gray Ghosts of the Confederacy 37, 85, & 170 (L.S.U. 1958). The situation became so harsh for Northerners themselves that the Northern Democratic Platform of 1864 declared in its fourth resolution against the suppression of free speech and press and the denial of the right of the people to bear arms in their defense. E. Pollard, The Lost Cause 574 (1867).

13. 51 The War of the Rebellion, ser. 1, pt. 2, 1068 & 1315 (1880–1901); R. Durden, The Gray & The Black 250 (1972).

14. R. Durden, supra note 13, at 169.

15. Cong. Globe, 38th Cong., 2nd Sess., pt. 1, 171 (Jan. 9, 1865).

16. *Id.* 289 (Jan. 18, 1865).

17. *Id.*, 39th Cong., 1st Sess., pt. 1, 674 (Feb. 6, 1866). But see id. at pt. 4, 3215 (June 16, 1866) (allegation by Rep. William E. Niblack (D., Ind.) that the majority of Southern blacks "either adhered from first to last to the rebellion or aided and assisted by their labor or otherwise those who did so adhere.").

18. DuBois, Black Reconstruction in America 167, 172, & 223 (New York 1962).

19. Cong. Globe, 39th Cong., 1st Sess., pt. 1, 40 (Dec. 13, 1865).

20. Civil Rights Act, 14 Stat. 27 (1866). A portion of this act survives as 42 U.S.C. § 1982: "All citizens of the United States shall have the same right, in every State

and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

21. Cong. Globe, 39th Cong., 1st Sess., pt. 1, 474 (Jan. 29, 1866).
22. *Id.* 478.
23. *Id.* 517 (Jan. 30, 1866).
24. *Id.* 651 (Feb. 5, 1866).
25. *Id.* 941 (Feb. 20, 1866).
26. *Id.*
27. *Id.*, pt. 2, 1266 (Mr. 5, 1866).
28. *Id.* 1629 (Mar. 24, 1866).
29. *Id.* 3
30. *Id.* 1838 (Ap. 7, 1866).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* 1839. Ironically, Clarke's home state, Kansas, adopted measures to prohibit former Confederates from possessing arms. Kennett & Anderson at 154.
35. Cong. Globe, 39th Cong., 1st Sess., pt. 3, 2765 (May 23, 1866).
36. *Id.* 2766. Italics added.
37. Id., pt. 4, 3210 (June 16, 1866).
38. Id., 2nd Sess., pt. 1, 107 (Dec. 13, 1866).
39. Id., 40th Cong., 2nd Sess. pt. 3, 2198 (Mar. 25, 1868).
40. Id.
41. 1464 H.R. REP. No. 37, 41st Cong., 3rd Sess. 3 (Feb. 20, 1871).
42. Cong. Globe, 42nd Cong., 1st Sess., pt. 1, 174 (Mar. 20, 1871). Introduced as "an act to protect loyal and peaceable citizens in the south . . .", H.R. No. 189.
43. H.R. Rep. No. 37, supra note 26, at 7–8.
44. Cong. Globe, 42nd Cong., 1st Sess., pt. 1, 154 (Mar. 18, 1871).
45. Id. 196 (Mr. 21, 1871).
46. Id. 321 (Mr. 28, 1871).
47. Id., pt. 2, Appendix, 68. Passed as the Enforcement Act. 17 Stat. 13 (1871). § 1 survives as 42 U.S.C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." The action for conspiracy to deprive persons of rights or privileges under 42 U.S.C. § 1985 derives from the same act.
48. Cong. Globe, 42nd Cong., 1st Sess., pt. 1, 337 (Mr. 29, 1871).
49. *Id.* 339.
50. Id. 385 (Ap. 1, 1871).
51. Id., pt. 2, Appendix, 84 (Mr. 31, 1871).
52. Id., pt. 1, 413 (Ap. 3, 1871).
53. Id. 422 (Ap. 3, 1871).
54. Id.
55. Id. Nathan Bedford Forrest told Congressional investigators in 1871 that the Klan originated in Tennessee for self defense against the militia of Governor William G. Brownlow. N. Burger and J. Bettersworth, South of Appomattox 129, 132, and 137 (1959). Still, two years before, Forrest denounced Klan lawlessness because "the order was being used . . . to disarm harmless negroes having no thought of insurrectionary movements, and to whip both whites and blacks." C. Bowers, THE TRAGIC ERA 311 (1929). The outrages in turn allegedly furnished "a plausible pretext for the organization of State militias to serve the purposes of Radical politices." C. Bowers at 311. Carpetbagger controlled militias were deeply involved in political violence to influence elections, and were blamed for infringing on their opponents' constitutional rights to free speech and to keep and bear arms, among numerous other abuses. E.g., C. Bowers at 439 and passim; O. Singletary, Negro Militia and Reconstruction 35–41, 74–75 (1963).
56. Cong. Globe, 42nd Cong., 1st Sess., pt. 1, 445 (Ap. 4, 1871).
57. Id. 453.
58. Id. 459.
59. *Id.* 475–76 (Ap. 5, 1871). [Emphasis added].
60. Id., 2, Appendix, 314.
61. 17 Stat. 13, 42nd Cong., 1st Sess., ch. 22 (1871).
62. 1484 S. Rep. No. 41, 42nd Cong., 2nd Sess., pt. 1, 35 (Feb. 19, 1872).
63. *Cummings* v. *Missouri*, 71 U.S. 277, 321 (1866).
64. Cong. Globe, 42nd Cong., 2nd Sess., pt. 1, 762 (Feb. 1, 1872).

65. *Id.*, pt. 5, Appendix, 25-26 (Feb. 6, 1872). On Amendment IX as a source of an individual right to keep and bear arms, see Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 Fordham Urban L. J. 31, 49-50 (1976). See also 2 Cong. Rec. 43rd Cong., 1st Sess., pt. 1, 384-385 (Jan. 5, 1874) (statement by Rep. Robert Q. Mills (D., Tex.) that Amendment XIV adopts Bill of Rights privileges).

66. Cong. Rec., 43rd Cong., 1st Sess., pt. 6, Appendix, 241-242 (May 4, 1874). Emphasis added.

67. *Id.* 242. Italic added.

68. *Id.* (May 22, 1874). The antebellum exclusion of blacks from the armed people as militia was commented on by Sen. George Vickers (D., Md.), who recalled a 1792 law passed by Congress: "That every free able-bodied white male citizen shall be enrolled in the militia." Vickers added that as late as 1855 New Hampshire "confined the enrollment of militia to free white citizens." Cong. Globe, 41st Cong., 2nd Sess., pt. 2, 1558-59 (Feb. 25, 1870). Exclusion of a right to bear arms by blacks was further evidence of their lack of status as citizens. See 1464 H.R. Rep. No. 22, 41st Cong., 3rd Sess. 7 (Feb. 1, 1871), citing Cooper V. Savannah., 4 Ga. 72 (1848) (not entitled to bear arms or vote).

69. While unrelated to the debates over the Fourteenth Amendment, congressional deliberation over whether the federal government could abolish militias in the Southern states also gave rise to exposition of the Second Amendment. In support of repeal of a statute prohibiting the Southern militias, Sen. Charles R. Buckalew (D., Penn.) pointed out that the U.S. President favored repeal of the statute because at all times, both when it was passed upon the statute-book and every moment since, it was and is in his judgment a violation of the Constitution of the United States. One of the amendments to our fundamental law expressly provides that "the right of the people to keep and bear arms shall not be infringed"—of course by this Government; and it gives the reason that a well-regulated militia in the several divisions of the country is necessary for the protection and for the interests of the people. Cong. Globe, 40th Cong., 3rd Sess., pt. 1, 33-34.

George F. Edmunds (R., Vt.) worried that repeal of the statute "will authorize anybody and everybody in the State of Texas, under what they call its ancient militia laws . . . to organize a militia hostile to the Government," id. at 31, and thus advocated "a selected militia" chosen by State and federal governments. Id. In contrast, Garrett Davis (D. Ky.) stated: "Wherever a State organizes a government it has of its own inherent right and power authority to organize a militia for it. Congress . . . has no right to prohibit that State from the organization of its militia." *Id.* at 34. Willard Warner (R., Ala.) stressed the first clause of the Second Amendment to form militias independent of federal control: we have the right now, being restored to our full relations to the Federal Government, to organize a militia of our own, and that we could have done so at any time in the past, this law to the contrary notwithstanding. Article two of the amendments of the Constitution provides 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." *Id.* at 35.

The prohibitionary statute was repealed, *id.* at 36. *Cf.* Houston v. Moore, 18 U.S. 1, 16-17 (1820).

Thus, while debates over the militia question suggested that the Second Amendment precluded federal legislation which prohibited the states or the people from forming militias, debates over the Fourteenth Amendment demonstrate the intent of Congress to preclude state militias or other state action from infringing on the individual right to keep and bear arms.

THE SECOND AMENDMENT TO THE UNITED STATES CONSTITUTION GUARANTEES AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS

(By James J. Featherstone, Esquire, General Counsel, National Rifle Association of America and Richard E. Gardiner, Esquire, Robert Dowlut, Esquire, Office of the General Counsel)

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 values of the Framers of the Constitution must be applied in any case construing the Constitution. Inferences from the text and history of the Constitution should be given great weight in discerning the original understanding and in determining the intentions of those who ratified the constitution. The precedential value of cases and commentators tends to increase, therefore, in proportion to their proximity to the adoption of the Constitution, the Bill of Rights or any other amendments. *Powell* v. *McCormack*, 395 U.S. 486, 547 (1969).

A. COMMON LAW DEVELOPMENT OF THE RIGHT TO KEEP AND BEAR ARMS

The right to keep and bear arms was not created by the Second Amendment; rather, this basic individual right, developed in England before this continent was colonized, pre-dated the constitution and was part of the common law heritage of the thirteen original colonies.

Sir William Blackstone, an authoritative source of the common law for colonists and, therefore, a dominant influence on the drafters of the original Constitution and its Bill of Rights, set forth in his Commentaries the absolute rights of individuals as personal security, personal liberty, and possession of private property, I *Blackstone Commentaries* 129, these absolute rights being protected by the individual's right to have and use arms for self-preservation and defense. As Blackstone observed, individual citizens were therefore entitled to exercise their "natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Id.* at 144.[1] Clearly evident in this statement is Blackstone's recognition that the exercise of an individual's absolute rights could be imperiled by a standing army as well as by private individuals, a view supported by his observation that "Nothing . . . ought to be more guarded against in a free state than making the military power . . . a body too distinct from the people." *Id.* at 414. To prevent such an occurrence, Blackstone not only believed in the individual's right to have and use arms, but further believed that for its defense a nation should rely not on a standing army, but the citizen soldier. Plainly, for such a concept to be a reality, it was necessary that all able-bodied males possess and be capable of using arms.

Blackstone was not alone in his view that the common law recognized the individual's right to possess arms: in his Pleas of the

Crown, Hawkins noted that "every private person seems to be authorized by the Law to arm himself for [various] purposes." 1 William Hawkins, *Pleas of the Crown*, ch. 28, Section 14, p. 171 (7th ed. 1795). In agreement with Blackstone was Sir Edward Coke who wrote that "the laws permit the taking up of arms against armed persons." 2 E. Coke Institutes of the Laws of England, 574 (Johnson & Warner, ed. 1812).

It was within this legal tradition of the individual's right to have and use arms for his own defense and self-preservation as well as to enable him to contribute to the common defense, that the spark which ignited the American Revolution was struck. The British, by attempting to seize large stores of powder and shot, sought to deny the Massachusetts colonists the ability to protect their absolute rights. The colonists retaliated by exercising their common law right to keep and bear arms, using the very arms which the British wished to render ineffective.[2] It is beyond question that prior to the Second amendment the common law recognized a fundamental individual right to keep and bear arms, subject only to a certain limited police power to regulate the bearing of arms so as not to terrify the good people of the land. 4 Blackstone Commentaries 149.

B. THE HISTORY OF THE SECOND AMENDMENT

The Second amendment to the United States Constitution 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.

The history of the Second Amendment indicates that its purposes were to secure to each individual the right to keep and bear arms so that he could protect his absolute individual rights as well as carry out his obligation to assist in the common defense. It is evident that the framers of the Constitution did not intend to limit the right to keep and bear arms to a formal military body or organized militia, but intended to provide for an "unorganized" armed citizenry prepared to assist in the common defense against a foreign invader or a domestic tyrant. This concept of an unorganized, armed citizenry clearly recognized the right, and moreover the duty, to keep and bear arms in an individual capacity.

One of the gravest decisions faced by the Framers of the Constitution was whether the federal government should be permitted to maintain a standing army. Because of their personal experiences in and prior to the Revolution, the Framers of the Constitution realized that although useful for national defense, a standing army was particularly inimical to the continued safe existence of those absolute rights recognized by Blackstone and generally inimical to personal freedom and liberty.

Unwilling, however, to forego completely the national defense benefits of a standing army, the Framers developed a compromise position. The federal government was granted the authority to "raise and support" an army, subject to the restrictions that no appropriation of money for the army would be for more than two years and civilian control over the army would be maintained. U.S. Constitution, Article I, Section 8, Clause 12. Furthermore, knowing

that the militiaman or citizen soldier had made possible the success of the American Revolution for Independence.[3] the Framers recognized that a militia would provide the final bulwark against both domestic tryanny and foreign invasion. Congress, however, was given only limited authority over the militia; it could "govern . . . [only] such part of the [the militia] as may be employed in the Service of the United States . . .," leaving to the states "the Appointment of the Officers, and the Authority of training the Militia . . ." (emphasis added) U.S. Constitution, Article I, Section 8, Clause 16.

It is evident from the underscored language of Clause 16 that, in addition to that part of the militia over which the Constitution granted Congress authority, there exists a residual, unorganized militia that is not subject to congressional control. The United States Code, in Title 10, Section 311, continues to recognize the distinction between the organized and unorganized militia:

> (a) The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are commissioned officers of the National Guard.
>
> (b) The classes of the militia are: (1) The organized militia, which consists of the National Guard and the Naval Militia; and (2) The unorganized militia which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

This distinction, recognized by the Framers in the Constitution, was first codified in the Militia Act of 1792, which defined both an "organized" militia, and an "enrolled" militia.[4] The unorganized or enrolled militia were not actually in service, but were nonetheless available to assist in the common defense should conditions necessitate either support of the organized militia or possibly defense against internal oppression. As fully explained later, the members of the unorganized militia were expected to be familiar with the use of firearms and to appear bearing their own arms. Obviously, they could be so prepared only if all individuals were guaranteed the right to keep and bear arms.

In his comments on the rights protected by the Constitution, a leading constitutional commentator, in discussing the right protected by the Second Amendment, wrote:

> *The Right is General.* It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrollment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those

> enrolled, the purpose of this guarantee might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. *The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.* But this enables the government to have a well regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies a right to meet for voluntary discipline in arms, observing in doing so the laws of public order. (Emphasis added.) Thomas M. Cooley, LL.D., General Principles of Constitutional Law in the United States of America, 298-299 (3rd ed. 1898).

When the Constitution was sent to the states for ratification, several states, chief among them Virginia, were concerned that in spite of the restrictions written into the main body of the Constitution, a federal standing army might still threaten the hard-won liberties of the people. In Federalist No. 46, written prior to the ratification of the Constitution, James Madison discussed how a federal standing army, which he estimated in 1788 would consist of "one twenty-fifth part of the number able to bear arms," might be checked or controlled:

> To these [the standing army troops] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by [state] governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late successful resistance of this country against the British Arms will be most inclined to deny the possibility of it. *Besides the advantage of being armed, which the Americans possess over the people of almost every other nation.* The existence of subordinate governments to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, . . . the governments [of Europe] are afraid to trust the people with arms. (Emphasis added.)

Alexander Hamilton, too, although more favorably inclined toward a strong central government, feared the detrimental effects on individual liberty that might result from the existence of a federal standing army. He explained in Federalist No. 29 how, under the proposed constitution, a federal standing army could be avoided or at least restrained:

> The attention of the government ought particularly to be directed to the formation of a select corps of moderate size upon such principles as will really fit it for service in case of need. By thus circumscribing the plan it will be possible to have an excellent body of well trained militia ready to take the field whenever the defense of the State shall require it. This will not only lessen the call for military establishments; but if circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people, while there is a large body of citizens little if at all inferior to them in discipline and the use of arms, who stand ready to defend their rights and those of their fellow citizens. This appears to me the only substitute that can be devised for a standing army; the best possible security against it if it should exist.

Hamilton evidently felt that the militia composed of the body of the people would provide a deterrent to a federal standing army or the organized militia, only because the people had the right to keep and bear arms. The states, however, wanted this right to be guaranteed explicitly. A number of them, therefore, proposed amending the Constitution to guarantee an individual right to keep and bear arms.

Consonant with the request of the states, the Congress proposed twelve amendments to the Constitution, one of which concerned the right to keep and bear arms.[5] In its original form, as proposed by James Madison of Virginia, the Second Amendment (the fourth proposed amendment) read:

> The right of the people to keep and bear arms shall not be infringed; a well-armed and well-regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.

Congressman Elbridge Gerry of Massachusetts opposed the amendment in this form because the provision exempting persons with religious scruples from bearing arms might be used by the federal government arbitrarily to declare an individual religiously scrupulous, thereby denying him the right to bear arms. Gerry offered an amendment modifying the religious exemption to apply only to religious sects and not to individuals. In the course of the floor debate, Gerry discussed the Second Amendment and the purpose of the militia:

> This declaration of rights, I take it, is intended to secure the people against the maladministration of the Government, if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed. Now, I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the Constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.

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> What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty. Now, it must be evident that, under this provision, together with their other powers, Congress could take such measures with respect to a militia, as to make a standing army necessary. Whenever Governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was done actually by Great Britain at the commencement of the late Revolution. They used every means in their power to prevent the establishment of an effective militia to the Eastward. The Assembly of Massachusetts, seeing the rapid progrsss that administration were making to devest them of their inherent privileges, endeavored to counteract them by the organization of a militia; but they were always defeated by the influence of the Crown. [Interruption.]
>
> No attempts they made were successful, until they engaged in the struggle which emancipated them at once from their thraldom. Now, if we give a discretionary power to exclude those from militia duty who have religious scruples, we may as well make no provision on this head. For this reason, [I wish] the words to be altered so as to be confined to persons belonging to a religious sect scrupulous of bearing arms. 1 Annals of Congress 749-750 (August 17, 1789).

Gerry plainly understood in making his proposal that one purpose of the amendment was to ensure the existence of the militia composed of the body of the people since the organized militia was subject to federal service; therefore it was necessary to protect the right of all people, that is, each individual, to keep and bear arms.[6] Gerry recognized that only if all individuals, those whose liberties were to be protected, were capable of using arms, could the militia truly serve as the final bulwark against a foreign invader or domestic tyrant. Following Gerry's discussion, the proposed amendment was revised to eliminate any reference to a religious exemption from keeping and bearing arms.

Supporting Gerry's view that the Second Amendment protected an individual right is that the Senate, while also considering the proposed amendments, soundly rejected a proposal to insert the phrase "for the common defense" after the words "bear arms," (1 History of the Supreme Court of the United States, 450 (J. Goebel, Jr. ed. 1971), 2 B. Schwartz, The Bill of Rights: A Documentary History 1153-54 (1971)), thereby emphasizing that the purpose of the Second Amendment was not merely to provide for the common defense, but also to protect the individual's right to keep and bear arms for his own defense and self-preservation.

Not removed from the originally proposed version, however, was the term "well-regulated." Contrary to modern usage, wherein "regulated" is generally understood to mean "controlled" or "governed by rule", in its obsolete form pertaining to troops, "regulated" is defined as "properly disciplined." II Compact Edition, Oxford English Dictionary 2473 (1971). In the Oxford English Dictionary, moreover, the verb "discipline," in its earlier usage, is defined as

"to instruct, educate, train." I Compact Edition, Oxford English Dictionary 741 (1971). Furthermore, as a noun, "discipline," which is etymologically "concerned . . . with practice or exercises," refers to a field of "learning or knowledge" or the "training effect of experience" that, in relation to arms, is defined as "training in the practice of arms . . ." Ibid. Plainly then, by using the term "well-regulated," the Framers had in mind not only the individual ownership and possession of firearms but also the voluntary undertaking of practice and training with such firearms so that each person could become experienced with and competent in the use of firearms and thereby be prepared, should the need arise, to carry out his militia obligation. This conclusion is in complete accord with the comment of Thomas M. Cooley, supra, p. 7.

Consistent with this view is a plan drafted by George Mason, the Framer of the Virginia Declaration of Rights and one of the Framers of the Constitution for the inhabitants of Fairfax County, Virginia, in February, 1775, whereby "all the able-bodied Freemen from eighteen to fifty Years of Age" were to "embody [them]selves into a Militia for th[e] County." I Papers of George Mason 215 (U. of N.C. Press, 1970). They did so because they were "thoroughly convinced that a well-regulated militia, composed of the Gentlemen, Freeholders, and other Freemen, is the natural Strength and only safe & stable security of a free Government, & that such Militia will relieve our Mother Country from any Expense in our Protection and Defense, will obviate the Pretence of a necessity for taxing us on that account, and render it unnecessary to keep any standing Army (ever dangerous to liberty) in this Colony . . ." Ibid.

Thus, each subscriber agreed, ". . . we do Each of us, for ourselves respectively, promise and engage to *keep* a good Firelock in proper Order, & to furnish Ourselves as soon as possible with, & *always keep by us*, one Pound of Gunpowder, four Pounds of Lead, one Dozen Gun-Flints, & a pair of Bullet-Moulds, with a Cartouch Box, or powder-horn, and Bag for Balls. That we will use our best Endeavours to perfect ourselves in the Military Exercise & Discipine . . ." (Emphasis added.) Id. at 216.

Finally, the state ratifying conventions provide an excellent insight into the perception of the Framers that the Second Amendment guaranteed to each individual the right to keep and bear arms.

In New Hampshire the ratifying convention advanced a proposal which provided that "Congress shall never disarm *any citizen* unless such as are or have been in Actual Rebellion." (Emphasis added.) Debates in the Federal Convention of 1787 as Reported by James Madison, 658 (Hunt & Scott ed. 1920).

Pennsylvania proposed a provision stating that "the people have the right to bear arms for the defense of themselves, their state, or the United States, and for killing game, and no law shall be enacted for disarming the people except for crimes committed or in a case of real danger of public injury from *individuals* . . ." (Emphasis added.) E. Dumbauld, *The Bill of Rights and What It Means Today* 12 (1957).

And in Massachusetts, Samuel Adams proposed an amendment requiring that the "Constitution be never construed to authorize Congress to . . . prevent the people of the United States, who are

peaceable *citizens* from keeping their *own* arms." (Emphasis added.) Pierce & Hale, Debates of the Massachusetts Convention of 1788 86-87.

The significance of the foregoing history is that the joining of "a well regulated militia" with "the right to keep and bear arms" was a natural and logical result of the experience of the men who had led the Revolution. Only if individuals had the right to keep and bear arms could the people provide for their own defense and self-preservation as well as in their capacity as members of the milita, provide for the common defense from a foreign invader or as a check against the internal usurpation of liberty by a standing army of the central government.

The Bill of Rights must be read in conjunction with the Constitution as an integrated whole. The seven articles comprising the main body of the Constitution establish a form of government and grant that government certain powers to effectuate governance of the United States. The first ten amendments, however, recognize the possibility of abuses against individuals by the government the Constitution established; thus, certain individual rights are guaranteed and protected. The fact that one of those protected and guaranteed rights, the right to keep and bear arms, is joined with language expressing one of its purposes or goals, in no way permits a construction which limits or confines the exercise of that right. To hold otherwise is to violate the principle that the guarantees and protections of the Bill of Rights must be interpreted to give liberty the broadest possible scope and further to turn a blind eye toward the common law and history of the adoption of the Second Amendment. The Supreme Court of Oregon recently recognized this principle by stating:

> We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision, is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.

State v. *Kessler*, 289 Or. 359, 614 P.2d 94, 95 (1980).

C. JUDICIAL INTERPRETATION

A conclusion that the Second Amendment does not guarantee an individual right is not supported by *United States* v. *Miller*, 307 U.S. 174 (1939), or other cases which the Supreme Court and other courts have considered.

In *United States* v. *Cruikshank*, 92 U.S. 542 (1876), the first case in which the Supreme Court had the opportunity to interpret the Second Amendment, the court recognized that the right of the people to keep and bear arms existed prior to the Constitution by stating that such a right "is not a right granted by the Constitution . . . [n]either is it in any manner dependent upon that instrument for its existence." 92 U.S. at 553. The indictment charged, inter alia, a conspiracy by Klansmen to prevent and hinder blacks from exercising their civil rights, including the bearing of arms for

lawful purposes. The Court held, however, that the Second Amendment guaranteed that the right to keep and bear arms shall not be infringed by Congress and hence did not apply to the instant case since the violation alleged was by fellow-citizens, not the federal government.

In *Presser* v. *State of Illinois*, 116 U.S. 252 (1886), although the Supreme Court affirmed the holding in *Cruikshank*, i.e. that the Second Amendment applied only to action by the federal government, it apparently found the states without power to infringe upon the right to keep and bear arms, stating at 265:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and in view of this prerogative of the general government, as well as of its general powers, *the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security and disable the people from performing their duty to the general government.* (Emphasis added.)

The idea of the armed people maintaining "public security" mentioned in this passage from *Presser*, was based on the common law concept that loyal individuals had the right and duty to resist malefactors and the disloyal, such as robbers and burglars, and to use deadly force, if necessary, to do so. The Second Amendment thus also contemplates the right of the people to keep and bear arms so as to be continuously able to maintain the "security of a free State" by aiding in the enforcement of criminal laws such as by making citizens' arrests and aiding peace officers in arresting malefactors. Joyce Lee Malcolm, Disarmed: The Loss of the Right to Bear Arms in Restoration England, p. 5 (Cambridge: The Mary Ingraham Bunting Institute of Radcliffe College, 1980). *Rex* v. *Compton*, 22 Liber Assisarum (Book of Assizes 1347) placitum 55, trans. in J.H. Beale, Jr., A Selection of Cases and other Authorities Upon Criminal Law, p. 501 (2d ed. 1907). E. Coke Institutes of the Laws of England at 56 (1648). Bohlen and Shulman, Arrest With and Without A Warrant, 75 U.Pa.L.Rev. 485, 497 (1927).

In *United States* v. *Miller*, supra, decided in 1939, the only case in which the Supreme Court has had the opportunity to apply the Second Amendment to a federal firearms statute, the Court carefully avoided making an unconditional finding of the statute's constitutionality; it instead devised a standard by which federal statutes relating to firearms are to be judged. The holding of the Court in *Miller*, however, should be viewed as only a partial guide to the meaning of the Second Amendment [77] primarily because neither defense counsel nor defendants appeared before the Supreme Court, nor was any brief filed on their behalf giving the Court the benefit of argument supporting the trial court's holding that Section 11 of the National Firearms Act was unconstitutional. As a result of the absence of the normal adversarial process, the Court was presented with only the prosecution's view of the Second Amendment, a view which, needless to say, was in favor of the constitutionality of Section 11 of the National Firearms Act. In

spite of this severe and critical limitation on its decision-making process, the Court's decision in some degree took account of the common law view of the right to keep and bear arms as well as the historical background of the Second Amendment.

The heart of the Court's ruling is found at the beginning of the opinion; it states:

> *In the absence of any evidence* tending to show that possession or use of a "shotgun having a barrell of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. (Emphasis added.) 307 U.S. at 178.

Two independent thoughts are expressed here: one, that for the keeping and bearing of a firearm to be constitutionally protected, that firearm's possession or use must have some reasonable relationship to the preservation of a well regulated militia; and two, that in this case, the Court would not take judicial notice that a short-barrelled shotgun met such a test. It remanded the case to the trial court for the taking of evidence on that question. [8] The Court's first point, that the right to keep and bear an arm is dependent on the firearm's military value, is faulty, however, because the Court failed to consider fully the common law (see section B above) and misinterpreted cited authorities. Rather, the Court only briefly discussed the common law and, moreover, did not consider the history of the adoption of the Second Amendment, both of which support the proposition that the Second Amendment guarantees and protects a fundamental individual right. As to the misinterpretation of cited authorities, a result undoubtedly of the one-sided argument, one important example should suffice.

In support of its position that the Second Amendment's protection and guarantee was limited to "ordinary military equipment" or weapons whose use "could contribute to the common defense," the Court cited one case, *Aymette* v. *State*, 21 Tenn. 154 2 Humph. 154 (1840). In *Aymette*, however, the Tennessee Supreme Court was construing not the Second Amendment but the provision of Tennessee's constitution guaranteeing the right to keep and bear arms, a provision which, unlike the Second Amendment, spoke of each citizen's right to keep and bear arms only as it related to the common defense. The Tennessee court thus reasoned that not all objects which could conceivably be used as weapons were protected by the Tennessee Constitution but only those weapons "such as usually employed in civilized warfare." Id. at 158. This limitation is not, however, applicable to the Second Amendment since the First Congress, while debating what ultimately became the Second Amendment, emphatically rejected the "common defense" language upon which the *Aymette* decision turned. It is plain, therefore, that the interpretation of the Second Amendment in *Miller* is more limited than it should be and that the Second Amendment protects the keeping and bearing of all types of arms which could

be carried by individuals. Moreover, the rejection of the "common defense" limitation signified the Framers' intention that the constitutional guarantee of the right to keep and bear arms was not inextricably tied to a militia nexus, but existed independently of it. Even accepting, however, that a militia or common defense nexus was necessary, *Aymette* went on to say that, "The citizens have an unqualified right to keep the weapon." Id. at 160.

One other comment should be made about *Aymette*. What Judge Green was discussing when he said that the legislature could pass laws concerning arms was that laws could be enacted which would punish the misuse of such arms. As an example, Judge Green noted that the legislature could punish a set of ruffians for entering a theatre or a church with drawn swords, guns, and fixed bayonets to the terror of the audience; he went on to observe, moreover, that "the citizens have an unqualified right to keep the weapon" and to bear it except to "terrify the people, or for purposes of private assassination." Id. at 160.

One of the chief values of the *Miller* opinion is its discussion of the development and structure of the militia which, the Court pointed out, consisted of "all males physically capable of acting in concert for the common defense" and that "when called for service these men were expected to appear bearing arms *supplied by themselves* and of the kind in common use at the time." (Emphasis added.) 307 U.S. at 179. The other significant value of *Miller* is its implicit rejection of the view that the Second Amendment guarantees the right to keep and bear arms only to those individuals who are members of the militia. Had the Court reviewed the Second Amendment as guaranteeing the right to keep and bear arms only to "all males physically capable of acting in concert for the common defense" it would certainly have discussed whether Miller met the qualifications for inclusion in the militia as it did with regard to the military value of a short-barrelled shotgun. That it did not signifies the Court's acceptance of the fact that the right to keep and bear arms is guaranteed to each individual without regard to his relationship with the militia.

The *Miller* Court examined in detail, at pages 179–182, not only the duty to assist in the common defense but indeed the legal obligation each individual then had to possess the arms necessary to undertake that common defense. For example, in Massachusetts there were laws which levied fines and penalties against adult males who failed to possess arms and ammunition. In Virginia and New York all males of certain ages were required to own and possess their own firearms at their own expense, and to appear bearing said arms when so notified.

It is clear that *Miller*, for all its shortcomings and limitations, supports the view that the Second Amendment protects and guarantees a fundamental individual right to keep and bear arms, subject to the restriction that only a certain category or categories of arms may, of right, be individually owned and possessed, i.e. those arms whose possession or use are reasonably related to the preservation or efficiency of the militia. As aptly put by Mr. Justice Black, in discussing *Miller* and the Second Amendment, "although the Supreme Court has held this amendment to include only arms necessary to a well-regulated militia, as so construed its

prohibition is absolute." Black, The Bill of Rights, 35 N.Y.U L. Rev. 865, 873 (1960). [9]

In *United States* v. *Tot*, 131 F.2d 261 (3rd Cir. 1942), the Third Circuit cited *Miller* in upholding the conviction under the Federal Firearms Act of a felon for possessing a pistol which had traveled in interstate commerce. [10]

The Third Circuit did not deny that individuals have the right to keep and bear arms; it merely stated, in dicta, its view that the Second Amendment was adopted as a protection for the states in the maintenance of their militia organizations against possible encroachments by the federal power. The heart of the Third Circuit's holding is that it was entirely reasonable for Congress to prohibit the receipt of weapons from interstate transactions by persons who have previously by due process of law been shown to be aggressors against society and that this classification did not infringe upon the preservation of the well-regulated militia protected by the Second Amendment.

The Court could have gone on to point out that the maintenance of the militias of the states is dependent upon the right of individuals, who may be called upon to serve in the militias, to keep and bear arms.

In *Cases* v. *United States*, 131 F.2d 916 (1st Cir. 1942), the First Circuit upheld the constitutionality of the Federal Firearms Act of 1938. In so doing it observed that apparently under *Miller* although the federal government could *limit* the keeping and bearing of arms by a certain type of individual, it could not

> . . . *prohibit* the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia, (emphasis added) 131 F.2d at 922,

a distinction arising from *Miller's* holding that the protections of the Second Amendment are limited to those firearms with a militia nexus. The Court indicated its unwillingness to accept the broad reach of *Miller* when it reasoned that it was already outdated because in "commando units" some sort of military use seems to have been found for almost any modern, lethal weapon. If this were true, concluded the court, the protection of the Second Amendment as set forth in *Miller* would be absolute except for antique weapons which have no modern military use since, as the court accurately observed, ". . . almost any other [weapon] might bear some reasonable relationship to the preservation or efficiency of a well regulated militia unit of the present day . . ." Id. at 922.

The First Circuit failed to consider the unambiguous wording of the Second Amendment in reaching its conclusion. The Second Amendment speaks not only of the right to keep arms, but to bear them as well, implying that the category of arms, the possession of which is protected, is limited to those arms that an ordinary individual can bear and does not extend to weapons such as cannons, trench mortars, and antitank guns, which cannot be carried by an ordinary individual. Also not protected are instrumentalities such as bombs which, although conceivably they could be carried by a single individual, are not arms in the sense used in the Second Amendment; rather, the historically and constitutionally protected

arms are those such as muskets, shotguns, rifles and pistols, which are ordinarily possessed by private individuals. To argue, ad absurdum, as the *Cases* court did, that all weapons are protected by the Second Amendment overlooks the fact that the Framers of the Bill of Rights were fully aware of the existence of heavier, horse-drawn and crew served arms which the individual was physically incapable of bearing. Had framers of the Bill of Rights intended to protect all weapons, they would not have linked the right to bear arms with the right to keep arms.[11]

Since, however, the Supreme Court did not review the *Cases* decision, *Miller* persists as that Court's guidance to the interpretation of the Second Amendment.

It is clear, therefore, based on analysis of the decided cases, the common law, and the history of the Second Amendment that the Second Amendment guarantees an individual's right to keep and bear arms.

D. THE RIGHT TO SELF-DEFENSE

The right to keep and bear arms is inextricably connected to the individual's absolute and inalienable right of self-defense which is, of course, derived from the Natural Law.

As referred to earlier, Blackstone clearly recognized as a natural right that of keeping and using arms for "resistance and self-preservation." I *Blackstone Commentaries* 144. The basic right to defend one's person with deadly force has, moreover, been recognized by the Supreme Court, *Beard* v. *United States*, 158 U.S. 550 (1895) and every state in the union. For example, in *State* v. *Dawson*, 272 N.C. 535, 159 S.2d, 1, 9 and 11 (1968), the Supreme Court of North Carolina, in interpreting a provision of that state's constitution which tracked the language of the Second Amendment, held that the individual right of self-defense was assumed by the Framers, and that any statute or construction of a common law rule which would amount to a destruction of the right to bear arms would be unconstitutional. Also, the *State* v. *Kessler*, supra, the court noted that "the necessity of self protection in a frontier society also was a factor" in guaranteeing the right to keep and bear arms.

The right to defend one's person is so fundamental that it was not set forth in the constitution but certainly exists as one of those rights included in the penumbra of unwritten rights surrounding the First, Second, Third, Fourth, Fifth, and Ninth Amendments. It is manifestly an inalienable right, incapable of surrender to the central government and encompassed by the Ninth Amendment as retained by the people.

II. Antebellum judicial construction

In the period from the adoption of the constitution to the War Between the States, keeping and bearing arms was treated as a virtually unquestioned right of each individual. The fundamental right to have arms was based in part on the political lessons of the Revolutionary experience. "None but an armed nation can dispense with a standing army," Jefferson wrote in 1803. "To keep ours armed and disciplined, is therefore at all times important." The

Jefferson Cyclopedia 553 (1900). In 1814, Jefferson further observed that "we cannot be defended but by making every citizen a soldier, as the Greeks and Romans who had no standing armies." Id. at 551. In addition to the prevention of aggression from domestic tyranny or foreign invasion, individual possession of arms functioned to provide a basic means of self-defense, as well as of subsistence for hunters.

That the Second Amendment secured an individual right to keep and bear arms was not an issue for partisan politics, and the courts fairly consistently so held. The major exception to this rule appeared in the context of slavery. Specifically, to disarm slaves as well as black freemen, certain courts originated the views that the guarantee was limited to citizens rather than to all people and that the Second Amendment did not restrain the states. The exceptions were aberrations to prevent black freedom, as most courts which analyzed the Second Amendment regarded all individuals as having the right and construed it as a restraint on state infringement.

A. JUDICIAL COMMENTARIES

Although Federalist and Republican differences in interpretation of the Constitution appeared early in judicial thought on subjects as diverse as the general welfare clause and the right of free speech, these points of divergence did not arise with respect to the Second Amendment. William Rawle, one of the first commentators on the Second Amendment, analyzed its two basic clauses in some detail:

> In the second article, it is declared, that a *well regulated militia is necessary to the security of a free state*: a proposition from which few will dissent. Although in actual war, the services of regular troops are confessedly more valuable; yet, while peace prevails, and in the commencement of a war before a regular force can be raised, the militia form the palladium of the country. They are ready to repel invasion, to suppress insurrection, and preserve the good order and peace of government. . . .
>
> The corollary, from the first position, is, that the right of the people to keep and bear arms shall not be infringed.
>
> The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretense by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.

W. Rawle, A view of the Constitution, 125–56 (1829).

Rawle's analysis stresses the significance of the first clause of the Second Amendment as an imperative for a militia system as opposed to a standing army. Clause two is then treated both in its linkage to clause one in that the individual right to keep and bear arms encourages a militia system, and independently as recognition of a fundamental right to have arms unrestrained by state no less than federal legislation. In negative remarks on English policy,

Rawle also clarified that the right to have arms is deemed more absolute in America than Britian, and that the Second Amendment protects individual use of arms for non-militia purposes such as hunting.

St. George Tucker, a veteran of the Revolutionary War and an early Justice of the Supreme Court of Virginia, followed Blackstone closely in regard to the common law right to have arms, at the same time stressing the more absolute character of the right under American law:

> The right of bearing arms—which with us is not limited and restrained by an arbitrary system of game laws as in England; but, is practically enjoyed by every citizen, and is among his most valuable privileges, since it furnishes the means of resisting as a freeman ought, the inroads of usurpation. . . . I St. Geo. Tucker, Commentaries on the Laws of Virginia, 43 (1831).

In addition to his explicit characterization of keeping and bearing arms as an individual right, elsewhere Justice Tucker distinguished the language of the English Bill of Rights that subjects may have arms for their defense, "suitable to their condition and degree, and such as are allowed by law," from the Second Amendment, wherein the right to have arms exists "without any qualification as to their condition or degree, as in the case of the British government." I *Blackstone Commentaries* *144 n. 40 (St. Geo. Tucker, ed. 1803).

B. STATE CASES

A provision of the Kentucky Constitution, "The right of the citizens to bear arms in defense of themselves and the state, shall not be questioned," provided the occasion for perhaps the first state judicial opinion on the nature and source of the right to bear arms. *Bliss* v. *Commonwealth*, 2 Litt. (Ky.) 90, 13 Am. Dec. 251 (1822). Defendant appealed his conviction for having worn a sword cane by asserting the unconstitutionality of an act prohibiting concealed weapons. The court held, "Whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution." Id. at 91-92. Observing that wearing concealed weapons was considered a legitimate practice when the constitutional provision was adopted, the court reasoned:

> The right existed at the adoption of the constitution: it had then no limits short of the moral power of the citizens to exercise it, and in fact consisted in nothing else but in the liberty of the citizens to bear arms. Diminish that liberty, therefore, and you necessarily restrain the right; and such is the diminution and restraint, which the act in question most indisputably imports, by prohibiting the citizens wearing weapons in a manner which was lawful to wear when the constitution was adopted. Id. at 92.[12]

Whether carrying and wearing dangerous weapons constituted an affray at common law was the issue in the Tennessee case of *Simpson* v. *State*, 13 Tenn. Reports (5 Yerg.) 56 (1833). The Court

answered in the negative, citing Blackstone for the proposition that violence which terrifies the people must also be present. The government cited Serjeant Hawkins, Pleas of the Crown, Bk. 1, ch. 28, sec. 4, regarding the Statute of Northampton, 2 Edw. 3, c.3(1328), that an affray could exist where one is armed with unusual weapons which naturally cause terror to the people, but the court rejected those "ancient English statutes, enacted in favour of the king, his ministers, and other servants" which provided that "no man . . . except the king's servants, & c. shall go or ride armed by night or by day." 13 Tenn. Reports (5 Yerg.) 358 (1833). The court seemed resentful of royal privilege in noting that the same source adds "persons of quality are in no danger of offending against this statute by wearing their common weapons" and, while rejecting the existence of a common law abridgement of the right to bear arms (*Id.* at 359), argued in the alternative that any such abridgement would be abrogated by the state constitution, which provided "that the freemen of this State have a right to keep and bear arms for their common defense."

> By this clause of the constitution, an express power is given and secured to all the free citizens of the State to keep and bear arms for their defense, without any qualification whatever as to their kind or nature. . . . *Id.* at 360.

The classic antebellum opinion which held that the Second Amendment protects an individual right from both state and federal infringement, but that the manner in which arms could be borne was a proper subject for regulation, was *Nunn* v. *State*, 1 Ga. 243 (1846). An ambiguous Georgia statute proscribed breast pistols, but not horseman's pistols, which were not worn openly. While upholding the proscription of concealed weapons, the court said that the state constitutions "confer no *new rights* on the people which did not belong to them before," that no legislative body in the Union could deny citizens the privilege of being armed to defend self and country, and that the colonial ancestors had this right which "is one of the fundamental principles, upon which rests the great fabric of civil liberty. . . ." Id. at 249.

Anticipating twentieth century selective incorporation by referring to the First, Fourth, Fifth, and Sixth Amendments as binding on both state and federal governments, the court reasoned:

> The language of the second amendment is broad enough to embrace both Federal and state government—nor is there anything in its terms which restricts its meaning. . . . Is this a right reserved to the States or to themselves? Is it not an unalienable right, which lies at the bottom of every free government? We do not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures. This right is too dear to be confided to a republican legislature. Id. at 250.

The Georgia court explained the relation between individual arms possession and the militia by reference to the fact that "in order to train properly that militia, the unlimited right of the people to keep and bear arms shall not be impaired," (*Id.* at 251),

and added that both constitutional and natural rights were at stake. Contending that the state governments were prohibited from violating the rights to assembly and petition, against unreasonable searches and seizures, to an impartial jury in criminal prosecutions, and to assistance of counsel, the court continued:

> Nor is the right involved in this discussion less comprehensive or valuable: "The right of the people to bear arms shall not be infringed." The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this right. . . . Id. at 251.

In the Texas case of *Cockrum* v. *State*, 24 Tex. 394 (1859), the Court explained that the object of the Second Amendment was that "the people cannot be effectually oppressed and enslaved, who are not first disarmed." Id. at 401, and added:

> The right of a citizen to bear arms, in lawful defense of himself or the State, is absolute. He does not derive it from the State government. It is one of the "high powers" delegated directly to the citizen, and "is excepted out of the general powers of government." A law cannot be passed to infringe upon or impair it, because it is above the law, and independent of the lawmaking power. Id. at 401–402.

C. SLAVERY AND THE DRED SCOTT DILEMMA

Despite the general rule in the antebellum courts that the Second Amendment guaranteed an individual right to keep and bear arms free from both federal and state infringement, to disarm blacks a few courts took the view that only citizens could have arms and that the Second Amendment did not apply to the states. In some states, free and slave blacks were disarmed by law to maintain their servile condition. State legislation which prohibited arms bearing by blacks was held to be constitutional owing to the lack of status of African Americans as citizens, despite the fact that the United States Constitution and most state constitutions referred to arms bearing as a right of "the people" rather than "the citizen."

In *State* v. *Newsom*, 27 N.C. 203 (1844), the Supreme Court of North Carolina upheld "an act to prevent free persons of color from carrying fire arms" on the ground that "the free people of color cannot be considered as citizens." Id. at 204. The court also stated: "in the second article of the amended Constitution, the States are neither mentioned nor referred to. It is therefore only restrictive of the powers of the Federal Government." Id. at 207. In *Cooper* v. *Savannah*, 4 Ga. 72 (1848), Georgia found its similar provision constitutional on the following logic: "Free persons of

color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office." Id. at 72.

The practical hardships suffered by individual blacks due to restrictive legislation is exemplified in *State v. Hannibal*, 51 N.C. (6 Jones) 57 (1859), which indicates that in the eighteenth century it was not illegal for a black to carry guns, but he was required to obtain a court certificate to hunt. An enactment in 1854 provided that "no slave shall go armed with a gun, or shall keep such weapons," with a penalty of up to 39 lashes. Id. at 57. In this instance, a master had given two slaves guns to guard his store at night, and the slaves were sentenced to twenty lashes each. Id. at 57.

Just as virtually the only antebellum state cases which limited the right to have arms functioned to disarm blacks, the ruling of the U.S. Supreme Court in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857), conceded that if members of the African race were "citizens," they would be "entitled to the privileges and immunities of citizens" and would be exempt from special "police regulations" applicable to them.

> It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies . . .; and it would give them full liberty of speech . . .; to hold public meetings upon political affairs, and *to keep and carry arms wherever they went.* (emphasis added) 60 U.S. at 417.

It is clear, therefore, that the Supreme Court included among the rights of every citizen the right to have arms wherever he goes; it is equally evident that in granting citizenship to African Americans by Amendments XIII and XIV, blacks were later guaranteed the fundamental rights of citizens. The Court's language also suggests that the right to have and carry arms anywhere is a right of national citizenship which the states cannot infringe any more than can the federal government—that the Second Amendment applies to the states.

Explaining further the rights of citizens, Chief Justice Taney observed that:

> The Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully, deny any right which it has reserved. . . . Nor can Congress deny the people the right to keep and bear arms, nor the right to trial by jury, nor compel anyone to be a witness against himself in a criminal proceeding. 60 U.S. at 450.

III. The Framers of the fourteenth amendment intended that the guarantees of the second amendment would be applied to the States

After the War Between the States, judicial commentators continued to interpret the Second Amendment as protecting an individual right from both state and federal infringement. The right to keep and bear arms and other Bill of Rights freedoms were viewed

as common law rights explicitly protected by the Constitution. T. Farrar, Manual of the Constitution, 59, 145 (1867). Joel P. Bishop wrote in 1865:

> The constitution of the United States provides, 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." This provision is found among the amendments; and: though most of the amendments are restrictions on the General Government alone, not on the States, this one seems to be of a nature to bind both the State and National legislatures. II J. Bishop, Commentaries on the Criminal Law, Section 124 (1865).

Yet Bishop's references to "statutes relating to the carrying of arms by negroes and slaves" (II J. Bishop, supra, n. 2, at 120, n. 6), and to an "act to prevent free people of color from carrying firearms" (*Id.* at 125, n. 2) exemplified the need for further constitutional guarantees to clarify and protect the rights of all individuals.

A. FIREARMS AND THE ABOLITION OF SLAVERY

Having won their national independence from England through armed struggle, post-Revolutionary War Americans were acutely aware that the sword and sovereignty go hand-in-hand, and that distribution of firearms among the oppressed ushered in a new epoch in the human struggle for freedom. Furthermore, both proponents and opponents of slavery were cognizant that an armed black population meant the abolition of slavery, although some blacks were trusted with arms to guard property, for self defense, and for hunting. This sociological fact explained not only the legal disarming of blacks, but also the advocacy of a weapons culture by abolitionists. Having employed the instruments for self-defense against his pro-slavery attackers, abolitionist and Republican Party founder Cassius Marcellus Clay wrote that " 'the pistol and the Bowie knife' are to us as sacred as the gown and the pulpit." 7 The Writings of Cassius Marcellus Clay, 257 (H. Greeley ed. 1848).

B. THE CIVIL RIGHTS ACT OF 1866

After the Civil War, the slave codes, which limited access of blacks to land, to arms, and to the courts, began to reappear in the form of black codes, (W. DuBois, Black Reconstruction in America, 167, 172, and 223 (1962); E. Coulter, The South During Reconstruction 40 (1947)) and United States legislators turned their attention to the protection of the freedmen. In support of Senate Bill No. 9, which declared as void all laws in the rebel states which recognized inequality of rights based on race, Sen. Henry Wilson (R., Mass.) explained in part: "In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them. . . ." Cong. Globe, 39th Cong., 1st Sess., pt. 1, 40 (Dec. 13, 1865).

When Congress took up Senate Bill No. 61, which became the Civil Rights Act of 1866, (14 Stat. 27 (1866)) Sen. Lyman Trumbull (R., Ill.), Chairman of the Senate Judiciary Committee, indicated

that the bill was intended to prohibit inequalities embodied in the black codes, including those provisions which "prohibit any negro or mulatto from having fire-arms." Cong. Globe, 39th Cong., 1st Sess., pt. 1, 474 (Jan. 29, 1866). In abolishing the badges of slavery, the bill would enforce fundamental rights against racial discrimination in respect to civil rights, the rights to contract, sue and engage in commerce, and equal criminal penalties. Sen. William Saulsbury (D., Delaware) added:

> In my State for many years, and I presume there are similar laws in most of the southern states, there has existed a law of the State based upon and founded in its police power, which declares that free negroes shall not have the possession of firearms or ammunition. This bill proposes to take away from the States this police power. . . ." Id. at 474.

The Delaware Democrat opposed the bill on this basis, anticipating a time when "a numerous body of dangerous persons belonging to any distinct race" endangered the state, for "the State shall not have the power to disarm them without disarming the whole population." Id. at 478. Thus, the bill would have prohibited legislative schemes which in effect disarmed blacks, but not whites. Still, supporters of the bill were soon to contend that arms bearing was a basic right of citizenship or personhood.

In the meantime, the legislators turned their attention to the Freedman's Bureau Bill. Rep. Thomas D. Eliot (R., Mass.) attacked an Opelousas, Louisiana ordinance which deprived blacks of various civil rights, including the following provision: "No freedman who is not in the military service shall be allowed to carry fire-arms, or any kind of weapon, within the limits of the town of Opelousas without the special permission of his employer . . . and approved by the mayor or president of the board of police." Id. at 517 (Jan. 30, 1866). And Rep. Josiah B. Grinnell (R., Iowa) complained: "A white man in Kentucky may keep a gun; if a black man buys a gun he forfeits it and pays a fine of five dollars, if presuming to keep in his possession a musket which he has carried through the war." Id. at 651 (Feb. 5, 1866).

As debate returned to the Civil Rights Bill, Rep. Henry J. Raymond (R., N.Y.) explained of the rights of citizenship: "Make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States under the laws and Constitution of the United States. . . . He has a defined status; he has a country and a home; a right to defend himself and his wife and children; a right to bear arms. . . ." Id., pt. 2, 1266 (Mar. 8, 1866). Rep. Roswell Hart (R., N.Y.) concluded that it was the duty of the United States to guarantee that the states have a republican form of government, "A government . . . where 'no law shall be made prohibiting a free exercise of religion;' where 'the right of the people to keep and bear arms shall not be infringed;' . . ." Id. at 1629 (Mar. 24, 1866).

Rep. Sidney Clarke (R., Kansas) objected to an 1866 Alabama law providing: "That it shall not be lawful for any freedman, mulatto, or free person of color in this State to own firearms, or carry about his person a pistol or other deadly weapon." Id. at 1838 (April 7,

1866). Clarke also attacked Mississippi, "whose rebel militia, upon the seizure of the arms of black Union soldiers, appropriated the same to their own use." Id. at 1838.

> Sir, I find in the Constitution of the United States an article which declares that "the right of the people to keep and bear arms shall not be infringed." For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in ther local laws. . . . Id. at 1838.

C. THE FOURTEENTH AMENDMENT

The need for a more solid foundation for the protection of freedmen as well as white citizens was recognized, and the result was a significant new proposal—the Fourteenth Amendment. A chief exponent of the amendment, Sen. Jacob M. Howard (R., Mich., referred to the "personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press; . . . *.the right to keep and to bear arms. . .* " [*emphasis added*] Cong. Globe, 39th Cong. 1st Sess. pt. 3, 2765 (May 23, 1866). Adoption of the Fourteenth Amendment was necessary because these rights were not then effectively guaranteed against state legislation. "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." Id. at 2766.

The Fourteenth Amendment was viewed as necessary to buttress the objectives of the Civil Rights Act of 1866. Rep. George W. Julian (R., Ind.) noted that the act

> Is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. South Carolina has the same enactments. . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact. Id. at pt. 4, 3210 (June 15, 1866.)

D. THE ANTI-KKK ACT

Within three years of the adoption of the Fourteenth Amendment in 1868, Congress was considering enforcement legislation to suppress the Ku Klux Klan. The famous report by Rep. Benjamin F. Bulter (R., Mass.) on violence in the South assumed that the right to keep arms was necessary for protection not only against the militia, but also against local law enforcement agencies. Noting instances of "armed confederates" terrorizing the negro, the report stated that "in many counties they have preceded their outrages upon him by disarming him, in violation of his right as a citizen to 'keep and bear arms,' which the Constitution expressly says shall never by infringed." 1464 H.R. Rep. No. 37, 41st Cong., 3rd Sess. 3 (Feb. 20, 1871). The congressional power based on the Fourteenth Amendment to legislate to prevent states from depriving any U.S. citizen of life, liberty, or property accounted for the following provision of the committee's anti-KKK bill:

[illegible]

> That whoever shall, without due process of law, by violence, intimidation, or threats, take away or deprive any citizen of the United States of any arms or weapons he may have in his house or possession for the defense of his person, family, or property, shall be deemed guilty of a larceny thereof, and be punished as provided in this act for a felony. Cong. Globe, 42nd Cong., 1st Sess., pt. 1, 174 (Mar. 20, 1871).

Rep. Butler explained the purpose of this provision in these words:

> Section eight is intended to enforce the well-known constitutional provision guaranteeing the right in the citizen to 'keep and bear arms,' and provides that whoever shall take away, by force or violence, or by threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed guilty of larceny of the same. This provision seemed to your committee to be necessary, because they had observed that, before these midnight marauders made attacks upon peaceful citizens there were very many instances in the South where the sheriff of the county had preceded them and taken away the arms of their victims. This was specially noticeable in Union County, where all the negro population were disarmed by the sheriff only a few months ago under the order of the judge. . . .; and then, the sheriff having disarmed the citizens, the five hundred masked men rode at night and murdered and otherwise maltreated the ten persons who were in jail in that county. H.R. Rep. No. 37, supra, note 38, at 7-8.

The bill was referred to the Judiciary Committee, and when later reported as H.R. No. 320 the above section was deleted—undoubtedly because its proscription extended to simple individual larceny over which Congress had no constitutional authority, and because state or conspiratorial action involving the disarming of blacks would be covered by more general provisions of the bill. Supporters of the rewritten anti-KKK bill continued to show the same concern over the disarming of freedmen as they had prior to the adoption of the Fourteenth Amendment. Sen. John Sherman (R., Ohio) stated the Republican position: "Wherever the negro population preponderates, there they [the KKK] hold their sway, for a few determined men. . . can carry terror among ignorant negroes . . . without arms, equipment, or discipline." Cong. Globe, 42nd Cong. 1st Sess., pt. 1, 154 (Mar. 18, 1871).

Further comments clarified that the right to arms was a necessary condition for the right of free speech. Sen. Adelbert Ames (R., Miss.) averred: "In some counties it was impossible to advocate Republican principles, those attempting it being hunted like wild beasts; in others, the speakers had to be armed and supported by not a few friends." Id. at 196. (Mar. 21, 1871). Rep. William L. Stoughton (R., Mich.) added: "If political opponents can be marked for slaughter by secret bands of cowardly assassins who ride forth with impunity to execute the decrees upon *the unarmed and de-*

fenseless. it will be fatal alike to the Republican party and civil liberty." [Emphasis added] Id. at 321 (Mar. 28, 1871).

Section 1 of the bill, which was taken partly from Section 2 of the Civil Rights Act of 1866, and survives today as 42 U.S.C. 1983 was meant to enforce Section 1 of the Fourteenth Amendment by establishing a remedy for deprivation under color of state law of federal constitutional rights of all people, not only former slaves. This portion of the bill provided:

> That any person who, under color of any law, statute, ordinance, regulation, custom or usage of any State shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities to which . . . he is entitled under the Constitution or laws of the United States, shall . . . be liable to the party injured in an action at law, suit in equity, or other propoer proceeding for redress . . . Id. pt. 2. Appendix, 68. 17 Stat. 13 (1871).

Rep. Washington C. Whitthorne (D., Tenn.), who complained that "in having organized a negro militia in having disarmed the white man," the Republicans had "plundered and robbed" the whites of South Carolina through "unequal laws," objected to Section 1 of the anti-KKK bill on these grounds.

> It will be noted that by the first section suits may be instituted without regard to amount or character of claim by any person within the limits of the United States who conceives that he has been deprived of any right, privilege, or immunity secured him by the Constitution of the United States, under color of any law, statute, ordinance, regulation, custom, or usage of any State. This is to say, that if a police officer of the city of Richmond or New York should find a drunken negro or white man upon the streets with a loaded pistol flourishing it, &c., and by virtue of any ordinance, law or usage, either of city or State, he takes it right away, the officer may be sued, *because the right to bear arms is secured by the Constitution*, and such suit brought in distant and expensive tribunals. [Emphasis added] Cong. Globe, 42rd Cong., 1st Sess., pt. 1, 337 (Mar. 29, 1871).

The Tennessee Democrat assumed that the right to bear arms was absolute, deprivation of which created a cause of action against state agents under Section 1 of the anti-KKK bill. In the minds of the bill's supporters, however, the Second Amendment as incorporated in the Fourteenth Amendment recognized a right to keep and bear arms safe from state infringement, not a right to commit assault or otherwise engage in criminal conduct with arms by pointing them at people or brandishing them so as to endanger others. Contrary to the congressman's exaggerations, the proponents of the bill had the justified fear that the opposite development would occur, i.e. that a black or white man for political reasons would be unconstitutionally deprived of his right to possess arms by state action. Significantly, none of the representative's colleagues disputed his statement that state agents could be sued

under the predecessor to Section 1983 for deprivation of the right to keep arms.

Debate over the anti-KKK bill naturally required exposition of Section 1 of the Fourteenth Amendment, and none was better qualified to explain that section than its draftsman, Rep. John A. Bingham (R., Ohio):

> Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States . . . .
>
> These eight articles . . . never were limitations upon the power of the States, until made so by the fourteenth amendment. The words of that amendment, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" are an express prohibition upon every State of the Union . . . . Id. at pt. 2, Appendix 84 (Mar. 31, 1871).

This is a most explicit statement of the incorporation thesis by the architect of the Fourteenth Amendment. Although he based the incorporation on the Privileges and Immunities Clause and not the Due Process Cause as have subsequent courts of selective incorporation, Rep. Bingham could hardly have anticipated the judicial metaphysics of the twentieth century in this respect. In any case, whether based on the Due Process Cause or on the Privileges and Immunities Clause, the legislative history supports the view that the incorporation of Amendments I-VIII was clear and unmistakable in the minds of the legislators attempting to effectuate the provision of the Fourteenth Amendment.

Rep. Henry L. Dawes (R. Mass.) also asserted the incorporation thesis when he argued:

> The rights, privileges and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject-matter of this bill. . . .
>
> In addition to the original rights secured to him in the first article of amendments he had secured the free exercise of his religious belief, and freedom of speech and of the press. Then again he has secured to him the *right to keep and bear arms in his defense.* . . . [Dawes then summarizes the remainder of the first eight amendments.]
>
> And still later, sir, after the bloody sacrifice of our four years' war, we gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens. . . .
>
> [I]t is to protect and secure to him in these rights, privileges, and immunities this bill is before the House. [emphasis added] *Cong. Globe*, 42nd Cong., 1st. Sess., pt. 1, 475-476 (April 5, 1871).

E. THE CIVIL RIGHTS ACT OF 1875

After passage of the anti-KKK bill, discussion concerning arms persisted as interest developed toward what became the Civil Rights Act of 1875, now 42 U.S.C. 1984. A report on affairs in the South by Sen. John Scott (R., Penn.) indicated the need for further enforcement legislation: "negroes who were whipped testified that those who beat them told them they did so because they had voted the radical ticket, and in many cases made them promise that they would not do so again, and wherever they had guns took them from them." 1484 S. Rep. No. 41, 42nd Cong., 2nd Sess., pt. 1, 35 (Feb. 19, 1872).

Following the introduction of the Civil Rights Bill the debate over the meaning of the Privileges and Immunities Clause returned. Sen. Matthew H. Carpenter (R., Wisc.) cited *Cummings* v *Missouri*, 71 U.S. 277, 321 (1866) a case contrasting the French legal system, which allowed deprivation of civil rights, "and among these of the right of voting, . . . of bearing arms," with the American legal system, stating that the Fourteenth Amendment prevented states from taking away the privileges of the American citizen. *Cong. Globe*, 2nd Sess., pt. 1, 762 (Feb. 1, 1872).

Sen. Allen G. Thurman (D., Ohio) argued that the "rights, privileges, and immunities of a citizen of the United States" were included in Amendments I-VIII. Reading and commenting on each of these amendments, he said of the Second: "Here is another right of a citizen of the United States expressly declared to be his right—the right to bear arms; and this right, says the Constitution, shall not be infringed." *Id.* at pt. 6, Appendix, 25-26 (Feb. 6, 1872).

The incorporationist thesis was stated succinctly by Senator Thomas M. Norwood (D., Ga.) in one of the final debates over the Civil Rights Bill. Referring to a U.S. citizen residing in a Territory, Senator Norwood stated:

> His right to bear arms, to freedom of religious opinion, freedom of speech, and all others enumerated in the Constitution would still remain indefeasibly his, whether he remained in the Territory or removed to a State.
>
> And those and certain others are the privileges and immunities which belong to him in common with every citizen of the United States, and which no State can take away or abridge, and they are given and protected by the Constitution. . . .
>
> The following are most, if not all, the privileges and immunities of a citizen of the *United States:*
>
> The right to the writ of *habeas corpus;* of peaceable assembly and of petition; . . . *to keep and bear arms;* . . . from being deprived of the right to vote on account of race, color or previous condition of servitude. [emphasis added] *Cong. Rec.*, 43rd Cong., 1st Sess., pt. 6, Appendix 241-242 (May 4, 1874).

Arguing that the Fourteenth Amendment created no new rights but declared that "certain existing rights should not be abridged by States," the Georgia Democrat explained:

> Before its [Fourteenth Amendment] adoption any State might have established a particular religion, or restricted freedom of speech and of the press, or *the right to bear arms*. . . . A State could have deprived its citizens of any of the privileges and immunites contained in those eight articles, but the *Federal Government* could not. . . .
>
> . . . And the instant the fourteenth amendment became a part of the Constitution, every State was at that moment disabled from making or enforcing any law which would deprive any citizen of a State of the benefits enjoyed by citizens of the United States under the first eight amendments to the Federal Constitution. (emphasis added) *Id.* at 242.

In sum, in the understanding of Southern Democrats and Radical Republicans alike, the right to keep and bear arms, like other Bill of Rights freedoms, was made applicable to the states by the Fourteenth Amendment.

REFERENCES

1. Although the common law in effect in the colonies did not develop any limitation on the absolute right of individuals to keep arms, it did recognize certain restrictions on the manner in which individuals could *use* arms.

2. Individual colonists, of course, kept their own firearms, with powder and shot, in their residences.

3. Justice Story wrote in 1833: "The militia is the natural defense of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample on 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 a republic;* since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them." (emphasis added.) 3 *Commentaries on the Constitution of the United States*, Section 1890, pp. 746–747 (1833).

4. Actually, the militia embraces a larger class of persons than today's statutory unorganized militia since it consists of at least all persons "physically capable of acting in concert for the common defense." *U.S. v. Miller*, 307 U.S. 174, 179 (1939). The Virginia Constitution, upon which the Bill of Rights was modeled, provides that the militia is "composed of the body of the people." Article I, Section 13.

5. Of the twelve proposed amendments, all but the first two dealt with the protection of the rights of individuals; all but the first two were ratified. Since, of the ten remaining, Amendments 1 and 3 through 10 have repeatedly been held to secure fundamental individual rights, it is logical that the Second Amendment also secures a fundamental individual right.

6. The word "people" as used in the First, Fourth, Ninth, and Tenth Amendments has consistently been construed to mean individual.

7. This view is supported by the Congressional Research Office of the Library of Congress which has observed, "At what point regulation or prohibition of what classes of firearms would conflict with the [Second] Amendment, whether there would be a conflict, the *Miller* case does little more than cast a faint degree of illumination toward answering." *The Constitution of the United States of America, Analysis and Interpretation*, Senate Document No. 92–82.

8. Applying this test, the defendant would have little difficulty today in demonstrating that possession of such a shotgun is protected by the Second Amendment, since shotguns were military issue in both World Wars, Korea, and Vietnam.

9. Numerous cases have held that a handgun is an arm for constitutional purposes, for example, in *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 224 (1921), the Court observed that the "historical use of pistols as 'arms' of offense and defense is beyond controversy. . . ." Similar holdings are found in *In re Brickey*, 8 Ida. 597, 70

P. 609 (1902) and *State* v. *Rosenthal*, 75 Vt. 295, 55 A. 610 (1903). Moreover, in colonial times pistols saw considerable service as a personal weapon. As a noted historian observed:

It was considered normal for civilians to carry pocket pistols for protection while traveling . . . Among eighteenth century civilians who traveled or lived in large cities, pistols were common weapons. Usually they were made to fit into pockets, and many of these small arms were also carried by military officers. George C. Neumann, The History of Weapons of the American Revolution, pp. 150–151 (Bonanza Books, N.Y. 1967).

10. Although *Tot* was appealed to the Supreme court, the Second Amendment issue was not addressed by that Court.

11. This view, moreover, is consistent with the common law which prohibited the bearing of arms when carried in such a manner as would terrify the people. 4 Blackstone Commentaries 149. Furthermore it is consistent with the concept of the militia as a body of persons who maintained firearms in their homes for self-defense and to be ready to contribute to the common defense.

12. But see *State* v. *Reid*, 1 Ala. Reports 612, 616–7 (1840), while holding that a statute prohibiting the carrying of concealed weapons was not incompatible with the right to keep and bear arms in defense of self and state, added: "A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional."

THE RIGHT TO BEAR ARMS: THE DEVELOPMENT OF THE AMERICAN EXPERIENCE

JOHN LEVIN*

I. INTRODUCTION

AS THE crime rate in the United States grows and pressures mount for laws restricting the use of firearms, the need for an understanding of the development of the "right to bear arms" has increased. Perhaps more than any other "right" enumerated in the federal and state constitutions, the "right" to bear arms was directed to maintaining a balance of power within our society. The "right to bear arms" developed at a time when a well-armed population was necessary for defense, and when the social and political structure was kept in balance by a balance of armed power.

While the American "right to bear arms" developed at the time of the Revolution, it grew out of the duty imposed on the early colonists to keep arms for the defense of their isolated and endangered communities. The definition of "bearing arms" as the phrase was used in legal instruments up to revolutionary times was "serving in an organized armed force."[1] It did not imply any personal right to possess weapons. For example, when Parliament in drafting the English Bill of Rights[2] or Blackstone in his *Commentaries on the Laws of England*[3] intended to convey the meaning of a personal right to possess arms, they spoke of the right to *have* arms, not of the right to *bear* arms.

II. EARLY HISTORY

A. *The Colonial Period*

The earliest colonial statutes requiring that the colonists arm themselves were Virginia statutes of 1623 stating that "no man go or send abroad without a sufficient party will [sic] armed," and that "men go not to worke in the ground without their arms (and a centinell upon

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[1] *See* the materials on the colonial statutes and on the United States Constitution discussed below.

[2] 1 W & M. I, St. 2, ch. 2 (1689).

[3] W. Blackstone, Commentaries on the Law of England 143-44 (1766).

them)."[4] In 1658 Virginia required that "every man able to beare armes have in his house a fixt gunn."[5] The colony, being unable to afford to arm its militia or troops, required them to arm themselves.[6] If the militia, however, found itself under-armed, the county courts could levy on the population for the provision of arms and distribute them to those not provided—the distributees then paying for the arms at a reasonable rate.[7]

Massachusetts in 1632 required each person to "have . . . a sufficient musket or other serviceable peece for war . . . for himself and each man servant he keeps able to beare arms."[8] In the Code of 1672 men were to provide their own arms, but arms would be supplied to those unable to obtain them. In New York, each town was to keep a stock of arms, and each man between 16 and 60 was to have arms.[9] Even those not obligated to serve in the militia were required to keep arms and ammunition in their houses.[10] The militia provisions of the Connecticut Code of 1650 said, "All persons . . . shall beare arms . . .; and every male person . . . shall have in continuall readiness, a good muskitt or other gunn, fitt for service." South Carolina had similar codes.[11]

This duty to keep and bear arms was limited by the interest of colonial governments in preventing the use of firearms for harmful ends. In order to prevent civil disturbances the colonial governments strove to keep arms from falling into the "wrong hands." To provide against Negro insurrections, Virginia forbade Negroes from carrying arms without their masters' certificate.[12] Pennsylvania had a similar provision by 1700,[13] and South Carolina even required that the master keep all arms not in use safely locked up in his house.[14] Virginia forbade the sale of arms or ammunition to Indians,[15] and Massachusetts

[4] Acts of the Grand Assembly 1623-1624, Nos. 24 and 25.
[5] Acts of the Grand Assembly 1658-1659, Act 25.
[6] Acts of the Grand Assembly 1684, Act 4.
[7] Acts of the Grand Assembly 1673, Act 2.
[8] The Compact with the Charter and General Laws of the Colony of New Plymouth 44-45 (1836).
[9] Duke of York's Laws (1665-1675).
[10] First Gen. Assembly, 2d Sess., ch. 20 (October 1684).
[11] S.C. Stat., No. 206 (1703).
[12] Acts of the Grand Assembly 1680, Act 10.
[13] Penn Stat., ch. 61 §5 (1700).
[14] S.C. Stat., No. 314 (1712).
[15] Acts of the Grand Assembly 1633, Act 10.

required that Indians possess a license to carry a gun within certain areas of the colony.[16]

In times of civil disturbance the colonies controlled arms to protect the security of orderly government. For example, in 1692 the Massachusetts Assembly felt it necessary to arrest "such as shall ride, or go armed offensively before any of their majesties' justices or other of their officers or ministers doing their office or elsewhere by night or by day, in fear or affray of their majesties' people."[17]

In addition to those laws preventing arms from falling into the hands of those groups openly hostile to colonial society, statutes regulated the conditions under which arms could be used. As the settlements grew crowded, shooting was restricted in order to protect people and livestock. By 1678 Massachusetts forbade shooting "so near or into any House, Barn, Garden, Orchards or High-Wayes in any town or towns of this Jurisdiction, whereby any person or persons shall be or may be killed, wounded or otherwise damaged."[18] In order to prevent fires caused by gunfire, Pennsylvania in 1721 forbade firing a gun within the city of Philadelphia without a special license from the governor.[19] Pennsylvania also forbade hunting by anyone on improved lands without the permission of the owner, and forbade those not qualified to vote from hunting on unimproved lands without the permission of the owner.[20]

Colonial statutes established a duty to keep and bear arms for the defense of the colonies and regulated the use of the arms in circulation. The American Revolution in turn provided fertile ground for the growth of the concept of the right of revolution and the related right to bear arms.

B. The Revolutionary Period

During the revolutionary period the issue of arms and the bearing of arms developed along two distinct lines. One line of development related to the balance of military power between the people and their respective governments. The people feared that if the state or federal

[16] Gen. Ct., Sess. of May 23, 1677.
[17] Province Laws 1692-1693, ch. 18, § 6.
[18] Council held in Boston, March 28, 1678.
[19] Penn. Stat., ch. 245, § 4 (1721).
[20] Penn. Stat., ch. 246, § 3 (1721).

government became too powerful, that government would abridge the liberties of the people and impose its will by force. The other line of development related to the balance of military power between the governmental bodies of the union. The state governments feared that if they entrusted too much power in the hands of the central government, that government would destroy the political and military independence of the states. Both lines of development concerned the creation of a military balance within the political structure which would result in the maintenance of liberty of the constituent parts—whether personal liberty under a government or state liberty in a union; and both lines of development resulted in the creation of a "right to bear arms" in order to insure the liberty of those constituent parts.

The colonists, fearful of oppression by governmental power, and being aware of the events of 17th Century England, believed that liberty was guaranteed by giving the rulers as little power as possible and by balancing governmental power with popular power.[21] The foremost factor in this balance of power was the existence of a standing army. Standing armies had been used by the English crown and by continental monarchs to impose their will on their subjects,[22] and royal forces had been used by the English crown to intimidate and control the colonies.[23] In 1774 the Continental Congress declared that keeping a "standing army in these colonies, in time of peace, without the consent of the legislature of that colony, in which such army is kept, is against law."[24] In 1775 the draftsmen of the Declaration of the Causes and Necessity of Taking up Arms[25] gave the presence of royal troops a prominent role in that declaration, and several sections of the Declaration of Independence were given to the issue.[26] Colonial mistrust of standing armies extended even to colonial troops. In 1776 Sam Adams wrote:

> [A] standing army, however necessary it be at some times, is always dangerous to the liberties of the people. Soldiers are apt to consider themselves as a body distinct from the rest of the citizens. They have their arms always in their hands. Their rules and their discipline is severe. They soon become attached to their officers and disposed to

[21] C.E. Merriam, A History of American Political Theories 83 (1926).
[22] *See e.g.*, G.M. Trevelyan, I-III History of England (1953).
[23] S. Morison, The Oxford History of the American People ch. XII, XIII, and XIV (1965).
[24] R. Perry and J. Cooper, Sources of our Liberties 288 (1959) (hereinafter cited as Sources).
[25] *Id.* at 295.
[26] *Id.* at 319.

yield implicit obedience to their commands. Such a power should be watched with a jealous eye.[27]

III Constitutional Provisions

The state constitutions framed during the War for Independence reflected the fears of a standing army. The framers felt that such an army would create an overbearing force at the disposal of the state governments. All the states included provisions regarding standing armies and militia in their bills of rights. Several had provisions similar to Virginia's:

> That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a Free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.[28]

Several others were similar to that of Maryland:

> XXV. That a well-regulated militia is the proper and natural defense of a free government.
>
> XXVI. That standing armies are dangerous to liberty, and ought not to be raised or kept up, without the consent of the Legislature.
>
> XXVII. That in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power.
>
> XXVIII. That no soldier ought to be quartered in any house, in time of peace, without the consent of the owner; and in time of war, in such manner only, as the Legislature directs.
>
> XXIX. That no person, except regular soldiers, mariners, and Marines in the service of this State, or militia when in actual service, ought in any case to be subject to or punishable by martial law.[29]

Some specifically mentioned a "right to bear arms," such as Pennsylvania's:

> That the people have a right to bear arms for the defense of themselves and the State; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up. And that the military should be kept under strict subordination to, and governed by, the civil power.[30]

North Carolina included a "right to bear arms" for the "defense of

[27] Letter to James Warren, quoted in M. Jensen, The New Nation—A History of the United States During the Confederation 1781-1789 29 (1962).

[28] Sources at 312.

[29] *Id.* at 348.

[30] *Id.* at 330.

the State,"[31] and Massachusetts included such a right for "the common defense."[32] Widespread copying by the draftsmen of state constitutions created, in part, the similarity between provisions.[33] These provisions were to be the basis of the militia provisions in the federal Constitution and Bill of Rights.

When the draftsmen of the majority of the state bills of rights wrote of replacing the standing army with a popular militia, they believed it would remove a source of arbitrary military power from the hands of the state governments and replace it with a military less likely to oppress the people.[34] They attempted to structure the political and military balance in the new states by making the governments less powerful and the citizens more powerful. The "right to bear arms" was a more extreme and revolutionary manifestation of this restructuring. By having a right to "bear arms," *i.e.*, to serve in the armed forces of the state, the people would have far greater military power than if the militia were merely the preferred defense, for the state governments would be unable to maintain a narrowly based standing army against the interests of the people. Rather the people would rely on their "right" to bear arms and demand that the defense force be broadly based.

The "right to *have* arms" was an adjunct to the right of revolution. The right of revolution is the natural right of a people to overthrow their government when that government no longer serves the purpose for which it was formed. By the middle of the 18th century, Blackstone had recognized that the primary rights of Englishmen—"personal security, personal liberty, and private property"—could not be maintained solely by law, for "in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment."[35] There were auxiliary rights in order to enable the subject to preserve the primary rights, and,

> The fifth and last auxiliary right of the subject . . . is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law. Which . . . is indeed a public allowance, under

[31] *Id.* at 356.
[32] *Id.* at 376.
[33] R. Rutland, The Birth of the Bill of Rights 1776-1791 *passim* (1962).
[34] *See* the material on the discussion of the United States Constitution below.
[35] *Supra* n.3 at 140.

> due restrictions, of the natural right of resistance and self-preservation when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[36]

The provisions in the state constitutions granting a "right to bear arms" were not intended to permit a public allowance of the right of revolution. In the first place, the phrase "to *bear* arms" only meant serving in an organized armed force.[37] In the second place, the right of revolution, or at least a statement of the principle of that right, was specifically contained in other sections of most state constitutions.[38] In the third place, the guaranty of the "right to bear arms" or similar statements of preference for the militia was contained in that section of the constitutions directly concerned with controlling the military power of the state and not in the section recognizing the right of revolution.

When the Constitutional Convention met on May 14, 1787, it was faced with some issues quite dissimilar to those which had troubled the states. In the years during and immediately following the Revolution, the doctrine of the natural right of revolution was an accepted part of colonial political theory.[39] After the Revolution, however, the need for stable and orderly government grew, and the philosophy of rebellion withered.[40] The fundamental problem facing the convention was not to support and nourish a revolutionary situation, but to create a viable federal government out of the jealous and independent states. One of the major aspects of this problem was the creation of a national army. The delegates to the convention feared that if the new federal government could obtain sufficient military power, it could then impose its will on the states and on the people.

The delegates, however, did not consider the new federal standing army to be a danger to the states or the people since Congress would have strict control over the appropriations for troops, and most delegates assumed that the standing army would be small.[41] The Articles of Confederation had left complete control of land forces in the hands

[36] *Supra* n.3 at 143-144.

[37] *See* text at n.1, n.2, and n.3.

[38] E. Douglas, Rebels and Democrats *passim* (1965).

[39] C. Becker, The Declaration of Independence 7-8 (1942).

[40] M. Jensen, The New Nation—A History of the United States During the Confederation 1781-1789 (1962).

[41] M. Farrand, II The Records of the Federal Convention of 1787 329-30 (1966).

of the states which raised them,[42] and by 1788 the Army of the Confederation consisted of only 679 officers and men.[43] The question of the balance of military power between the states and the federal government was raised rather on the issue of federal control over the state militia.

On August 18, 1787, a motion was made in the convention to give Congress the power "to make laws for the regulation and discipline of the Militia of the several States reserving to the States the appointments of Officers."[44] Here the military power of the states was at stake. John Dickinson exclaimed that "we are come now to a most important matter, that of the sword . . . The states never would or ought to give up all authority over the Militia."[45] Oliver Ellsworth believed that "the whole authority over the Militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power."[46] Supporters of the motion recalled how ineffectual the militia was during the Revolution. They stressed the need for an effective and centralized military.[47]

When the debate continued on August 23rd, Edmund Randolph felt that the militia could be trusted to look after the liberties of the people. He asked, "What dangers there could be that the Militia could be brought into the field and made to commit suicide on themselves. This is a power that cannot from its nature be abused, unless indeed the whole mass should be corrupted."[48] Elbridge Gerry stated, when a motion was made to allow the federal government to appoint the general officers, that "as the States are not to be abolished, he wondered at the attempts that were made to give powers inconsistent with their existence."[49] James Madison replied: "As the greatest danger is that of disunion of the States it is necessary to guard against it by sufficient powers to the Common Government and as the greatest danger to the

[42] H. Commager, I Documents of American History 112-13 (7th ed. 1963).
[43] *Supra* n.41 at 365.
[44] *Id.* at 330.
[45] *Id.* at 331.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 387. For a discussion of the relation of the militia to popular uprisings in colonial America, *see* P. Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 28 Wm. & Mary Q. (3rd Ser. 1970).
[49] *Supra* n.41 at 388.

liberty is from large standing armies, it is best to prevent them by an effectual provision for a good Militia."[50]

A compromise was reached whereby the federal government would maintain a standing army plus have the authority to regulate and call out the militia, and the states would have authority over the militia except when it was called into federal service. The results of the compromise appear in article I, section 8 of the United States Constitution declaring that Congress shall have power:

> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer term than two Years;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining the Militia, and for governing such Parts of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

Thus, a tentative military balance was achieved between the federal government and the states.

Before the Constitution was ratified, however, its provisions were debated before the state legislatures and in the press. The militia provisions were again argued in terms of the balance of military power between the states and the federal government. Charles Pinckney argued for a federalized militia to give the federal government the power to impose its will on the states:

> The exclusive right of establishing regulations for the Government of the Militia of the United States ought certainly to be vested in the Federal Councils. As standing Armies are contrary to the Constitutions of most of the States, and the nature of our Government, the only immediate aid and support that we can look up to, in case of necessity, is the Militia . . . Independent of our being obliged to rely on the Militia as a security against Foreign Invasions or Democratic Convulsions, they are in fact the only adequate force the Union possesses, if any should be requisite to coerce a refractory or negligent Member, and to carry the Ordinances and Decrees of Congress into execution. This, as well as the cases I have alluded to, will sometimes make it proper to order the Militia of one State into another. At present the United States possesses no power of directing the Militia, and must depend upon the States to carry their Recommendations upon this sub-

[50] *Id.*

> ject into execution . . . To place therefore a necessary and Constitutional power of defense and coercion in the hands of the Federal authority, and to render our Militia uniform and national, I am decidedly in opinion they should have exclusive right of establishing regulations for their Government and Discipline, which the States should be bound to comply with, as well as with their Regulations for any number of Militia, whose march into another State, the Public safety or benefit should require.[51]

Luther Martin, speaking before the Maryland legislature, argued against the federalized militia as it would give the federal government so great a power that it could destroy the integrity of the states:

> [Through] this extraordinary provision, by which the Militia, the only defense and protection which the State can have for the security of their rights against arbitrary encroachments of the general government, is taken entirely out of the power of their respective States, and placed under the power of Congress . . . . It was argued at the Constitutional convention that, if after having retained to the general government the great powers already granted, and among those, that of raising and keeping up regular troops, without limitations, the power over the Militia should be taken away from the States, and also given to the general government, it ought to be considered as the last *coup de grace* to the State governments; that it must be the most convincing proof, the advocates of this system design the destruction of the State governments, and that no professions to the contrary ought to be trusted: and that every State in the Union ought to reject such a system with indignation, since, if the general government should attempt to oppress and enslave them, they could not have any possible means of self-defense . . . .[52]

Superimposed upon this debate over the balance of power between the states and the federal government was the issue of the balance of power between the people themselves and the new government. To assuage fears that the new federal government would infringe upon the rights of the people, the authors of *The Federalist* raised the factors of militia, arms, and the right of revolution in describing how the new government could be controlled. Federalist Number 28 mentioned the right of revolution:

> If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense which is paramount to all positive forms of government.[53]

And the military power of the states:

> When will the time arrive that the federal government can raise and maintain an army capable of erecting a despotism over the great body

[51] *Id.* III at 118-19.
[52] *Id.* at 208-09.
[53] The Federalist, No. 28 (Hamilton).

> of the people of an immense empire, who are in a situation, through the medium of their States governments, to take measure for their own defense, with all the celerity, regularity and system of independent nations?[54]

The 46th Federalist by Madison discussed the armed population and its relationship to the militia and the central government:

> Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments to which the people are attached, and by which the Militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms.[55]

Though the Constitution was ratified, the issue of the federal militia was not resolved until adoption of the second amendment. Several states had suggested during their ratifying conventions that a bill of rights be added to the United States Constitution.[56] When such a bill of rights was debated in the First Congress, the militia amendment was first reported out of committee of the House of Representatives reading:

> A well-regulated Militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.[57]

Several of the representatives objected to the provision excusing those people "religiously scrupulous" from bearing arms. Elbridge Gerry stated that as the purpose of the militia "is to prevent the establishment of a standing army" it was "evident, that under this provision, together with their own powers, Congress could take such measures with respect to a Militia, as to make a standing army necessary." This could be accomplished by Congress using "a discretionary power to exclude those from the Militia who have religious scruples."[58] In such event, so many citizens would attempt to avoid Militia duty on religious grounds that a standing army would be necessary for national defense.

In any event the religious exemption from the militia was dropped and the amendment in its final form read:

[54] *Id.*
[55] The Federalist, No. 46 (Madison).
[56] For a study of the forces at work to create a bill of rights, *supra* n.33.
[57] 1 Annals of Congress 778.
[58] *Id.* at 778-79.

> 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.[59]

From the debates it seems clear that the intent of Congress in passing the second amendment was to prevent the federal government from destroying the state militia. Pinckney would keep a defense force uniform and at the disposal of the federal government. Martin was assured that the federal government would not emasculate the states and leave them at the mercy of federal troops. The "right to bear arms" was a corporate right used to insure that a desired balance between liberty and authority within the union would be maintained.

Attempts were made to include a personal right to have arms in the Bill of Rights. Sam Adams introduced a bill in the Massachusetts legislature that the state support an amendment holding that the "Constitution be never construed to authorize Congress to . . . prevent the people of the United States, who are peaceable citizens from keeping their own arms."[60] New Hampshire supported a provision that "Congress shall never disarm any citizen unless such as are or have been in Actual Rebellion."[61] Though these provisions were never adopted, they indicate that there has never been any absolute "American" philosophy on the right to bear arms. This confusion arises from America's situation of being a frontier nation created out of revolution and espousing a belief in revolution but which also desires and needs to create an orderly social and political structure.

The result has been the use of the concept of the right to bear arms to support several different, and often contradictory, theories of the relation of armed citizens to the government. The judicial opinions of the courts of the various jurisdictions in the United States best exemplify this situation.

IV. Relevant Court Decisions

A. *State Courts*

The first pronouncement on the right to bear arms was by a Kentucky court in *Bliss v. Commonwealth*.[62] The court held that "the right of

[59] U.S. Const. Amend. II.

[60] Pierce & Hale, Debates of the Massachusetts Convention of 1788 86-87, quoted in Feller and Gotting, *The Second Amendment: A Second Look*, 61 Nw. U. L. Rev. 47 (1966).

[61] Feller and Gotting, *The Second Amendment: A Second Look*, 61 Nw. U. L. Rev. 59 (1966).

[62] 2 Ky. 90 (1822).

the citizens to bear arms in defense of themselves and the State must be preserved entire," and all legislative acts "which diminish or impair it as it existed when the Constitution was framed are void."[63] Thus an act prohibiting the wearing of concealed arms was declared void. This point of view which considers the right to bear arms as absolute, unabridgable, and personal is rare. Most cases follow the reasoning of a Texas court which asked "How far personal liberty may be restrained for the prevention of crime."[64]

A few states adopted the thinking of the early Tennessee case of *Aymette v. State*[65] which held that the right to bear arms was a right of the people to enable them to rise up and defend their rights against an oppressive government. This concept was similar to Blackstone's presentation of the right to bear arms as a public allowance of the right of revolution. Courts holding this theory consider that, as the right is by public allowance, the state can regulate the use of arms to insure the public peace and welfare. This position was well presented by the Arkansas court in *Haile v. State*:[66]

> The constitutional provision sprung from the former tyrannical practice, on the part of governments, of disarming the subjects, so as to render them powerless against oppression. It is not intended to afford citizens the means of prosecuting, more successfully, their private broils in a free government. It would be a perversion of its object, to make it a protection to the citizen, in going, with convenience to himself, and after his own fashion, prepared all time to inflict death upon his fellow citizens, upon the occasion of any real or imaginary wrongs.[67]

While most courts have not attempted to counter the assertion of the right of revolution, an earlier Arkansas court had stated in *State v. Buzzard*[68] that such a right was unnecessary under a free, republican government which could be changed at the will of the people.

The *Aymette* line of cases is perhaps truest to the intention of the draftsmen of the state bills of rights. The right to bear arms was a means of preserving the liberty of the people by balancing the military power in the hands of the state by military power in the hands of the

[63] *Id.* at 91.
[64] English v. State, 35 Tex. 437, 477 (1872).
[65] 2 Tenn. 154 (1840).
[66] 38 Ark. 564 (1882).
[67] *Id.* at 566.
[68] 4 Ark. 18, 24 (1843).

people. The desire to maintain such a balance has had a long history dating from feudal times, through the English revolution to the present day. Such thinking, however, is rare in judicial opinions. Similarly rare is the unitary concept of society and government expressed by the Kansas court in *City of Salina v. Blakesly*.[69]

> The provision . . . that 'the people have the right to bear arms for their defense and security' refers to the people as a collective body. It was the safety and security of society that was being considered when this provision was put into our Constitution . . . . The provision in question applies only to the right to bear arms as a member of the State Militia, or some other military organization provided for by the law.[70]

Such thinking indicates belief that there is no need to provide for a military balance within the political and social structure when that structure is responsive to the people.

Most state courts have never spoken of the right to bear arms in the sophisticated terms of political balance, but rather treated the right as synonymous with the right of self-defense. In 1950 an Illinois court warned in the construction of an arms control statute "that it is aimed at persons of criminal instincts, and for the prevention of crime, and not against use in the protection of person or property."[71] In *Andrews v. State*,[72] a dissenting judge found that "the right exists only for the purpose of defense: and this is a right which no constitutional or legislative enactment can destroy." The dissent in the Oklahoma case of *Pierce v. State*[73] proclaimed—"From time immemorial, the home, be it ever so humble, has been sacred—the castle of the occupant—with the right to repell [sic] invasion or any trespass."

Answers to such claims vary from the flat declaration in *Buzzard* that individuals have surrendered the right of self-defense to the society as a whole, to the more moderate holding in *Andrews* that "every good citizen is bound to yield his preference as the means to be used, to the demands of the public good."[74] A Michigan court put forth a novel answer saying that the state's power is "subject to the limitation that its exercise be reasonable [and does not result] in the prohibition of

69 70 Kan. 230, 83 P. 619 (1905).
70 *Id.* at 231-32, 83 P. at 620.
71 People v. Liss, 406 Ill. 419, 424, 94 N.E.2d 340, 323 (1950).
72 50 Tenn. 165 (1871).
73 275 P. 393, 397 (Okla. Crim. Ct. App. 1929).
74 50 Tenn. 165, 193 (1871).

those arms which, by the common opinion and usage of law-abiding people, are [to be kept for] protection of person and property."[76]

These debates over the issue of the right of self-defense, though of primary interest today, have little relation to the intent of the draftsmen of the Bill of Rights. The right of self-defense has had a long history; but its history was parallel to, not connected with, the right to bear arms. The use of the right of self-defense to support a right to bear arms is of modern usage. Nevertheless, its modernity does not affect its relevance. The concept is the supreme law in several states of the union, and is a concept to be considered by any legislature hoping to pass restrictive arms legislation.

The confusion in the state courts over the right to bear arms is partly due to the judicial process itself. A court generally does not base its decision on political theory but considers the facts of the particular case before it. If a court feels a particular restrictive arms statute to be necessary and fair, and if the facts of the case before it are favorable, then the court will uphold the statute using whatever language and doctrine is required to so hold. If the statute appears unfair, if the times are unfavorable, or if the factual situation is difficult, then the court will use the language and doctrine necessary to overturn the statute. For example, a Florida court stated in 1912 that the right to bear arms "was intended to give the people the means of protecting themselves against oppression and public outrage, and was not designed as a shield for the individual man."[76] Fifty years later the court declared that "doubtless the guarantee was intended to secure to the people the right to carry weapons for their protection."[77] Similar situations have occurred in several states.[78] The development of federal doctrine, however, has followed a more constant and evolutionary course.

B. *Federal Courts*

Cases concerning the second amendment arose in the federal courts only after the Civil War. The first of such cases, *U.S. v. Cruick-*

[75] People v. Brown, 253 Mich. 537, 541, 235 N.W. 245, 246 (1931).

[76] Carlton v. State, 63 Fla. 1, 9, 58 So. 486, 488 (1912).

[77] Davis v. State, 146 So.2d 892, 893 (Fla. 1962).

[78] *Cf.* State v. Buzzard, 4 Ark. 18 (1843); Wilson v. State, 33 Ark. 557 (1878); Haile v. State, 38 Ark. 564 (1882); City of Akron v. Williams, 172 N.E.2d 28 (Mun. Ct. Akron, Ohio 1960); City of Akron v. Williams, 177 N.E.2d 802 (Ct. App. Ohio 1960), aff'd without opinion, 172 Ohio St. 287, 175 N.E.2d 174 (1961).

shank,[78] implied that there was a *personal* right to bear arms upon which Congress could not infringe. The central point of the opinion, however, was to state that the second amendment did not apply to state governments, and such governments could pass whatever legislation they desired without fear of federal sanction.

Cruickshank was not directly concerned with the right to bear arms or the militia, but with civil rights legislation. The first federal case to be directly concerned with arms was *Presser v. Illinois*.[80] Presser was convicted for leading a military parade in violation of an Illinois statute which forbade such parades by any group but the state militia. Presser claimed that the Illinois statute was in violation of the second amendment. The court relied on *Cruickshank* in stating that the "amendment is a limitation only upon the power of Congress and the National Government, and not upon that of the States,"[81] but added a restriction upon the State's power:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve Militia of the United States as well as of the States; and, in view of this prerogative of the General Government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government.[82]

This principle harkens back to the citizen army of Saxon times and had little relevance in 1886. It was understandable, however, that only twenty years after the Civil War, the Supreme Court would be concerned with state attempts to weaken the central government by withholding arms and troops from national service. Nevertheless, the restriction is a complete reversal from the aims of the draftsmen of the Constitution and Bill of Rights which was to restrict the military power of the central government and give the state more leverage.

On one subject *Presser* was quite clear—there was no right to band together in paramilitary organizations:

> Military organization and military drill and parade under arms are subjects especially under the control of the government of every

[78] 92 U.S. 542 (1874).
[80] 116 U.S. 252 (1886).
[81] *Id.* at 264.
[82] *Id.* at 265.

> country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and Federal Governments, acting in due regard to their respective prerogatives and powers.[83]

Thus, whatever right to bear arms was recognized, that right was limited to arms and organizations that did not threaten the security of the government. The court did not approve of an armed population as a balance to governmental power.

For many years after *Presser* the issue of the second amendment appeared in federal courts only in reaffirming the *Cruickshank* holding that the second amendment did not apply to the states.[84] In the 1930's Congress passed two laws, the Federal Firearms Act[85] and the National Firearms Act,[86] to control commerce in certain types of dangerous weapons. Both acts were attacked in court for being in violation of the second amendment. In upholding the National Firearms Act, the district court held in *United States v. Adams*[87] that the second amendment "refers to the Militia, a protective force of government; to the collective body and not individual rights." This language was quoted verbatim by another district court in *United States v. Tot*[88] in upholding the Federal Firearms Act. Neither court went into the problem of the extent to which the collective right could be regulated, but both made clear that no personal right to own arms existed under the federal Constitution.

The issue of regulating the collective right arose in *United States v. Miller*[89] in which the Supreme Court held that as long as the weapon regulated did not have a direct relationship to the arms used in maintaining a well-regulated militia, they could be controlled:

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated Militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.[90]

The difficulty with such an interpretation is that were a weapon to have

[83] *Id.* at 266-67.
[84] Miller v. Texas, 153 U.S. 535 (1894).
[85] 15 U.S.C.A. 901-909.
[86] 26 U.S.C.A. 5801-5862.
[87] 11 F. Supp. 216, 219 (S.D. Fla. 1935).
[88] 28 F. Supp. 900, 903 (D. Conn. 1939); rev'd on other grounds, 319 U.S. 463 (1943).
[89] 307 U.S. 174 (1939).
[90] *Id.* at 178.

such a "reasonable relationship" it would be a protected weapon under the second amendment. The circuit court in *Cases v. United States*[91] recognized this problem saying: "But to hold that the Second Amendment limits the federal government to regulations concerning only weapons which can be classed as antiques or curiosities,—almost any other might bear some reasonable relationship to the preservation or efficiency of a well-regulated militia unit of the present day,—is in effect to hold that the limitation of the second amendment is absolute."[92] The court also recognized that such an interpretation would prohibit the federal government from prohibiting private ownership of heavy weapons "even though under the circumstances of such possession or use it would be inconceivable that a private person could have any legitimate reason for having such a weapon."[93] The court then decided it would be impossible to formulate any general test to determine the limits of the second amendment and each case would have to be decided on its individual merits.

The federal courts have interpreted the right to bear arms contained in the second amendment very narrowly. The right exists only to the extent that the arms are required for a well-regulated militia. Since *Presser*, however, the second amendment has been interpreted as a source of federal power and not as a protection of state power. The need for the old military balance between state and national governments had disappeared, and the federal courts no longer recognized its existence.

Similarly, the federal courts no longer recognized the need for a military balance between the population and its government. Rather, the courts have held that the interests of order and stability must be balanced against the need for revolution, and such interests may outweigh any need for the right of revolution. Thus, there could also be restrictions on other, subsidiary natural rights such as the right to bear arms. As Justice Vinson said in *Dennis v. United States*[94] in upholding the Smith Act:

> That it is within the *power* of the Congress to protect the government

[91] 131 F.2d 916, (1st Cir. 1942); *cert. den. sub nom.* Cases Velasquez v. United States, 319 U.S. 770 (1943); rehearing denied, 324 U.S. 890 (1945).

[92] *Id.* at 922.

[93] *Id.*

[94] 341 U.S. 494 (1951).

> of the United States from armed rebellion is a proposition which requires little discussion. Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparations for revolution, which principle, carried to its logical conclusion, must lead to anarchy.[95]

Even thought the right of revolution has never been recognized by the courts of the United States, armed rebellion has been—and still is—an important part of the American political tradition. From the early Republic to the present day dissident elements who have not been able to achieve their goals within the political structure have resorted to arms as a final resort.[96] In many instances, such elements have been punished as rebellious or treasonable, but in others the use or threat of violence has forced the political structure to compromise with the dissidents. Though not protected by the Constitution, this use of arms is the most important and relevant use of arms today.

V. Conclusion

Regardless of the long history of violence and assassination in the United States, the right to bear arms has remained closely and jealously guarded. This right appears to provide the individual with the means of protecting himself against other individuals and of protecting himself against his government. The maintenance of a military balance within the political structure was the genesis of this right, and the desire to continue such a balance will promote its continuation. The right to bear arms supports man in his fear of being defenseless in the face of personal danger or oppression.

The possibility, however, of maintaining a military balance within a political structure has become smaller as society has become more complex and warfare more destructive. In the words of Roscoe Pound:

> In the urban industrial society of today a general right to bear efficient arms so as to be enabled to resist oppression by the government would mean that gangs could exercise an extra-legal rule which could defeat the whole Bill of Rights.[97]

Thus, after over three centuries, the right to bear arms is becoming anachronistic. As the policing of society becomes more efficient, the

[95] *Id.* at 501.
[96] *See* R. Ginger, Age of Excess (1965), and references cited therein.
[97] R. Pound, The Development of Constitutional Guarantees of Liberty 91 (1957).

need for arms for personal self-defense becomes more irrelevant; and as the society itself becomes more complex, the military power in the hands of the government more powerful, and the government itself more responsive, the right to bear arms becomes more futile, meaningless and dangerous.

John Levin. "The Right to Bear Arms: The Development of the American Experience." Chicago - Kent Law Review, Fall-Winter 1971.

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Standing Armies And Armed Citizens: An Historical Analysis of The Second Amendment

By Roy G. Weatherup*

I. Introduction: Guns and the Constitution

As a result of a steadily rising crime rate in recent years, a sharp public debate over the merits of federal firearms regulation has developed. "Crime in the streets" has become a national preoccupation; politicians cry out for "law and order"; and the handgun has become a a target of attention. The number of robberies jumped from 138,000 in 1965 to 376,000 in 1972, while murders committed by guns shot up from 5,015 to 10,379 in the same period, and the proportion of cases in which the murder weapon was a firearm rose from 57.2 percent to 65.6 percent.[1] The recent attempt on the life of President Ford in Sacramento by an erstwhile member of the "Manson Gang" serves to heighten the terror of a nation already stunned by the assassinations of John F. Kennedy, Martin Luther King and Robert F. Kennedy, and the maiming of George Wallace. Many people assert that these tragedies could have been prevented by keeping the murder weapons out of the hands that used them. Others vehemently dispute this claim.

The free flow of firearms across state lines has undermined the traditional view of crime and gun control as local problems. In New York City, long noted for strict regulation of all types of weapons, only 14 percent of the 390 homicides of 1960 involved pistols, by 1972, this proportion had jumped to 49 percent of 1,691. In 1973, there were only 31,000 lawfully possessed handguns in the nation's largest city, but police estimated that there were as many as *1.3 million* illegal handguns, mostly imported from southern states with lax laws.[2] These statistics give credence to the arguments of proponents of gun control that federal action is needed, if only to make local laws enforcible.

The great majority of the American people now support registration of both handguns and rifles. When the Gallup Poll asked the

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1. U.S. Bureau of the Census, Statistical Abstract of the United States: 1974 at 147-51, (95th ed. 1974).

2. N.Y. Times, Dec. 2, 1973, § 1, at 1, col. 5 (city ed.).

question: "Do you favor or oppose registration of all firearms?" in a recent survey, more than two-thirds (67 percent) favored the concept, while 27 percent opposed it, and 6 percent had no opinion. Even gun-owners endorsed registration by a margin of 55 percent to 39 percent with 6 percent undecided.[3] Yet, although the intensity of belief is undoubtedly far stronger in the minority than in the majority Congress has remained dormant.[4] The zeal of those individuals dedicated to the preservation of the "right to keep and bear arms" in its present form cannot be doubted.

American history has often seen social and political problems transformed into constitutional issues.[5] The gun control issue is no exception to this phenomenon, and particular attention has been focused on the Second Amendment to the United States Constitution, which 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."

Proponents of gun control seize the phrase "a well regulated Militia" and find in it the sole purpose of the constitutional guarantee. They therefore assert that "the right of the people to keep and bear Arms" is a collective right which protects only members of the organized militia, e.g., the National Guard, and only in the performance of their duties. It is their belief that no one else can claim a personal right

3. L.A. Times, June 5, 1975, § 1, at 29, col. 1.

4. Congressional lethargy cannot be attributed to a lack of proposed legislation. At every session of the Congress, a number of bills for the control of handguns and other weaponry are introduced, only to be shunted to committee and never heard from again. For example, the following is only a partial listing of proffered statutes for the First Session of the 94th Congress: S. 750 was introduced by Senator Hart (Mich.) to prohibit the importation, manufacture, sale, purchase, transfer, receipt, possession or transportation of handguns unless authorized by federal or state authorities. S. 1477, introduced by Senator Kennedy (Mass.) and known as the Federal Handgun Control Act of 1975 is basically a registration and licensing statute. It would prohibit the private sale or manufacture of handguns under six inches in length. (Both bills are currently pending in the Senate Judiciary Subcommittee on Juvenile Delinquency.)

S. 1880, authored by Senator Bayh (Ind.) was passed by the Senate by a vote of 68 to 25, only to die on the floor of the House of Representatives. Entitled the Violent Crime and Repeat Offender Act of 1975, it would have provided additional penalties for felonies committed with firearms, and required the prompt reporting of theft of firearms by licensees.

In addition, there is a major bill pending in the House of Representative which is not duplicated in the Senate. H.R. 2381 would prohibit the importation and manufacture of hollow-point bullets. This bill is now pending in the House Ways and Means Committee as well as in the House Interstate and Foreign Commerce Committee.

5. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (the question of abortion); Schechter Corp. v. United States, 295 U.S. 495 (1935) (the New Deal's National Recovery Administration); Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) (the spread of slavery to territories).

to keep and bear arms for any purpose whatsoever, criminal or otherwise.

Opponents maintain that having guns is a constitutionally protected individual right, similar to other guarantees of the Bill of Rights. Some hold this right to be absolute, while others would allow reasonable restrictions, perhaps even licensing and registration. Still others would limit the protection of the Second Amendment to individuals capable of military service and to weapons useful for military purposes. The essential characteristic of the "individualist" interpretation, as opposed to the "collectivist" view, is that the Second Amendment precludes, to some extent at least, congressional interference in the private use of firearms for lawful purposes such as target shooting, hunting and self-defense.

It is one of the ironies of contemporary politics that the many of the most vocal supporters of "law and order" are persistent critics of federal firearms regulation. "Guns don't kill people; people kill people" is their philosophy. Firearms in private hands are viewed as a means of protecting an individual's life and property, as well as a factor in helping to preserve the Republic against foreign and domestic enemies. Whereas strict constructionism is often the preferred doctrine in interpreting the constitutional rights of criminals, such a narrow view of the Second Amendment is unacceptable. Far from being narrowly construed, the Second Amendment is held out to be a bulwark of human freedom and dignity as well as a means of safeguarding the rights of the individual against encroachment by the federal government. It thus becomes a weapon in the arsenal of argument against gun control, and each new proposal is said to infringe upon the rights of the people to keep and bear arms.

The clash between "collectivist" and "individualist" interpretations of the Second Amendment has not been definitely resolved. Even members of Congress believe that their power to regulate firearms is limited by the existence of an individual right to have, to hold, and to use them. Senator Hugh Scott, Republican of Pennsylvania, writes in *Guns & Ammo* magazine: "As my record shows, I have always defended the right-to-bear-arms provision of the Second Amendment. I have a gun in my own home and I certainly intend to keep it."[6]

There has been very little case law construing the Second Amendment, perhaps because there has been very little federal legislation on the subject of firearms. This may change, and it may become necessary for the Supreme Court to rule upon constitutional challenges to federal statutes based on the Second Amendment. Even before this

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6. Scott, *Leading Senator Admits Gun Law Mistake!*, Mar. 1970 GUNS & AMMO, 46, 47.

courts, it would be helpful to dispel the uncertainties that exist in Congress about the extent of federal legislative power.

In order to determine accurately the intended meaning of the Second Amendment, it is necessary to delve into history. It is necessary to consider the very nature of a constitutional guarantee—whether it is an inherent, fundamental right, derived from abstract human nature and natural law or, alternatively, a restriction on governmental power imposed after experience with abuse of power.

Historically, the right to keep and bear arms has been closely intertwined with questions of political sovereignty, the right of revolution, civil and military power, military organization, crime and personal security. The Second Amendment was written neither by accident nor without purpose; it was the product of centuries of Anglo-American legal and political experience. This development will be examined in order to determine whether the "collectivist" or "individualist" construction of the Second Amendment is correct.[7]

II. The Evolution of British Military Power

Victorious at the Battle of Hastings in 1066, William the Conqueror was able to assert personal ownership over all the land of England and sovereignty over its people. All power emanated from the King, and all persons held their property and privileges at his sufferance.

Feudal society was organized along military lines in 1181, King Henry II, great grandson of the Conqueror, issued the Assize of Arms, which formalized the military duties of subjects. The first three articles of the decree specify what armament each level of society is to maintain—ranging from the holder of a knight's fee, who must equip himself with a hauberk, a helmet, a shield and a lance, down to the poorest freeman armed only with an iron headpiece and a lance. The philosophy of the law is expressed in the fourth article, which is as follows:

> Moreover, let each and every one of them swear that before the feast of St. Hilary he will possess these arms and will bear allegiance to the lord king, Henry, namely the son of the Empress Maud, and that he will bear these arms in his service according to his order and in allegiance to the lord king and his realm. And let none of those who hold these arms sell them or pledge them or offer them, or in any other way alienate them; neither let a lord

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7. For an earlier article which discusses the "collectivist" versus the "individualist" approach to the Second Amendment, *see* Feller & Gotting, *The Second Amendment: A Second Look*, 61 Nw. U.L. Rev. 46 (1966-67). The authors conclude: "[T]he 'right of the people' refers to the collective right of the body politic of each state to be under the protection of an independent effective state militia". *Id.* at 69. (citation omitted). *But see* Hays, *The Right to Bear Arms, a Study in Judicial Misinterpretation*, 2 Wm. & Mary L. Rev. 381 (1960). Hays contends that the right to bear arms is an individual one.

> in any way deprive his men of them either by [illegible] surety or in any other manner.[8]

The remainder of the statute prescribes rules and procedures governing its administration. The Assize of Arms marked the beginning of the militia system; its clear purpose was to strengthen and maintain the King's authority.

In 1215, the rebellious Norman barons forced King John to sign the Magna Carta, a document justly regarded as the foundation of Anglo-American freedom. The Great Charter consists of sixty-three articles which set forth in great detail certain restrictions on the King's prerogative. Its introductory article concludes, "Ye have also granted to all the free men of Our kingdom, for Us and Our heirs forever, all the liberties underwritten, to have and to hold to them and their heirs of Us and Our heirs."[9] Implicit in this statement is the fact that sovereignty is deemed to be vested in the office of kingship, and that the King is restricting his powers in favor of his subjects. Roscoe Pound makes this comment on the Magna Carta:

> The ground plan to which the common-law polity has built ever since was given by the Great Charter. It was not merely the first attempt to put in legal terms what became the leading ideas of constitutional government. It put them in the form of limitations on the exercise of authority, not of concessions to free human action from authority. It put them as legal propositions, so that they could and did come to be a part of the ordinary law of the land invoked like any other legal precepts in the ordinary course of orderly litigation. Moreover, it did not put them abstractly. In characteristic English fashion it put them concretely in the form of a body of specific provisions for present ills, not a body of general declarations in universal terms. Herein, perhaps, is the secret of its enduring vitality.[10]

Centuries were to pass before an English sovereign would again proclaim the doctrine of unrestricted royal power which William the Conqueror had established by force of arms, and which King John had lost in the same manner.

Even though medieval England had not yet developed firearms, the government found it necessary to severely restrict such weapons as did exist. In 1328 Parliament passed the celebrated Statute of Northhampton, which made it an offense to ride armed at night, or by day in fairs, markets, or in the presence of king's ministers.[11]

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8. The Assize of Arms, ¶ 4 (1181), in 2 English Historical Documents 416 (D. Douglas & G. Greenaway ed. 1953).

9. Magna Carta: Text and Commentary 34 (A.E.D. Howard ed. 1964).

10. R. Pound, The Development of Constitutional Guarantees of Liberty 18-19 (1957).

11. Statute of Northhampton, 2 Edw. 3, c.3 (1328).

The fifteenth century dynastic struggle known as the War of Roses virtually destroyed the feudal system, and prepared the way for a new consolidation of royal power beginning with the coronation of Henry Tudor as King Henry VII in 1485. The Tudors maintained a large degree of national unity. Their task was made easier by practical applications of gunpowder. The royal cannon made resistance by the nobility futile.

Perhaps because of the weakness of their hereditary claims, the Tudor monarchs attempted to control and manipulate Parliament, rather than assert the royal prerogative in defiance of Parliament. It was even admitted that Parliament could regulate the succession to the throne, acting in conjunction with the reigning monarch, of course. In the reign of Elizabeth, it was declared to be high treason to deny that Parliament and the Queen could "make laws and statutes of sufficient force and validity to limit and bind the crown of this realm, and the descent, limitation, inheritance, and government thereof."[12]

The long war with the Hapsburg Empire that began at the time of the Spanish Armada contributed to an upsurge of national sentiment. Faith in the English militia was vindicated as free men had held their own against the massive, professional standing armies of the Spanish King. Englishmen came to believe the militia was the best security for their country and their liberties.

At the death of Elizabeth I in 1603, King James VI of Scotland ascended the English throne as James I. The advent of the House of Stuart marked the beginning of a century of religious and political struggle between Crown and Parliament. Out of this struggle, what we know as the English Constitution emerged. The monarchy was finally and firmly restricted, but preserved, the supremacy of Parliament was established, the common law became a strong, independent force, and the liberties of the people were encased in a Bill of Rights.

Although a model constitutional monarch in some respects, in the realm of political theory, James I challenged the sensibilities of the nation. He boldly proclaimed the divine right theory of government—that kings hold their thrones by the will of God alone, and not by the will of peoples or parliaments. Typical of his sentiment are these excerpts from his speech to Parliament on March 21, 1610:

> The State of MONARCHIE is the supremest thing upon earth: For Kings are not onely GODS Lieutenants upon earth, and sit upon GODS throne, but even by GOD himselfe they are called Gods. . . . In the Scriptures Kings are called Gods, and so their power after a certaine relation compared to the Divine Power.

The King concluded that "to dispute what GOD may doe, is blas-

12. Treasons Act, 13 Eliz. 1, c. 1 (1571).

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phemie," and thus it is "sedition in Subjects, to dispute what the King may do in the height of his power."[13] Here was a King not restricted by any human law.

Neither the legal profession nor Parliament was willing to accept such a boundless royal prerogative. Having grown up in the civil law tradition of Scotland, James I was indifferent to the common law, but the English lawyers argued that, while the King had many privileges at common law, he was limited by and subordinate to it. When James I asserted that Parliament existed only by "the grace and permission of our ancestors and us,"[14] the House of Commons passed the famous Protestation of December 18, 1621, which asserted:

> That the Liberties, Franchises, Privileges and Jurisdictions of Parliament, are the ancient and undoubted birthright and inheritance of the subjects of England; and that the arduous and urgent affairs concerning the King, State and defence of the realm, and of the Church of England, and the making and maintenance of laws, and redress of mischiefs and grievances, which daily happen within this realm, are proper subjects and matter of counsel and debate in Parliament: and that in the handling and proceeding of those businesses every member of the House hath, and of right ought to have, Freedom of Speech, to propound, treat, reason and bring to conclusion the same. . . .[15]

The King's response was to walk into the House of Commons and to tear from the Journal the page containing these words.

The leading legal theorist of the time was Sir Edward Coke, whose writings and leadership were to enhance the prestige of the common law, and bring it into alliance with Parliament against the monarchy. In response to an inquiry from James I, Coke and his colleagues declared:

> That the King by his proclamation cannot create any offence which was not an offence before, for then he may alter the law of the land by his proclamation in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment . . .; That the King hath no prerogative, but that which the law of the land allows him. . . .[16]

The common law courts asserted jurisdiction to inquire into the legality of acts of servants of the Crown, and thus began the doctrine of the rule of law.

In response to the wars waged by James I's improvident heir, Charles I, Parliament enacted the Petition of Right in 1628, inspired

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13. King James I, The Workes of the Most High and Mightie Prince James 529, 531 (1616).

14. 1 Parl. Hist. Eng. 1351 (1621).

15. *Id.* at 1361.

16. 7 The Reports of Sir Edward Coke, KNT 76 (G. Wilson trans. 1777).

and drafted largely by Coke. The petition was an assertion of the power of Parliament and the common law, and contained a long list of grievances. The abuses of the King's military power—billeting, martial law, imprisonment without trial, and forced loans—were particularly resented. Charles I had no choice but to sign the petition, since he needed revenues from Parliament, but he secretly consulted his judges who assured him that his signature would not be binding. Soon afterward, in 1629, the King dissolved Parliament and began the long period of personal rule which was to end in the Great Rebellion.

Charles I was short of money, and revived an ancient tax; his judges upheld the legality of this action in the famous Ship Money case of 1635. The King also wished to strengthen the Church of England, the mainstay of the monarchy. The ecclesiastical canons of 1640 emphatically affirmed the theory of Divine Right of Kings and, in addition, promulgated the doctrine of nonresistance:

> For subjects to bear arms against their kings, offensive or defensive, upon any pretence whatsoever, is at least to resist the powers which are ordained of God; and though they do not invade but only resist, St. Paul tells them plainly they shall receive to themselves damnation.[17]

This doctrine of "nonresistance" was to have an important role in religion and politics in both England and America, for the next century and a half.

Faced with a Scottish rebellion, Charles I was forced to summon the English Parliament in 1640 in order to obtain the resources necessary to put down the insurrection. After eleven years of personal royal government, Parliament trusted neither the King nor his leading minister, the Earl of Strafford. Parliament demanded a wide array of religious and political concessions, including the removal of Strafford as governor of Ireland and the disbanding of the strong army he had created there. When the King acceded to these demands, Ireland rebelled.

Charles I was now desperate. Scotland and Ireland were in open rebellion, and the Parliament of England was dominated by the King's enemies. The King had made numerous concessions, but to no avail. Strafford wanted to [illegible]ng John Pym, the parliamentary leader, to trial for treasonable dealings with the Scottish army invading England, but Pym struck first with a bill of attainder against Strafford. The main charge was the creation of a powerful army in Ireland for the purpose of crushing opposition in England. The bill of attainder passed, and the King was forced to send his ablest servant to the scaffold in 1641.

17. Constitutions and Cannons Ecclesiastical, Treated Upon by the Archbishops of Canterbury and York (1640), in 1 SYNODALIA 390-91 (E. Cardwell ed. 1842).

Still unsatisfied, Parliament presented its Nineteen Propositions as an ultimatum to the King in 1642. The Propositions, if acceded to, would have established a very limited monarchy with the King surrendering the power of the sword and Parliament obtaining complete control over the militia. Instead, the King raised the royal standard at Nottingham and proclaimed Parliament to be in rebellion. Thus began the Civil Wars, which resulted in the decapitation of Charles I and the proclamation of a republic in 1649.

Oliver Cromwell and the Puritans came to power by force of arms and the creation of a disciplined standing army. Cromwell soon quarreled with Parliament and assumed the role of a military dictator. The soldiers supported their leader because Parliament proposed to disband much of the army thus depriving them of their livelihood, and also because they feared that Parliament might once again come under the control of the Anglicans, who would revive persecution of the Puritan sects.

It was soon proposed that Cromwell be made king, but only because that office would have definite constitutional restrictions. Finally Cromwell assumed the title of Lord Protector in 1653, under a written constitution that gave him virtually royal power. Although Cromwell's government brought domestic peace and ruled efficiently, it did not gain in popularity. The Lord Protector's government was created and maintained by bayonets, and the people came to hate it. The end of the Protectorate and its legacy have been described by historian Eric Sheppard as follows:

> The great soldier's death in 1658, while the army he had made was still fighting victoriously in Flanders, marked the beginning of the end of that army's rule; its leaders soon had no choice but to accept the inevitable, and in May 1660 the red coats of the New Model were arrayed on Blackheath to do honor to the monarch whom nine years before it had hunted into exile. A few months later, setting an example which has since been followed by all the great armies of England, it . . . laid down its arms and passed silently and peacefully into the pursuits of peace, leaving behind it, in the minds of the governing class and the people, besides a deservedly high military reputation, a legacy of hatred and distrust of all standing armies which has endured to our own day.[18]

The mood of England at the restoration of Charles II, son of the martyred Charles I, was one of relief and enthusiasm. An act was swiftly passed which recited that "the people of this kingdom lie under a great burden and charge in the maintenance and payment of the present army," and provided that it should be disbanded with "all convenient speed."[19]

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18. E. Sheppard, A Short History of the British Army (4th ed. 1959).
19. Disbanding Act, 12 Car. 2, c. 15 (1660).

Once again reliance for the country's security was placed in the militia system, which had fallen into disuse after two decades of professional armies, civil wars and military government. Statutes were passed in 1661 and 1662 declaring that the King had the sole right of command and disposition of the militia, and providing for its organization.[20] Winston Churchill makes this comment on the Cavalier Parliament, which had restored the monarchy:

> It rendered all honour to the King. It had no intention of being governed by him. The many landed gentry who had been impoverished in the royal cause were not blind monarchists. They did not mean to part with any of the Parliamentary rights which had been gained in the struggle. They were ready to make provision for the defence of the country by means of militia; but the militia must be controlled by the Lord-Lieutenants of the counties. They vehemently asserted the supremacy of the Crown over the armed forces; but they took care that the only troops in the country should be under the local control of their own class. Thus not only the King but Parliament was without an army. The repository of force had now become the county families and gentry.[21]

The revival of the militia did not mean that the King was forbidden to raise and maintain armies. He had no means of doing so, however, because Parliament held the purse strings, and the quartering of soldiers had been condemned since the days of the Petition of Right.

Foreign wars made the development of a standing army inevitable, and it reached 16,000 men by the end of the reign of Charles II. It was done with the consent of Parliament, and English country gentlemen were secure in their control of the domestic armed power—the militia. In addition, guns were taken out of the hands of the common people. Among the conditions of a 1670 statute was one that no person, other than heirs of the nobility, could have a gun unless he owned land with a yearly value of £100.[22] The protection of the people's liberties was thus committed entirely to Parliament and other legal institutions. The possibility of a citizen army, such as that created by Oliver Cromwell, was precluded.

In the reign of Charles II, religious controversy dominated politics. The Cavalier Parliament wished to maintain the established Anglican Church and persecute dissenters, Catholic and Puritan alike. Parliament was also alarmed by the prospect that the King's Catholic brother, the Duke of York, would succeed to the throne. A parliamentary attempt to exclude the Duke failed, but in 1673 and 1678, two Test Acts

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20. First Militia Act, 13 Car. 2, Stat. I, c. 6 (1661); Second Militia Act, 14 Car. 2, c. 3 (1662).

21. 2 W. Churchill, A History of the English-Speaking Peoples 336 (1956).

22. Game Preservation Act, 22 Car. 2, c. 25, § 3 (1670).

were passed which barred [illegible]
and from both Houses of Parliament.[23]

In 1685, the Catholic Duke of York ascended to the throne as James II. The new King quieted the fears of his subjects by proclaiming his intention to maintain church and state as they were by law established. The people were also comforted by the fact that the heirs to the throne were his Protestant daughters, Mary and Anne, and his Protestant nephew, William of Orange, stadtholder of the Dutch Republic and Mary's husband. Because of the Test Acts, James II inherited an entirely Protestant government.

At the same time a rebellion, led by the Duke of Monmouth, broke out in the western counties. The King successfully crushed the uprising, but in the process succeeded in doubling his standing army to 30,000 men, granting commissions to catholic officers, and bringing in recruits from Catholic Ireland. In addition he quartered his new army in private homes. These arbitrary actions were in direct violation of previous parliamentary proclamations.

James II then asked Parliament to repeal the Test Acts and the Habeas Corpus Act, which Parliament refused to do. The King also asked the representatives of the nation to abandon their reliance on the militia, in favor of standing armies:

> My Lords and Gentlemen,
>
> After the storm that seemed to be coming upon us when we parted last, I am glad to meet you all again in so great Peace and Quietness. God Almighty be praised, by those Blessing that Rebellion was suppressed: But when we reflect, what an inconsiderable Number of Men began it, and how long they carried [it] on without any Opposition, I hope every-body will be convinced, that the Militia, which hath hitherto been so much depended on, is not sufficient for such Occasions; and that there is nothing but a good Force of well disciplined Troops in constant Pay, that can defend us from such, as, either at Home or Abroad, are disposed to disturb us . . .[24]

John Dryden, the poet, shared the King's attitude toward the militia when he wrote these timeless words:

> The country rings around with loud alarms,
> And raw in fields the rude militia swarms;
> Mouths without hands; maintained at vast expense,
> In peace a charge, in war a weak defence;
> Stout once a month they march, a blustering band,
> And ever, but in times of need, at hand.

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23. Test Act. 25 Car. 2, c. 2. (1673); Parliamentary Test Act, 30 Car. 2, Stat. 2, c. 1 (1678) (an exemption allowed the Duke of York to retain his seat in the House of Lords).

24. 9 H.C. Jour. 756 (1685).

> This was the morn when, issuing on the guard,
> Drawn up in rank and file they stood prepared
> Of seeming arms to make a short essay,
> Then hasten to be drunk, the business of the day.[25]

Parliament adjourned in 1686 without resolving any of the basic issues. The King kept his army and pursued his policies through extra-parliamentary means.

To get rid of the Test Act, and to revive the royal prerogative at the same time, the King arranged a collusive lawsuit. A coachman in the service of a Roman Catholic officer brought suit under the Test Act to recover the statutory reward for discovering violators, and the officer pleaded a royal dispensation in defense. The King's judges in *Godden v. Hales*[26] upheld the validity of the dispensation and gave judgment for the defendant. Lord Chief Justice Herbert stated:

> We are satisfied in our judgments before, and having the concurrence of eleven out of twelve, we think we may very well declare an opinion of the court to be, that the King may dispense in this case: and the judges go upon these grounds;
>
> 1. That the kings of England are sovereign princes.
>
> 2. That the laws of England are the king's laws.
>
> 3. That therefore 'tis an inseparable prerogative in the kings of England, to dispense with penal laws in particular cases and upon particular necessary reasons.
>
> 4. That of those reasons and those necessities the king himself is sole judge: And then, which is consequent upon all,
>
> 5. That this is not a trust invested in or granted to the king by the people, but the ancient remains of the sovereign power and prerogative of the kings of England; which never yet has taken from them, nor can be.[27]

Thus armed with the law, the King proceeded to dispense with statutes as he saw fit. He replaced Protestants and Catholics at high posts in government, particularly at important military garrisons. The army was further enlarged and 13,000 men were stationed at Hounslow Heath, just outside London, in order to hold the city in subjection if necessary. How far James II planned to carry his religious and political program is unknown, but his powerful standing army made many Protestants fearful and uneasy about the future.

With the birth of a son, who would take precedence over the King's Protestant daughters in the succession, fear led to revolution.

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25. J. Dryden, Cymon and Iphigenia, in The Poetical Works of John Dryden 641 (W. Christie ed. 1893).

26. Godden v. Hales, 89 Eng. Rep. 1050 (Ex. 1686), *as reported in*, 11 State Trials 66 (T. Howell comp. 1811).

27. *Id.* at 1199.

Leading [illegible] to England in defense of the liber[illegible] to the Crown. When William landed with a large Dutch army, the English army and government deserted James II who fled to France. Thus the Glorious Revolution of 1688 was accomplished. James II had believed that his enemies were paralyzed by the Anglican doctrine of nonresistance, but he had so alienated his subjects that he was deposed without being able to put up any resistance himself.

William and Mary were offered the Crown jointly after they accepted the Declaration of Rights on February 13, 1689. The Declaration was later enacted in the form of a statute, known as the Bill of Rights.[28] The document is divided into two main parts: 1) a list of allegedly illegal actions of James II, and 2) a declaration of the "ancient rights and liberties" of the realm.

The sections of the first part of the statute that are relevant to the right to bear arms are the allegations that James II

> did endeavor to subvert and extirpate the Protestant Religion and the Laws and Liberties of this Kingdom . . .
>
> 5. By raising and keeping a Standing army within this Kingdom in Time of Peace without Consent of Parliament and quartering Soldiers contrary to Law.
>
> 6. By causing several good Subjects, being Protestants, to be disarmed at the same Time when Papists were both armed and employed contrary to Law.[29]

It should be pointed out that the King did not disarm Protestants in any literal sense; the reference is to his desire to abandon the militia in favor of a standing army and his replacement of Protestants by Catholics at important military posts.

The parallel sections of the declaration of rights part of the statute are:

> 5. That the raising or keeping a Standing Army within the Kingdom in Time of Peace unless it be with the Consent of Parliament is against Law.
>
> 6. That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law.[30]

The purpose, and meaning of, the right to have arms recognized by these provisions is clear from their historical context. Protestant members of the militia might keep and bear arms in accordance with

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28. Bill of Rights, 1 W. & M., sess. 2, c. 2 (1689).
29. *Id.*
30. *Id.* Securing the Peace in Scotland Act.

their militia duties for the defense of the realm. The right was recognized as a restriction on any future monarch who might wish to emulate James II and abandon the militia system in favor of a standing army without the consent of Parliament. There was obviously no recognition of any personal right to bear arms on the part of subjects generally, since existing law forbade ownership of firearms by anyone except heirs of the nobility and prosperous landowners.

In summary, the English Bill of Rights represents the culmination of the centuries old problem of the relationship of sovereignty and armed force. The king could have an army, but only with the express consent of Parliament. The king could not, however, dismantle and disarm the militia. There was no individual right to bear arms; the rights of subjects could be protected only by the political process and the fundamental laws of the land.

III. England and Her Colonies

The revolutionary settlement that followed the accession of William and Mary gave the English people permanent security. England, however, had become the center of an Empire, and the relationship between England and the outlying territories raised legal and political problems.

When William and Mary, and, later, Queen Anne, all died without heirs, the Crown passed to the distantly-related House of Hanover in Germany. Uprisings led by the son and grandson of James II were suppressed in 1715 and in 1745, and Parliament felt it necessary to deprive the people entirely of the right to bear arms in large parts of Scotland.[31]

The history of the English colonies in America was closely intertwined with that of the Mother Country. The New England colonies had been settled by Puritan refugees from the early Stuart kings. When Cromwell and the Puritans came to power in England, thousands of royalists fled to the southern colonies, swelling their populations.

The foundation of government in the colonies was the charter granted by the king. An important feature of a charter was the provision securing for the inhabitants of the colony the rights of Englishmen. For example, the 1606 Charter of Virginia contains this passage:

> Also we do . . . DECLARE . . . that all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the

31. 1 Geo. 1, Stat. 2, c. 54 (1715).

> Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of *England*, or any other of our said Dominions.[12]

During the seventeenth century and the first half of the eighteenth century, the North American colonies were essentially self-governing republics following the political and legal model of England. In 1720, Richard West, counsel to the Board of Trade, gave this description of the state of law in the colonies:

> The Common Law of England is the Common Law of the Plantations, and all statutes in affirmance of the Common Law, passed in England antecedent to the settlement of a colony, are in force in that colony, unless there is some private Act to the contrary; though no statutes, made since those settlements, are there in force unless the colonies are particularly mentioned. Let an Englishman go where he will, he carries as much of law and liberty with him, as the nature of things will bear.[13]

The legal relationship of Britain and the colonies became more than an academic problem after the end of the Seven Years' War in 1763. That war, known in America as the French and Indian War, brought large British armies to colonies which had hitherto known no armed force but the colonial militia. The cost of the war was enormous, and the British government decided that the colonies should share it.

In his efforts to tax and govern the colonies, George III acted in two capacities: as King, armed with the prerogatives of his office, and as the agent of the British Parliament which at that time was under his personal control. The colonists acknowledged the authority of the King, but only in accordance with their charters and with the same restrictions that limited his power in Britain. Many of the colonists denied the authority of the British Parliament to regulate their internal affairs in any way.

Colonial resistance forced the British government to abandon the Stamp Tax, but Parliament passed the Declaratory Act in 1766 entitled "An Act for the better securing the Dependency of his majesty's dominions in *America* upon the Crown and parliament of *Great Britain*."

> Whereas several of the Houses of Representatives in his Majesty's Colonies and Plantations in *America*, have of late, against Law,

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12. VA. CHARTER (1606), in 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3788 (F. Thorpe ed. 1909) [hereinafter cited as CONSTITUTIONS].

13. 1 G. CHALMERS, OPINIONS OF EMINENT LAWYERS ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE 194, 195 (1814).

> claimed to themselves or to the General Assemblies of the same, the sole and exclusive Right of imposing Duties and Taxes upon his Majesty's Subjects in the said Colonies and Plantations; and have, in pursuance of such Claim, passed certain Votes, Resolutions and Orders, derogatory to the Legislative Authority of Parliament, and inconsistent with the Dependency of the said Colonies and Plantations upon the Crown of *Great Britain* be it declared . . . That the said Colonies and Plantations in *America* have been, are, and of Right ought to be, subordinate unto, and dependent upon, the Imperial Crown and Parliament of *Great Britain*; and that the King's Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons of *Great Britain* in Parliament assembled, had, hath, and of Right ought to have, full Power and Authority to make Laws and Statutes of sufficient Force and Validity to bind the Colonies and People of *America*, Subjects of the Crown of *Great Britain*, in all Cases whatsoever.[34]

The colonists were free-born Englishmen and they were not willing to accept inferior status. They could not admit the authority of Crown and Parliament to bind them "in all cases whatsoever." They fell back on the doctrine of fundamental law as expressed in 1764 by James Otis:

> 'Tis hoped it will not be considered as a new doctrine, that even the authority of the Parliament of *Great-Britain* is circumscribed by certain bounds, which if exceeded their acts become those of meer *power* without *right*, and consequently void. The judges of England have declared in favour of these sentiments, when they expressly declare; that *acts of Parliament against natural equity are void*. That *acts against the fundamental principles of the British constitution are void*. This doctrine is agreeable to the law of nature and nations, and to the divine dictates of natural and revealed religion.[35]

The concept of fundamental law was developed and grounded squarely on the English legal tradition. In 1772, Samuel Adams wrote in response to another writer in the *Gazette*:

> Chronus talks of *Magna Charta* as though it were of no greater consequence that an act of Parliament for the establishment of a corporation of button-makers. Whatever low ideas he may entertain of the *Great Charter* . . . it is affirm'd by Lord Coke, to be declaratory of the principal grounds of the fundamental laws and liberties of England. "It is called *Charta Libertatum Regni, the Charter of the Liberties of the kingdom*, upon great reason . . . because *liberos facit, it makes and preserves the people free*." . . . But if it be declaratory of the principal grounds of the fundamental laws and liberties of England, it cannot be altered in any of its essential parts, without altering the constitution. . . . Vatel tells us plainly and without hesitation, that "the supreme legislative can-

34. Declaratory Act, 6 Geo. 3, c. 12 (1766).

35. J. Otis, The Rights of the British Colonies Asserted and Proved 72-73 (1764).

> not change the constitution." . . . If then according to Lord Coke, *Magna Charta* is declatory of the principal grounds of the *fundamental* laws and liberties of the people, and Vatel is right in his opinion, that the supreme legislative cannot change the constitution, I think it follows, whether Lord Coke has expressly asserted it or not, that an act of parliament made against Magna Charta in violation of its essential parts, is void.[36]

This statement of fundamental law later influenced the intellectual foundation of judicial review in the United States.

In order to sustain his claim of full and unrestricted sovereignty, George III sent large standing armies to the colonies. America was outraged. The colonists drew their arguments from Whig political theorists on both sides of the Atlantic who maintained that standing armies in time of peace were tools of oppression, and that the security of a free people was best preserved by a militia.

The American colonists, who had always relied on their own militia, hated and feared standing armies even more than their English brethren. In quartering his redcoats in private homes, suspending charters and laws, and eventually imposing martial law, George III was doing in America what he could not do in England. The royal prerogative had virtually ended in England with the Revolution of 1688, but the King was reviving it in America.

The Fairfax County Resolutions, drawn up under the leadership of George Washington and passed on July 18, 1774, reflect the colonial attitude in the year prior to the outbreak of war. Of particular interest is the following paragraph:

> *Resolved*, That it is our greatest wish and inclination, as well as interest, to continue our connection with, and dependence upon, the *British* Government; but though we are its subjects, we will use every means which Heaven hath given us to prevent our becoming its slaves.[37]

In October of the same year, the First Continental Congress assembled and stated the position of the colonies in these resolutions:

> *Resolved*, . . . 1. That they are entitled to life, liberty, & property, and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent.
>
> *Resolved*, . . . 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.

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36. S. Adams, *Candidus Letters* (1772), in 2 The Writings of Samuel Adams 324-26 (H. Cushing ed. 1906).

37. Fairfax Co. Resolutions, (1774) in A. E. D. Howard, The Road From Runnymede: Magna Carta and Constitutionalism in America 435 (1968).

> *Resolved*, . . .3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their decendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.
>
> *Resolved*, . . . 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed. . . .[38]

After stating these general principles, the Congress listed specific rights that had been violated by George III, including the following:

> *Resolved*, . . . 9. That the keeping a Standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.[39]

The colonists were asserting, in effect, that the restrictions on royal power that had been won by Parliament in its long struggle against the Stuart kings were binding against the sovereign, in favor of the colonial legislatures as well as Parliament. In order to make that claim good, the colonists were forced to take up arms.

IV. Popular Sovereignty and the New Nation

America's long war in defense of the rights of Englishmen began in 1775. Although many colonists still hoped for a reconciliation with the mother country, it was necessary to set up state governments in the interim. In Connecticut and Rhode Island, all that was necessary was to strike the King's name from the colonial charters, which continued to serve for many years as state constitutions.

In other states, written constitutions were drawn up. They generally had these features: 1) an assertion that political power derives from the people; 2) provision for the organization of the government with a three-fold separation of powers; 3) a powerful legislature with authority to pass all laws not forbidden by the Constitution; and 4) a specific bill of rights restricting governmental power in the same way that the English Bill of Rights restricted the King. It is important to emphasize that the concept of enumerated powers had not yet been

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38. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, 67-68 (Oct. 14, 1774) (W. C. Ford ed. 1904-1907).

39. *Id.* at 70.

developed, and that rights were [illegible] the nature of restrictions on power, not as individual freedoms.[40]

The Declaration of Independence substituted the sovereignty of the people for that of the King, and appealed to the "Laws of Nature and of Nature's God," but it did not proclaim a social or legal revolution. It listed the colonists' grievances, including the presence of standing armies, subordination of civil to military power, use of foreign mercenary soldiers, quartering of troops, and the use of the royal prerogative to suspend laws and charters. All of these legal actions resulted from reliance on standing armies in place of the militia.

Although America repudiated the British King, it did not repudiate British law. The Constitution of Maryland, for example, declared:

> That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury according to the course of that law, and to the benefit of such of the English statutes as existed on the fourth day of July, seventeen hundred and seventy six, and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the courts of law or equity, . . .[41]

The War for Independence was fought by fourteen different military organization—the Continental Army under Washington, and the thirteen colonial militias. The debate over the relative merits of standing armies and the militia continued even during the fighting. A defender of standing armies, Washington wrote to the Continental Congress in September of 1776 as follows:

> To place any dependence upon Militia, is, assuredly, resting upon a broken staff. Men just dragged from the tender Scenes of domestick life; unaccustomed to the din of Arms; totally unac-

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40. For example, the Virginia Bill of Rights, adopted June 12, 1776, declared: "That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by the civil power." VA. CONST., Bill of Rights, § 13 (1776) in 7 CONSTITUTIONS 3814.

The comparable provision in Massachusetts was as follows: "The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it." MASS. CONST., Declaration of Rights, art. 17 (1780) in 3 CONSTITUTIONS 1892. (Considered in its context, the meaning of the "right to keep and bear arms" is clear. The words "for the common defence" makes it obvious that a collective right is intended. The people of Massachusetts did not want to risk a second British occupation.)

41. MD. CONST., Declaration of Rights, art. 3 (1851), in 3 CONSTITUTIONS 1713.

> quainted with every kind of military skill, which being followed by a want of confidence in themselves, when opposed to Troops regularly train'd, disciplined, and appointed, superior in knowledge and superior in Arms, makes them timid, and ready to fly from their own shadows. . . .
>
> The Jealousies of a standing Army, and the Evils to be apprehended from one, are remote; and, in my judgment, situated and circumstanced as we are, not at all to be dreaded; but the consequence of wanting one, according to my Ideas, formed from the present view of things, is certain, and inevitable Ruin; for if I was called upon to declare upon Oath, whether the Militia have been most serviceable or hurtful upon the whole; I should subscribe to the latter.[42]

To maintain the supremacy of civil power over that of the military Article II of the Articles of Confederation provided that each state would retain "its sovereignty, freedom, and independence."[43] A provision that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred" was included in Article VI.[44] In contrast, the military powers of the United States rested in Congress were strictly limited; Congress could not maintain standing armies without the consent of nine of the thirteen states.

The government of the United States under the Articles of Confederation was weak. Experience was to show that it needed to be strengthened in its military powers.

V. Forging a More Perfect Union

When the War for Independence ended, the government of the Confederation was faced with one gigantic, insoluble problem—money. As troublesome as foreign and domestic bondholders were, there was one stronger pressure group that simply could not be ignored: the former soldiers who had been promised back pay and large pensions. Organized under the name of the Society of Cincinnati, these veterans were viewed with suspicion by many Americans, who nurtured fears of standing armies.

The danger to civil authority from the military was not entirely imaginary. In the summer of 1783 there was a direct attempt to coerce the Confederation into paying what had been promised to the army. Originally intended as a peaceful protest march on the capitol in Philadelphia, the ex-soldiers were soon "mediating more violent measures,"

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42. Letter from George Washington to the President of Congress, Sept. 24, 1776, in 6 THE WRITINGS OF GEORGE WASHINGTON 110, 112 (J. Fitzpatrick ed. 1931-1944).

43. *See generally* M. JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789 (1950).

including "seizure of the members of Congress."[44] [illegible] adjourned and fled to Trenton, New Jersey. The soldiers eventually gave up, and the officers who led them escaped.

Following the abortive demonstrations in Philadelphia in the summer of 1783, Madison and other leaders felt the need to reorder the nation's military structure.

The other important military event that precipitated demands for a stronger national government was Shays' Rebellion in Massachusetts in 1786. Oppressed by debt, farmers in the western part of the state seized military posts and supplies and defied the state government. Although the insurrection was suppressed fairly easily and Shays himself pardoned, exaggerated reports of the uprising circulated among the states, and conservatives were aghast. Madison, in writing the introduction to his notes on the Federal Convention, lists Shays' Rebellion as one of the "ripening incidents" that led to the Convention.[45]

Thomas Jefferson, in contrast, was not alarmed by the apparent dangers of anarchy, and he criticized the clamor of the Federalists. Just after receiving a copy of the proposed Constitution, he wrote from Paris:

> . . . We have had 13 states independent 11 years. There has been one rebellion. That comes to one rebellion in a century & a half for each state. What country before ever existed a century & a half without rebellion? & what country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is set them right as to facts, pardon & pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. It is natural manure. Our Convention has been too much impressed by the insurrection of Massachusetts: and in the spur of the moment they are setting up a kite to keep the henyard in order.[46]

Whatever the merits of Jefferson's beliefs, they were not shared by the majority of the Convention, which wished to prevent insurrections by strengthening the military powers of the general government.

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44. Debates of the Congress of the Confederation (June 2, 1783), in 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 93 (J. Elliot ed. 1836-1845) [hereinafter cited as STATE DEBATES].

45. DRAFTING THE FEDERAL CONSTITUTION: A REARRANGEMENT OF MADISON'S NOTES GIVING CONSECUTIVE DEVELOPMENTS OF PROVISIONS IN THE CONSTITUTION OF THE UNITED STATES 10 (A. Prescott ed. 1941) [hereinafter cited as MADISON REARRANGED].

46. Letter from Thomas Jefferson to William Stephen Smith, Nov. 13, 1787, in 4 THE WORKS OF THOMAS JEFFERSON 362 (P. Ford ed. 1892-1899).

The new military powers of Congress were listed in Article I, Section 8 of the proposed constitution, and include the following authority:

> . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

The spirited debate over these provisions in the Federal Convention reflects the purposes and fears of the framers of the Constitution.

There was universal distrust of standing armies. For example, in June of 1787, Madison stated:

> . . . A standing military force, with an overgrown Executive will not long be safe companions to liberty. The means of defence agst. foreign danger, have been always the instruments of tyranny at home. Among the Romans it was a standing maxim to excite a war, whenever a revolt was apprehended. Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people. It is perhaps questionable, whether the best concerted system of absolute power in Europe cd. maintain itself, in a situation, where no alarms of external danger c. tame the people to the domestic yoke. The insular situation of G. Britain was the principal cause of her being an exception to the general fate of Europe. It has rendered less defence necessary, and admitted a kind of defence wch. c. not be used for the purpose of oppression [47]

The defense "which could not be used for the purpose of oppression" was the militia, which was still revered on both sides of the Atlantic, even with its shortcomings.

Yet, despite the preference for the militia, it was generally agreed that Congress must have authority to raise and support standing armies in order to protect frontier settlements, the national government, and the nation when threatened by foreign powers. However, a few members were still fearful. Elbridge Gerry and Luther Martin, both of whom later opposed the Constitution, moved that a definite limit—two or three thousand men—be placed on the size of the national standing army. Voting by states, as always, the Convention unani-

47. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 465 (M. Farrand ed. 1911).

mously rejected the motion. The judgment of delegates and the two year appropriation limitation were thought to be sufficient safeguards.[48]

The proper extent of federal authority over the militia was much more heatedly debated. The subject was introduced by George Mason, author of the Virginia Bill of Rights, who later opposed the Constitution, but who now maintained that uniformity of organization, training and weaponry was essential to make the state militias effective. His hope was that the need for a standing army would be minimized; perhaps only a few garrisons would be required. Mason's opinions were shared by Madison, who gave this analysis:

> The primary object is to secure an effectual discipline of the Militia. This will no more be done if left to the states separately than the requisitions have been hitherto paid by them. The states neglect their militia now, and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety, and the less prepare its militia for that purpose; in like manner as the militia of a state would have been still more neglected than it has been, if each county had been independently charged with the care of its militia. The discipline of the militia is evidently a *national* concern, and ought to be provided for in the *national* Constitution.[49]

Despite such explanations, there were still opponents to the militia clauses. Gerry, for example, declared:

> This power in the United States, as explained, is making the states drill sergeants. He had as lief-let the citizens of Massachusetts be disarmed as to take the command from the states and subject them to the general legislature. It would be regarded as a system of despotism.[50]

Later, as the Convention moved toward resolution of the issue, Gerry marshalled his final arguments. One can sense his feeling of outrage, as he solemnly warned of the dangers of centralized military power: "Let us at once destroy the state governments, have an executive for life or hereditary, and a proper Senate; and then there would be some consistency in giving full powers to the general government. . . ."[51] But as the states are not to be abolished, he wondered at the attempts that were made to give powers inconsistent with their existence. He warned the Convention against pushing the experiment too far. Some people will support a plan of vigorous government at every risk. Others, of a more democratic cast, will oppose it with equal determination; and a civil war may be produced by the conflict.

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48. MADISON REARRANGED 513-26.
49. *Id.* at 522.
50. *Id.* at 521.
51. *Id.* at 523-24.

Madison rose immediately and answered Gerry in these words:

> As the greatest danger is that of disunion of the states, it is necessary to guard against it by sufficient powers to the common government; and as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good militia.[52]

The last discussion of the militia clauses took place on September 14, 1787, just before the Convention finished its work. Mason moved to add a preface to the clause that allowed federal regulation of the militia, in order to define its purpose. His proposed addition was "that the liberties of the people may be better secured against the danger of standing armies in time of peace." The motion was opposed as "setting a dishonourable mark of distinction on the military class of citizens," and was rejected.[53]

Thus ended the Convention's debate over the relative merits and difficulties of standing armies and the militia. The debate was soon to be revived, however, as the new nation prepared to consider the proposed new form of government.

VI. The Ratification Controversy and the Bill of Rights

The new Constitution was signed on September 17, 1787 and the contest over its ratification soon began. The controversy was carried on mainly through the printed media. It was an unequal contest because the proponents of the new government, who now called themselves Federalists, controlled most of the newspapers. The Antifederalists resorted mainly to pamphlets and handbills.

Because the Antifederalist effort was decentralized and local in nature, it is difficult to generalize about the arguments used against the Constitution. The unifying theme, to the extent there was one, was that the new government would overreach its powers, destroy the states, deprive the people of their liberty, and create an aristocratic or monarchical tyranny. In finding evidence of such dangers, the Antifederalists often made inconsistent interpretations of what the Constitution provided. In the case of the militia powers, for example, it was said that Congress would disarm the militia in order to remove opposition to its standing army; at the same time it was argued that Congress would ruthlessly discipline the militia and convert it into a tool of oppression.

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52. *Id.* at 524.
53. *Id.* at 525.

Bearing in mind the inconsistency of [illegible], some of the pamphlets and articles will be examined in order to show how the fears of military power existed. One of the most scurrilous critics of the Constitution was "Philadelphiensis." His identity is uncertain, but he is believed to have been Benjamin Workman, a radical Irishman and a tutor at the University of Pennsylvania. His comments include the following:

> Who can deny but the *president general* will be a *king* to all intents and purposes, and one of the most dangerous kinds too; a king elected to command a standing army? Thus our laws are to be administered by this *tyrant*; for the whole, or at least the most important part of the executive department is put in his hands.
>
> The thoughts of a military officer possessing such powers, as the proposed constitution vests in the president general, are sufficient to excite in the mind of a freeman the most alarming apprehensions; and ought to rouse him to oppose it at *all events*. Every freeman of America ought to hold up this idea to himself, *that he has no superior but God and the laws*. But this tyrant will be so much his superior, that he can at any time he thinks proper, order him out in the militia to exercise, and to march when and where he pleases. His officers can wantonly inflict the most disgraceful punishment on a peaceable citizen, under pretense of disobedience, or the smallest neglect of militia duty.[54]

Another anonymous writer, Brutus, appealed to history as proof that standing armies in peacetime lead to tyranny:

> The same army, that in Britain, vindicated the liberties of that people from the encroachments and despotism of a tyrant king, assisted Cromwell, their General, in wresting from the people that liberty they had so dearly earned. . . .
>
> I firmly believe, no country in the world had ever a more patriotic army, than the one which so ably served this country in the late war. But had the General who commanded them been possessed of the spirit of a Julius Caesar or a Cromwell, the liberties of this country . . . [might have] in all probability terminated with the war.[55]

Still another unknown, styling himself "A Democratic Federalist," asserted that the Revolution had proved the superiority of the militia over standing armies:

> Had we a standing army when the British invaded our peaceful shores? Was it a standing army that gained the battles of Lexington and Bunker Hill, and took the ill-fated Burgoyne? Is not a well-regulated militia sufficient for every purpose of internal defense? And which of you, my fellow citizens, is afraid of any

54. 'Philadelphiensis' *Letter*, Independent Gazetteer (Phila.), Feb. 7, 1788.
55. 'Brutus' *Letter*, N. Y. Journal, Jan. 24, 1788.

invasion from foreign powers that our brave militia would not be able immediately to repel?"[56]

Some writers, such as "Centinel," feared that national control over the militia would transform that bulwark of democracy into a tool of oppression:

> This section will subject the citizens of these states to the most arbitrary military discipline: even death may be inflicted on the disobedient; in the character of militia, you may be dragged from your families and homes to any part of the continent and for any length of time, at the discretion of the future Congress; and as militia you may be made the unwilling instruments of oppression, under the direction of government; there is no exemption upon account of conscientious scruples of bearing arms, no equivalent to be received in lieu of personal services. The militia of Pennsylvania may be marched to Georgia or New Hampshire, however incompatible with their interests or consciences; in short, they may be made as mere machines as Prussian soldiers.[57]

Other Antifederalist propagandists believed that the true motive for assertion of national control over the militia was not to use it, but to destroy it, and thus eliminate any opposition to the new standing army. The Bostonian who used the pseudonym "John De Witt" asked these questions about the militia clauses:

> Let us inquire why they have assumed this great power. Was it to strengthen the power which is now lodged in your hands, and relying upon you and *you solely* for aid and support to the civil power in the execution of all the laws of the new Congress? Is this probable? Does the complexion of this new plan countenance such a supposition? When they unprecedently claim the power of raising and supporting armies, do they tell you for what purposes they are to be raised? How they are to be employed? How many they are to consist of, and where stationed? Is this power fettered with any one of those restrictions, which will show they depend upon the militia, and not upon this infernal engine of oppression to execute their civil laws? The nature of the demand in itself contradicts such a supposition, and forces you to believe that it is for none of these causes—but rather for the purpose of consolidating and finally destroying your strength, as your respective governments are to be destroyed. They well know the impolicy of putting or keeping arms in the hands of a nervous people, at a distance from the seat of a government, upon whom they mean to exercise the powers granted in that government. . . .
>
> It is asserted by the most respectable writers upon government, that a well regulated militia, composed of the yeomanry of the country, have ever been considered as the bulwark of a free people. Tyrants have never placed any confidence on a militia composed of freemen.[58]

56. 'A Democratic Federalist' *Letter*, Pa. Packet (Phila.), Oct. 23, 1787.
57. 'Centinel' *Letter*, Independent Gazetteer (Phila.), Nov. 8, 1787.
58. 'John De Witt' *Letter*, Am. Herald (Boston), Dec. 3, 1787.

Anonymous pamphleteers and [illegible]
persons concerned about standing armies [illegible]
Henry Lee, in a letter that was widely circulated in Virginia, [illegible] the contradictory arguments that the militia would be abandoned in favor of a standing army, and that the militia would be strengthened and forged into an instrument of tyranny. He foresaw that a small proportion of the total militia would be made into a select unit, much like a standing army, while the rest of the militia would be disarmed:

> Should one fifth, or one eighth part of the men capable of bearing arms, be made a select militia, as has been proposed, and those the young and ardent part of the community, possessed of but little or no property, and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of any army, while the latter will be defenceless.[59]

A necessary premise underlying Antifederalist attack on the militia clauses of the Constitution was that these clauses operated to place exclusive jurisdiction over the militia in the hands of the general government. Though the Federalists denied this premise, it was affirmed even by Luther Martin and Elbridge Gerry, who had been members of the Federal Convention, but who now opposed the Constitution. Martin is particularly interesting because he advanced all of the contradictory arguments used by the antifederalists. Speaking on November 29, 1787 to the Maryland legislature, he said:

> . . . Engines of power are supplied by the standing Army—unlimited as to number or its duration, in addition to this Government has the entire Command of the Militia, and may call the whole Militia of any State into Action, a power, which it was vainly urged ought never to exceed a certain proportion. By organizing the Militia Congress have taken the whole power from the State Governments; and by neglecting to do it and encreasing the Standing Army, their power will increase by those very means that will be adopted and urged as an ease to the People.[60]

Martin later invoked the opposite approach, that the milita would be subject to ruthless discipline and martial law, and would be marched to the ends of the continent in the service of tyranny. In a letter published on January 18, 1788, Martin wrote that the new system for governing the militia was "giving the states the last coup de grace by taking from them the only means of self preservation."[61]

Elbridge Gerry, like many of the pamphleteers, viewed centralized military power as inseparable from monarchy:

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59. R. H. Lee, Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention 24-25 (1787).

60. 3 The Records of the Federal Convention of 1787, at 157 (M. Farrand ed. 1911).

61. Martin, *Letter*, Md. Journal, Jan. 18, 1788.

> By the edicts of authority vested in the sovereign power by the proposed constitution, the militia of the country, the bulwark of defence, and the security of national liberty is no longer under the control of civil authority; but at the rescript of the Monarch, or the aristocracy, they may either be employed to extort the enormous sums that will be necessary to support the civil list—to maintain the regalia of power—and the splendour of the most useless part of the community, or they may be sent into foreign countries for the fulfilment of treaties, stipulated by the President and two thirds of the Senate.[62]

The supporters of the proposed constitution were well-prepared to meet these and similar arguments. They had the support of America's two national heroes, George Washington and Benjamin Franklin, and this helped make the Constitution respectable, as well as alleviating fears. Articles favoring the Constitution, such as the *Federalist Papers*, were often reprinted in distant states. Intelligent and well-educated, the proponents of the new government carefully and consistently answered the arguments of their rivals.

To the general argument that there were not sufficient restrictions on the power of the proposed general government, the federalists replied that no bill of rights was necessary. This was because the Constitution would establish a novel type of government, one of enumerated powers; restrictions were necessary only where full sovereignty was conferred. In Federalist Number 84, Alexander Hamilton made the argument in these words:

> It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CHARTA, obtained by the barons, sword in hand from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the Petition of Right assented to by Charles I, in the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants.[63]

To particular criticism of the military clauses of the proposed Constitution, both Hamilton and Madison replied in detail in the Federalist Papers.

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62. E. GERRY, OBSERVATIONS ON THE NEW CONSTITUTION AND ON THE FEDERAL AND STATE CONVENTIONS 10 (1788).

63. THE FEDERALIST No. 84, at 536 (H. Lodge ed. 1888) (A. Hamilton).